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# CLEAR CASES†

Theorists of the legal process in common law countries have, in recent years, been preoccupied with hard cases.[1] A hard case occurs where a legal rule or legal rules cannot determine a uniquely correct result when applied to given facts. This paper will examine what theorists and law practitioners alike have believed to be a very different kind of case: the clear case. Practising lawyers assure us that clear cases occupy a large percentage of their case load. Professional law teachers design teaching materials and often conduct themselves in the classroom with apparent assurance that most cases in the 'real world' of a law practice are clear cases. The lawyer is presented with material facts and rules which are rid of the difficulties giving rise to hard cases. The facts have been ascertained and proved. The lawyer has been able to sort out the material from the immaterial facts with a much-envied ability to determine the criteria of materiality. He has also discovered the rules and somehow has rejected some and accepted others as legally relevant. The lawyer need only deduce a conclusion by applying the relevant rule to the material facts. Choice, uncertainty, or human frailty enter the picture only when the lawyer makes that final deduction. Consequently, clear cases are supposed to be relatively easy.

What I wish to question is whether there is more to the competent lawyer's job in clear cases than carrying on the deductive process of applying the relevant rule to the material facts. The manner in which I shall go about responding to this general question is to ask whether the content of The Law in a clear case is composed of more than rules. That is,

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1 See generally Dickinson, Legal rules: Their function in the process of decision (1931) 79 *U. Pa. L.R.* 833; Hart *The Concept of Law* (1961) 120–44; Problems of philosophy of law, 6 *Encyclopedia of Philosophy* 264 (1967); Dworkin, Judicial discretion (1963) 60 *J. Phil.* 624, *Taking Rights Seriously* (1977) c. 2–4; Sartorius, The justification of the judicial decision (1968) 78 *Ethics* 171, Social policy and judicial legislation (1971) 8 *Am. Phil. Q.* 151; Hughes, Rules, policy and decision-making (1968) 77 *Yale L.J.* 411; Greenawalt, Discretion and judicial decision: The elusive quest for the fetters that bind judges (1975) 75 *Col L.R.* 243, Policy, rights and judicial decision (1977) 11 *Georgia L.R.* 991; MacCormick *Legal Reasoning and Legal Theory* (1978).

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are there other standards, no doubt implicit, to which a competent lawyer may legitimately appeal? If so, why may the lawyer appeal to them in clear cases? In addition, what is the nature of those standards? If there are standards other than legal rules to which a lawyer may appeal in clear cases, then there are very serious ramifications for such issues as legal education, precedent, legislative supremacy, legal argument, and opinion-writing generally.

Although I shall deal with the doctrine of precedent, the priority of legislative rules, and the political nature of the standards to which a lawyer may appeal, the primary objective of this essay is to make an argument concerning the issue as to whether there is more to the competent lawyer's job in clear cases than carrying on the deductive process of applying the relevant rule to the material facts. My argument hinges upon what constitutes a properly decided judicial decision. And this, in turn, depends upon the differing conceptions about justice which underlie the activities of courts and legislatures in a democratic state. My argument then connects those differing conceptions to such concepts as formal justice, substantive justice, liberty, guidance to lawyers, and accountability in the context of clear cases.

## 1 *A properly decided judicial decision*

To begin the task I shall make an important distinction. I shall distinguish a decision made in the legislative or 'political' sphere of government from a decision made by the judicial arm of government in a liberal state. My concern here is not of an empirical nature. That is, I do not generalize from the historical or contemporary experiences of particular states. Rather, I wish to elaborate the legislative and judicial functions in a liberal state as an ideal model. Although examples of liberal states may help to illustrate the operation and consequences of the ideal type, the resource material for the latter is found for the most part in the writings of a distinctive group of scholars associated with liberalism. I have in mind Thomas Hobbes, John Locke, Jeremy Bentham, James Mill, John Stuart Mill, T.H. Green, John Rawls, and Ronald Dworkin.

### PURE PROCEDURAL JUSTICE

Although it is a formidable task in itself to extrapolate a common theme from liberal political theory, one particular conception of justice appears crucial to liberalism: namely, pure procedural justice. Pure procedural justice does not allow for an independent criterion of justice separate from and prior to the procedure by which public authority is constituted.

The conception is John Rawls'.[2] He contrasts it with perfect and imperfect procedural justice. The latter two conceptions do possess an independent criterion. Perfect procedural justice has two requirements: first, there is an independent criterion to ascertain what is a just outcome; and secondly, it is possible to devise a procedure which can guarantee that outcome. With imperfect procedural justice it is impossible to design legal rules which can guarantee the just outcome even though there is an independent criterion to assess a just outcome.

