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Logical Method and Law

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LOGICAL METHOD AND LAW.¹

HUMAN conduct broadly viewed falls into two sorts. Particular cases overlap, but the difference is discernible on any large scale consideration of conduct. Sometimes human beings act with a minimum of foresight, without examination of what they are doing and of probable consequences. They act not upon deliberation, but from routine, instinct, the direct pressure of appetite, or a blind 'hunch.' It would be a mistake to suppose that such behavior is always inefficient or unsuccessful. When we do not like it, we condemn it as capricious, arbitrary, careless, negligent. But in other cases we praise the marvellous rectitude of instinct or intuition; we are inclined to accept the offhand appraisal of an expert in preference to elaborately calculated conclusions of a man who is ill-informed. There is the story of the layman who was appointed to a position in India where he would have to pass in his official capacity upon various matters in controversy between natives. Upon consulting a legal friend, he was told to use his common-sense and announce his decisions firmly; in the majority of cases his natural decision as to what was fair and reasonable would suffice. But, his friend added: "Never try to give reasons, for they will usually be wrong."

In the other type of conduct, action follows upon a decision, and the decision is the outcome of inquiry, comparison of alternatives, weighing of facts; deliberation or thinking has intervened. Considerations which have weight in reaching the conclusion as to what is to be done, or which are employed to justify it when it is questioned, are called 'reasons.' If they are stated in sufficiently general terms, they are 'principles.' When the operation is formulated in a compact way, the decision is called a conclusion, and the considerations which led up to it are called the premises. Decisions of the first type may be reasonable: that is, they may be adapted to good results; those of the second

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type are reasoned or rational; increasingly so, in the degree of care and thoroughness with which inquiry has been conducted and the order in which connections have been established among the considerations dealt with.

Now I define logical theory as an account of the procedures followed in reaching decisions of the second type, in those cases when subsequent experience shows that the procedures employed were the best which could have been used under the conditions. This definition would be questioned by many authorities, and it is only fair to say that it does not represent the orthodox nor the prevailing view. But it is stated at the outset so that the reader may be aware of the conception of logic which underlies the following discussion. If we take an objection which will be brought against this conception by adherents of the traditional notion, it will serve to clarify its meaning. It will be said that the definition restricts thinking to the processes antecedent to making a deliberate decision or choice; and, thereby, in confining logical procedure to practical matters, fails even to take a glance at those cases in which true logical method is best exemplified: namely, scientific, especially mathematical subjects.

A partial answer to this objection is that the especial topic of our present discussion is logical method in legal reasoning and judicial decision; and that such cases at least are similar in general type to decisions made by engineers, merchants, physicians, bankers, etc., in the pursuit of their callings. In law we are certainly concerned with the necessity of settling upon a course of action to be pursued, giving judgment of one sort or another in favor of adoption of one mode of conduct and against another. But the scope of the position taken will appear more clearly if we do not content ourselves with this *ad hoc* reply.

If we consider the procedure of the mathematician or of any man of science, as it concretely occurs, instead of considering simply the relations of consistent implication which subsist between the propositions in which his finally approved conclusions are set forth, we find that he, as well as an intelligent farmer or business-man or physician, is constantly engaged in making decisions; and that in order to make them wisely he summons before his mental gaze various considerations and accepts and rejects

them with a view to making his decision as rational as possible. The concrete subject with which he deals, the material he investigates, accepts, rejects, employs in reaching and justifying a decision, is different from that of the farmer, lawyer or merchant, but the course of the operation, the form of the procedure, is similar. The scientific man has the advantage of working under much more narrowly and exactly controlled conditions, with the aid of symbols artfully devised to protect his procedure. For that reason it is natural and proper that we should, in our formal treatises, take operations of this type as standards and models, and should treat ordinary 'practical' reasonings leading up to decisions as to what is to be done as only approximations. But every thinker, as an investigator, mathematician or physicist, as well as 'practical' man thinks in order to determine *his* decisions and conduct—his conduct as a specialized agent working in a carefully delimited field.

