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THE NATURE OF JUDICIAL REASONING

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IN THIS PAPER I shall attempt to describe some attributes of judicial reasoning which give uniqueness to the process and concern to those who use it; to examine to some extent the process itself and the relationship between it and the articulation of neutral principles; and finally to examine once more the uncertainties of judicial reasoning in the light of the importance of time and place and changing function.

I.

The topic of judicial reasoning evokes the memory of countless after dinner talks given by members of the judiciary and a kind of entourage of lawyers and law professors. This is not all it evokes, of course. In any case many of the talks are good, and it would be churlish to mention this except to suggest one point and to ask a first question. The point is somewhat difficult to make. It involves questions of emphasis and degree and qualification to such an extent that I cannot help but have doubts about it. Yet to put it in the large it would be this: it would be difficult to think of another scholarly profession which speaks as little of the consequences of its acts or the discoveries it has made and as much about the circumstances of its own behavior. Surely these public expressions of wonderment at the difficulties and niceties of the judge's behavior are not to be dismissed simply as orgies of narcissism or flattery. I am not of course speaking of the judicial opinion, although there is a relationship between the

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opinion and talks about how opinions get to be written. A facet to the point is that, as I believe, the literature about judging is an American, possibly an Anglo-American, phenomenon.

I have put the point which I am suggesting in terms of a concern with judging and a lack of inquiry into the effects of judging. This must be qualified. Inquiries into judicial behavior are related to inquiries into effect. A shift in constitutional interpretation can have obvious consequences, suggesting questions as to the relationship between judging and the justification for the shift. Perhaps it should be said that the effect of the shift so far as the judge or lawyer is concerned is primarily on the fabric of the law. The lawyer's or the judge's function may be sufficiently self-delimited so as to exclude from the realm of their professional competence the larger social consequences, for example, of the school desegregation decision or the recent reapportionment cases, even though the lawyer or judge will know or believe what others in that kind of segment of society will know or believe. For the judge or lawyer the relevant effects are upon the web of the law, the administration of law and respect for it. These are large items, and the priest who only keeps his temple in good repair is not to be condemned on that account. Yet with all these qualifications, and even with the difficulties which analogous illustrations suggest, the point though battered seems to me to persist. Is the analogy to be to the man of medicine who describes not what the virus does and how it is to be counteracted but rather emphasizes the difficulties and virtues of his diagnostic art? Is it to be to the scientist who cares less about his discovery and more about how he made it? Again it is to be recognized that perhaps the discovery is more the way and less the result. Perhaps the analogy should be to the novelist who thinks his reactions and growth are matters of importance to an understanding of the craft. I think the analogies on balance emphasize the point that there is indeed unusual concern with the decision-making processes of judges, and the question to be put is whether this unusual concern, if it does exist, points to a uniqueness in the judicial process itself.

The uniqueness does not appear to arise in any simple way from the importance of the items ruled upon by the judge. Much of what a judge decides, if you look at the situations with which he deals, is no more or less important than what a plumber does, to speak of the plumber as the symbol of the worker on every day items without whose skill matters could be uncomfortable, annoying, and at times catastrophic. Of course there is a difference, since the judge, even though the case before him may involve price-fixing on plumbing items, is dealing with rights and duties imposed or acknowledged by the state, and he is an

