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Wasserstrom: The Judicial Decision- Toward A Theory of Legal Justification

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RECENT BOOKS

THE JUDICIAL DECISION — TOWARD A THEORY OF LEGAL JUSTIFICATION. By *Richard A. Wasserstrom.* Stanford: Stanford University Press. 1961. Pp. 197. $5.

The perennial concern over the processes of judicial decision seems again in full bloom. Wasserstrom's book follows close on the heels of Karl Llewellyn's great study of the common law appellate tradition. The current political debate over the role of the Supreme Court in constitutional interpretation mingles with the more narrowly professional discussion of judicial revisions of accepted common-law doctrines. A number of recent decisions highlight the current wave of judicial activism by employing the device of prospective overruling. Whether we now confront a "crisis in confidence" in our appellate courts, as Llewellyn believed, and if so, how deep and pervasive that crisis may be, I don't know. If such a crisis has arisen, I should think Wasserstrom's little book would contribute to our surviving it with a decent faith in the integrity and viability of our judicial institutions.

As Wasserstrom's sub-title makes clear, his central theme is not how courts in fact decide cases but how they ought to decide them. This statement requires clarification, however, to emphasize his useful distinction between the process of discovery, that is, the procedure by which a court reaches its conclusion, and the process of justification by which the conclusion is supported or justified. Wasserstrom does not purport to deal descriptively with either of these processes; rather he writes normatively. With becoming modesty he suggests that his study merely moves *toward* a theory of legal justification, adding: "If the work succeeds at all, it does so not because it presents any definitive theory of how all cases ought to be decided, but because it lays bare some of the implications of certain of the more obvious ways in which courts might go about deciding cases." (p. 8)

The author's normative orientation is clearly articulated in his assumption that the function of the legal system is essentially utilitarian, that is, "that a desirable legal system is one that succeeds in giving maximum effect to the needs, desires, interests, and aspirations of the members of the society of which it is a part." (p. 10) No defense of the assumption is made beyond the assertion that it is "the common view." The purpose of the study is to explore the relation to this general end of three possible procedures of legal justification—the procedure of precedent, the procedure of equity and what Wasserstrom calls the "two-level procedure."

As a prelude to his analysis of the procedure of precedent, Wasserstrom analyzes the various attacks that have been made on even the possibility of a deductive procedure in judicial decision making. Those writers who

have denied the descriptive accuracy and even the possibility of a deductive procedure and who have insisted that judicial decisions result from either the intuition, personality or emotions of the judge, he charges with the "irrationalist fallacy." This mistake proceeds from a recognition of the limited utility of formal logic to an assertion that courts cannot have used any rational or objective criteria of decision. In part this fallacy is attributable to a failure of legal philosophers to distinguish between procedures of discovery and procedures of justification. Wasserstrom's interest is in the latter and he firmly insists that a deductive procedure like that suggested by the typical judicial opinion is a feasible, though not necessarily desirable, mode of justification even if it does not delineate the route followed by the court in reaching or "discovering" its conclusion.

One of the most useful chapters analyzes some typical discussions of the doctrine of precedent. This analysis cannot be summarized here. It suffices to say that the frustrating indeterminateness at critical points of most of the discussion is brought out sharply. Most formulations of the doctrine appear to recognize that in certain instances the existence of a relevant rule drawn from precedent does not necessarily justify a decision in accordance with that rule. The discussion becomes ambiguous or vacuous at the point of identifying those cases requiring a departure from precedential rule. For purposes of his discussion, however, Wasserstrom accepts a formulation of the doctrine that avoids this difficulty by its absoluteness. Thus as he deals with the first of the "ideal procedures" of justification, the doctrine of precedent means that it is sufficient justification of any decision that it is consistent with a rule derived from precedent for that class of cases. The procedure of precedent, thus conceived, is then examined in the light of the usual justifications of certainty, the protection of reliance, equality and efficiency and each is found insufficient to support absolute adherence to precedent.

The procedure of equity may be offered as an alternative to reliance on precedent. Exactly what this procedure is remains unclear. It may range from the extreme theory of particularized justice, that finds conclusive justification for decision in an intuition of the deciding judge, to what Wasserstrom calls non-intuitive equity which demands that the judge consider "rationally" all the facts of the particular case and decide in the way that "best takes into account the interests of the litigants who are currently before the court." (p. 114) Implicit also in many discussions of non-intuitive equity is the suggestion that courts should be free to take into account relevant moral rules. Wasserstrom does not immediately pass judgment on the procedure of non-intuitive equity. Rather he raises certain questions as to the meaning of the procedure with a warning that the answers to those questions may indicate that non-intuitive equity is not an "equitable" procedure at all.

The third or "two-level" procedure of legal justification is introduced by a summary analysis of extreme and restricted utilitarianism to which moral philosophers in recent years have devoted much attention. Restricted utilitarianism refers the justification of any individual act to a relevant moral rule while the moral rules are themselves evaluated by their capacity to promote happiness or minimize conflict. By contrast, extreme utilitarianism refers the individual act itself directly to the standard of promotion of happiness. While recognizing that there is no necessary theoretical or practical difference between these two approaches if each is used carefully, Wasserstrom insists that restricted utilitarianism has two advantages that justify its existence as a separate doctrine. First, by its reference of the particular decision to rules, restricted utilitarianism better assures the careful consideration of long-term consequences of various decisional possibilities. Extreme utilitarianism, while theoretically competent to take the long view, at least runs the risk of losing it in the immediacy of the problem case. Second, restricted utilitarianism leaves open the possibility of recognizing certain classes of cases in which application of a certain rule free of exceptions and not easily revisable would produce the greatest overall quantum of happiness even though in some statistically determined percentage of cases, not individually identifiable in the present state of human knowledge, it would produce injustice.

Wasserstrom's "two-level" procedure of legal justification is simply the application of restricted utilitarianism to the work of the courts. In any case the judge would determine the existence of a relevant rule from precedent, and the rational relation of the instant case to that rule would form the basis for a satisfactory justification unless it were shown on utilitarian grounds that a different rule would more effectively approach the utilitarian goal. Such a showing would be made, however, by considering not merely the interests of the litigants before the court but also the interests of the broader social group that would be affected by the new rule the court might be urged to formulate. At this point, the basis of Wasserstrom's preference for the "two-level" procedure over the procedure of non-intuitive equity becomes clear. While the latter may be able to accommodate a calculation of relative happiness and unhappiness of the parties immediately before the court, only the former enables the court to take properly into account the long-term effects on persons of the classes represented by the present litigants.

The contribution of the study clearly does not lie in a novel theory of legal justification. In fact, as Wasserstrom expressly recognizes, the "two-level" procedure he advocates is identical or at least quite similar to the techniques actually employed by the courts. Further, it should be noted that Wasserstrom's normative theory assumes the propriety of judicial modification of established rules when a utilitarian calculation warrants

it. He thus avoids the question agitating most current discussion—within what limits can such judicial activism be accommodated if we are to preserve the traditional image of judicial functions in the context of a representative democracy. I do not, however, propose to cavil because the author did not write on a different subject. Wasserstrom has made a thoughtful and incisive contribution to all who feel concern that the judicial process produce rational justifications reconciling insofar as possible the recurrent and conflicting claims of stability and change.

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