JUDICIAL REVIEW OF THE DEATH PENALTY

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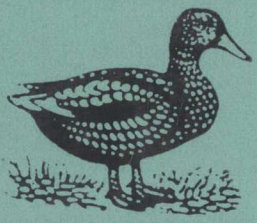

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To DENISE

'I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will ...' – Learned Hand *The Spirit of Liberty*

Preface

This book owes much to the enthusiasm, the scholarship and the skills of advocacy of Anthony Lester Q.C., the only member of the English bar who truly understands the mysteries of constitutional adjudication. Michael Beloff Q.C. (in addition to offering helpful criticisms of the book) tolerated me as his pupil, allowing me to learn something of his legal skills and how he makes use of them in the cause of civil liberties. He also has my thanks for granting me temporary manumission from my status as pupil to work on judicial review of the death penalty.

I would also like to express my gratitude to other friends and colleagues who provided information or who read and criticised drafts of the text: Hugo Adam Bedau, David Cohen, Philip Baker, Barry L. Goldstein, Brian Green, Tony Honoré, Roger Hood, Polyvios Polyviou, Eric Prokosch, Nigel Sloam, Maurice Sloam, and John Vickers. I am especially grateful to Professor Bedau: the frequency with which his works are cited in the text is a minor indication of the importance of his efforts in formulating challenges to the constitutionality of capital punishment.

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None of the above mentioned bears any responsibility for the views I express in the chapters that follow. Such responsibility is, however, not mine alone. It is shared with my wife, Denise. Her contributions of information, judgment and support ensure that if there be anything of value in this book, it abrogates the advice of Prince Andrei in *War and Peace* that one should: 'Marry as late as possible, when you're no good for anything else. Or else everything good and noble in you will be lost. You will be submerged by triviality.'

D.P.P.

All Souls College, Oxford
23 October 1981.

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CHAPTER 1
Introduction

I

It was the optimistic belief of the eighteenth-century philosophers of the Enlightenment that all problems could be resolved, and all questions correctly answered, if only we could discover and apply the relevant formula. Leibniz dreamt of a 'logic machine' that would, without debate or delay, supply the right answer to any moral or political controversy. The Encyclopaedists worked at producing eighty-four octavo volumes that would provide the information to settle any dispute.

There remains only one forum where the Enlightenment philosopher would today feel at home: our courts of law. It is not merely the antiquated language, dress and procedure that welcome the savant to the Law Courts. It is that the courts of the Anglo-American legal system still proceed on the doubtful premise that there are right answers to all legal disputes. When interpreting statutes, deciding hard common law points, or sentencing offenders, Condorcet's motto, '*Calculemus*', is applied. After consideration of the precedents cited and the arguments addressed to him, the Judge decides what the Law demands, permits or prohibits. The solution is there, awaiting discovery if only we search hard enough.

Yet judges are often asked to resolve hard cases, those to which there is no obviously correct legal answer, those in which two intelligent lawyers can reasonably disagree about the proper legal result. The concept of a hard case is by no means unique to modern jurisprudence. In Exodus (18:26) we are told that the ordinary cases were tried by the judges appointed for that purpose, but 'the hard cases they brought unto Moses'. In his *Philosophical Dictionary*, Voltaire complained: 'My lawsuit was heard in one of the courts, and I lost everything by one vote. My advocate told me that I would have won it by one vote in another court ...'

Many of the hard cases brought before the courts, as well as being legally controversial, raise issues on which philosophers, economists, sociologists and politicians can and do take sides. Does an occupier

of land owe a duty of care towards a trespasser on that land?[1] Is inequality of bargaining power between contracting parties relevant to whether the contract is valid or void?[2] Does the trade union immunity from civil suit for certain activities performed 'in contemplation or furtherance of a trade dispute' (under the British Trade Union and Labour Relations Act 1974, as amended) apply whenever the union or its members believe that they are acting to further a trade dispute, or is the test an objective one?[3] Did a local authority breach the provision of the Race Relations Act 1968 prohibiting discrimination on the ground of 'colour, race or ethnic or national origin' by considering for council houses only those applicants who were British subjects?[4] Is a barrister immune from an action in negligence brought by a dissatisfied client seeking damages for the barrister's conduct of an earlier court case?[5] And does a trial judge have a discretion to exclude otherwise admissible evidence on the ground that it was obtained by improper or unfair means?[6] The American courts constantly face cases demanding the resolution of similar moral, political and economic dilemmas. Does the owner of land adjacent to a lake owe a duty to allow a boat to moor to his land during a tempest?[6a] Can a landlord exercise his contractual right to terminate a tenancy if his motive is retaliation for the tenant's act of reporting him for a violation of the law?[6b] Does the Civil Rights Act 1964 prohibit an affirmative action scheme to train black workers?[6c]