instrument of government. But this is true also of the legislator, the policeman, and the prosecutor. Behavioral scientists do attempt to study the decision-making processes of these occupations. We know these groups do make important decisions, yet the literature of the wonderment and agony of the road to determination does not really pertain to them. A comparison between the judge and the legislator seems particularly suggestive, because even though we were traditionally told that the judge only applies old rules through specific determinations to cases brought before him, while the legislator changes the law, we know that to a considerable extent the judge and the legislator perform the same function. By this I mean that the legislator also must have points of reference to basic doctrines which justify the determinations of changes he makes. Yet the differences in the American practice between judge and legislator are there to be seen. First, there are many legislators, and while appellate judges are more than one, the comparison is not so much between individual judges and individual legislators as it is between a judge and the legislative body. The legislator is champion of a point of view. If all points of view are to be represented it is because the debate, if that is what it can be called, has brought them out and the legislator is but a participant, although a later voter, in that debate. On the contrary, the judge who writes an opinion has the task of reflecting the outlines of the debate, to show that he is aware of the different voices and that his thought processes have traveled through an inner debate prior to determination. In short, while this is honored in varying degrees, the judge, although he may feel strongly, does not appear as an advocate. Second, while we know that both judges and legislators change the law and both refer to immutable principles, the emphasis in the court in the American system is not only on the prior or stated rule but on its application in other cases, creating for the judge the problem of showing how an old equity can be preserved and better and new justice be done. Third, the assumption for the judge is that the process of determination is one of reason. There is almost a claim to infallibility if the system works properly. The result is not one of indifference or bias but follows from inner thought processes which bring the right result implicit in the rule. Judicial reasoning no doubt is like any other kind of reasoning which involves the use of a moving classification system. But here a moral judgment is frequently involved in the conclusions reached by the judge. Moreover, as I will indicate later, the integrity of the process in which the judge is engaged depends not only on distinctions which he may make reasonably, but also on his own belief in the legitimacy and decisiveness of these distinctions. Thus, there is an astonishing combination of com-

pulsions on the Anglo-American judge: the duty of representing many voices, of justifying the new application in terms of a prior rule and the equality of other cases, the assumption that reason is a sufficient and necessary guide, the responsibility for moral judgment and the importance of sincerity—all these do tend to give uniqueness to the institution of judicial reasoning in our system and in our society.

II.

I come now to the second point which is that the technique of judicial reasoning is admirably adapted to a moving classification system and has a built-in device for the exploration and creation of ambiguities. At the same time the process tends to obscure the problem of the relationship between equality and change. Equality seems to be the moving principle which justifies, indeed compels, reference to the handling of similar cases once this material is readily available. I realize the reference to a similar specific instance could be considered solely as a means of supplying or clarifying a definition of a key concept in a rule. I do not mean to suggest either that the sole style of legal reasoning is from case to case to the creation of a rule. Styles change and the structure of the opinion at any given time and with a particular judge may appear to be from the general proposition downward. The problem of the determination of the application of the general proposition to the cluster of facts still remains, however. The adversary system, which is closely related to the idea of a fair hearing, creates a forum in which competing versions of the factual situation can be explored, and this is another way of saying that competing propositions are being advanced. And it is a little difficult even under the most static and simple view of law to see how competing versions of the same fact situation can be avoided. The briefs of counsel further the idea of the comparison of situations by their citation of cases. Yet it is true that the cases may be cited more for the statement of general propositions and less or not at all for any close scrutiny of similarity of factual situations. A judge with strong convictions and an authoritarian view as to good and bad cases and a well formed, logically held structure of the law in mind may cite only those good cases which reflect his view as to the appropriate and correct application of the right terms—much as it appears the early casebooks tended to do. One could then conceive of the process as laying down an understood logical structure of terms illustrated through cases which in their function with respect to the system are quite passive. Thus I would not want to say here that what is usually called reasoning by analogy is the sole judicial technique in opinion writing, nor even that it is the concealed

starting point for the judge's own working out of the problem. But I do think that a closer look at how reasoning by analogy or example works in the judicial process reveals some interesting problems.

The Anglo-American legal system has as one of its comfort points the idea of dictum. The system is not very precise as to what dictum is. In some sense the idea undoubtedly is a necessary one since otherwise the judge could write a treatise as an opinion and accomplish an unacceptable codification of the law. So we say loosely that the judge's observations on matters not before him for decision, or which are perhaps not necessary for the conclusion which he reaches, are only dicta and not binding on future judges. At one extreme the doctrine suggests that the particular views of a given judge on propositions of law can be decisive on future cases, and indeed must be, if these views are given with cogent reference to the precise issues he had to decide. At the other extreme the doctrine contends that we need not permit the prior judge to overreach and establish law by his own exaggerated view of the issues or the relevance of what he feels called upon to say. At the same time, as we all know, in the web of the law one can find the compelling influence of repeated doctrine even though close scrutiny would show that for all the appellate cases which have discussed it the doctrine could be called only dictum. But the phrase "close scrutiny," while it may indicate diligence and the bringing to bear of an expert mind, does not disclose the rules of the game. I suggest as a starting point for inquiry the question of how pivotal the position taken by a prior judge is made to be by the inner discipline of the system. I believe a view of the system through the structure of reasoning by example is helpful in this connection.

