

REVIEWS

THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION. By Richard A. Wasserstrom.* Stanford: Stanford University Press. London: Oxford University Press, 1961. Pp. 197. \$5.00.

PROFESSOR Wasserstrom's little book represents the initial efforts of a young lawyer-philosopher, just embarking upon a career of teaching in law, to bring the insights and enlightenment of a sister discipline to bear upon problems in the judicial decision process. Such efforts at using philosophy to improve law deserve applause, even if they do not achieve perfect success. The study is concerned with the problem of how courts ought to decide cases,¹ and Professor Wasserstrom has presented his remedial prescriptions forthrightly and with vigor. The question which his inquiry is an attempt to answer is whether logic ought to have a significant function in the process of judicial decision making.² This focus has led the author to consider the nature and persuasiveness of attacks upon "the deductive theory" of judicial decision making and to evaluate other methods of making decisions which have been evoked by supposed rejections of "logical" decision procedures.³ This reviewer cannot help but wonder whether the whole enterprise might not have been radically altered if a slightly different question had been asked and investigated carefully—namely: whether the formal deduction that is in fact involved in judicial decision making is really important in providing criteria for choice or whether it is in this respect a matter so trivial as to be of almost inconsequential importance in a full contextual analysis of judicial decision making.

Nearly half of the book is devoted to a discussion of the role of precedent and equity in judicial decision making that might, perhaps, be of interest to a beginning student of law. More stimulating and more controversial is the discussion in the remaining chapters about the possibility of a deductive procedure by judges for deciding legal disputes, the relation of two kinds of utilitarianism (extreme and restricted) to possible judicial decision procedures, and Professor Wasserstrom's own recommended procedure as to how judges ought to decide cases. In conclusion he urges that courts use a two-level procedure of justification; this is indicated to be the same as asserting that a rational decision process is both possible and desirable.⁴ Membership in an old and firmly established philosophical tradition—"the tradition that proclaims the rewards of

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1. P. 3.
2. P. 172.
3. P. 5.
4. P. 172.

reasoned inquiry and the virtues of enlightened action"—is claimed for such conclusions.⁵

The recommended two-level procedure of justification is grounded in the moral philosophy of restricted utilitarianism that emphasizes the evaluation of a particular action by appeal to a moral rule, which in turn is to be justified in terms of a principle of utility for producing maximum happiness with minimum conflict.⁶ The mode of judicial decision making rejected by Professor Wasserstrom is one that is supposed to be a parallel of extreme utilitarianism in which a particular decision is justifiable if and only if "the particular consequences of an act are justifiable on utilitarian grounds."⁷ The crux of Professor Wasserstrom's position is his emphasis upon logic and rules in judicial decision making. The two crucial features of his two-level procedure of justification which are claimed to make it a "rational" decision procedure are:

1. [B]efore any particular decision is deemed to have been truly justified, it must be shown to be formally deducible from some legal rule. Here the ordinary canons of logic would be employed to determine whether the conclusion reached indeed follows from the premises selected.⁸
2. [B]efore any particular decision is deemed to have been truly justified, the rule upon which its justification depends must be shown to be itself desirable, and its introduction into the legal system itself defensible.⁹

One cannot help but wonder to what extent such a focus upon logic and rules as the crucial features of the judicial decision process tends to blur the important insight of the legal realists that these are only relatively minor parts of how judicial decisions are in fact (and should be) made. In the two-level procedure of justification the author emphasizes the role of "ordinary canons of logic" and rules, and thereby tends to underplay in a full contextual analysis of judicial decision making the intimate personal responsibility of the judge in the judicial act of decision and the discretion that is involved in such other aspects as (1) determining (primarily at the trial court level) which of various events claimed to have occurred are to be treated as having occurred for purposes of adjudicating the dispute, (2) characterizing the events found to have occurred in the dispute in terms of the normative language of the "legal rules," (3) selecting which among various proposed rules are the appropriate ones to be applied to the particular dispute before the court, and (4) interpreting the selected rule or rules to decide whether the characterized events of the dispute fulfill the conditions required to be fulfilled for imposition of the legal consequences of the rules. The danger of such preoccupation with logic and rules is that it may encourage the tendency of a careless decision maker who relies upon an inappropriate rule to ignore the over-all effects of his decision. A more cautious (and perhaps safer) approach would be to call explicit attention to

5. P. 175.

6. P. 119.

7. P. 121.

8. P. 172.

9. P. 173.

where discretion and flexibility are available and not presume that every decision-maker automatically incorporates such awareness into his rule-justification procedure. One of the examples offered by Professor Wasserstrom in support of the two-level procedure of justification dramatically illustrates this danger.