It may be replied, of course, that this is an arbitrary notion of logic, and that in reality logic is an affair of the relations and orders of relations which subsist between propositions that constitute the accepted subject-matter of a science, relations that are independent of the operations of inquiry and reaching conclusions or decisions. I shall not stop to try to controvert this position, but shall use it to point the essential difference between it and the position taken in these lectures. According to the latter, logical systematization with a view to the utmost of generality and consistency of propositions is indispensable but not ultimate. It is an instrumentality, not an end. It is a means of improving, facilitating, clarifying the inquiry that leads up to concrete decisions; primarily the particular inquiry which has just been engaged in, but secondarily, and of greater ultimate importance, other inquiries directed at making other decisions in similar fields. And here at least I may fall back for confirmation upon the special theme of law. It is most important that rules of law should form as coherent and generalized a logical system as possible. But these logical systematizations of law in any field, as of contracts or of torts, in effecting the reduction of a multitude of decisions to a few general principles that are logically consistent with one another, while it may be an

end in itself for a particular student, is clearly in the last resort subservient to the economical and effective reaching of decisions in particular cases.

It follows that logic is ultimately an empirical and concrete discipline. Men first employ certain ways of investigating, and of collecting, recording and using data in making decisions; they perform their inferences and make their checks and tests in various ways. These different ways constitute the empirical raw material of logical theory. The latter thus comes into existence without any conscious thought of logic, just as forms of speech take place without conscious reference to rules of syntax or of rhetorical propriety. But it is gradually learned that some methods which are used work better than others. Some yield conclusions that do not stand the test of further situations; they produce conflicts and confusion; decisions dependent upon them have to be retracted or revised. Other methods are found to yield conclusions which are available in subsequent inquiries as well as confirmed by them. There occurs a natural selection of the methods which afford the better type of conclusion, better for subsequent usage, just as happens in the development of rules for conducting any art. Afterwards the methods are themselves studied critically. Successful ones are not only selected and collated, but the causes of their effective operation are discovered. Thus logical theory becomes scientific.

The bearing of the conception of logic which is here advanced upon legal thinking and decisions may be brought out by examining the apparent disparity which exists between actual legal development and the strict requirements of logical theory. Justice Holmes has generalized the situation by saying that "the whole outline of the law is the resultant of conflict at every point between logic and good sense—the one striving to work fiction out to consistent results; the other restraining and at last overcoming that effort when the results become too manifestly unfair."¹ This statement he substantiates by a thorough examination of the development of certain legal notions. Upon its surface, such a statement implies a different view of the nature of logic than that stated. It implies that logic is not the

¹ *Collected Legal Papers.*

method of good sense, that it has as it were a substance and life of its own which conflicts with the requirements of good decisions with respect to concrete subject-matters. The difference, however, is largely verbal. What Justice Holmes terms logic is formal consistency, consistency of concepts with one another irrespective of the consequences of their application to concrete matters-of-fact. We might state the facts by saying that concepts once developed have a kind of intrinsic inertia on their own account; once developed the law of habit applies to them. It is practically economical to use a concept ready at hand rather than to take time and trouble and effort to change it or to devise a new one. The use of prior ready-made and familiar concepts also gives rise to a sense of stability, of guarantee against sudden and arbitrary changes of the rules which determine the consequences which legally attend acts. It is the nature of any concept, as it is of any habit, to change more slowly than do the concrete circumstances with reference to which it is employed. Experience shows that the relative fixity of concepts affords men with a specious sense of protection, of assurance against the troublesome flux of events. Thus Justice Holmes says, "The language of judicial decision is mainly the language of logic, and the logical method and form flatter that longing for repose and certainty which is in every human mind. But certainty in general is an illusion." From the view of logical method here set forth, however, the undoubted facts which Justice Holmes has in mind do not concern logic, but rather certain tendencies of the human creatures who use logic, tendencies which a sound logic will guard against. For they spring from the momentum of habit once formed, and express the effect of habit upon our feelings of ease and stability. Such feelings have little to do with the actual facts of the case.

However this is only part of the story. The rest of the story is brought to light in some other passages of Justice Holmes. "The actual life of the law has not been logic; it has been experience. The felt necessities of the times, the prevalent moral and political theories, considerations of public policy, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules

by which men should be governed." In other words, Justice Holmes is thinking of logic as equivalent to the syllogism, as he is quite entitled to do in accord with the orthodox traditions. From the standpoint of the syllogism as the logical model which was made current by scholasticism there *is* an antithesis between experience and logic, between logic and good sense. For the philosophy embodied in the formal theory of the syllogism asserted that thought or reason has fixed forms of its own, anterior to and independent of concrete subject-matters, and to which the latter have to be adapted whether or no. This defines the negative aspect of the discussion, and it shows by contrast the need of another kind of logic which shall counteract the influence of habit, and facilitate the use of good sense regarding matters of public consequence.

