THE PRINCIPLES OF LEGAL REASONING

By R. DAVID BROILES*

The popular conception of a system of law usually includes two elements: the law, which is made by the legislature, and adjudication of disputes by mean of the law and precedents. The process of adjudication is often thought of as involving the application of a law or precedent to a specific case in order to render a decision. The types of reasoning appropriate to this process would be two: (1) deductive reasoning from a general principle and a specific instance of that principle to a conclusion, and (2) an argument by analogy from the specific case at hand to another previously decided case analogous to it. Deductive reasoning would be the type of reasoning appropriate to applying laws; analogical reasoning would be the type of reasoning appropriate to reaching a decision on the basis of precedent. This conception of legal reasoning, which I shall call "mechanical," has recently been attacked by many lawyers, judges, and philosophers.[1] As a *description* of what judges in fact do it is erroneous, and as a *prescription* of what judges should do it is inadequate. Both points will become clear in the development of this paper. If the mechanical conception of legal reasoning is incorrect, then what processes are appropriate to reaching a decision? Before answering this question one important point should be made clear. The question should not be construed as one asking for a *description* of legal reasoning. Such a description, while possibly useful in understanding particular judges or some general characteristics of judges, would tell us little about legal reasoning. The question then, for the purposes of this paper, is not one calling for a description, but one calling for a recommendation. It will be my purpose in this paper to offer some recommendations in answer to this question: "What considerations should be taken into account by a judge in arriving at a reasonable decision?"

THE PROBLEM: MECHANICAL REASONING V. INTERPRETATIVE REASONING

Any discussion of legal reasoning would be well served by starting with some particulars. I shall take two cases to illustrate some of the problems involved in judicial decision making. My cases are *Plessy v. Ferguson*[2] and

*Assistant Professor of Religion and Philosophy, The University of Georgia. B.A., Southern Methodist University, 1959; M.A., 1960; Ph.D., Ohio State University, 1960. Director, American Civil Liberties Union of Georgia. Author, *The Moral Philosophy of David Hume* (1964).

1. To cite but a few of the better known works in this area, I might mention CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) and THE GROWTH OF THE LAW (1924); FRANK, LAW AND THE MODERN MIND (1930); POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922); and, more recently, FULLER, THE MORALITY OF LAW (1964) and HART, THE CONCEPT OF LAW (1961).
2. 163 U.S. 537 (1896).

Brown v. Board of Education.[3] Both cases deal with the constitutionality of racial clasification imposed by the states. The question before the Court in both cases is essentially this: Does state enforced separation of the races abridge the privileges or immunities of the colored man, deprive him of his property without due process of law, or deny him the equal protection of the law, within the meaning of the fourteenth amendment? In 1896 the Supreme Court said no; in 1954 the Court answered yes.[4] Let us consider some of the reasons given by the 1954 Court in overturning a well-established, though somewhat questioned,[5] precedent. Most importantly the two Courts differed in their beliefs about the facts. The question before the Court, as spelled out in the *Brown* decisions, was this: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"[6] In the *Plessy* case the Court said that "laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other. . . . The most common instance of this is connected with the establishment of separate schools for white and colored children."[7] The Court added these considerations: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[8]

By contrast the *Brown* decision made these points:

> To separate [Negro children] . . . from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson,* this finding is amply supported by modern authority. Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected.[9]

The point of mentioning these two cases is not that of arguing which is correct—this much seems obvious. Rather, I introduced them to make

3. 347 U.S. 483 (1954).
4. *Plessy,* of course, ruled on public transportation, but the doctrine of "separate but equal," which arose out of this case, was upheld by the courts in public education. See Gong Lum v. Rice, 275 U.S. 78 (1927); Berea College v. Kentucky, 211 U.S. 45 (1908); Cumming v. Board of Educ., 175 U.S. 528 (1899).
5. In the area of education, prior to 1954, the Court had already altered the "separate but equal" doctrine. See McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Oklahoma, 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).
6. Brown v. Board of Educ., *supra* n. 3, at 493.
7. Plessy v. Ferguson, *supra* n. 2, at 544.
8. *Id.* at 551.
9. Brown v. Board of Educ., *supra* n. 3, at 494-95.

a point about judicial reasoning. I think the point can be made by posing a question. What possible relevance could the above-mentioned consideration have to the mechanical application of a law to the cases at hand? The theory of mechanical legal reasoning would be at a loss to answer this question. After all, on that theory you merely deduce the conclusion from a premise or make an analogy. But the question asked points up the weakness of that theory. The judge does not simply start with given data—a law and an instance of it. First of all, laws do not come "complete," that is, they do not arrive at the bench complete in meaning and detail. For example, the fourteenth amendment states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

