# REASONS AND RULINGS

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The thesis of this paper can be stated quite simply. It is that a search for the "justification" of "judicial reasoning" is misguided, if that project is intended to deliver a general account of *the* "logic" of judicial reason-giving. (My concern here is with reason-giving rather than with decision-making, i.e., with the relations between reasons and rulings, and with the nature of the reasons that can and are given in support of a ruling or interpretation, not with the processes and motivations that lead a judge to make the decisions he makes). I want to maintain that the justification of judicial decisions can, and properly should, take as many forms as does the *criticism* of judicial decisions, and that the variety of possible criticisms is as great as the variety of possible criticisms of human actions and decisions generally.

There should be nothing startling in these assertions. I hope they have the ring of obviousness, even of triviality, that goes with the commonplace. *Of course* we criticize (and defend) judicial decisions in an enormous number of ways: we try to show that they are fair or unfair, just or political, wise or unwise, bigoted or enlightened, capricious or principled, cowardly or courageous, honest or evasive, etc., and these are words which we know how to apply perfectly well in ordinary life, outside the realm of jurisprudence and the law, when we consider human beings and their lives. This is not to say that ordinary common sense, without specialized knowledge or experience, is sufficient to enable us to apply such words correctly everywhere. A man who knows nothing of music may be in no position to criticize a Beethoven performance or interpretation as eccentric, distorted, undisciplined, or to praise it for its logic, coherence, understanding, technical virtuosity, elegance or pathos, He may be expert in using these words in other contexts, discerning the logic or illogic of a mathematical

proof, the distortions or perspicacity of a political commentator, the pathos of a Tolstoy novel, the faithfulness of a builder to the architects's plans, and yet he may be totally baffled when he hears musicians argue with these same words. Similarly, a man who knows people and their virtues and faults may well be at a loss to tell, or even understand, what is meant when a court's ruling is criticized or praised as evasive, cowardly, heroic, capricious etc. He must learn something about how the institutions of the law operate, and know what is at stake in the particular case before he has a basis of assessment; and learning these things is, among other things, finding out how judicial reasoning can go wrong.

The point of emphasizing these familiar facts and of stressing that we have a large number of critical words in our repertoire is, for one thing, to help us get away from an exclusive preoccupation with the two or three terms of assessment — "just", "logical", and "rational" are the favorites — on which philosophers who discuss the justification of legal reasoning are generally inclined to focus. The point is also to see that the determination of what is an adequate "justification" cannot be reduced to any litmus-paper test. *How* we justify or *whether* we can justify a judicial decision will depend on what we are *called upon* to justify, i.e., on what charges or criticisms are being answered. We do not really know what we are being asked to do when someone questions the "rationality" or "logic" of judicial decisions *in vacuo*. The demand for justification makes sense only in a context where one can see what is being questioned, challenged, worried about. And since there are *many* ways of questioning the adequacy of a decision, many ways in which reason-giving can go wrong, there are also many things that will count, in this or that context, as a justification.

But I want to go beyond these Austinian homilies to a point of positive Wisdom ([1]), viz., that we shall have a more adequate grasp of *some* important ways in which judicial reason-giving can be justified and attacked if we notice how, in cases which I hope are not atypical, the relation between reasons and rulings can be other than logical. A more radical point which,

at the risk of seeming to defend what Professor Wasserstrom calls "intuitive or visceral reactions" (2), I am nevertheless tempted to maintain is this: *some* judicial decisions and arguments can be seen to be reasonable, wise, justified, and some can be seen to be patently misguided, ill-conceived, unjust, etc., without our being able to give a "rational decision procedure" for determining that this is so. Yet it is so, and we — or some of us — *know* it is so. We learn to *tell non sequiturs* and distortions and dishonesty as we learn to recognize dissonance, bad breath, insolence, hypocrisy, and it is not always possible — or *necessary* — to explain why these qualities are present when they are present. When someone questions a judicial decision or the warrantedness of a judicial interpretation, the answer may be to *show* him, or to get him to see aspects of the case to which he has been blind; and this need not take the form of supplying him with *reasons.* It may be a matter of opening his eyes to the *importance* of something he had not adequately prized. There is humane and inhumane reasoning, aside from all questions of formal validity, obedience to legal rules, sufficiency of empirical evidence, etc., and it may be that, at least in some striking cases, a man can recognize this and lead others to share his insight. Justification does not always consist in deducing or showing the deducibility of a conclusion from a set of rules or premises or principles.

