

## A FORMAL MODEL FOR JUDICIAL DISCRETION

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The problem of judicial discretion revolves around the appropriate roles of formal or deductive reasoning and non-formal or intuitive reasoning in the overall process of judicial reasoning. Both formal deductive patterns of legal rules and facts and intuitive insights or "senses of fairness" have always been inseparable from judicial reasoning as it occurs in real life. Yet, these two elements have never been successfully reconciled in a single formal model that outlines clearly the respective role for each. It will be proposed here that by adapting the hypothetico-deductive model of explanation from the philosophy of science we can provide a new dynamic model for judicial reasoning that thrives on the tension between intuition and deduction rather than foundering on it.

The important key to resolving the traditional antinomy between the governing principles of intuition and deduction is the simple recognition that judicial decisions, like scientific discoveries, generally spring from a two-phase process. The first is the *context of discovery* where the mind of the judge or scientist wrestles non-formally with a particular problem. Once he finds a satisfactory solution he moves to the second phase, the *context of justification*. At this point he develops a formal argument or thought pattern that justifies his solution by linking it deductively to relevant rules and principles.

This approach to a solution of the problem of judicial discretion rests on the premise that legal reasoning is but a subspecies of human reasoning and, therefore, must follow the same basic patterns. Deduction is the standard form for presenting controversial conclusions for the consideration of reasonable men. It is a naturally occurring standard in that whenever the abstractions or class concepts that populate our mental worlds are given expression in language, we find that if they are not deductively related that they are not gramatically correct. But

as deduction is an exceedingly ponderous and tedious method of searching vaguely related groups of abstractions in a problem-solving context, intuitive, non-formal thought modes fortunately intervene to make private thought possible.

### *Judicial Opinions as Explanations*

Simply defined, a judicial opinion is a statement wherein a judge offers formal and hopefully persuasive reasons for his ruling. Although the format may vary, the standard purpose of written opinions is to *explain* why the judge believes the decision to be correct. Likewise, dissenting judges generally seek to explain why another decision or rationale would make more sense. In either case we can see that judicial opinion writing is an explanatory process. All that is formally required of the judge is a decision — "guilty", "affirmed", "remanded", etc. But judges very often feel compelled to justify their judgment with an explanation which appeals to the reason of all interested parties and shows how the judge necessarily reached the decision as rendered.

In adopting Reichenbach's distinction between the contexts of discovery and justification, we implicitly equate judicial decision-making with non-formal reasoning of scientific discovery. This leaves formal judicial opinions (or decision-justifying) to be equated with formal scientific explanations as they arise in the context of justification. Inasmuch as the opinions can be regarded as explanations, we can profitably turn to the advances made in the theory of scientific explanation for many important insights into the nature of explanation and the appropriate form for explanations to follow. This, in turn will suggest the beginning of an overall model for judicial reasoning. We can take our cue from Professor Perelman, who has made explicit comparisons between scientific explanations and justifications of *ethical* choices:

To explain a phenomenon is to show how it is deduced from the accepted rules. If it conforms to the conclusion

of a chain of reasoning which invokes accepted premises the phenomena is explained.

The same thing applies when it comes to justifying an act. The act is just if it conforms to the conclusion of a chain of reasoning of which the premises have been granted, one of these constituting a deontic judgment flowing from a formula of concrete justice.

Explanation and justification make use of the same procedure of reasoning. They differ only in the nature of one of the premises of the argument (1).

Taking the broad perspective suggested here by Perelman we can go on to see if the same logical structure which has proved so useful in science might not also be as applicable to the law as it is to ethics. With all the comparisons of scientific and legal method that have been made over the past century, hardly anyone seems to have found the same reasoning patterns at work in both the judge's chamber and the laboratory. They have all missed the implications of the simple fact that judges and scientists are all men engaged in similar endeavors; as they each strive to find truth and to justify their conclusions, they are all constrained to follow similar patterns of non-formal and formal thought.

Abraham Kaplan has distinguished two types of explanation that could be taken as relevant to law. The first is semantic and seeks to clarify the meanings of words. It is appropriate for use in rational systems of ethics, etc., as invoked by Perelman in the above quotation. The second is scientific and seeks to rationalize empirical phenomena with what is believed to be true of the physical world (2). To the extent that legal philosophers have taken explanation to be relevant to law, it has largely been in the first sense above, and law was consequently treated as a formal rational system without empirical reference. Although the logical structure of both types of explanation are basically the same, it will be proposed in what follows that law can more profitably be compared with an empirical science which allows experience to correct the errors of old

explanations, thereby achieving a species of corporate progress and objectivity in the actual administration of the law.

Although there has recently been considerable objection raised against the deductive model, we find that explanations are inadequate if they do not make at least *tacit* reference to general laws. It is well established in contemporary theory of explanation that

all scientific explanation involves, explicitly or by implication, a subsumption of its subject matter under general regularities; ... it seeks to provide a systematic understanding of empirical phenomena by showing that they fit into a nomic nexus (<sup>3</sup>).