What is meant by "due process of law" or "equal protection of the laws"? Some interpretation of these phrases is required before a decision can be reached. Secondly, there is no datum which comes before the bench marked with a flag that says "I am a violation of due process of law." My point, I hope, is obvious, and possibly I have belabored the issue. Legal reasoning is not *simply* a mechanical process of deduction or analogy. Deduction and analogy are *parts* of the process of legal reasoning, but in this respect legal reasoning is unlike any other form of reasoning. Another characteristic to be noted is that a great deal is left open to the courts' discretion—both with regard to interpreting the law and interpreting the facts. The limits and extent of this discretion are matters to be settled within a legal system. Our own system, however, gives extensive powers to the judiciary by contrast to many other legal systems. But no judicial system escapes the problems of interpretation of the law and the facts. One must go beyond deduction and analogy to see whether it is possible to state any principles that can be applied in this process of interpretation which would give rise to decisions which could be said to be "reasoned" or "reasonable."

Social Engineering v. Neutral Principles

In dealing with this question of what is a reasoned decision, I would like to begin again by considering the proposal put forth by Professor Herbert Wechsler in his article *Toward Neutral Principles of Constitutional Law*.[10] Professor Wechsler states his position as follows: "I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[11] This type of reasoning, Wechsler holds, is intrinsic to judicial action. In a later elaboration of his thesis, Wechsler

10. 73 Harv. L. Rev. 1 (1959).
11. *Id.* at 15.

again points out that, while the courts do not merely apply antecedently established norms, any process of interpretation, adaptation, and innovation must be based on neutral principles.[12] A court is not at liberty to act according to fiat, but judicial action must embody the main qualities of law, its generality and neutrality.

What is it for a judicial decision to be "genuinely principled"? The main point seems to be this: A judge who "makes changes in the law must take seriously the duty of reworking the pattern of the law."[13] By reworking the law Wechsler means that the principle used in reaching the decision on the case at hand must be applicable to all cases like the one at hand. To illustrate this point Wechsler takes the case of *Shelley v. Kraemer*,[14] which deals with the judicial enforcement of racially restrictive covenants in real property sales. The Court ruled that state judicial enforcement of such restrictive covenants was *state* denial to Negroes of their constitutional rights to property as guaranteed by the fourteenth amendment. Wechsler argues that this was an *ad hoc* determination, lacking the generality required of decisions of the courts. He illustrates this point as follows: "If the enforcement of the owners' discrimination made it that of the state in the case of the covenant, the tenement owner's refusal to lease, the store owner's refusal to sell, the testator's discriminatory devise must equally become discriminatory action of the state if enforced by a state court."[15] The principle employed by the Court was not general and neutral precisely because the Court does not apply this principle to *like* cases where state courts enforce discrimination in private contracts.

Let me now try to state the requirements of a neutral principle, and thus of a reasoned decision of a court. (1) Court decisions must be based on principles which will apply to a number of cases and not merely to the one at hand. This is the *general* character of legal reasoning. (2) In the interpretation and application of a law the court must be willing to apply this principle to all cases like the one being decided. This seems to be what is meant by reworking the pattern of the law. This is the *neutral* character of legal reasoning. Briefly stated, Wechsler's recommendation is this: Legal reasoning involves decisions based on general principles which treat like cases like and different cases differently. Any decision that fails these requirements is merely an *ad hoc* decision or fiat of the court, which could be characterized as unreasonable, no matter how much one may approve of the effect of the decision.

I have thus far introduced four principles of legal reasoning. The first two, the principles of deduction and analogy, while required for any form of reasoning, were found to be inadequate when problems of interpretation

12. Wechsler, *The Nature of Judicial Reasoning*, in LAW AND PHILOSOPHY 290 (Hook ed. 1964).
13. *Id.* at 296.
14. 334 U.S. 1 (1948).
15. Wechsler, *supra* n. 12, at 296.

