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Robert F. Ladenson

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OF THE JUDICIAL ROLE

Robert F. Ladenson [1/]

In this paper I want to identify and describe a major ethical issue for administrative law judges. The issue concerns circumstances of the institutional background of most administrative law adjudication that tend to make it difficult for administrative law judges to fulfill their judicial responsibilities in a way they themselves consider meaningful. The issue is familiar, perhaps all too familiar, to many administrative law judges. I think, however, that my approach to the issue, which draws heavily upon moral and jurisprudential philosophy, may bring out some of its important aspects that are often overlooked.

Administrative law judges face many of the same problems of other employees in large organizations. They may, at times, find themselves subject to arbitrary salary and promotion decisions, or to unfair discipline. In some circumstances they may have reason to fear retaliation for speaking candidly to superiors within the administrative hierarchy. Situations may arise where they have knowledge of grossly inappropriate behavior by superiors or associates, but no way to bring this to light without placing their careers in jeopardy.

In addition to facing the above problems, however, administrative law judges also confront a unique difficulty in virtue of their judicial role. With depressing regularity, administrative law judges see their decisions overturned by superiors who completely, or almost completely, ignore the legal reasoning upon which the judges based their decisions. This situation raises a deep ethical problem that goes beyond the issues of due process, workplace free speech, and whistleblowing that arise generally for employees in large organizations. The problem concerns basic ideals toward which anyone who takes the judicial role seriously should aspire.

Before analyzing this problem in depth, it helps for understanding its nature as an <u>ethical</u> problem to focus

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1/ Department of Humanities, Illinois Institute of Technology.

briefly upon an important distinction in moral philosophy. There are two distinct conceptions of ethics that have played important roles in western philosophy and which correspond to important aspects of the way in which most people think about ethics. [2/] One need not feel compelled to make a judgment about which of these two conceptions is superior, all things considered. Each provides special illumination with respect to different areas of human ethical experience. The two conceptions thus may be thought of as complementary, rather than as opposed to one another.

The first conception, which one may term "ethics as morality", treats ethics as fundamentally concerned with interpersonal conduct. Under this conception, ethics consists, at its core, of a set of rules that apply to human beings over the totality of their inter-relationships with one another, and which take precedence over all other rules. The basic moral rules, according to ethics as morality, such as "Do not kill", "Do not cause pain", "Do not deceive", "Do not cheat", "Keep your promises", and so forth, forbid various kinds of behavior causing severe harm to others or substantially increasing the likelihood that others will suffer grave harm. [3/] The American Bar Association Code of Professional Responsibility and Code of Judicial Conduct both exemplify the conception of ethics as morality insofar as they apply the above kinds of rules to circumstances of professional conduct for attorneys and judges, respectively.

The second conception of ethics, which one may term ethics as the quest for a good life, has a fundamentally different emphasis from ethics as morality. Ethics as the quest for a good life does not allot a critical role to the idea of a code of moral conduct that defines the basic obligations of human beings. Instead, it focuses upon the very different idea of flourishing, or fulfillment for the

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2/ For a useful discussion of the two conceptions of ethics to be described, see Lon L. Fuller, The Morality of Law (New Haven, Yale University Press, 1964) pp. 3-30.

3/ The ethical theories of philosophers such as Hobbes, Kant, and Mill, however different from one another, all exemplify the conception of ethics as morality. For a recent philosophical theory clearly illustrating this conception, see Bernard Gert, The Moral Rules (New York, Harper and Row, 1970).

human individual; that is to say, the ends, or values to be sought in a genuinely good human life, and the means for realizing them. 4/

When administrative law judges have their decisions regularly overturned by superiors who ignore the legal reasoning upon which the judges base their decisions, a deep ethical problem arises from the standpoint of ethics as the quest for a good life, a problem that concerns the ideals to be sought after in a genuinely fulfilling professional life for an administrative law judge. Any judge who takes the judicial role seriously must identify in a strong way with the ideal of fidelity to the rule of the law. Administrative law judges who identify with this ideal, however, confront severe difficulties when seeing their decisions overturned in disregard of the legal reasoning they put forward to support those decisions.

A clear and illuminating statement of these difficulties requires one to analyze first the ideal of fidelity to the rule of law itself in some detail. To begin, this ideal is separate and independent from the ideal of doing justice, interpreted in a purely result-oriented manner. Even if the decision in a given case accorded with very widely shared intuitive ideas about fairness, nonetheless I think that anyone who takes the judicial role seriously would feel an important ideal had been undermined if the decision maker resolved the case in a way that disregarded legal reasoning that was relevant to it.

One cannot, however, equate the ideal of fidelity to the rule of law with the notion of "strict construction"; that is, of non-deviating adherence to precedent and statute. Difficult cases, and even many not so difficult cases, require a judge to go well beyond the range within which precedent and statute provide unambiguous guidance. The problem of explicating the nature of the ideal of fidelity

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4/ The clearest and historically most important example of a philosophical work that exemplifies the conception of ethics as the quest for a good life is Aristotle's Nichomachean Ethics.