Pure procedural justice is a theory about political method. The procedure determines what goods ought to be produced, how much ought to be produced, what goals ought to be sought, and by what means. The procedure rather than some independently defined standard or principle of justice resolves these issues. So long as the scheme of procedures is just, so too will the substantive outcome of the procedure in any particular circumstance be considered just. That is, some kind of fairness embedded in the procedure translates itself to the outcome.

The moot issue is what property or properties of a procedure guarantee that, when the properties exist, the outcome of the process will be just. I think there would be some support amongst liberal theorists for the assertion that liberalism has posited at least three background conditions as necessary properties for a fair political procedure.

First, that there be formal political equality.[3] The idea here is that every person counts for one vote and, as a corollary, that one person's vote is the equivalent of the next person's. The connection between formal political equality and fair institutional procedures underpins why liberals revolted against despotism, political privilege, and social status. Liberals have

2 Rawls *A Theory of Justice* (1971), sect 14. Also see Barry *Political Argument* (1965), c 4, 6. Robert A. Dahl has the notion of pure procedural justice in mind in his important essays, although he does not connect it to Rawls in *A Preface to Democratic Theory* (1963) and Procedural democracy, in Laslett and Fishkin (eds) *Philosophy, Politics and Society (5th Series)* (1979).

For an excellent analysis of the notion of pure procedural justice, see generally Nelson, The very idea of pure procedural justice (1980) 90 *Ethics* 502. For interesting applications of the idea see Resnick, Due process and procedural justice, in Pennock and Chapman (eds) *Nomos XVIII: Due Process* (1977) and Care, Participation and policy (1978) 88 *Ethics* 316.

3 See generally, J.S. Mill *Considerations on Representative Government* (N.Y.: Bobbs-Merrill, 1958); Harriet Taylor Mill, Enfranchisement of women (1851) in Rossi (ed) *Essays on Sex Equality* (1970); J.S. Mill, The subjection of women (1869), ibid, and James Mill *Essay on Government* (Indianapolis: Bobbs-Merrill, 1955).

The Warren Court associated itself with this background condition. See eg, *Reynolds* v *Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 500; *Kramer* v *Union Free School Dist. No. 15*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969); *Shapiro* v *Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

correspondingly advocated that all persons – lord and tenant, labourer and owner, man and woman – be granted universal access to the political process. Similarly, liberals have objected to racial, religious, and other restrictions being placed upon candidates for political office. And their belief in political equality as a background condition for fair institutional procedures has justified their proscriptions against corruption or the gerrymandering of the political process.

Secondly, that the political process will remain open over time only if the freedoms of expression, assembly, and religion are not infringed. This background requirement ensures that all persons will have an input into the process, that minority groups will be heard, and that they will be able to compete with majorities in relative parity without fear or threat. Without the freedoms, the political process would not remain neutral amongst competing policies over time. Rather, the process would serve as a barrier for minorities wanting access to power.[4]

Thirdly, that the majority will determine the outcome of the political process.[5] Because pure procedural justice does not allow for an independent criterion of justice separate from and prior to the procedure by which public authority is constituted, a minority's view of the just outcome can neither override nor check the majority's. The rightness or wrongness, justice or injustice of the individual outcome is irrelevant. In any case, because the political process operates against a background of formal political equality with equal liberties for all, the minority group one day may become the majority the next.

## DWORKIN'S ANALYSIS OF THE LEGISLATIVE-JUDICIAL FUNCTION

Of the liberal political theorists mentioned above, Ronald Dworkin alone has elaborated a theory of the 'legislative' and 'judicial' functions in the liberal state as an ideal type. His critics have rigorously analyzed his theory. What I wish to suggest is that their dialogue has so far been misdirected.

Dworkin pinpoints the difference between a legislative and a judicial function in terms of the character of argument which is made. In the

4 This particular conception of the place of freedom of expression in the political process can be found most prominently in the writings and judgments of Holmes J. See, eg, *Gitlow* v *N.Y.* 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925). It would appear that the reason why Holmes did not hold restrictions upon the teaching of the German language as an infringement of free speech was that *political* speech and the *political* process had not been infringed. See, eg, *Meyer* v *Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Bartels* v *State of Iowa*, 262 U.S. 400, 43 S. Ct. 628 (1923); *Holmes-Laski Letters: 1916–1935* ed Howe (1953), at 202–3 dated 23 July 1925 and at 75 dated 31 March 1917.