In other words, there are different logics in use. One of these, the one which has had greatest historic currency and exercised greatest influence on legal decisions, is that of the syllogism. To this logic the strictures of Justice Holmes apply in full force. For it purports to be logic of rigid demonstration, not of search and discovery. It claims to be a logic of fixed forms, rather than of methods of reaching intelligent decisions in concrete situations, or of methods employed in adjusting disputed issues in behalf of the public and enduring interest. Those ignorant of formal logic, the logic of the abstract relations of ready-made conceptions to one another, have at least heard of the standard syllogism: 'All men are mortal; Socrates is a man; therefore he is mortal.' This is offered as the model of all proof or demonstration. It implies that we need and must procure first a fixed general *principle*, the so-called major premiss, such as: 'all men are mortal'; then, in the second place, a *fact* which belongs intrinsically and obviously to a class of things to which the general principle applies: 'Socrates is a man.' Then the conclusion automatically follows: 'Socrates is mortal.' According to this model every demonstrative or strictly logical conclusion 'subsumes' a particular under an appropriate universal. It implies the given existence of particulars and universals.

Stated in legal terms, it thus implies that for every possible case which may arise, there is a fixed antecedent rule already

at hand; that the case in question is either simple and unambiguous or is resolvable by direct inspection into a collection of simple and indubitable facts, such as, 'Socrates is a man.' It thus tends, when it is accepted, to produce and confirm what Professor Pound has called mechanical jurisprudence; it flatters that longing for certainty of which Justice Holmes speaks; it reinforces those inert factors in human nature which make men hug as long as possible any general idea which has once gained lodgment in the mind.

In a certain sense it is foolish to criticize the model supplied by the syllogism. The statements made about men and Socrates are obviously true and the connection between them is undoubted. The only trouble is that while it sets forth the *results* of thinking, it has nothing to do with the *operation* of thinking. Take the case of Socrates being tried before the Athenian citizens, and the thinking which had to be done to reach a decision. Certainly the issue was not whether Socrates was mortal; the point was whether this mortality would or should occur at a specified date and in a specified way. Now that is just what does not and cannot follow from a general principle or a major premiss. Again, to quote Justice Holmes, "General propositions do not decide concrete cases." No concrete proposition, that is to say one with its subject-matter dated in time and placed in space, follows from any general statements nor from any combination of them however 'logical' it may be.

If we trust to an experimental logic, we find that general principles emerge as statements of generic ways in which it has been found helpful to treat concrete cases. The real force of the proposition that all men are mortal is found in the expectancy tables of insurance companies, which, with their accompanying rates, show how it is prudent and socially useful to deal with human mortality. The 'universal' stated in the major premiss is not outside of and antecedent to particular cases; neither is it a selection of something found in a variety of cases. It is an indication of a single way of treating, for certain purposes or consequences, cases in spite of their diversity. Hence its meaning and worth are subject to inquiry and revision in view of what happens, what the consequences are, when it is used as a method of treatment.

As a matter of fact, men do not begin thinking with premisses. They begin with some complicated and confused case, apparently admitting of alternative modes of treatment and solution. Premisses only gradually emerge from analysis of the total situation. The problem is not to draw a conclusion from given premisses; that can best be done by a piece of animate machinery, by fingering a key-board. The problem is to find statements, both of general principle and of particular fact, which are worthy to serve as premisses. As matter of actual fact, we generally begin with a vague anticipation of a conclusion (or at least of alternative conclusions), and then we look around for principles and data which will substantiate it or will enable us to choose intelligently between rival conclusions. No lawyer ever thought out the case of a client in terms of the syllogism. He begins with a conclusion which he intends to reach, favorable to his client of course, and then analyzes the facts of the whole situation to find material out of which to construct a favorable statement of facts, to form a minor premiss. At the same time he goes over recorded cases to find rules of law employed in cases which can be presented as similar, rules which will substantiate a certain way of looking at and interpreting the facts. And as his acquaintance with rules of law judged applicable widens, he probably alters perspective and emphasis in selection of the facts which are to form his evidential data. And as he learns more of the facts of the case, he may modify his rules of law upon which he bases his case.