"In a word, we explain a fact by adducing the law which governs it" (<sup>4</sup>). This illustrates the manner in which general theory and the laws it might include can be invoked to order a range of phenomena. Because certain phenomena can be explained by reference to governing laws which in turn depend on theory, we can see that "every theory may be said to demarcate an *explanatory* shell for the phenomena with which it deals. The shell around a given event is, as it were, a sphere containing whatever is referred to in the theory of that event" (<sup>5</sup>).

The deductive model of explanation has been developed in its present form largely through the efforts of philosophers of science in this century, especially Hempel, Popper and Braithwaite. It has been variously referred to in slightly altered versions as the deductive-nomological, the hypothetico-deductive, or simply the deductive model. Although deductive explanations often provide more explanation than is psychologically necessary, they do present all their presuppositions and links to covering laws in such a way that they are fully exposed to orderly and effective testing. And although they do not guarantee the certainty that some of their proponents claim, they are no less certain than any alternative approach. Scientists and judges cannot be discouraged by evidence that there is probably some error in all their formulations. Judges in particular cannot be sceptics. Political necessity demands that they

make decisions here and now. The pursuit of certainty is a luxury the political community cannot afford.

This model suggests that, as in science, the objectivity appropriate for judicial reasoning is not to be found in the mechanical procedures used in a single case, but in the relationship of one case to all others and the principles they espouse. The judge's *ratio decidendi* constitutes a hypothesis as to what is the just and legal solution of that kind of controversy. His hypothesis will be tested as new cases arise under the same principles. As they are found to be justly resolved under the earlier principles, these principles will be "corroborated" as being true of the law in that state. But should later cases require some modification of the earlier principles for a just settlement, the earlier principles are "falsified" and need to be corrected or replaced. The new version becomes in turn a hypothesis to be tested by future cases (\*).

Thus we see the judge laboring in the context of discovery to find the suitable principle for justly resolving a particular controversy. He is guided extensively by his familiarity with the principles other judges have used successfully in similar cases. But should the instant case differ from the precedents in any significant detail, or should the precedents be under moral censure from the political community, the judge will also need to refer to his intuitive notions of justice to find a "correct" solution. Although there can be no standard mechanism to guarantee that he does in fact find the "correct" solution in a particular case, the mechanism of intersubjective testing of his *ratio decidendi* by other judges and by public opinion will soon detect any errors and diminish or eliminate them in the future.

Admittedly, this proposal gives up the positivist ideal of a rational model that will find a unique correct decision in every concrete case. It appeals to the flux of public opinion and sense of fairness and justice as metaphysical justification for its truths. It makes no claim to full rationality in the analytic sense, but instead seeks a second-order rationality in the ongoing judicial process, the process of finding better solutions to legal problems through educated hypothesis and trial.

Some will object that it is one thing to allow the scientist the luxury of endless experimentation in his laboratory and quite another to turn a corps of judges loose on a free society to find what is just. But these critics need to produce some new model of judicial reasoning that takes this informal or subjective element out of judicial discretion. If judicial discretion is both real and necessary, as the above model claims, the important move is to harness and channel it and salvage whatever rationality and objectivity one can. For this purpose the hypothetico-deductive model of scientific explanation seems almost exactly like the legal reasoning we are trying to explicate. It allows the judge to search his formal and informal knowledge for the best solution which he must then present in formal deductive format as a justification. The latter step acts as a control on the former as it formulates a hypothesis which all human experience can test and quickly reject if it is found to be defective. Ironically, this seems in a way to be more objective than the positivist ideal which could safely ignore the moral consensus of a society, relying on sterile logic and printed statutes.

The above proposal is much more objective and rational in its encounter with political realities. Furthermore, it explains how judicial review can operate objectively to keep the law current with the moral attitudes of the public, without having to redraw it through political or military revolutions. It also reveals more clearly the utter helplessness of judges or other political leaders to hold together a society that is losing its basic moral consensus.

Philosophers of science have advanced their understanding of scientific reasoning greatly by paying strict attention to what scientists in fact do. It is proposed that jurisprudence could profit greatly by following their lead.

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## NOTES

(<sup>1</sup>) Chaim PERELMAN, *The Idea of Justice and the Problem of Argument*, trans. John PETRIE (London: Routledge and Kegan Paul, 1963), p. 43.

(<sup>2</sup>) Abraham KAPLAN, *The Conduct of Inquiry* (San Francisco: Chandler Publishing, 1964), pp. 327-32.

(<sup>3</sup>) Carl G. HEMPEL, *Aspects of Scientific Explanation* (New York: Free Press, 1965), p. 488.

(<sup>4</sup>) Kaplan, p. 341.

(<sup>5</sup>) *Ibid.*, p. 299.

(<sup>6</sup>) The terminology is taken from Karl R. POPPERS's *Logic of Scientific Discovery* (New York: Harper and Row, 1965), which has had a pervasive influence on my approach to this problem.