5 See Locke *Second Treatise of Government* (New York: Appleton-Century-Crofts, 1937), cc 7, 8, 11–13, 19.

legislative realm, according to Dworkin, one supports a legislative decision by an appeal to an argument of policy. An argument of policy demonstrates that a decision advances or protects some collective goal of the community.[6] In spite of the fact that those who benefit from a decision do not possess a right to the benefit, the provision of the benefit will advance the collective goal of the political community.[7] His example is an argument that a subsidy for aircraft manufacturers will protect national defence. In the judicial world, according to Dworkin, one supports a judicial decision by an appeal to principle. An argument of principle is intended to establish an individual or group right or an 'individual political aim.'[8] An example is that a minority has a right to freedom of speech and assembly.

Dworkin's identification of arguments of policy with the legislative function exemplifies how one should conceive the legislature's role in a liberal society. The legislature reaches a decision 'as a compromise among individual goals and purposes in search of the welfare of the community as a whole.'[9] Dworkin conceives the political process as a reflection of interest-group politics. Because judges are non-elected, according to Dworkin, they possess neither the competence nor the democratic role to measure, weigh, and compromise competing interests of pressure groups. In contrast, what the judiciary is particularly suited to do is discover and assess the relative weight and importance of arguments of principle.[10] The judge discovers those principles by looking backward into extant institutional materials. Consequently, judicial decisions, which are rendered with particular concern for articulate consistency, are not retroactive.

In reply to Dworkin's distinction Kent Greenawalt has suggested that, because of the limitations of legislative time, legislatures leave certain areas of the common law for judicial elaboration.[11] There is no logical reason why a court should not promote the general welfare and, accordingly, make arguments of policy in those very areas where the legislature would otherwise do so except for a lack of time or interest. Furthermore, according to another critic, Dworkin's thesis about the judicial function advocates the continued application of principles of judicial origin.[12] Consequently, it is more logical to grant present judges

6 Dworkin *Taking Rights Seriously*, supra note 1, at 90 ('Hard Cases')
7 Dworkin, Seven Critics (1977) 11 *Geo L.R.* 1201, at 1204
8 Dworkin *Taking Rights Seriously*, supra note 1, at 82, 90 (Hard Cases')
9 Ibid, at 85 (Hard Cases)
10 See especially ibid, at 84–8.
11 Greenawalt, Policy, rights and judicial decision, supra note 1, at 1004–15
12 Brilmayer, The institutional and empirical basis of the rights thesis (1977), 11 *Georgia L.R.* 1173, at 1176

more legislative power than past judges since even a judge with life tenure is presumably more responsive to contemporary popular opinion than a judge long dead for several hundred years.

## DIFFERING CONCEPTIONS OF JUSTICE

I want to suggest that the Dworkin-Greenawaltian debate has missed the crucial difference between the proper legislative and judicial function in a liberal state. The difference is not in terms of the character of argument (principles versus policies); the crucial distinction is that the legislature and the judiciary in a liberal state operate under very different conceptions of justice. Whereas it is conceptually possible for the legislature to conduct itself in a manner which respects the background conditions of political equality, freedom of expression, and majority rule, political equality and majority rule are conceptual impossibilities, and freedom of expression is rigidly restricted in the judicial process. Each citizen does not count for one vote, for judges are appointed. Nor is any adjudicative dispute resolved by the majority vote of the citizenry as a whole or by the litigants before the court. Even the second background condition of free expression is severely restricted by virtue of rules of standing and evidence. It would seem that the judicial process can be more accurately described as imperfect procedural justice. That is, there exist independent criteria to assess a just outcome – independent and separate, that is, from the procedure by which judges, their agenda, or their decisions are constituted.

One might initially consider the judicial process as really a version of pure procedural justice with merely a different procedure – one marked by justificatory argument – than that which characterizes the legislative process.[13] Pure procedural justice occurs, again, when there is no criterion for a right or just outcome independent of and prior to the simple application of the procedure itself. Rawls' example of pure procedural justice is a gambling procedure where the distribution of money is considered fair after the last fair bet is made, whatever the resulting distribution of funds happens to be. I submit that the legislative process is conceived to fit this conception in a liberal state because the background conditions of formal equality of opportunity, the freedoms of expression, assembly, and religion, and majority rule are presumed to ensure that the procedure is fair. But, as suggested above, the latter background conditions have a restricted application to the judicial procedure, with the consequence that the gambling analogy is inappropriate. One can contemplate a just judicial outcome only if the judicial procedure

13 I would like to thank this journal's referee for raising the need to clarify this problem.

presumes the existence of a criterion for the right or just outcome independent of and prior to the judicial procedure itself. Accordingly, the conception of justice underlying a properly decided judicial decision must be either perfect or imperfect procedural justice.

Both perfect and imperfect procedural justice involve the existence of an independent criterion for determining the just or right outcome. If Professor Dworkin were correct that there is one right judicial answer in any hard case,[14] then the appropriate conception of justice underlying the activity of courts would be perfect procedural justice. That is, the procedure of principled argument in the Herculean mould would *always* achieve the just outcome. But as I argue below and elsehwere,[15] the appeal to principled standards independent of and external to the judicial process does not guarantee a right or just outcome. The judicial answer is a provisional one. Consequently, imperfect procedural justice best characterizes a properly decided judicial decision.