I do not for a moment set up such a procedure as a model for logical thinking; it is precommitted to the establishment of a particular desired conclusion; it is therefore not a standard of true inquiry. But it does illustrate, in spite of this deficiency, the particular point which is here being made: namely, that thinking actually sets out with a more or less confused situation, which is vague and ambiguous with respect to the indications it supplies, and that the formation of both major premiss and minor proceeds tentatively and correlatively in the course of analysis of this situation and of prior rules. Once acceptable premisses are given—and of course the judge and jury have eventually to do with their becoming accepted—and the con-

clusion is also given. In strict logic, the conclusion does not follow from premisses; conclusions and premisses are two ways of stating the same thing. Thinking may be defined either as a development of premisses or development of a conclusion; as far as it is one operation it is the other.

Courts not only reach decisions; they expound them, and expositions must state justifying reasons. The mental operations herein involved are somewhat different from that involved in arriving at a conclusion. The logic of exposition is different from that of search and inquiry. In the latter, the situation as it exists is more or less doubtful, indeterminate and problematic with respect to what it signifies. It unfolds itself gradually and is susceptible of dramatic surprise; at all events it has, for the time being, two sides. Exposition implies that a definitive solution has been reached; that the situation is determinate with respect to its legal implications. Its purpose is to set forth grounds for the decision reached so that it will not appear as an arbitrary dictum, and so as to indicate the rule for dealing with similar cases in the future. It is highly probable that the need of justifying to others conclusions reached and decisions made has been the chief cause of the origin and development of logical operations in the precise sense: generalization, abstraction, regard for consistency of implications. It is quite conceivable that if no one had ever had to account to others for one's decisions, logical operations would never have developed, but men would have continued to use exclusively methods of inarticulate intuition and dumb impression; so that only after considerable experience in accounting for their conduct to others who demanded a reason, and were not satisfied till they got an exculpation and explanation, did men begin to give an account to themselves of the process of arriving at a decision. However this may be, it is certain that in judicial decisions the only alternative to arbitrary dicta which will be accepted by the parties to a controversy only because of the power or prestige of the judge, is rational statement, formulation of grounds and of connecting, or logical, links.

It is at this point that the chief temptation and stimulus to mechanical logic and abstract use of formal concepts are intro-

duced. Just because personal and local elements cannot be entirely excluded, while the decision must assume as nearly as possible an objective, rational and impersonal form, the temptation is to abandon the vital logic which has led to the conclusion, and to substitute forms of speech which are rigorous in appearance and which give the illusion of certainty. Another moving force in the same direction is the undoubted need for the maximum possible of stability and regularity of expectation in determining courses of conduct. Men need to know the consequences which society through the courts will attach to their transactions, the liabilities they are incurring, the fruits they may hope to enjoy in security, before they enter upon a course of action.

It is a legitimate requirement from the standpoint of the interests of the community and of particular individuals. Enormous confusion has resulted, however, from confusing with each other *theoretical* certainty and *practical* certainty. There is a wide gap separating the reasonable proposition that judicial decisions should possess the maximum possible regularity in order to enable persons in planning their conduct to foresee the legal import of their acts, and the absurd because impossible proposition that every decision should flow from antecedently known premisses with formal logical necessity. To attain the former result there are required general principles of interpreting cases—the rules of law—and procedures of pleading and trying cases which do not alter arbitrarily. But principles of interpretation do not signify rules so rigid that they can be stated once for all and then be literally and mechanically adhered to. For the situations to which they are to be applied do not literally repeat one another in all details; and questions of degree of this factor or that have the chief weight in determining which general rule will be employed in judging the situation in question. A large part of what has been asserted concerning the necessity of absolutely uniform and immutable antecedent rules of law is in effect an attempt to evade the really important issue of finding and employing rules of law, substantial and procedural, which will actually secure to the members of the community a reasonable measure of practical certainty in framing their courses of conduct. The mechanical ease of the court in disposing of cases

and not the actual security of agents is the real cause, for example, of making rules of pleading hard and fast. The result introduces an unnecessary element of chance into the behavior of those seeking settlement of disputes, while it affords to judges only that factitious ease and simplicity supplied by any routine habit of action. It substitutes a mechanical procedure for the need of analytic thought.

