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ESSAY

JUDICIAL DECLARATION OF PUBLIC POLICY*

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I. INTRODUCTION

I have been writing judicial opinions for fifty years: since 1969 as a federal appellate judge on the Third Circuit, and for eight years before that on the Pennsylvania Court of Common Pleas.¹ For nearly forty years of that time, I have offered my advice as an expert opinion writer to other judges in opinion-

*Adapted from Ruggero J. Aldisert, *Opinion Writing* ch. 4 (2d ed., AuthorHouse 2009). The reader should be aware that both *Opinion Writing* and this article draw on material first published in Ruggero J. Aldisert, *The Role of Courts in Contemporary Society*, 38 U. Pitt. L. Rev. 437 (1977) and Ruggero J. Aldisert, *Philosophy, Jurisprudence and Jurisprudential Temperament of Federal Judges*, 20 Ind. L. Rev. 453 (1987).

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1. The Pennsylvania Supreme Court required trial judges to write an opinion in every case that was appealed; to play it safe, I wrote an opinion in every final judgment.

writing seminars and through my book *Opinion Writing*,² which for many years was distributed free of charge to all federal trial and appellate judges, and to all state appellate judges, when they took the bench.³ Over the past year, as I have revised and prepared *Opinion Writing, 2d Ed.* for availability to a wider audience, I have endeavored to provide my best practical guidance on the nuts and bolts of opinion writing, style, and structure, as well as on the judicial decisionmaking process and the theoretical underpinnings of opinion writing. I have encouraged opinion writers to keep their readers in mind as they write, and have advised opinion readers on how better to understand the opinion-writing process.⁴ However, no comprehensive discussion of opinion writing theory can be complete without a discussion of judicially declared public policy.

Recent criticism of judges—whether as lawmakers or as interpreters of constitutional or statutory text—has been particularly strong when they base decisions on considerations of public policy. Such decisions generate controversy on grounds both political and institutional. Public policy issues more readily inspire the familiar labels of “liberal,” “conservative,” “strict constructionist,” or “a Bork-type.” They provoke criticism from social, economic, and political perspectives. Some critics argue from an institutional perspective, contending that articulating policies for the public interest is the task of state and national legislatures rather than federal or state judiciaries. Depending upon the viewpoint of the critic, judges who seek to advance the common good expressly through policymaking are pilloried as either “activists” or “traditionalists.” This controversial aspect of judicial responsibilities demonstrates the interplay among the

2. Ruggero J. Aldisert, *Opinion Writing* (West 1990) [hereinafter *Opinion Writing 1990*]. The first edition of *Opinion Writing* was not made available to the general public.

3. I was commissioned by West Publishing to write *Opinion Writing 1990* as an expansion of discussions held at the Senior Judge Seminars sponsored by the Institute of Judicial Administration at New York University in 1970-1971, 1973-1982, and 1985. It reflected, also, ideas discussed in opinion writing seminars I taught for newly appointed judges at the Federal Judicial Center in 1974-1980 and 1982.

4. See Ruggero J. Aldisert, Meehan Rasch & Matthew P. Bartlett, *Opinion Writing and Opinion Readers*, 31 *Cardozo L. Rev.* 1 (2009).

components of the trichotomy of legal philosophy, jurisprudence, and jurisprudential temperament.

II. OVERVIEW OF JUDICIAL DECLARATION OF PUBLIC POLICY

Roger J. Traynor admonished us not to “be misled by the half-truth that policy is a matter for [only] the legislators to decide.”⁵ The courts are continually called upon to weigh considerations of public policy when adding to the content of the common law, when filling in statutory gaps left by an inattentive, divided, or politically sensitive legislature, and when applying constitutional precepts to changing and novel circumstances. In all these aspects of the judicial process, considerations of public policy may be compelling or even decisive. David A. J. Richards emphasized the same point, noting that policy considerations underpin even the threshold doctrines of justiciability:

[T]he proper ends of adjudication surely at least sometimes include policies. For example, the many discretionary rules of standing, ripeness, mootness, and the like clearly rest in part on policies of conserving judicial resources, a social policy of maximum output from limited inputs. Even aside from the problematics of the proper weight of principle and policy in understanding these rules, many cases of adjudication on the merits clearly invoke policies, as in many instances of statutory construction. Even where there is no clear legislative intent, courts invoke policy considerations *sua sponte* in order to effectuate a sensible legislative result; the burgeoning area of federal common law is one example.⁶

These American authorities have rejected sentiments voiced by English judges of an earlier era: that “public policy . . . is a very unruly horse and when once you get astride it you never know where it will carry you,”⁷ and that judges are more

5. Roger J. Traynor, *Reasoning in a Circle of Law*, 56 Va. L. Rev. 739, 749 (1970).

6. David A.J. Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 Ga. L. Rev. 1069, 1097-98 (1977) (footnotes omitted).

7. *Richardson v. Mellish*, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824) (Burrough, J.).

to be trusted as interpreters of the law than as expounders of public policy.⁸ And yet, more recent United Kingdom jurists do not follow the teachings of the earlier era. The venerable Lord Denning, for instance, applied the modern view in his discussion of the measure of damages in a tort case:

At bottom, I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the damages recoverable—saying that they are, or are not, too remote—they do it as a matter of policy so as to limit the liability of the defendant.⁹

Justice Hopkins of the Appellate Division of the New York Supreme Court was similarly realistic in declaring that among the several devices available as bases for decisions—such as maxims, doctrines, precedents, and statutes—public policy is primary. As he put it, “[t]he other grounds for a judicial decision yield to the declaration of public policy, once that policy is ascertained.”¹⁰

Although much of the controversy concerning judicial implementation of public policy is of recent vintage, the practice itself is longstanding and well established in common law adjudication. As early as 1881, Justice Holmes wrote:

The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.¹¹

8. *In re Mirams*, (1891) 1 Q.B. 594, 595.

9. *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* (1973) 1 Q.B. 27, 36.

10. James D. Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 Brooklyn L. Rev. 323, 323 (1971).

11. Oliver Wendell Holmes, Jr., *The Common Law* 35-36 (Little Brown 1881).

Notwithstanding the importance of these considerations to judicial decisionmaking, it is well to remember that judges are far more constrained than legislators in fashioning or declaring public policy. Professor and former Yale Law School Dean Wellington offers the thoughtful suggestion that

when a court justifies a common law (as distinguished from a statutory or constitutional) rule with a policy, it is proceeding in a fashion recognized as legitimate only if two conditions are met: The policy must be widely regarded as socially desirable and it must be relatively neutral.¹²

This poses an obvious question: How may—indeed, how can—a court determine whether a policy is socially desirable? Wellington recommended that in fashioning common law on public policy grounds, the court first look

to the corpus of law—decisional, enacted, and constitutional—to determine whether relevant policies have received legal recognition. . . .

[i]n determining the extent of a policy's social desirability, a court should examine such things as political platforms, and take seriously—for this purpose—campaign promises and political speeches. The media is a source of evidence and so too are public opinion polls. Books and articles in professional journals, legislative hearings and reports, and the reports of special committees and institutes are all evidence.¹³

The sound requirement of neutrality extends to constitutional and statutory interpretation as well as to common law adjudication. The principle of neutrality demands that judges, who are intentionally shielded from the pressures of interest groups by the structure of American government, should not justify their rulings by accepting the demands of one interest group at the expense of another that is not party to the litigation.¹⁴ Professor Wechsler bore the brunt of much criticism—unfounded and undeserved—for his 1959 Holmes

12. Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 236 (1973).

13. *Id.* at 236-37.