From the standpoint of reasoning by example, the circumstances before the court are compared with a number of somewhat similar circumstances which have been classified in terms of opposing categories. These categories would result in opposite or at least different legal conclusions and different although presumably compatible rules of law. The fact cluster before the court could be included within either category. After enough successive fact clusters have been added, the probability is that it will be apparent that the original rule of law has changed its meaning and this may be reflected in a change in the name of the determining concept and therefore in the language of the rule. If it is correct that the fact cluster could be classified equally well under the categories of opposing concepts and rules, this must be because no authoritative definition has removed ambiguity. If reliance is to be on the authority of a prior case for the scope and effectiveness of an announced rule of law now to be applied, then the similarity and

difference between the present fact cluster now up for decision and the fact cluster of the prior case are decisive. What power does the judge in the prior case have to establish for all time the compelling and, in the future, decisive aspects of the case before him, including (1) a determination of what is irrelevant and therefore would make no difference if present or absent, and (2) a determination of what cannot be done without? Thus, what is to be the result if the first judge forecasts similarity when the second and later judge finds a reasonable difference?

I think the answer in Anglo-American law, although some English writers have suggested this is only true of American and not English practice, is that the second judge, where only case law is involved, is free to make his own determination of decisive similarity or difference. This of course gives the law a great deal of flexibility and capacity for growth. I am not suggesting that the inner discipline of the system permits the later judge to create distinctions which he regards as irrelevant. If the judge reworks the system and has a new classification, he is under compulsion to supply reasons for reworked old cases in order to project a pattern which can guide later cases. The distinctions which he makes must appear reasonable to him. Under one view of the judge's restricted power the amount of change is limited by the judge's ability to encompass it within a logical structure which explains all prior cases, albeit the judges of the prior cases would have rejected the explanation. Under this view there is a sense in which the system is engaged not in change but in explication. At best this view of the constraint upon the judge is somewhat idealized. It is recognized that cases are discarded and are explained in terms of the now inoperative ideas of their time rather than in terms of any present pattern. Particularly in those areas of the law where reported cases are so numerous, the present judge is really not compelled to organize them all. Yet the compulsion upon him is real and effective even though it does not require him to make sense out of every case which has ever occurred and even though now and then he may recognize a shift in the law so that he is not required to take account of an older view. If the views of the prior judge and the distinctions he made were decisive, the system would be much more rigid and change more frequently would have to come about through legislation.

When English commentators describe their system as one in which the second and later judge is bound by the determinations of the first judge, they appear to have reference to cases in which the question is one of statutory interpretation. They thus do not distinguish between common law cases and cases where the issue is the meaning of legislation.

I believe that to a considerable degree it can be shown that in this country also the second and later judge finds himself much more bound by the prior court's views when the prior court is construing a statute. In such situations the prior court's views even when broadly stated as dictum frequently determine the direction of future statutory construction. I state the matter too simply of course, but I think there is this basic difference in the freedom of the judge in case law areas as contrasted with the case law-statutory interpretation fields. The explanation may be that dictum places a gloss upon the statute; it is a kind of communication to the legislature as to how its words will be interpreted, and since the legislature has manifested an interest in the area anyway, if the gloss is not to its liking it can change the statute. This line of argument is not fully satisfying since it can be said that court and legislature should be considered in a partnership even in the absence of legislation. It may be that subsequent court interpretations of legislation reveal less leeway for the second court for the very reason that interpretation must focus on specific language and its meaning, and there may be a natural inclination to assume that the document takes on and keeps the meaning assigned to it. One way the restriction of the second court in statutory matters manifests itself in our country is in the plea of a judge that he is free of the restraints of the previous case because this is a case involving basic or constitutional issues. The written constitution and the insistence that it and not its interpretations must prevail, in marked contrast to the situation when legislation is involved, make it possible in constitutional matters to change from the even flow of common law case law accretions or from the more rigid following down the path in statutory interpretation to an abrupt, although usually foreshadowed, change in direction.