Let us flesh this point out a little deeper. It may well be that legislators attempt to justify their decisions by an appeal to standards of substantive justice in any particular circumstance. But it is not the latter standards which determine whether the outcome is just. Rather, it is the careful, rigorous adherence to the three (and possibly other) background conditions which guarantees the justice of the procedures by which a decision is reached. Those three background conditions go to the fairness of the procedure itself and are neither external to nor independent of that process. Similarly, precisely because it is the fairness of the legislative procedure which determines the justice of its outcomes, legislators can rest content with mere assertions of policy so long as the policy does not infringe one of the background conditions.

In contrast, when a judge or lawyer discovers, construes, applies, or elaborates a rule of law the fairness of the process by which he discovers the rule does not guarantee its justice. Rather, the judge proceeds to justify his discovery by an appeal to principles external to himself and to the process by which he is constituted a judge. The process of reasoned justification requires the conscious articulation and weighing of arguments: lawyers must propose rival rules, policies, and principles; withdraw existing judgments in the light of the weight of arguments; revise others; and, by going back and forth amongst arguments, the judicial officer must arrive at a provisional statement of the appropriate legal standard in the circumstances. In section 2 below I shall argue why the process of reasoned justification is required in 'clear cases.' Suffice it to

14 Dworkin *Taking Rights Seriously*, supra note 1, c 4 ('Hard Cases')
15 See especially Conklin *In Defence of Fundamental Rights* (1979), at 190–6, 245–59.

suggest at this point that this process of justification appeals to independently defined criteria of substantive justice – independent, that is, of the judicial procedure itself.

### THE DISCOVERY VS THE JUSTIFICATORY PROCESS

The nature of the justificatory process in judicial decisions can be better appreciated by a further distinction: the distinction between the discovery and the justificatory process.[16] The initial discovery of a rule in any concrete case may very well be the outcome of internal impulses, hunches, beliefs, or inarticulate assumptions on the part of the decision-maker. A study of the discovery process would consider the psychological, physiological, social, economic, political, and other internalized pressures which motivate a judge or lawyer. Although David Hume may have been correct that these pressures constitute the 'natural' as opposed to the 'artificial' world of reason,[17] Hume's claim does not preclude the possibility that reasons for rules, once articulated, become internalized into one's belief system just as any other factors external to the person's psyche may become internalized under certain circumstances over time. Nor does Hume's claim foreclose an inquiry into whether any given rule, once discovered, is justifiable. The latter inquiry raises an entirely different set of questions from the discovery of a rule. The justificatory process appeals to a standard or set of standards external to and independent of the person's psyche or belief system.

This distinction is an important one. With respect to the discovery process we are content with mere assertions of rules, policy, or principle. But as regards the justificatory process one is required to pry behind the assertions; mere assertions are not enough. The distinction also introduces a second important difference between a properly decided legislative and a properly decided judicial decision.

A properly decided legislative decision may well concern itself with the mere discovery of rules of law so long as the rules do not prima facie contradict the three background conditions of a fair legislative procedure. To suggest, as do contemporary legal theorists, that one can characterize the legislative function in terms of the character of argument supporting a legislative decision wrongly assumes that an argument is invariably required. Again, an argument is only required if a legal rule prima facie violates the fairness of the procedure itself. So long as the procedure remains fair and the background conditions to it are not

16 This distinction is raised by Wasserstrom in *The Judicial Decision* (1961), at 25–30.
17 See generally Hume *A Treatise of Human Nature* (2nd ed 1978) book III, part II, s 1–6.

infringed, the liberal theory of the legislative function rests content with the mere discovery of rules.

In contrast, the mere discovery of a rule by a judge without more does not warrant one's description of the judicial decision as a sound or properly decided one. Rather, the judge must pursue the justificatory process and justify his decision by an appeal, through reasoned argument, to principled standards external to the judicial process. Sometimes those standards may well be the three background conditions which guarantee a fair legislative procedure. Even where a legal rule does not prima facie violate the background conditions, however, the judge is obligated to justify his decision to principled standards external and independent of himself or his judicial process.