:o the rule of law relates to perennial issues about the ıature of the judicial process, issues stated clearly by :ardozo:

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of social welfare, by my own or the common standards of justice and morals? [5/]

Cardozo's questions clearly lie beyond the scope of this paper. They define one major province of jurisprudential philosophy. I want to focus, however, on one aspect of these questions that has a special pertinence for understanding the ideal of fidelity to the rule of law. Cardozo's quotation rightly presupposes a conception of judicial reasoning as a complex intellectual activity, bringing into play the abilities of analysis and synthesis, and also inevitably providing considerable scope for the exercise of independent judgment by the judge; that is, judgment from the standpoint of a judge's own social vision and sense of justice. A problem arises, however, of how to reconcile such a conception with the ideal of fidelity to the rule of law and not of men and women.

To state the problem another way, under the ideal of fidelity to the rule of law, one regards the law as a constraint upon the scope within which a judge may inject his or her independent social vision and personal sense of justice into the process of making a judicial decision. On the other hand, under any reasonable account of the judicial decision-making process, the social vision and personal sense of justice of a judge enter into the process in many important ways. The problem is how to reconcile these two points of view which both exert a pull upon us, but which pull in opposed directions.

5/ Benjamin Cardozo, The Nature of the Judicial Process (New Haven, Yale University Press, 1921) p. 10.

In his recent book, entitled Law's Empire, Ronald Dworkin[6/] provides a highly illuminating approach to the above problem. Dworkin begins, in effect, by underscoring the conception of judicial reasoning as a complex and profound intellectual activity, implicit in the above quoted words of Cardozo. In this regard, Dworkin draws an analogy between judging and literary criticism. Judges and literary critics alike deal with texts whose overall meanings are substantially undetermined by their exact words. For this reason, both judges and literary critics confront problems of interpretation that call for a theoretical approach which brings a diversity of elements to one's understanding of a text, such as history, philosophy, politics, religion, and psychology. Dworkin notes, however, that the analogy between judging and literary criticism breaks down in a crucial respect. The judge not only interprets law, but also makes it. That is to say, a judge's interpretation of the body of law in a jurisdiction, as it applies to a particular case, becomes part of that body of law for judges to interpret in the future. The judge, notes Dworkin, is like a critic, but like an author as well.

To continue the analogy between judging and literary activity, Dworkin thus introduces the idea of an imaginary literary genre, which he calls the chain novel. In a chain novel a number of different authors write its chapters one after another. In this respect chain novels resemble television soap operas and story games played around a campfire. Unlike soap operas and story games, however, each of the authors of a chain novel takes the enterprise seriously. Chain novelists view themselves as responsible to continue the novel, at the respective points where they begin writing, in a way that makes the novel the best it can be as a literary artwork.

Continuing a chain novel thus requires an author to develop a conception of how the novel, as written up to a given point, hangs together, how its elements such as plot, development of characters, narrative style, imagery, symbolism, and so forth cohere with one another. Such a conception, in turn, depends upon developing an overall interpretation of the novel, of its main themes and underlying aesthetic

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6/ (Cambridge, Harvard University Press, 1986) The following discussion draws upon chapters six and eleven of Law's Empire, entitled, respectively, "Integrity" and "Integrity in Law".

structure. Dworkin notes that overall interpretations of a novel have two dimensions of evaluation, which he terms, respectively, fit and soundness.

The dimension of fit concerns how well posited hypotheses about theme and aesthetic structure harmonize and make sense of the novel so that the chain novelist can continue it in a way that makes it the best it can be. Dworkin employs a striking example to illustrate how considerations of fit serve to select between different hypotheses about the theme of a chain novel. Dworkin invites us to suppose that Charles Dickens' A Christmas Carol has been written as a chain novel, and a given author in the chain must write the last chapter. Consider a choice at this point between the following two hypotheses concerning the overall theme of Dickens' A Christmas Carol. Under the first hypothesis, A Christmas Carol illustrates that although liable to corruption under the economic institutions of capitalism, human beings have a fundamentally good nature. By contrast, the second hypothesis views A Christmas Carol as expressing a conception of human nature as inherently evil. Which hypothesis should a chain novelist choose as a standpoint from which to write the final chapter of A Christmas Carol? Recall that by the beginning of the last chapter Scrooge has already had his dream, repented, bought the Cratchett family a turkey, and so forth. These aspects of the plot, as it has unfolded up to the last chapter, would appear to rule out the second of the above hypotheses categorically.

Suppose, however, that a chain novelist had to write the second, rather than the last chapter of A Christmas Carol. At this stage considerations of fit cannot select unequivocally between the above two hypotheses. Under this circumstance, soundness, the second dimension for evaluating overall interpretation of a chain novel, comes into play. Soundness concerns the chain novelist's independent artistic judgments, as determined, among other ways, by his or her outlook on life, personal value judgments, and so forth. In some cases two or more interpretations may appear to fit the novel equally well, and so the chain novelist, taking seriously the charge to help make the novel the best it can be, proceeds from the standpoint of his or her independent aesthetic outlook.

