ADJUDICATION AND THE BALANCING METAPHOR

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> "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."
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The symbol of the scales of justice is closely tied, in recent American legal thinking, to the idea that adjudication consists in a balancing of interests. According to this view, justice is done when the scales of justice tip in favor of a party to a legal dispute with the weightier case. Judges must examine and assess carefully all the interests alleged to be relevant and determine their proper weight. It is interesting to note that in Latin the word *'examen'* means the tongue of the balance. After all the relevant interests are placed on the scales, the judge is supposed to rule in favor of the interests which have more weight. The influence of this picture of adjudication is exemplified in the pervasive use of the balancing metaphor in judicial opinions and legal theory. My aim in this paper is to discuss briefly the source from which the balancing metaphor arose and to evaluate its theoretical significance.

The balancing metaphor emerged as a corollary to the general theory that law is an instrument for managing, evaluating, and resolving (or at least terminating) conflicts of interests. It was a device to liberate judicial thought from a set of rules, standards, and principles which had little relevance to the needs and interests of a society in transition at the turn of the twentieth century from a rural to an industrial way of life. Judges, were urged to shift the focus of their attention away from obsolete legal doctrines and dogmas to the specific interests of the parties to a dispute. By balancing the interests of the parties — whether it is the government, a corporation, a

community, an individual, etc. — judges could engage in piecemeal social engineering to complement the large-scale social engineering of legislators or perhaps to counteract the sluggishness of legislators in revising obsolete laws. Although no one denies that the interest theory of law has had a pervasive impact on American legal thought, there has been considerable opposition to the interest theory of adjudication, and in particular to the balancing metaphor. Some have said that the balancing metaphor, if it does not enslave thought, at least suggests a misleading picture of the nature and purpose of adjudication. The most important objections that have been raised are, first, that the balancing metaphor oversimplifies and distorts the nature of adjudication and, second, that it confuses the role of the judge with the role of the legislator. Although these objections are formidable, a proponent of the interest theory of adjudication can make a reply which, if not wholly persuasive, is at least plausible.

The objection that the balancing metaphor oversimplifies and distorts the nature of adjudication focuses on an assumption which is central to the interest theory — that all the relevant variables for making a judicial decision can be translated into and reduced to interests. In opposition to this assumption it is argued that judges must consider a complex set of incommensurate factors — including facts, statutes, common law rules, constitutional standards and principles, and perhaps other sources of law. Because the process of adjudication is complex and multi-dimensional, the balancing metaphor is thought to be misleading. For it suggests that balancing interests — factors of the same type — is analogous to a quantitative and mechanical task such as weighing rocks. The danger of such oversimplification is like the danger of stereotyping, for it encourages hasty and superficial judgments. In contrast, the critic of the balancing metaphor would claim that adjudication requires an evaluation of the relative imporance of factors of different types. This type of evaluation, even if it requires making a determination of the relative weight (importance) of relevant factors, is more like assessing a person's character or making an aesthetic judgment than

weighing rocks. Reliance on the balancing metaphor might narrow a judge's vision of the richness and complexity of human experience. Insensitivity to the nuances of cases can lead to assembly-line justice.

The proponent of the interest theory would attempt to meet these objections in two ways. First, he would argue that the balancing metaphor does not imply that all interests are of the same type or that judicial balancing is analogous to quantitative measurement. The reduction of relevant variables to interests is simply a means of giving conceptual unity to an otherwise disparate array of data. The interest theorist, however, could agree wih his critic that adjudication requires an evaluation of the relative importance of relevant factors, that is, of different interests and different kinds of interests. In addition, the balancing metaphor and the interest theory avoid the ring of paradox suggested by the view that judges must in some sense measure incommensurables. Second, a proponent of the interest theory might argue that the balancing metaphor, though it does simplify the conceptual framework of adjudication, does not oversimply or distort it. The balancing metaphor, precisely because it is familiar, simple, and neutral, facilitates thinking about the details and nuances of particular cases and controversies. It does not, like so many legal doctrines, obstruct a judge's vision of the richness and complexity of human experience. By avoiding theoretical opaqueness the balancing metaphor encourages practical clarity. The balancing metaphor is appealing because it reminds us that adjudication is essentially a mode of practical decision making refined by the doctrines embodied in legal institutions.

The critic of the balancing metaphor would respond by pointing out that it is a mistake to suppose that the fact that adjudication is a mode of practical decision making supports the theory that the judge's role is to balance interests. There are at least two very different kinds of practical decision making, one which involves something like a balancing of interests and one which involves classifying cases under legal concepts. Opponents of the interest theory of adjudication usually argue that in the United States legislators, rather than judges, are charged

with a utilitarian task of balancing competing interests when they enact laws. Accordingly, legislators formulate general rules designed to accomodate, guide, and control human actions in the present and the future. The role of a legislator calls for practical decision making in which balancing takes place: advantages and disadvantages are weighed against each other, for example, in deciding how to distribute scarce resources. Judges, however, perform an essentially non-utilitarian function in classifying a past event according to a set of doctrines embodied in the common law, the Constitution, statutory provisons, and other sources of law. It is presumed that whatever balancing of interests is done occurs prior to and independent of adjudication. Since the balancing metaphor suggests that adjudication consists in a balancing of interests it confuses the utilitarian role of a legislator with the non-utilitarian role of an adjudicator.

Proponents of an interest theory of adjudication admit that legislators and judges have different institutional roles conditioned by different institutional structures. Nevertheless, it is argued that legislators and judges merely employ different means to achieve the same end: managing, evaluating, resolving (or at least terminating) conflicts of interests. The contrasts between the roles of judges and legislators are minimized when they are seen as complementary tasks. Although judges must classify cases under legal concepts, they stress the idea that adjudication requires a particularized balancing of interests to provide content and additional meaning to general and often vague legal concepts. Proponents of the interest theory neither deny nor object to the legislative dimension of adjudication. For the interest theory of adjudication is closely tied to a particularistic, pragmatic, and utilitarian approach to legal problems. As I said previously, judges engage in piecemeal whereas legislators engage in large-scale social engineering. In reply to the objection that the balancing metaphor confuses the roles of judges and legislators it is emphasized that the balancing metaphor illuminates the extent to which their roles overlap. At the same time, even if both judges and legislators balance interests, the significant differences

in the institutional structures of adjudication and legislation are sufficient to distinguish them.

I am uncertain about the outcome of the dialectic I have constructed to illustrate the strengths and weaknesses of the balancing metaphor. I have attempted at least to clarify some of the central notions germane to an adequate understanding of the nature of adjudication. My inclination is to think that to some extent the distance between the opponents and the proponents of the fruitfulness of the balancing metaphor has decreased in one respect and increased in another. One feature of the dispute about the balancing metaphor almost seems like a pseudo-problem, for it has become clear that there is an underlying agreement between the proponents and the opponents of the balancing metaphor about the complexity and multi-dimensional character of judicial decision making. What is left of the dispute is merely whether one thinks that the balancing metaphor helps or hinders one to see this. But, when I examined the question about the roles of judges and legislators, the distance between proponents and opponents of the balancing metaphor seems to have increased. For the underlying controversy about classification and balancing of interests does raise perplexing theoretical issues. It is clear that both balancing and classifying are characteristic of adjudication, for judges typically perform both utilitarian and non-utilitarian tasks. What is not clear is the relative importance of each. To resolve this issue it would be necessary to examine in detail paradigm cases of adjudication in different areas of the law. It would also be necessary to explore in greater depth both conceptually and historically the goals and results of legislation and adjudication. Such obvious but fundamental issues are perennially in need of reexamination.

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