An illustration from the field of aesthetics may help to clarify this. I may justify my interpretation of a line of poetry as ironic by reciting it to you in a special way. Take, for example T. S. Eliot's line, "Again, in spite of that, we call this Friday good" (3) and consider a controversy between two readers who disagreed on whether the line was ironic. One of them might appeal to the fact of Eliot's religious orthodoxy, and his generally conservative intentions, to support the conclusion that the line was not to be read ironically; the other might get him to see that his argument was defective, and that the line *had* to be read another way by *showing* him. Questions of how a musical score has to be interpreted or what the correct tempo for a piece is are often settled in an analogous fashion, not by giving reasons but by humming. A conductor may say, "It

has to go like *this!*" and shake his fist violently at the cello section. The fist-shaking calls attention to, or illustrates, a way of playing the music. It leads the players to the correct result — not inevitably, of course: the players must see the point of these gestures.

I wish that my knowledge of cases and decisions and judicial arguments were much greater, so that I could offer many legal examples of what I have been saying. Fortunately the limitations on the permissible length of papers at this congress will conceal some of my own limitations in this regard. But there is time for perhaps one or two illustrations, which may serve at least to give some semblance of plausibility to my claims. Let us consider the competing arguments in a well-known Supreme Court decision in the United States, some twelve years ago, Barenblatt v. U.S., (1959) ([4]). At issue was the right of an individual, a teacher, to refuse to answer certain questions put to him by the House Committee on Un-American Activities (HUAC, as it was affectionately called) during the course of the committee's inquiry into alleged Communist infiltration in the field of education. A majority of the court, with Justice Harlan presenting the arguments, concluded that HUAC had legitimate legislative interests in asking Barenblatt whether he was or had ever been a member of the Communist Party, and that those interests, when balanced against the interests of Barenblatt in remaining silent about his political associations, outweighed the latter interests.

Justice Harlan began his defense of the decision by granting that in some circumstances the First Amendment to the Constitution (Congress shall make no law... abridging the freedom of speech, etc.) protects a man from compelled disclosure of his associations. But, he argued, the right to resist inquiry is not an absolute one; it must always be balanced against competing private and public interests that may be at stake in particular circumstances. It is a right that must not be judged "abstractly". Viewed "concretely" in the light of the "world-wide problem" of Communism, the individual's interest in privacy is over-balanced by the government's right of self-preservation, "'the ultimate value of any society", as Harlan

put it, citing an earlier decision ([5]). To summarize Harlan's reasoning:

1. The committee had a valid legislative purpose in investigating Communist infiltration, a purpose justified by considerations of "self-preservation", since it was a "widely accepted view" that the Communist Party was out to destroy the United States government.

2. Academic freedom is a good thing, which the Court believes in protecting; but teachers can be interrogated just like anyone else. This need not be an abridgment of their freedom to teach or of their students' freedom to learn.

3. There was in fact no intention on HUAC's part to control what is taught in the universities. Harlan here cites testimony of the chairman of HUAC in support of his interpretation of the committee's purposes as benign. The committee's purpose was not purely to expose Barenblatt or others like him. There is "no congressional power to expose for the sake of exposure", Harlan agrees; but inquiry into the motives of the committee's members is unnecessary since, even if those motives were bad (i.e., if the members of the committee were out to punish Communists or former Communists without a fair trial) that fact would not give the Supreme Court any authority to interfere with the exercise of the Legislature's powers. (Notice the implicit philosophical thesis that the committee's purposes and its members' purposes are two different things — here is a case where the metaphysics of nominalism might have had a salutary political effect !)