Sometimes judicial decisions in such hard cases have monumental public importance. It has been suggested that in Britain the judgment of the House of Lords in *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*[7] that a union is liable for losses caused by a strike 'drove the unions to political action – specifically to the support of the Labour party – and produced concrete results in the 1906 general election in the form of a massive Liberal landslide, with many M.P.s in the category of "Lib-Labs".'[8] The judgment of the U.S. Supreme Court in *Dred Scott v. Sandford*[9] is widely blamed for precipitating the American Civil War.[10]

Despite the political, moral, economic and social controversy of the issues which some hard cases raise, and despite the potential consequences (beneficial or adverse) to the litigants and to society of judicial decisions therein, still a theory of adjudication evades modern jurisprudence. Who should resolve a hard case and how should they resolve it?[11]

Judicial reluctance to articulate the absence of a right legal answer to the legal problem before the court, and ritual incantations of the excellence of the common law, cannot conceal the ambiguity of statutory (like any other) language, the gaps that exist in the common law, the conflicts of principle that arise and the consequent need for judges to exercise a choice between alternative solutions, each of which is legally valid. The law is not a consistent body of principles arranged, indexed and bound, ready for easy reference. It embraces thousands of statutes, millions of judicial decisions and an uncertain quantity of custom. Some of those judicial decisions are reported (some accurately, some not). Some of them are remembered by those who participated in them or by those who know somebody who did; most common law decisions are long dead, buried and forgotten. These fragments of legal history were created by judges who shared no common philosophy, or political beliefs, or jurisprudential ideology. The English common law (from which much of American law derives) was constructed by judges of successive legal generations since 1189 (the date to which legal memory reverts). Those judges were men of different social backgrounds whose only feature in common was their training as lawyers. The content of that common law has developed from the fortuity of events: the occurrence of accidents, the meeting of minds, the legal advice requested and given, the ability and the willingness of the parties to bear the burden of initial litigation and appeals, or their preference for an out-of-court settlement. It would be surprising, disconcerting even, if the result of this haphazard, unstructured body of decisions was anything other than a confused, unprincipled mass of case law that offers uncertain and conflicting guidance to the judge searching for the solution to a novel legal problem. A choice between values is as inevitable in adjudicating hard cases as it is when legislating on hard political, social or economic matters.

There is a shameful absence of notable contributions by members of the English judiciary to the advance of legal philosophy. Blackstone's *Commentaries* (written before he was elevated to the Bench) and Mr Justice Stephen's *History of the Criminal Law* are the only oases in the desert. Holmes, Cardozo, Learned Hand, Frank and Frankfurter have, in this sense if in no other, no equal on the European side of the Atlantic. It may be that, as Mr Justice Roche told Harold Laski, English judges are 'vaccinated against the

dangers of speculation by their careers at the Bar'.[12] Or perhaps they work too long hours. Whatever the reason there remain judges for whom the judicial role is, as it was for Francis Bacon, '*jus dicere* and not *jus dare*; to interpret law and not to make law or give law'.[13] Harold Laski wrote to Holmes that when Laski told Mr Justice Macnaghten of Holmes' theory of adjudication ('where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice'[14]), Macnaghten replied that 'no damned nonsense about complexity' was going to obscure *his* judgments.[15]

A few Macnaghtens remain. But the majority of modern English judges, if not Holmeses, Frankfurters or Cardozos, have learnt from the insights of their American brethren and have rejected the simplicities of judicial formalism. What Lord Reid ridiculed as the 'fairy tale' that 'in some Aladdin's cave'[16] is hidden the key to correct judicial interpretation of the law's demands, is subscribed to no more. Lord Diplock has acknowledged that: 'The Court may describe what it is doing in tax appeals as interpretation. So did the priestess of the Delphic oracle. But whoever has final authority to explain what Parliament meant by the words that it used makes law as if the explanation it has given were contained in a new Act of Parliament. It will need a new Act of Parliament to reverse it.'[17]