Dworkin invites us to conceive of the judicial ideal of fidelity to the rule of law on analogy with the chain novel. According to Dworkin, judges should "identify legal rights and duties so far as possible on the assumption that they were created by a single author, the community personified,

expressing a coherent conception of justice and fairness". 7/ As with the chain novelist, notes Dworkin, ideally speaking, a judge brings an interpretative theory to the adjudication of cases in order to further the development of the law so as to make it the best it can be. Furthermore, as with chain novels, such a theory can be evaluated from the standpoints of fit and soundness. Fit concerns the degree to which an interpretative theory effects coherence among the diverse sources of law such as statutes, case law, general principles of law, and so forth. The dimension of substance comes into play when considerations of fit cannot discriminate between two or more interpretations of some statute or line of cases. When this occurs, Dworkin asserts, the judge must choose between eligible interpretations by asking which of them is superior from the standpoint of a social vision or conception of justice with which the judge identifies.

Judicial reasoning, according to Dworkin's account, thus accords a large role to the independent judgment of judges. This role, however, is limited by a responsibility to decide cases from the standpoint of an intellectual approach which aims to discover coherence among the diverse sources of law and to bring them to bear upon cases in a way that promotes development of the law toward the best it can be. All of this undoubtedly seems very much up in the clouds. Such, however, is as it should be. The purpose of Dworkin's analysis is not to describe what a typical judge actually does in deciding a case. Rather, Dworkin seeks to identify the most important ideals that should inform our conception of the judicial role. Dworkin designates his approach with the highly apt title of "law as integrity".

Dworkin thus provides, in essence, a procedural, as opposed to a substantive, account of the idea of fidelity to the rule of law. Fidelity of the rule of law in a given case cannot be analyzed as reaching the result absolutely demanded by the law. In difficult cases, or even in not so difficult cases, the law makes no such absolute demands. For Dworkin, judges express fidelity to the rule of law when they adopt the standpoint of law as integrity; that is, when they decide cases by "trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and

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7/ Ibid, p. 225.

legal doctrine of their community". [8] Law as integrity thus requires a judge "to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole". [9]

The foregoing account of the ideal of fidelity to the rule of law in terms of Dworkin's notion of law as integrity throws an illuminating light on the issue raised at the outset of this paper. That is, it provides a deeper understanding of why disregard by superiors of the legal reasoning behind an administrative law judge's decision cuts deep ethically, when one views professional ethics from the standpoint of the quest for a meaningful and fulfilling professional life. The more an administrative law judge has his or her decisions overturned in disregard of the judicial reasoning that went into them, the more difficult it becomes to conceive of himself or herself as a professional jurist essentially engaged in the kind of complex and profound intellectual activity called for by identification with the ideal of fidelity to the rule of law, when understood in terms of Dworkin's conception of law as integrity. As such, the administrative law judge works under conditions that, on a continuing basis, tend to undermine his or her sense of professional self-esteem.

Furthermore, taking the ideal of fidelity to the rule of law seriously, involves more for a judge than just adopting the conception of law as integrity as a personal approach to reaching judicial decisions. He or she also must have an abiding concern that the judicial process, of which his or her decisions are a part, makes sense, considered as a whole from the point of view of law as integrity, and thus expresses respect for the ideal of fidelity to the rule of law. A process in which judges find their decisions regularly overturned in disregard of the legal reasoning that underlies them cannot be reconciled easily with the conception of law as integrity. For this reason, an administrative law judge, with a strong sense of the ideals of the judicial role, works under conditions which tend to produce a chronic sense of frustration.

8/ Ibid, p. 255.

9/ Ibid, p. 245.

There are thus major ethical issues for administrative law judges from the standpoint of professional ethics, conceived of as the quest for a good or meaningful professional life. Aspects of the organizational context in which an administrative law judge functions, aspects not easily altered, have a tendency to undermine the administrative law judge's sense of professional self-esteem and tend to create a sense of frustration for administrative law judges who take the ideals of the judicial role seriously.

The above observations inevitably lead one to ask what can be done. As noted at the outset, this paper simply aims to identify and describe an important ethical issue for administrative law judges. It does not propose solutions. I do not think, however, that one should view the paper as deficient for this reason. The paper concerns circumstances that hinder the realization of an important professional ideal for administrative law judges. Professional ideals resemble personal ideals in a critical respect. Questions of what personal ideals with which to identify in the quest for a good life, and how to realize them, cannot be answered by one individual for another individual. By the same token, I think that similar questions about professional ideals can only be addressed by the members of a given profession either as individuals or on a collective basis. In this regard, unquestionably much dialogue bearing upon the issues raised in this paper has occurred among administrative law judges at national conferences, in the pages of the Journal of the National Association of Administrative Law Judges, and other places as well. This paper aims not to provide direct guidance with respect to the many issues raised in such a continuing dialogue. By contrast, it seeks to clarify and illuminate one important ideal implicated in those issues, which makes the issues significant for administrative law judges not only from a practical standpoint, but from an ethical point of view as well.