4. Finally, there is nothing to indicate that the individual interests at stake were not subordinate to the state.

In their dissent from the majority opinion, Justices Black, Douglas and Warren offer a line of argument that strikes me as not only correct and powerful, but *beautiful.* (Is it fair to criticize an argument for its ugliness, or to praise one as I have just done ?) Though he disagrees with the very idea of "balancing" First Amendment rights against other considerations, Black says that it is clear that *if* balancing is to be done then much more than Barenblatt's personal interests must be weighed against the interests of the state. It is the interests of the people

as a whole, not just those of Barenblatt, that should be considered — the people's interest in freedom, in their ability to join organizations and even to *make political mistakes* without fear of being penalized for thinking for themselves. It is the right of the people to err politically that gives the nation its strength. If people are allowed to hear, consider, and even to accept Communist arguments, they will eventually arrive at their own personal conviction of the worthlessness of those arguments. The Constitution assumes that people have common sense that enables them to withstand erroneous ideas. The idea of abridging First Amendment freedoms in order to "preserve" the country is confused precisely because what one wants to preserve would no longer be there to be preserved. If those rights are denied, the United States is no longer a free nation. The idea that national security depends on the power to punish people for thoughts, speech, associations, is itself incompatible with the Constitution.

Black also challenges the majority's interpretation of HUAC's aims. The committee's purpose, he argues, is purely judicial, not legislative: it aims to bring witnesses to trial and punishment, an old and vicious sort of punishment which used to be practiced in the form of pillory, ostracism, and exposure to public hatred. Black cites an earlier action of HUAC which had been voided by the Court as a bill of attainder. (The relevance of this is that it supports his claim about the punitive character of HUAC inquiries). *Anyone can see* that HUAC's reason for existence is exposure and punishment, writes Black. The larger question at issue is not simply the limits of congressional powers of investigation vis à vis the right to refuse disclosure; it is, ultimately, whether the United States will try futilely to preserve democracy by adopting totalitarian methods.

What are we to make of the disagreements between Harlan and Black ? What sorts of criticisms and defenses are possible ? Both justifications include appeals to certain empirical considerations and these, I suppose, could be challenged or defended on the basis of evidence or lack of evidence. It is not immediately obvious, e.g., that academic freedom and freedom

of association must be conducive to the nation's *strength*; indeed we may have serious reservations about this *kind* of defense of civil liberties. It would be possible to question the wisdom of Black's argument as well as its evidential basis. One might also feel that, whether or not Black's claim is empirically warranted, it is an *important consideration* and one which the majority seems simply to ignore. Was it true that HUAC's purpose was harrassment, as the minority opinion held, or was the Chairman's word to be trusted, as Harlan believed ? Black points to other HUAC actions in order to discredit the Chairman's assurances concerning the Committee's legitimate legislative aims. What shall we say of a judge who takes the word of a HUAC chairman as *obviously* trustworthy ? Is there not an error in *judgment* here (6). The committee's intention to expose and punish is blatantly obvious to anyone who has followed its career. No significant legislation has ever emerged from its "legislative investigations". Yet Harlan does not take this as decisive or even relevant in deciding what the committee's purpose is. The question of "the committee's purpose" is crucial to the arguments, and one might wish for some independent, mechanical way of deciding what it is. But there is obviously a disagreement as to what is to count as *important* in determinations of purpose. The evaluation is not one which can be made by simply applying criteria and rules. The craving for "something independent" to which this judgment can be tied is understandable and perhaps laudable — "I feel in my bones that the Chairman is lying" is no substitute for evidence. But in the final analysis a decision as to his credibility and as to HUAC's aims must be made, a decision which can be assessed as naive or wise. We can *point to* the naiveté of accepting the Chairman's own estimate of his committee's purpose, but this may or may not succeed. With Harlan and the majority it presumably failed. I do not know whether to describe the failure simply as *insensivity* in the discerning of motives, or as indifference to the evils of political repression.