We should not exaggerate the number of hard cases that occur in a legal system. 'Nine-tenths, perhaps more, of the cases that come before a court are predetermined – predetermined in the sense that they are predestined – their fate pre-established by inevitable laws that follow them from birth to death.'[18] And for every case that comes to court there are thousands that are settled out of court because the law, and its application, are clear beyond reasonable dispute (or because the parties, for a variety of non-legal reasons, some of them financial, prefer to compromise their claims). But when a hard case does arise, it can only be resolved by the application of non-legal criteria and the creation of new law. To argue this proposition and to suggest that judges have discretion in hard cases is not to imply agreement with the thesis of Jerome Frank that judicial decisions in hard cases depend less on abstract judicial inquiry and more on what judges eat for breakfast. Nor is it to express support for the theory of John Chipman Gray that judges are the creators of all law, and that even a statute has no validity in

law unless and until it is interpreted and applied in court. There are constraints on judicial law-making even in hard cases. Some decisions can be dismissed as legally wrong because illogical, inconsistent with previous decisions or with another statute, or incompatible with principles in which the judge purports to believe. Justice Holmes emphasised that 'judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions ...'[19]

The premise, then, is a narrow one: that in deciding the hard legal case (of which there are few), the judge has open to him a pool of possible legal solutions, all of which are legally correct, and the choice between which can only be made on moral, economic and other non-legal criteria. In Shakespeare's *Henry IV, Part 2*, the new King, Henry V, promises the Chief Justice,

> My voice shall sound as you do prompt mine ear,
> And I will stoop and humble my intents
> To your well practis'd wise directions.[20]

Judicial power in the modern legal system is neither so extensive nor as arbitrarily exercised as perhaps it once was. Nevertheless, Shakespeare does hint at an essential truth of judicial discretion in a legalistic society.

Because of the existence of judicial discretion in hard cases, the identity of the judge and the values he brings with him on to the Bench are of crucial importance in determining the content and the quality of the judgments he hands down. So pervasive have been the errors of formalism (the jurisprudential theory that presents the judicial role as *jus dicere*), that we have, to a substantial extent, ignored the judge in administering the judicial process. So heavy a preoccupation have we made with the Law, its discovery and its application by independent agents who play no creative role, that we have paid little, if any, regard to the appointment, training, qualities, demeanour and performance of the individuals selected to act as the mouth of the legal oracle. Laski wrote to Holmes: 'I wish that people could be persuaded to realise that judges are human beings; it would be a great help to jurisprudence.'[21]

Judges are not desensitized and passionless instruments which weigh, on inanimate and impartial scales of legal judgment, the evidence and the arguments presented on each side of the case. The judicial exercise of discretionary powers is influenced, consciously or subconsciously, by the human qualities and the defects of those who

sit in judgment. In *Resurrection*, Tolstoy's description of the trial of Maslova portrays the mortal imperfections of those who try her case. Her judges dream the same ambitions, have the same preoccupations, suffer the same frustrations and succumb to the same temptations as other men. The President of the court is anxious to finish judicial business as early as possible so that he can call on his mistress. The second judge has quarrelled with his wife that morning, and she has warned him not to expect any dinner when he arrives home. The third judge is always late in arriving at court:

> He suffered from gastric catarrh and on his doctor's advice had that very morning begun a new treatment, which had delayed him at home even longer than usual. Now, as he ascended the steps to the platform, his face wore an expression of deep concentration, resulting from a habit he had of using various curious means to decide the answers to questions which he put to himself. Just now he was counting the number of steps from the door of his study to his chair: if they would divide by three the new treatment would cure his catarrh. If not, the treatment would be a failure. There were twenty-six steps, but he managed to get in an extra short one and reached his chair exactly at the twenty-seventh.[22]