There is of course every reason why rules of law should be as regular and as definite as possible. But the amount and kind of antecedent definiteness which is actually attainable is a matter of fact, not of form. The amount is large wherever social conditions are uniform, and where industry, commerce, transportation, etc., move in channels of old customs. It is much less wherever invention is active, and new devices in business and communication bring about new forms of human relations. Thus the use of power machinery radically modifies the old terms of association of master and servant and fellow servants; rapid transportation brings into general use commercial bills of lading; mass production engenders organization of laborers and collective bargaining; industrial conditions favor concentration of capital. In part legislation endeavors to reshape old rules of law to make them applicable to new conditions. But statutes have never kept up with the variety and subtlety of social change. They cannot entirely avoid ambiguity, which is due not only to carelessness but also to the intrinsic impossibility of foreseeing all possible circumstances, since without such foresight definitions will be vague and classifications indeterminate. Hence the claim that old forms are ready at hand that cover every case and that may be applied by formal syllogizing, is to pretend to a certainty and regularity which cannot exist in fact. The effect of the pretension is to increase practical uncertainty and social instability. Just because circumstances are really novel and not covered by old rules, it is a gamble which old rule will be declared regulative of a new case. Shrewd and enterprising men are thus encouraged to sail close to the wind, and to trust to ingenious lawyers to find some rule under which they can go scot free.

The facts involved in this discussion are commonplace and they are not offered as presenting anything original or novel.

What we are concerned with is their bearing upon the logic of judicial decisions. For the implications are more revolutionary than they might at first sight seem to be. They indicate either that logic must be abandoned, or that there must be adopted a logic *relative to consequences rather than to premisses*, a logic of prediction of probabilities rather than of demonstration of certainties. General principles, for the purposes of a logic of inquiry, can only be tools justified by the work they do. They are means of intellectual survey, analysis and insight into the factors of the situation to be dealt with. Like other tools they must be modified when they are set to work amid new conditions and required to yield new results. Here is where the great practical evil of the doctrine of immutable and necessary antecedent rules comes in. It sanctifies the old; adherence to it in practice constantly widens the gap between current social conditions and needs and the principles used by the courts. The effect is to breed irritation, disrespect for law, together with virtual alliance between the judiciary and the entrenched interests that correspond most nearly to the conditions under which the rules of law were previously laid down.

Failure to recognize that general legal rules and principles are working hypotheses needing to be constantly tested by the way in which they work out when applied to concrete situations, explains the otherwise paradoxical fact that the slogans of the liberalism of one period often become the bulwarks of reaction in a subsequent era. There was a time in the eighteenth century when the great social need was emancipation of industry and trade from the mass of restrictions which held over from the feudal state of Europe. Adapted well enough to the localized and fixed conditions of that earlier age, they had become annoyances and hindrances as the effects of use of coal and steam showed themselves. The movement of emancipation expressed itself in principles of liberty in use of property, and of freedom in making contracts, which were embodied in a consistent series of legal decisions in which gradually the principles were laid down with increased naked and drastic force. But the absolutistic logic of rigid syllogistic forms infected these ideas. It was soon forgotten that they were relative to the requirements of

a particular state of affairs, needed to secure a greater measure of economic social welfare. Thus these principles became in their turn so rigid as to be almost as socially obstructive as 'immutable' feudal laws had been in their day.

That the remarks which have been made, commonplace as they are in themselves, have a profound practical import, may also be seen in the present reaction against the individualistic formulæ of an older liberalism. The last thirty years have seen an intermittent tendency in the direction of legislation, and to a less extent of judicial decision, toward what is vaguely known as social justice, toward formulæ of a collectivistic character. Now it is quite possible that these newer rules may be needed and useful at a certain juncture, and yet that they may also become harmful and socially obstructive if they are hardened into absolute and fixed antecedent premisses. But if they are treated as tools to be adapted experimentally to conditions as they actually obtain, rather than as absolute and intrinsic 'principles,' attention will go mainly to the facts of social life, and the rules will not engross attention so as to become absolute truths to be maintained intact at all costs. Otherwise we shall in the end merely have substituted one set of absolute and immutable syllogistic premisses for another set.

If we now recur to our introductory conception, that logic is really a theory about empirical phenomena, primarily connected with intelligent guidance of making decisions, and that it is subject to growth and improvement like any other empirical discipline, we shall recur to it with an added conviction: namely, that the issue is not a purely speculative one but implies consequences vastly important in practise. I should not, indeed, hesitate to assert that the sanctification of ready-made antecedent principles as methods of thinking is the chief obstacle to the development of the kind of thinking which is the indispensable prerequisite of steady, secure and intelligent social reform in general, and of social advance by means of law in particular. If this be so, infiltration into law of a more experimental and flexible logic is a social as well as an intellectual need.

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