This latter point seems to have been foremost in Herbert Wechsler's mind when he argued that judges should support their value choices by a 'type of reasoned explanation' which is 'genuinely principled.'[18] A decision was principled, Wechsler argued, if it rested 'on grounds of adequate neutrality and generality' – neutral in the sense that the judge would be prepared to follow the reason for the decision in other hypothetical facts to which it applies;[19] general in the sense that the reason would transcend the immediate facts so as to connect the immediate decision with past and future cases which presented potentially similar issues. That is, a decision would not be formulated with reference to some proper name or a fact category appropriate to only one person. The neutrality and generality of a decision, according to Wechsler, must inhere in every issue to the case.[20]

### 2 *Why justify decisions by an appeal to principled reasons?*

Now, why ought this be so? Why can a sound legislative decision be confined to the mere discovery of legal rules whereas a sound judicial decision must be justified? And why must the justification be in terms of some standard independent of and external to the fairness of the legislative process?

18 Wechsler, Toward neutral principles of constitutional law (1959) 73 *Harv. L.R.* 1. For an excellent study of Wechsler's notion of 'neutral principles' see generally Greenawalt, The enduring significance of neutral principles (1978) 78 *Col. L.R.* 982.

19 Wechsler, ibid, at 15. Note that Wechsler does not use the term *neutral* to connote political neutrality. Quite to the contrary. Judicial decisions are 'inescapably political,' he claims, 'in that they [ie, the issues] involve a choice among competing values or desires, a choice reflected in the legislative or executive action in question, which the court must either condemn or condone' (p 65).

20 Wechsler, ibid, at 23

### FORMAL JUSTICE

In the first place, if judges were content to discover legal rules without any attempt to justify them, then formal justice might be an extraneous consideration to the judiciary's frame of reference. What is more, if formal justice were implemented, it would evolve only by chance.

Formal justice is admittedly a primitive type of justice.[21] Its precept is that like cases should be treated alike. It is primitive because it leaves unanswered any evaluation of the distinguishing criterion by which one is to measure likeness. The criterion could be racial. It could even differentiate slaves from non-slaves on grounds of race, intellect, colour, status, military defeat, or whatever. Formal justice only requires that all persons who possess the likeness criterion be brought under the application of the rule. That is, the likeness criterion must be applied impartially and consistently.

If a legal rule were simply asserted without any attempt to justify why it ought to be applied in any particular case, how could the legal rule be applied impartially and consistently unless the judge consciously asked himself why a distinguishing trait in the legal rule ought to be considered relevant in a clear case and whether the party before the court possessed that distinguishing criterion? The latter questions require some rational process on the part of the judge. He may conceivably be able to make the connection unconsciously or subconsciously. But unless he does so in a conscious, articulate fashion, we shall not know whether he has even addressed his mind to the issue of likeness. Law-making by fiat does not assure us that the judge has exercised his mind upon the question of who possesses the distinguishing trait and why it ought to be considered relevant in any particular case. Furthermore, to the extent that reason has an effect upon one's decisions, a conscious articulate justification of the application of the likeness criterion will increase the chance that like cases will be treated alike.

### SUBSTANTIVE JUSTICE

A second implication arises if a judge asserts a legal rule or its application without justifying the rule by an appeal to a standard external to and independent of the judicial procedure: namely, there would be no guarantee of a just outcome in any particular circumstance. Because the background conditions of political equality and majority rule cannot conceivably apply to a judicial decision, it is inappropriate to talk of the judicial function in terms of pure procedural justice. Rather, a different kind of justice is applicable, one which contemplates an independently

21 See Barry *Political Argument*, supra note 2, at 100–2.

defined identification of what justice requires in the particular circumstances. Instead of the procedure making the outcome just, the independently defined entitlement does so. The latter ushers forth a plethora of end-state or entitlement theories of substantive justice.

### LIBERTY

An additional implication flows from a judicial decision which merely asserts a legal rule without an appeal to principled standards external to and independent of the judge and the judicial procedure: namely, there would not appear to be any theoretical limit to the repression of liberty by the judiciary or, ultimately, the legislature. Without an appeal to principled standards which are independent of the judge's psyche or external to the fiats of the political arena, the judiciary could logically erode a minority's freedom to speak on political issues, to practise a religion, to join a political party, or even to think certain thoughts. Only if there exists some institution in society where a minority or an individual can confidently appeal to principled standards external to the immediate legislative or judicial process can one possess any long-term assurance that one's life and liberty will be respected and protected. The legislature might well perform that role so long as the political actors consciously adhere to the three background conditions which make for a fair legislative procedure. That seems unlikely, though. A 'watchdog' institution such as a court which, of necessity, is required to appeal to principled standards assures us of a minimum hope – although by no means a guarantee – that a party (including the State) can be brought to an accounting.