Few judges can aspire to display the commitment to judicial impartiality exemplified by Lord Mansfield, Chief Justice of the King's Bench 1756-88. After his valued and valuable library had been destroyed in a fire started by the Gordon rioters in 1780, Mansfield presided at the trial of Gordon and conducted the proceedings (which resulted in the acquittal of Gordon on the charges of high treason) in an exemplary fashion.[23] All judges should be able to (and all modern English judges do) avoid the sins of partiality in most circumstances. Robert Louis Stevenson's character Lord Hermiston, Lord Justice-Clerk of the Scottish courts (whom Stevenson modelled on the infamous Lord Braxfield), by comparison with whom the Judicial Committee of the Privy Council appear as sentimentalists,

> did not affect the virtue of impartiality; this was no case for refinement; there was a man to be hanged, he would have said, and he was hanging him. Nor was it possible to see his lordship, and acquit him of gusto in the task. It was plain he gloried in the exercise of his trained faculties, in the clear sight which pierced at once into

> the joint of fact, in the rude, unvarnished jibes with which he demolished every figment of defence. He took his ease and jested, unbending in that solemn place with some of the freedom of the tavern; and the rag of man with the flannel round his neck was hunted gallowsward with jeers.[24]

Unconscious bias is far more pervasive than the conscious variety. It results not from any imperfections in the judge, but from the nature of the adjudicative process in hard cases. Judges are not political and moral eunuchs able and willing to avoid impregnating the law with their own ideas and judgment. Objectively correct legal decisions being unattainable in difficult cases, reasoned subjective opinion is what the judge is paid to provide.[25] Nor is total judicial dispassion always a desirable goal for which to strive. William Hazlitt's description of the emotionless Lord Eldon (Lord Chancellor for most of the period 1801-27) condemns a judge whose passions were awoken only when his personal welfare or reputation was at stake.

> The impatience, the irritation, the hopes, the fears, the confident tone of the applicants move him not a jot from his intended course; he looks at their claims with the 'lack-lustre eye' of professional indifference. Power and influence apart, his next strongest passion is to indulge in the exercise of professional learning and skill, to amuse himself with the dry details and intricate windings of the law of equity. He delights to balance a straw, to see a feather turn the scale, or make it even again, and divides and subdivides a scruple to the smallest fraction. He unravels the web of argument and pieces it together again, folds it up and lays it aside that he might examine it more at his leisure. He hugs indecision to his breast and takes home a modest doubt or a nice point to solace himself with it in protracted luxurious dalliance.[26]

The treatment of adjudication as an abstract exercise in which the values of the judge play no part leads, at best, to the making of morally neutral decisions, and, at worst, produces judgments justified and justifiable by no rules or principles other than those of the abstract game itself. The attempt to sever human instincts and non-legal learning from the mind of the judge will result in the making of orders which lack human feelings, are unhelpful as practical solutions to the problems posed, and are productive only of further social tension. The abnegation of commitment to moral

values too easily leads to compliance in the perpetuation of injustice. Judges are as responsible for their actions as anyone else, and the mask of total disinterestedness cannot disguise judicial authority.

II

The legal systems of many nations of the world contain a written constitution which guarantees fundamental rights against the excesses and the apathy of the legislature and the executive. Such constitutions often recognise the 'right to life', 'equal protection of the law' and 'due process of law'. They prohibit 'cruel and unusual punishment' and 'degrading treatment or punishment'. In these countries, the weak, the poor and the unpopular are protected against what John Stuart Mill called 'the tyranny of the majority'.[27] Even in a democracy, legislative and executive abuses of power are evils against which the citizen needs protection.[28] To permit the State to determine the scope of fundamental rights is to ignore Justice Jackson's insistence that 'fundamental rights may not be submitted to [the] vote; they depend on the outcome of no elections'.[29] The difficult task of interpreting the vague signposts written into the Constitution, of giving life to the inanimate provisions of a fundamental law and of determining whether a statute or other State action breaches the rights recognised in the Constitution and is therefore void, is a task given to an independent judiciary. Politically sensitive, legally complex and morally equivocal though the function may be, the Constitutions of the United States, India, Cyprus, Singapore (and, to a lesser extent, the Canadian Bill of Rights), among other countries' fundamental documents, appoint the judiciary in the exercise of its adjudicatory role, with the task of determining whether, and to what extent, State action is void as a denial of constitutional rights.