and application arose. Two further principles have been introduced, the principles of generality and neutrality. Do these last two principles solve the problems of interpretation the first two principles failed to solve? Let us consider first the principle of generality. Granted that judicial decisions must be genuinely principled, the problem still confronts the judge as to what principle to employ. Principles, like facts, do not come ready marked for the occasion. Consider again *Shelley v. Kraemer*. The principle laid down by the Court reads as follows. "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand."[16] The *general principle* then is: Any state enforcement of racially restrictive covenants in real-property sales denies the individual equal protection of the law. The fact subsumed under this principle is: Shelley has had racially restrictive covenants in real-property sales enforced against him by the state. Therefore, Shelley has been denied equal protection of the law. As I have stated the general principle of this decision, Wechsler's criticism seems to have no force. His objection, in part, was that *Shelley v. Kraemer* was not decided on general principles. But certainly the principle in *Shelley* is a general principle—it covers all restrictive covenants in real-property sales that are enforced by state courts.[17] One could then say that the examples that Wechsler cites of where this principle has not been applied are not examples of restrictive covenants in real-property sales. My point is this: General principles don't get their character of generality because of the number of members of the class they cover. The principle "All even numbers are preceded and followed by odd numbers" is not more general than the statement "All the books in the library are numbered" just because the former statement has an infinite number of members that fall under it while the latter has a limited number. It would seem that Wechsler means by "general" what we usually mean by "broad." He wants legal principles to be broad enough to cover a whole range of cases rather than just a few. The question to be proposed to Wechsler is this: how does one determine when a principle is "broad enough" in order to be said to be a reasonable one? The answer that the judge must take seriously the duty of reworking the pattern of the law does not provide a satisfactory answer. Must he use a principle that accords with all the laws of contract and property? Must his principle be broad enough to cover only all the cases dealing with racial discrimination? Or finally, why isn't a principle which deals with only restrictive covenants broad enough? I hope I have pointed out that the principles of legal reasoning that we have thus far considered do not answer these questions.

Let me now turn to the principle of neutrality. This principle prescribes that a general principle be applied to all cases in a like manner. I shall state

16. Shelley v. Kraemer, *supra* n. 14, at 20.
17. See Barrows v. Jackson, 346 U.S. 249 (1953); Hurd v. Hodge, 334 U.S. 24 (1948).

this principle as "Treat like cases like and different cases differently."[18] In an important sense this principle goes without question. Surely no decision could be said to be just or reasonable which decided two like cases in different ways. I take the principle to be a truism—but I also take it to be virtually useless as stated. The problem is of course obvious. When are two cases alike? Are cases of individual's wills which involve discrimination and which are enforced in state courts like restrictive covenants? Or, to refer back to an earlier case, was Plessy, who had one great-grandparent who was Negro, more like the people who sat in the front section of the train or more like the people who sat in the rear? The principle of neutrality, which states "treat like cases like and different cases differently," is such that there are any number of ways in which the second clause can cancel out the first. When are two cases alike? The *Plessy* case is not like the *Brown* case because they deal with different individuals. But this we would say was irrelevant. They are alike in all *relevant characteristics*. But what makes one characteristic relevant and another irrelevant? The principle of neutrality does not itself contain such a criterion for making this distinction and, as such, is inadequate as the sole guide to a reasonable judicial decision.

My purpose in this paper is not merely to criticize the suggestions of others. I also hope to make some recommendations of my own to the solution of this problem. The preceding criticisms, I believe, have set the stage for these suggestions. I have tried to lay out four principles: deduction, analogy, generality, and neutrality. In criticizing these principles, I have not rejected them as erroneous; I have only tried to point out their shortcomings. I shall call these principles the *principles of procedure* in legal reasoning.[19] But, as pointed out, the application of these principles alone to problems of interpretation and application of a law does not tell us what principle of decision should be applied to a particular case and when cases are alike. I believe the solution to these problems might be suggested in what I shall call the *principle of content*. Let me try to illustrate this principle before stating it.

In my original statement about *Plessy v. Ferguson* and *Brown v. Board of Education* I pointed out that the difference between the two decisions lies in certain factual considerations accepted by the respective courts. The *Plessy* decision laid down a rule that was followed for better than half a century. It held that state statutes which create racial classification do not adversely discriminate against Negroes. In almost every case dealing with racial discrimination the same point is made: Racial segregation by state statute does not discriminate against Negroes since the laws apply equally

18. For further discussion of this principle, see HART, THE CONCEPT OF LAW ch. 8 (1961); PHILOSOPHY AND LAW pt. 1 (Hook. ed. 1964); SINGER, GENERALIZATIONS IN ETHICS (1961); Rawls, *Justice as Fairness*, 68 PHILOSOPHICAL REV. 164 (1958).