### GUIDANCE TO LAWYERS

There is a utilitarian reason why the justificatory process is such an important element in a clear case: namely, unless a judge can offer a justification in terms of 'neutral' and 'general' principles as to why a distinguishing trait in the legal rule ought to be considered relevant, and unless he can justify why a particular person in fact possesses that distinguishing trait, future lawyers will possess little guidance to confront a novel set of facts. What facilitates a lawyer's advising a client in an original fact situation is first that some earlier court, preferably at an appeal level, has rendered a principled reason for a decision in a similar case and secondly that that reason is sufficiently neutral and general as to transcend the immediate circumstances.

Some weight should be given to the facility of a legal system to guide lawyers in their advice to clients. For, without principled reasons to guide lawyers, the social and economic costs would be extraordinarily burdensome both for potential litigants and for society as a whole (the latter is

involved because society must finance the institutional structure to resolve the dispute). Litigation, to the extent that the parties could afford it, would abound. And, to the extent that the parties could not afford litigation, disputes would remain unresolved, expectations frustrated, reasons for earlier clear cases hypothesized, and pre-trial agreements transitory. For why should a party to any dispute remain content when the 'resolution' out of court has been made without reference to any 'neutral' and 'general' standard which transcends the issues in any one case.

### ACCOUNTABILITY

There is one final reason why the justificatory process is required of judges in clear cases. The liberal model elaborated earlier in this paper posits the legislature as the institution which can be trusted to make the best political decision. Because judges are appointed, the argument goes, they cannot be trusted. Whereas the electorate can, theoretically at least, rid itself of politicians, it cannot oust judges. Consequently, the model presumes that legislators are accountable to the people, but judges are not. In addition to accountability, the liberal model generally assumes that because legislators are elected, they are more closely in tune with society's contemporary values. Further, the background principle of majority rule gives added weight to the legislature's role. Because the legislature alone is presumed to represent the will of the majority, liberal theory requires that courts act as passive deputies to the legislature. For these reasons, liberal theory considers the legislature as the institution most suited to render political decisions.

All of these arguments are, of course, debatable for their empirical and normative content.[22] Nevertheless, they have moulded the self-image of the judiciary in common law countries. One consequence is that it is deemed offensive to liberal theory for a judge to allow his feelings and intuitions to discover legal rules without some attempted justification of the rule, and without some attempted justification as to why a party before the court ought to be brought under the rule in the clear case. As an 'undemocratic' institution in a 'democratic' society, a higher degree of justification is demanded from the judiciary than from politicians. In addition, in order to remain consistent with the liberal premises posited above, the judiciary must remain cautious and restrained when counsel requests the court to choose some value in opposition to that chosen by an elected institution. The judiciary alleviates the latter dilemma in which it

22 See, eg, Bishin, Judicial review in democratic theory (1977) 50 *Southern Cal. L.R.* 1099; Choper, The Supreme Court and the political branches: democratic theory and practice (1974) 122 *U. Pa. L.R.* 810; Mace, The anti-democratic character of judicial review (1972) 60 *Cal. L.R.* 1140.

finds itself by justifying its decisions and by doing so in a manner which defers to standards external to the judge's will. It is the latter two requirements which legitimize judicial decisions in a liberal society.

### 3 *Are judges confined to rules of law in clear cases?*

We are now ready to return to the threshold question posed by this paper: is a properly decided judicial decision confined to rules of law in a clear case? In a clear case, let us recall, the facts have been ascertained and proved. The lawyer has been able to sort out the material from the immaterial facts and has discovered the relevant rules of law. He need only deduce a conclusion by applying the relevant rule to the material facts. Accordingly, Ronald Dworkin's phraseology of a rule of law appears appropriate: a rule of law, he suggests, applies in an 'all-or-nothing' fashion.[23] The rule sets out a fact category followed by a legal consequence.

We have been taught to believe that the lawyer's task in a clear case is to assert the appropriate legal rule and to connect the rule to the material facts of the case. But this simple deductive process leaves critical issues unanswered. How is the lawyer to ascertain whether some facts are material whereas others are immaterial? What is it about a party to a dispute which is sufficiently distinguishing to connect him to the fact category of the legal rule? And why does a lawyer reject some rules as legally irrelevant and accept others as legally relevant? The issues are crucial because pure procedural justice is conceptually impossible in the context of the judicial function. If pure procedural justice were appropriate to the judicial procedure, then these questions would not have to be asked. In contrast, for reasons of formal justice, substantive justice, liberty, guidance to lawyers, and judicial accountability, the type of justice appropriate for judges is imperfect procedural justice: that is, judicial officers must decide as if there exists an independent criterion to ascertain what is a just outcome in a particular case although it is impossible to devise a procedure which can guarantee that outcome. Imperfect procedural justice, however, is not possible if a judge or lawyer merely asserts a rule of law. It requires that he be prepared to go beyond that assertion and justify his use of a rule of law in terms of independently defined principles of substantive justice.