The equal protection clause and the due process clause of the Fourteenth Amendment to the U.S. Constitution have been used by the American Supreme Court Justices to establish and to protect rights not specifically mentioned in the body of the Constitution or the amendments thereto. The Supreme Court has held unconstitutional the segregation by race or colour of children in State schools;[30] it has developed a procedure to be observed by the police before questioning a suspect;[31] it has declared that a State

has a duty to provide counsel for the defendant in all criminal trials, capital or non-capital (with the exception of minor misdemeanours);[32] malapportionment in legislative districts has been remedied by judicial decree;[33] evidence obtained by searches and seizures conducted in violation of constitutional rights has been held inadmissible in court;[34] a State law making the payment of a poll tax a condition of eligibility to vote is unconstitutional;[35] statutes restricting a woman's right to have an abortion during the initial stages of pregnancy have been struck down.[36]

Critics of this 'government by judiciary' have attacked the Supreme Court for illegitimate assertions of legislative power and for subverting the Constitution to satisfy judicial conceptions of political and moral justice. They have complained that the words of the Fourteenth Amendment to the Constitution give no mandate for such wide interpretation and application, and that Supreme Court judgments have become indistinguishable in content and style from legislative enactments as social regulations.

Yet a Constitution is no greater a guarantee of legal certainty than is an ordinary statute or a common law precedent. The Constitutions which provide for equal protection of the law and due process of law do not pre-empt competing conceptions of what the constitutional formulae permit and demand. The existence of a constitution which gives the court power to strike down statutes and overrule executive action for non-compliance with constitutional norms extends judicial power but does not alter its fundamentally discretionary nature in the hard cases which are argued in court. 'Whether enforcing constitutions written or unwritten, interpreting statutes or applying the common law, the job is much the same, the difference is one of degree. Whichever is resorted to for the solution of social problems offers the opportunity for creative manipulation or resigned impotence ... The judges of England perform the same functions as do the judges of the United States – or France or Italy or Germany.'[37]

The assertion that the United States, or any other legalistic society, is 'a government of laws, and not of men',[38] is profoundly misleading. The inevitability of hard cases ensures that any legal system is, to a certain extent, the government of judges and lawyers charged with the active interpretation of the laws of the nation. The right to abortion and the right to counsel in a criminal trial 'are protected by the Equal Protection and Due Process Clauses only

because the Court chose thus to recognise them'.[39]

Philosophers and politicians cannot agree on the weight or the content of the demands made by the concepts of equality, fairness and justice. It is therefore churlish to expect enlightenment in the form of a structured, uniform theory of constitutional interpretation from mere lawyers, no matter how distinguished. The judicial dilemma in the hard constitutional case is to reach a satisfactory solution to finely-balanced issues of adjudication without reliance on mere intuition and personal values. Supreme Court decisions will win the legitimacy they need to effect eradication of the evil against which the Justices have spoken only if the Court 'seeks to dissociate itself from individual or group interests, and to judge by disinterested and more objective standards'. [39a] The efficacy (indeed, the survival) of judicial review as an instrument to protect individual rights, depends on the promulgation of judgments that are grounded in reason and principle strong enough to withstand the onslaught of political expediency and vested interests, and that can be understood and respected by the Court's audience.

The exercise of judicial discretion by reliance on objective factors may not always enable the judge to reconcile his conscience with his institutional role. Nor will it necessarily 'answer questions of moral philosophy and political theory plainly and definitively, but it will help answer them differently than a process open to trials of strength, and to the free play of interest, predilection and prejudice. And it will help test answers against analogues in the tradition of the society and in surrounding contemporary practice'.[39b] This book adopts the premise (more fully analysed in Chapter 11) that comparative legal standards, international norms, and non-legal learning (social, moral, economic and literary) are objective factors relevant to the adjudication of equivocal constitutional clauses.

Of course, judges should, like all other men, exercise their powers with care, with diligence and with dignity. But that does not entail the conclusion that, in adjudicating hard cases, judges ought necessarily to act as conservatives rather than as liberals or socialists. However a judge decides a hard case he will be making new law. Objective factors do not supplant judicial discretion: reason and principle often give no right answers. The choice for the judge, when interpreting the equivocal demands of the constitution,