Suppose that someone has given me his gun to keep and I have promised to return it to him should he ask me for it. And suppose that after having talked several times about committing suicide, he comes to me in a particularly despondent mood and demands that I keep my promise by returning the gun to him immediately. It is argued that as an extreme utilitarian I might be justified in breaking my promise in this case on the grounds that the consequences of breaking my promise would in the long run be less deleterious than those which would result from honoring the promise and permitting an almost certain suicide. But as a restricted utilitarian, I would, arguably, be justified only in keeping my promise and returning the gun, because I had promised to do so and because the rule "Always keep your promises" is a rule which is clearly justifiable on utilitarian grounds.¹⁰

Professor Wasserstrom explains that a *careful* restricted utilitarian probably would not return the gun because he would *probably* decide that the rule "Always keep your promises" is not as justifiable on utilitarian grounds as the rule "Always keep your promises except when keeping the promise would result very probably in the immediate loss of a human life."¹¹ If this is the case, let's hope that there are not too many careless restricted utilitarians among the judiciary! An approach to judicial decision making based upon a philosophical theory that demands some meticulous care in order to make the appropriate decision in such a hypothetical example as the one above seems unlikely to attract much favor among law men (and women). Judges are faced with more agonizing choices upon which to expend their not-limitless reservoirs of meticulous care.

Neither of the criteria in the two-level procedure of justification exclude judicial discretion; they merely fail to pinpoint where that discretion is exercised—which may, in turn, encourage less-than-comprehensive evaluations of a particular judicial decision.

Those inclined to sympathize with the outlook of the legal realists may feel that it is a rather distorted version of legal realism that is presented in *The Judicial Decision* as the alternative to the two-level procedure of justification. To believe that logic and rules should and do have relatively minor roles in judicial decision making and that the effect of the decision upon the particular parties involved in the litigation should be and is generally regarded as one important aspect is quite different from believing that judges should decide cases on the basis of their intuition alone without any recourse at all to logic or rules and that justice to the immediate parties should be the only concern

10. Pp. 121-22.

11. P. 133.

of the judge without any consideration being given to the over-all effects of his decision.¹² The latter is a bit remindful of a slightly overstuffed straw man.

As an inquiry into the relation between logic and judicial decision making, *The Judicial Decision* has left a great deal unsaid about logic. To a reader unfamiliar with the revolution that has occurred in modern logic during the past century in adopting mathematical techniques and vastly extending its scope, there is no hint that advances have been made since the time of Aristotle. Nowadays, it is a bit misleading to talk about showing particular decisions to be deducible from legal rules merely by means of "the ordinary canons of logic."¹³ Since there are now a multitude of logical systems from which to choose, it is helpful for the sake of clarity to specify just which system is being referred to. For example, in the customary two-valued propositional logic, the following conclusion :

(3) Lawyers do not reason intuitively.

is formally deducible from the following pair of premises :

- and
- (1) Either lawyers use mathematical logic or lawyers reason intuitively.
- (2) Lawyers do not use mathematical logic ; and it is not so that if lawyers use mathematical logic, then lawyers reason intuitively.

There are a great many lawyers who reason intuitively—and some more rigorous logicians, too¹⁴—who might question the appropriateness of using customary two-valued propositional logic as the test of the formal deducibility of (3) from (1) and (2). One wonders what system Professor Wasserstrom has in mind for testing formal deducibility.