Practitioner and legal academic alike have believed that the competent lawyer's task in a clear case is complete when he asserts the material fact as the reason for his decision. But such an assertion is of an explanatory

23 Dworkin *Taking Rights Seriously*, supra note 1, at 24

rather than a justificatory nature. To explain why something has occurred is a descriptive enterprise. When we explain that a particular material fact is the reason for a judge's decision we implicitly assume that the judge's decision-making is a rational process; that is, that the material fact caused the conclusion. We could also have explained the conclusion in terms of the judge's intuition, his personality, his socio-economic class, or whatever. We might look inwardly at his psyche or outwardly at external factors influencing his conduct. These are empirical claims which may or may not be true.

But they are a part of an enterprise which is very, very different from a justificatory one. Explaining why a decision has been made is distinguishable from justifying whether a particular rule of law is the right or just one. The latter inquiry requires that we push behind the rule to a second level where consideration is given to reasons why the rule ought to be followed. The one is a descriptive enterprise; the other is a normative one. To explain something is not to justify it.

A rule of law, by itself, is a mere assertion. If, when pressed, a judge is content to stop with the assertion of a rule, he fails to perform his proper function even in a clear case. By stopping his analysis with the assertion of a rule, the judge becomes entrapped in the very role which we just found so unbecoming of a judge for reasons of formal justice and the like. Rather than appeal to principled reason as the criterion of a sound judgment, such a judge implicitly adopts the position that 'this assertion of the law is correct because I said so.' This might be satisfactory for a legislature in a liberal state. But we have seen why it is inconsistent with the judicial function once that function is grounded in considerations of formal justice, substantive justice, liberty, guidance to lawyers, and accountability. Only if the judge is prepared to go on to ask the normative question 'Why ought this rule to be applied here?' can he play the role which the absence of pure procedural justice has thrust upon him. And this requires that he be prepared to articulate and weigh arguments in support of the rule; withdraw some arguments for the rule in the light of the weight of counter-arguments; revise the rule; and, by going back and forth amongst the arguments, arrive at a provisional statement of why the rule ought to be the appropriate legal standard in the circumstances.

One possible explanation why lawyers have found it adequate to arrest their analyses in clear cases by merely asserting a legal rule is that the principled reasons for justifying any particular rule are so commonplace that they need not be re-stated. The implicit reason why lawyers are justified in adopting a statutory rule, for example, is that the legislature ought to be the supreme law-making institution in the body politic. Lawyers and judges ought to subordinate alternative rules, however

meritorious, to the rules of the elected legislature – thus the justificatory argument proceeds. One can push behind this principled reason, however, in order to uncover further second-level arguments such as the very idea of pure procedural justice.

The justification for the lawyer's adoption of a legislative rule could be grounded, for example, in the constitutional principle that there ought not to be an independent criterion of justice separate from and prior to the procedure by which legislative public authority is constituted. Given that the procedure used to choose legislators is fair, the substantive outcome of the process will likewise be considered fair. Consequently, the lawyer's adoption of a legislative rule will produce a just outcome, according to liberal theory. But one could legitimately go on to raise counter-arguments as to why a fair procedure will not necessarily lead to a just outcome. Indeed, one could root the legislative function in some competing political theory of justice. The original legislative rule might be revised. And, by going back and forth amongst the arguments, we could arrive at a principled argument as to why the lawyer ought to consider the original legislative rule legally relevant, why he ought to revise the original rule, or why he ought to substitute some alternative rule in the circumstances.

Similarly, the crucial reason why courts are justified in applying a pre-established, legislatively or judicially created rule in a clear case is that by doing so the courts can be assured of treating similar cases similarly. Formal justice ensues. But I showed earlier in this paper how formal justice is a very primitive form of justice in that it does not allow for any evaluation of the moral content of the rule by which similar cases are to be treated similarly. When one examines the substantive content of both statutory and common law rules, one can often find principled justifications for the rule other than formal justice. These justifications can be framed in terms of tradition, contemporary values, or the goals of society. The content of the rule represents a choice which has been made amongst competing values which, in turn, possess corresponding justifications. Once again, the door is opened for the articulation of the justifications of competing principles, the weighing of formal justice vis-à-vis the latter, the possible withdrawal of the original rule in favour of arguments which go to the justice of the content of the rule, and the possible revision of the original rule or the substitution of a new one. When the function of a lawyer is seen in this light, one can appreciate how it is that law and normative argument intermix even in clear cases. One can also appreciate how there are second- and third-level justificatory standards to which a competent lawyer may appeal even in clear cases. Those standards possess a political character.