I do not deny that there are difficulties in the way of the application of this analysis. For example, the United States Supreme Court in 1922 held that the antitrust laws did not apply to baseball since the exhibition, although made for money, was not to be called trade or commerce.[1] In subsequent years as a matter of constitutional interpretation the scope of the commerce power of the United States was greatly increased. In 1953 the Court was again asked to rule on the application of the Sherman Act to baseball.[2] Quite apart from the point that the Sherman Act is so vague it may be regarded less as legislation and more as common law, one can argue that if this is a matter of statutory interpretation, then the 1922 opinion, assuming the basic facts of baseball are the same, must be adhered to; if it is a

1 Federal Baseball Club v. National League, 259 U.S. 200 (1922).

2 Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).

matter of constitutional interpretation, then presumably the wider impact of federal power would be acknowledged to exist. As we know, the way the matter was handled compels us to distinguish between baseball on the one side and theatres and boxing on the other, leading to the interesting argument, which failed when football was considered, that football was a team sport like baseball and unlike boxing and therefore should be exempt also. The point is that the jurisprudential question of the leeway in the law for particular categories really decided these cases.

This analysis of judicial reasoning is rudimentary and could be made more elaborate, paying more attention to those cases where there is a mixture of legislation and case law interpretation, or cases where legislation is persuasive as indicating a shift in policy or perhaps is to be treated much as an analogous case for reasoning by example to work upon. It is surprising, however, that a judicial reasoning system which places such great store on the correct analysis of cases should have as little doctrine as ours does upon the crucial question of whether the judge's own explanation of the decisive features of the case, a successor judge's rationale or perhaps the underlying structure as seen by some commentator are all equally available methods for finding or justifying the law. To the extent that there is any general assumption about this I would suppose that it is that the first judge's language, when not dictum, is decisive—a view which is not only unclear but wrong. This in itself suggests that for the effective operations of the system it is not necessary to be either clear or correct about such matters.

The compatibility of judicial reasoning, which relies heavily on reasoning by example, with a moving classification system is, I think, clear. The movement in the system frequently will not be apparent. When it is apparent, it is often justified obliquely on the basis that this policy step was taken some time ago and is reflected in prior decisions. The system permits a foreshadowing of results and therefore has built into it the likelihood of a period of preparation so that future decisions appear as a belated finding and not a making of law. The joint exploration through competing examples to fill the ambiguities of one or many propositions has the advantage of permitting the use in the system of propositions or concepts saved from being contradictory because they are ambiguous, and on this account more acceptable as ideals or common-place truths; the advantage, also, of postponing difficult problems until they arise, and of providing an inner discipline for the system by forcing an analysis of general propositions in terms of concrete situations. The avoidance of explicit policy determinations by referring to prior and selected examples appears as

a substitution of the idea of equality for a head-on examination of issues of policy. Undoubtedly some of the magic of the judicial process stems from this fact, and also some of the doubt which has given rise to the literature of self-examination.

III.

Against this background it seems to me that a third point is at least tenable and it is this: the caliber of a court's opinion even in a constitutional case is not to be made dependent on its announcement of a principle which is fully satisfying in reason and which will indicate for us how future cases are to be decided. I put the matter this way in reaction to Professor Wechsler's observations on neutral or articulated principles[3] and upon the basis that the caliber of an opinion is to be seen in terms of the governmental function it performs. What Professor Wechsler said was that the courts in exercising their duty to review the actions of the other branches of the government in the light of constitutional provisions, must act as courts of law and not as naked power organs. The determinations of the court, then, to have legal quality must be "entirely principled," and a "principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[4] The emphasis throughout his superb essay is on "standards that transcend the case at hand" and upon "principled articulation." I have heard it suggested that the use of the "neutrality" concept is unfortunate since it seems to give the impression that the values about which the judge feels deeply may not be the appropriately articulated reasons for decision. And this has thrown the essay into a kind of maelstrom of discussion as to whether judges should be neutralists or umpires or social reformers. I would suppose that all would agree with the answer I think is suggested by Professor Wechsler's essay: namely, that a judge who makes changes in the law must take seriously the duty of reworking the pattern of the law. The distinctions which he makes must be genuine, articulated, and sufficiently acceptable. But granted the description of judicial reasoning as the working or reworking of a moving classification system, to what extent must the judge have worked out the full impact upon future cases of conflicting values and legal concepts? And to what extent is it appropriate or necessary for a judge to plot out in the written opinion, as contrasted with the inner process of decision, the future course of

[3] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[4] *Id.* at 19.

the law as to those instances and future distinctions which seem foreseeable to him?