In order to refrain from injecting further confusion into a literature that is already sufficiently muddled, contemporary writers about logic and law ought to be extremely careful in specifying exactly what they refer to when they use the word "logic" and to exercise some restraint in their claims about how logic may be useful to lawyers.¹⁵ Most of the occurrences of the word "logic" in legal

12. See Ch. 7.

13. P. 172.

14. See, e.g., ANDERSON, COMPLETENESS THEOREMS FOR THE SYSTEMS E OF ENTAILMENT AND EQ OF ENTAILMENT WITH QUANTIFICATION (Technical Report No. 6, Office of Naval Research, Group Psychology Branch, Contract SAR/Nonr-609(16), New Haven (1960)); Anderson & Belnap, Jr., *The Pure Calculus of Entailment* (Forthcoming in J. OF SYMBOLIC LOGIC); and BELNAP, JR., A FORMAL ANALYSIS OF ENTAILMENT (Technical Report No. 7, Office of Naval Research, Group Psychology Branch, Contract No. SAR/Nonr-609(16), New Haven (1960)).

15. For a perceptive account of the relation of logic to decision making in law along with a rather comprehensive summary of the literature on logic and law, see Simitis, *The Problem of Legal Logic*, 3 *RATIO* 60 (Eng. Trans. 1960). It is also curious to find missing from the bibliography in *THE JUDICIAL DECISION* any reference to the works of Felix S. Cohen, one of the most astute and sensitive commentators of all on the relation of logic and law. See, e.g., *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809 (1935); and *Field Theory and Judicial Logic*, 59 *YALE L.J.* 238 (1950).

writings seem to refer to a loose synonym for "common sense" or else the writer's opinion about what is reasonable. It is somewhat startling, as well as paradoxical, that among the members of a profession that is held out to the public as expert in the art of communication, there is so little reference to or apparent awareness of modern logic as a tool of analysis that can help improve communication by enhancing the precision of language. This reviewer has elsewhere expressed views about how modern logic can be used to advantage by lawyers in drafting and interpreting legal documents, in making the information retrieval aspect of legal research more effective, and in helping to make normative language more systematic and precise, and urged the usefulness of exposing lawyers to some training in modern logic.¹⁶ But how to develop what Reichenbach calls "common sense enough to learn more than common sense [itself] can teach," continues to be an interesting problem.¹⁷ However, it does not contribute to the cause of clarifying how lawyers can benefit from some knowledge of modern logic to hint vaguely that logic can somehow provide criteria for making value choices. Most lawyers know better. In a truly controversial situation, where the important decision is a choice between competing values, an emphasis upon logical deduction as a criterion for choosing is frequently little more than dust for the eyes of the unwary.

In any legal system faced with the task of reaching some practical accommodation between the competing goals of predictability and flexibility, is it realistic to hope for objective criteria to evaluate whether or not a given judicial decision has been adequately justified? Or is the best to which one should reasonably aspire merely a procedure that encourages the persons authorized by the community to adjudicate disputes to consider as much of the relevant information as is practical in their efforts to implement the goals and policies of the community and to exercise their own personal subjective sense of reasonableness and fairness in reaching a decision? Can a judge ever hope in a genuinely controversial situation to make a decision that cannot be shown by some criteria to be "wrong" in some respect—a decision with which some other observer cannot have some reasonable disagreement?

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16. See, e.g., *Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents*, 66 YALE L.J. 833 (1957); *Toward a More Systematic Drafting and Interpreting of the Internal Revenue Code: Expenses, Losses and Bad Debts*, 25 U. CHI. L. REV. 1 (1957) (co-authored by Gabriel Orechkoff); *Toward More Clarity in Business Communication by Modern Logical Methods*, 5 MANAGEMENT SCIENCE 121 (1958); *Law, Logic and Dreams*, 52 LAW LIB. J. 131 (1959); *Toward a Procedure for Detecting and Controlling Syntactic Ambiguity in Legal Discourse*, in KENT, INFORMATION RETRIEVAL AND MACHINE TRANSLATION (1960); and *Modern Logic: A Useful Language for Lawyers*, Proceeding of the NATIONAL CONFERENCE ON LAW AND ELECTRONICS of the University of California, Los Angeles, Oct. 21-23, 1960.

17. REICHENBACH, *THE RISE OF SCIENTIFIC PHILOSOPHY* viii (First paper-bound ed. 1956).

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