### 4 *The political character of justifications in clear cases*

When it is suggested that the justifications which rules of law invoke in clear cases possess a political character, what is meant? The usual sense of *political* refers to the context of party politics and describes a person who represents a certain political party or political interest group. Although judges in a country such as Canada are invariably appointed in return for years of service to the governing political party, this paper has not substantiated why one could justifiably claim that, after they are appointed, they retain party allegiance and are motivated according to the contemporary line of the party. This clearly is not the sense in which we can describe rules of law as political in clear cases.

A second possible sense of the word *political* is that the judge should be viewed as a political actor, much as a politician is. Accordingly, we should examine the judge's behaviour in much the same manner as we would the behaviour of other political actors. This line of inquiry focuses upon the behaviour of the court rather than the rule of law which the court applies. Our focal point would be the actual vote in the case rather than the express or implicit justifications which the rule typically invokes. Once again, however, there is little in this paper which warrants that we describe rules of law as political in this sense. For I have argued that it is the justificatory process which characterizes the judicial function, not the discovery process of the rules. A focus upon ultimate votes in a series of cases underplays the importance of the justifications invoked by a rule of law.

A third sense of describing a rule of law as *political* is that it emanates from a political institution. Our focus, in this sense, would be to perceive the court as we would any other political institution such as the legislature, a political party, or the bureaucracy. One would examine what particular functions or roles the court plays generally in society. Any outcome in a clear case would be connected and explained in terms of that institutional role. One would bear in mind the similarities and differences which characterize the court and other institutions in the structure of government. And one would question whether the courts rather than other institutions are particularly suited to deal with certain types of disputes. Once again, however, we must reject this sense of the word *political*. For this line of inquiry examines the structures of government whereas the justifications rooted in rules of law involve ideas.

The sense in which rules of law can be characterized as *political* in clear cases is that there are justificatory ideas and conceptions which are rooted in the rules. And those ideas and conceptions are political because they make statements about the distribution of power within society. The

distribution of power can be analysed in terms of ideas about the relationship or role between one decision-making structure and another. Or the rules of law can talk about the distribution of power by assigning rights and duties, powers and immunities, and the like to certain categories of persons. Or the rules affect the distribution of power by specifying certain social practices or forms of conduct as permissible whereas others are identified as proscribed. Consequential defences and penalties are posited when violations of the proscriptions occur.

Furthermore, the rules of law are political because they explicitly or implicitly employ concepts which pose political issues. Concepts such as private property, markets, parliaments, trials, free expression, libel, and the like pose normative issues as to how power ought to be distributed in society. The concepts do not provide the answers to those issues nor do they report or describe set patterns of conduct. They pose political issues for whose solution there may be many rival conceptions. Or, finally, the rules of law often try to incorporate a particular conception which tries to answer the issue posed by the concept. Accordingly, a rule of law is inescapably political in that it states what choice has been made between rival conceptions or models for distributing power. It works out political ideas at a concrete level.

When one understands the word *political* in this sense one can better appreciate why a judge makes a political decision in a clear case even when he strictly applies a rule or when he leaves changes in the rule to the legislature. Such a decision invokes political ideas about the institutional arrangement of power as between the courts and the legislature. The content of such a decision or non-decision distributes power by proscribing some conduct or permitting other conduct. Such a decision or non-decision poses political issues concerning majoritarianism, rights, interest groups, popular sovereignty, the nature of the State, and the like. And a judicial non-decision tries to answer such concepts by choosing a conception of majoritarianism over competing conceptions of how power ought to be distributed in society. A rule of law merely transposes the choice of conceptions into an institutional setting in a concrete case.

## *Conclusion*

The claim that lawyers are confined to rules of law in clear cases can no longer be sustained. What characterizes a properly decided judicial decision in a liberal state is a commitment to justify the decision by an appeal to principled standards independent of and external to the judicial process itself. This commitment is crucial because whereas pure procedural justice is appropriate to the legislature it is conceptually impossible

with a court. Consequently, the contemporary debate about the judicial function has been misdirected in that it has looked to the character of argument as the critical issue rather than to the kind of justice appropriate to a legislature or court.

The importance of the justificatory as opposed to the discovery element in a properly decided judicial decision flows from arguments about formal justice, substantive justice, liberty, guidance to lawyers, and judicial accountability. I have shown how the latter arguments are as relevant for clear cases as for hard cases. I have shown how, embedded in the rules of law, there rest second- and third-level conceptions and justificatory arguments which connect the rules of law to normative issues of substantive justice. I have also elaborated how the second- and third-level standards to which a competent lawyer may appeal in clear cases possess a political character.

The conclusion appears warranted that clear cases are hard cases, perhaps the hardest of all. For the apparent clarity and simplicity of applying a rule of law to the facts subtly camouflage the complexity of the lawyer's enterprise even in a clear case.