Surely there are several meaningful ways in which the Constitution is something more than what a court says it is. In our country in any event the Constitution is a written document embracing basic and sometimes contradictory values and using both very broad and sometimes rather specific concepts. The freedom which the Court has to abandon its prior reading of the Constitution is a recognition of primacy of the document. Granted the right and duty of the Court to interpret the document, it has not been given the duty or the opportunity to rewrite the words. It can decide cases on the basis of its interpretation of the words, but if the analysis of reasoning by example means anything, it means that a later court can accept the results in those cases but justify them on a different theory. And the value of court action as opposed to action by a constitutional convention or a legislature is that the matter can be taken one step at a time. This does not mean that the steps can be taken without justification—the discipline requires a justification which will explain the way prior cases and this case have been handled, and may even be a justification which latches onto a shift in constitutional interpretation. But I do not think this is equivalent to demanding a fully satisfying theory which projects a line to the future and steers a safe course for future conflicts. Particularly where a constitution is involved, with its conflicting values, such a demand seems unobtainable. In addition to the point that it is one of the values of court action that it can deal with the case at hand and avoid the broad reach, there is the more central complexity that with conflicting values a political system has to decide some things on the basis of specific decisions approaching a dividing line which in fact may be a moving line and not one which can be grandly fixed through articulation. Because the Supreme Court has ventured into an enlarged circle where primaries are protected from racial discrimination does not, I think, require it or make it desirable for it to attempt to leap to a determination of whether under any and all circumstances political parties should be prevented from being organized on racial or religious grounds in the United States. An attempt to make a judicial pronouncement on this subject might be more fraught with mischief than a wrong decision crossing a line which it should not cross and resulting from the misapplication of a more standard principle that a governmental function must be carried on without that kind of clear discrimination. And so for the opinion of the Supreme Court in the segregated schools case,[5] I would not suppose it would be desirable for the Court to have

[5] Brown v. Board of Education, 347 U.S. 483 (1954).

attempted to articulate its adjudication upon the basis of a resolution of the conflict between the right of freedom of association and the right to not associate—a conflict which Professor Wechsler has suggested he would like to see come out on the side of association, but where he indicates there are certain difficulties, and, as he said, he has "not yet written the opinion."[6] It is because Professor Wechsler has not yet written the opinion that I am dubious that others can. But it does not follow that segregation in schools should be allowed to persist. It is possible that the *Brown* case should have been decided with the same result but with less of an immediate jump and on the partial basis of an old and accepted theory.

The recognition and preservation of future leeways in the law until the time for decision has been reached is of course not a new thought or a new value. The doctrine that constitutional matters should not be decided until their resolution is necessary to the case at hand is in part a reflection of that thought. Of course it is virtuous in terms of the legal process to be willing to deny the legitimacy of desired results which cannot be reached through appropriate reasoning. But the process of judicial reasoning is frequently, perhaps basically, retrospective, taking advantage of situations which have been met. This in itself involves some projection into the future as well, going beyond the case at hand, but it can also involve care not to foreclose the consideration of future distinctions and further relevance. This is in recognition that time has its advantages, that the constitutional or legal posture of later cases may be doctrinely different, that situations which seem the same now under a new light may appear otherwise, and that situations and doctrine may be more interrelated than is earlier realized.