19. These four principles of procedure might be reduced to only two. One could combine deduction and generality on the one hand and analogy and neutrality on the other. This would have the advantage of being more elegant, but elegance is sometimes bought at the price of clarity.

to whites and Negroes. Just as Negroes cannot go to white schools, so whites cannot go to Negro schools.[20] The facts, however, do not bear this position out. By 1938 the Supreme Court began to question this contention in the area of public education,[21] and in 1954 the Court declared that racial segregation in public education did deny the Negro child an opportunity to an education on equal terms with the white child.[22]

How does this tell us anything about the problems at hand? Most importantly it points out that the meaning of any statute cannot be determined by transcending the immediate result that is to be achieved. The meaning of a statute is determined by the role it plays in our social relations. A law that segregates whites and non-whites does, as a matter of *fact,* deny the Negro the full values of social life under the law. The courts cannot be blind to the realities of social life under the law. The specific decision of the court will have the force of prescribing the distribution of values in the social context among individuals, groups, and communities.[23] The courts cannot reach what would be called "reasonable" decisions if they overlook the social implications of their decisions. Judges are, then, in a very real sense, social engineers.[24]

The principle of content then is this: A decision must take into account the specific problem at hand and determine how a decision in this case will affect the present and future distribution of the values of social life. In following this principle the courts will be called upon to make many judgments about the facts and about what are the values of social life under the law. This was the case in *Plessy* and also in *Brown.* Mistakes will be made. But to say that a court has made a mistake presupposes the relevancy of the principle of content in evaluating judicial decisions.

The most important aspect of the principle of content is that it gives us some rational grounds for determining the generality of the principle to be employed and some considerations for determining likenesses and differences in cases. Let me illustrate again from *Shelley v. Kraemer.* With regard to the generality of the principle of decision, one must consider the problem to be solved. In this case the problem is that Negroes cannot acquire the property they desire solely because of their color. The Court also held that "it is clear that but for the active intervention of the state courts, supported by the full panoply of state power, [Negroes] . . . would have been free to occupy the properties in question without restraint."[25] That this exercise of state power does not discriminate against Negroes since the

20. See Sweatt v. Painter, *supra* n. 5 (education); Shelley v. Kraemer, *supra* n. 14 (restrictive covenant); Berea College v. Kentucky, *supra* n. 4 (education).
21. McLaurin v. Oklahoma State Regents, *supra* n. 5; Sweatt v. Painter, *supra* n. 5; Missouri *ex rel.* Gaines v. Canada, *supra* n. 5.
22. Brown v. Board of Educ., *supra* n. 3.
23. See McDougal, *Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry,* 4 J. OF CONFLICT RESOLUTION 337, 339 (1960).
24. This phrase is taken from POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 47 (1922).
25. Shelley v. Kraemer, *supra* n. 14, at 19.

courts would also enforce restrictive clauses against whites "does not bear scrutiny."[26] The Court pointed out that "the parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color."[27] Therefore, the principle of decision must be general enough to solve the problem at hand of ensuring the Negroes their personal right to the social benefits of ownership of real property. I have tried to illustrate my point that the generality of the principle of decision can only be determined by considering the social issues raised in a particular case and the consequences of the judicial determination on the present and future distribution of the values of social life.

With regard to the grounds for determining when cases are alike and when they are different I believe essentially the same considerations as mentioned above must be taken into account. Let me illustrate from a problem at hand. It is a very widespread practice that literacy is a requirement for voting. The Supreme Court has struck down any number of these literacy tests in southern states while not declaring void those required in other states. Clearly not all literacy tests are alike—some test literacy and some enforce racial discrimination.[28] The determination of this difference in tests is, however, an empirical matter. While I have possibly oversimplified the difficulties in determining when cases are alike and when they are different, I believe the point is sufficiently clear that such a determination cannot be made apart from considerations of what I have called the principle of content.

The problem of this paper has been to spell out the principles by which one might judge a judicial decision as to its reasonableness. I have incorporated two sets of rules: (1) procedural rules, including the principles of deduction, analogy, generality and neutrality, and (2) rules of content by which one determines the generality of the principle to be employed and the relevant similarities and differences in the cases at hand. The bulk of the argument has centered around the necessity of including the rules of content in any list of principles of legal reasoning. This, however, should not be construed as minimizing the role of the rules of procedure. Both sets of rules are relevant in legal reasoning. Possibly I can point out the relationship between the two by rephrasing a famous observation: Rules of procedure without rules of content are empty, while rules of content without rules of procedure are blind.

26. *Id.* at 22.
27. *Ibid.*
28. See Lassiter v. Northampton Election Bd., 360 U.S. 45 (1959).