It seems to me that Harlan's lack of concern about the general effect of the Court's ruling on the exercise of freedom of political association supports the latter alternative: it is a

defect not of logic or of insufficient empirical evidence but of sensitivity. Harlan and the majority either *failed to notice* the consequences which Black points out (an unlikely explanation since these men must sit and discuss their rulings and arguments before issuing them) or they minimized their *significance.* Perhaps they had never felt threatened by fear of exposure, fear of losing one's job because of radical views. Such fears must not seem important to them, when balanced against a "threat to national security". The majority opinion sees Barenblatt as an individual obstructing Legislative Purposes, not as Everyman or Kafka's K. His refusal to submit to the interrogation is not viewed as courageous, principled, or morally admirable; the loss of his freedoms is not seen as a terrible thing. (I am reminded of a great physicist, extremely enthusiastic about the development of nuclear reactors to supply needed electricity, who recently conceded in a discussion that a few workers would die prematurely of over-exposure to radiation but who saw this as *unimportant,* the price of technological progress). What shall we say of an argument that *underplays* the disagreable consequences of a decision ? It is a bad argument; it should not have been accepted. But its defect is perhaps closer to that of an unperceptive translation or a piece of bad music criticism than to that of bad logic or bad science. There is a failure to *appreciate* something that ought to be appreciated, a failure which may require a sort of conversion rather than refutation. The scientist needs to be made to see that a case of leukemia is not negligible. The Supreme Court justice must come to recognize that a life of perpetual anxiety about one's possible political transgressions is not a good life, and that a nation with many such lives among its members is sick. But the kind of failure in judgment (or in sensibility) of which I have been talking may not always be curable. If appeal to legal rules and evidence is in principle undecisive, so too is fist-shaking. (But does it make sense to *reason* with someone who hears nothing important in the *Missa Solemnis ?*)

I do not want to maintain that philosophers who love logic and rational decision procedures are all wrong. We certainly

can examine the arguments I have outlined from the point of view of a logician or that of an empirical scientist. It may even be useful to do so: we do not want our friends to be caught with their middles undistributed or their hypotheses disconfirmed. In the case before us, it would be nice if the minority arguments did not contain so many tenuous empirical claims. For example, as I suggested earlier, I can imagine someone challenging the proposition that First Amendment freedoms actually are necessary to the country's *strength*, as the minority opinion asserts; nor is it obvious that the freedoms in question were any great part of what HUAC and the majority of the Court were anxious to preserve, when they spoke of the nation's right of self-preservation (so that it would be empirically false to say that the investigation of Communists was meant to preserve a nation in which civil liberties are guaranteed). It also could be argued that the prediction that people will come to see the worthlessness of Communist arguments if they are given a chance to embrace them is either too optimistic or too pessimistic, depending on one's point of view. It is not clear, at any rate, that any careful empirical research supported this defense of the "freedom to err". (Are the ideals and arguments for liberal democracy *fated* to be accepted?) Furthermore, an expert on Constitutional interpretation might challenge the way in which the minority has read that document. Neither side can claim to be a mere "Dolmetch" in its interpretation of the Constitution as sanctioning or forbidding the "balancing" of civil liberties with other national interests.

These critical questions are not negligible. What I have tried to suggest is merely that they do not come close to exhausting the many considerations that may legitimately be raised in an appraisal of judicial arguments.

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NOTES

(1) The pun is intentional. My point obviously owes everything to John Wisdom.

(2) *The Judicial Decision*, p. 174.

(3) From *Four Quartets,* "East Coker".

(4) 360 U.S. 109, 3 L.Ed. 2nd 1115, 79 S.Ct. 1081 (1959). I am grateful to Professor Joseph R. Grodin for teaching me what little I know about Constitutional Law

(5) Dennis v. U.S., 1951.

(6) Compare Immanuel KANT's remarks on the faculty of "judgment", in the *Critique of Pure Reason,* A 133, B 173, ff.