Having said this much I hasten to add that I realized that a call for responsible articulated reasons does not mean that a judge must shoulder the responsibility for deciding all future cases. And probably the articulation of reasons in the opinion is of greater or at least different importance in constitutional cases to the extent that the Court's overriding authority has to be justified. The course of common law cases in which one can find inchoate theories, incomplete expressions of new views, and then finally the better expression of the theory is well known and includes the best judges as the writers of opinions. Shocking as it may be, even the case which has no articulated theory to support it but seems right and is treated as a kind of unique incident has a place in our jurisprudence. Perhaps one's point of view on the importance of the completed theory depends upon whether one sees the theory in some sense as prior to the determination of result or rather

[6] Wechsler, *supra* note 3, at 34.

as arising out of the same process of seeing similarity and difference. If it is the latter, then the completed theory is less important than the description of the process of comparison (which of course includes a statement of what are the crucial points of comparison) for after all it is that process upon which we must rely. I trust that the category of articulated neutral principles is broad enough to permit this approach.

IV.

I have tried to describe some of the strains inherent in judicial reasoning which perhaps have contributed to the literature of self-examination, and to describe also the process of this reasoning which is adapted to a moving classification system. I have urged that the articulation of neutral principles be regarded in the light of a process of judging in which the direction of perceived standards and the comparison of situations both play a part but one in which it is not always possible or wise to anticipate the inevitable collision of important values too far beyond the case at hand. But of course the choice of the preferred way of judicial reasoning depends upon a judgment as to the functions which judicial reasoning is to perform. Clearly these functions are not always the same. They depend in part upon the needs of a society at a given time and the availability of other and possibly better ways of fulfilling these needs. The classic function for judging is to redress a wrong caused by a violation of a sufficiently understood legally authorized standard. The clearer the standard, and the more acceptable that standard is to elements within the community, the greater the moral judgment carried by the decision. Because rewards and punishment are involved and the relationship to moral judgment very close, judging is an important educational and changing factor. The interpreter of the standard becomes the creator of the standard. And the standard or law which is applied may become in varying degrees no more than, but as much as, the changing customs or value systems of the community as seen through a particular mechanism. As we know, there need not be an institutional separation of judging from executive or legislative authority. The functional lines between them can become exceedingly blurred in part because even naked power hardly ever is that simple. We can begin with a skeletonized view of the judicial process: the received standard, the adversary proceeding, the focusing on a single situation and the exemplification of the standard in similar actual or hypothetical cases. But these are the broad outlines and the working of the process will change as needs are felt differently.

It is perhaps relevant to remind ourselves that law as regulated by the judicial opinion operates within a literary tradition. One function

of the opinion has been to map out the contours of the law, much as a text writer would do, and in this sense the reasoning of the judge as dictum has been quite important. But the view of the judge on the effects of laws or on the quantity and types of cases and issues which may arise within the legal system itself may be quite limited. I do not know whether it is worthwhile, but modern methods of research could tell us a great deal more about the operations of the legal system itself—that is, the frequency with which particular types of cases arise, the relationships among issues, the likelihood of recovery and similar questions, than can be handled appropriately in legal opinions. This limitation of judicial reasoning to an examination of the facts which arise in the particular case, an acceptance of enlightened or sound social views and an intense scrutiny of the intellectual issues thought to be involved in the case is no doubt regarded as a positive value by members of our craft. Judges are not behavioral scientists. The point is, however, that there was a time when no one else was, and the sphere of the judge as social philosopher was less limited or threatened. Today the organization by the bar of various instruments for mapping out the law and also for such collaborative research as can be done both on the operations within the legal system and the effect of laws on social problems—all these suggest a certain limitation on the need for formal judicial reasoning as words on high to fill these gaps. We still want to know what the judge thought was relevant in deciding the case but the thought that he might do some research on his own in matters economic or sociological fills us, no doubt correctly, with dread.

But we still think of the judge as appropriately law reformer and also as wise man or political scientist for the community. The meaning of the image of the judge as law reformer is clouded because in part it refers only to the restating and remaking of the case law as the pattern of the law. But the fact is that in our society the law court is a powerful instrument for effecting changes which the legislature will not enact or for preventing for some time at least the changes which legislatures do enact. And the defense of judicial action against the charge that its behavior is simply legislative, and therefore the assumption of naked power, is frequently but not always that where action is prevented, the matter is so great as to go to the essential spirit of institutions, and where change is effected, that the amount of change is so small that a comparison of other situations will show it has already occurred. It would be comforting to think that an analysis of proper judicial reasoning would show which actions were appropriate. I do not think an articulation of powerful reasons and serious concern is sufficient to separate proper judicial from improper

judicial or essentially legislative behavior or wise from imprudent judicial behavior. It seems to be a question partly of time and place, the acceptability of what is done and the need for it. It can be plausibly argued that all great judges have recognized this, and that it is one of the tragedies of judging that, with this recognition and perhaps because of it, misconceptions of felt needs can make for unwise decisions. Of course a court which operates in areas where there are strong differences of views runs great risks, but in our system it is supposed to do so somewhat. The analysis of jurisprudence which makes much of the difference between the *is* and the *ought* does not seem to me to be helpful at this point. A judicial system which makes this distinction and echews the *ought* will have lost both the spirit and symbol of justice. In effect it will have made the *was* the *is*.

Yet it can be asked whether at a particular time and place it is valuable for a court to become the main forum for basic political debate. It is somewhat anomalous in a highly developed political society that lawyers in court and lawyers in robes should have to discuss matters of political power which certainly as appropriately come within the province of lawyers in the legislature, but which presumably are inadequately treated there. The fact of the anomaly is not necessarily a criticism of the Court's behavior. The fact is that in our society, although some may disapprove, the Court has advantages as a forum for the discussion of political-moral issues. In a broadly based, vocal and literate society, susceptible to the persuasion of many tongues and pens, and with inadequate structuring of relevant debate, the Court has a useful function not only in staying time for sober second thought but in focusing issues. It is sometimes the only forum in which issues can be sharply focused or appear to be so. It has the drama of views which are more opposing and less scattered because its procedures require a certain amount of relevance. It operates more within a structure of logical ideas, and yet one into which current views may be infused through new words which must find a relationship to the old and through new meanings. It has the drama of a limited number of personalities who are called upon to explain their views. It has the advantage of beginning with certain agreed upon premises to which all participants profess loyalty and thus can force concentration upon the partial clarification of ambiguities. It must reach a conclusion for the particular situation which has the force of a moral judgment. The Court operates from a base in which the identification of its members is explicitly to the higher ideals of the entire community. This freedom and responsibility minimizes that kind of double standard between public and private convictions which cannot so clearly be said to be

inappropriate in other areas. This does not mean that the price for such participation by a court does not come high nor that there are not substantial weaknesses in its fulfillment of these functions. A basic insecurity in the foundation for a court's approach to such issues is that it must proceed with a standard of constitutionality, including problems of distribution of powers, or a rule of minimum fairness distorts the lesson. It makes for poor public education even though it may be the best available. Finally, without regard for the technical propriety of what the Court does, there is no doubt that the Court's influence as an acceptable objective force is diminished the greater the controversy. This easy and customary point, however, must be corrected by an awareness that it is the Court's appeal to our better selves, connoting some controversy, which is the source of its moral power and persuasion.

In this setting the function of articulated judicial reasoning is to help protect the Court's moral power by giving some assurance that private views are not masquerading behind public views. This might lead to the conclusion that the more controversial the issues the more the Court should endeaver to spell out the future rules of the road. But I doubt if this conclusion follows. I do not ignore the obligation of higher courts to give directions to trial and intermediate courts, the need greater in some areas than in others to guide private transactions, the special duty to enforce rules of fairness when court procedures are involved, and the requirement that law not be segmented but be a continuing pattern. But the existence of controversy on public issues may speak for a less decisive and far-reaching determination by a court which can have the advantage of taking the law a step at a time. The commentators' happy and useful lament that the reasoning is unclear and that ambiguities and uncertainties remain in itself is no cause for alarm; future courts can and will take advantage of such learning and hindsight as they take advantage of their own. What is needed in the judicial opinion is an indication of the points at issue, a narrowing of the determinative factors, and to some extent care not to take unnecessary steps until they can be taken in a sense retrospectively. This is not an argument for the thoughtless decision. It is rather an argument that the decision must bear witness that it was reached through the discipline of the pattern of the law, which provides both restrictions and leeway. It is indeed the recognition of the present and future leeway, as much as of the prior restrictions, which compels the thoughtful decision and makes of judicial reasoning something more than arrangements to be projected on a computer or predicted from the bias of a judge.