14. *Id.* at 238.

lecture on neutrality, given at Harvard Law School.¹⁵ Commenting in 1975 on that criticism, he reasserted the importance of his principle:

The central thought is surely that the principle once formulated must be tested by the adequacy of its derivation from its sources and its implications with respect to other situations that the principle, if evenly applied, will comprehend. Unless those implications are acceptable the principle surely must be reformulated or withdrawn.¹⁶

This, I suggest, is but the jurisprudential expression of Immanuel Kant's categorical imperative: "Act only on that maxim through which you can at the same time will that it should become a universal law."¹⁷ (I concede of course that some subscribe instead to George Bernard Shaw's advice: "Do not do unto others as you would that they should do unto you. Their tastes may not be the same."¹⁸)

The essence of neutrality is the quality of evenhandedness, a recognition that whatever influence special interests may have in legislative decisionmaking, the imposition of special burdens on, or the granting of special favors to, a particular group has no place in adjudication—no place, that is, absent principled reasons for being there. Special-interest decisionmaking is for only the legislative branch, which has perfected the art; statutes are the products of a series of marginal adjustments and compromises among various semi-independent groups.¹⁹ Legislation is the art of accommodation, and politics is the art of the possible. And the possible is conditioned by the ballot box. Modern legislators seem to accommodate only the perceived desires of the parochial constituencies whose members elect or support them, setting aside any consideration of what is

15. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

16. Herbert Wechsler, *Remarks at Federal Appellate Judges' Conference* (Fed. Jud. Ctr., Wash., D.C., Mar. 12, 1975), in Ruggero J. Aldisert, *The Judicial Process* 630-31 (2d ed., West Pub. Co. 1996).

17. Immanuel Kant, *Groundwork of the Metaphysics of Morals* 88 (H.J. Paton trans., Barnes & Noble, Inc. 1964).

18. George Bernard Shaw, *Man and Superman: A Comedy and a Philosophy* 227 (Brentano's 1903) (section titled *Maxims for Revolutionists*).

19. See Martin Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* 29 (Prentice Hall 1966).

preferable for the entire population of the state or nation. Even within their own electorates, they often fail to equate numbers with influence, for experience has taught them that minorities punish, but majorities seldom protect.

The judiciary is not equally restrained by, or susceptible to, the interests of electorates confined within relatively small legislative districts, nor does it have available to it the legislature's opportunities for largess. Judges can learn what is widely regarded as desirable by identifying, isolating, and then weighing the same factors legislators would take into account—and then, when it is proper to do so, ignoring those factors. Because they can, with courage and dignity, eschew parochial and partisan factors, judges are able to make their decisions on the fairly neutral bases of principles and rights.

Assuming the essential element of neutrality, we must turn now to a broader canvas of the factors relevant to policy declaration. How is the judge to ascertain the public interest and the policies that will advance it? Dean Rostow addressed this problem as a search for the “common morality of a society.”²⁰ Professor Friedmann believed it necessary to identify the collective judgment in terms of the basic norms of the community's life. He suggested that a primary source of information would be the general state of contemporary legislative policy, but argued also that the judge should turn to the state of organization in the society in which he lived, make note of the groupings and pulls of the major social forces of his society, be aware of society's pluralistic aspects, and recognize the state of modern science.²¹

Professor Hart also discussed the importance of ascertaining the conventional morality of an actual social group, referring to

20. Eugene V. Rostow, *The Enforcement of Morals*, 1960 Cambridge L.J. 174, 197 (1960). Rostow described this common morality as

a blend of custom and conviction, of reason and feeling, of experience and prejudice. . . . [I]n the life of the law, especially in a common law country, the customs, the common views, and the habitual patterns of the people's behaviour properly count for much. . . . All movements of law reform seek to carry out certain social judgments as to what is fair and just in the conduct of society.

Id.

21. Wolfgang Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 Colum. L. Rev. 821, 843-45 (1961).

standards of conduct which are widely shared in a particular society, and are to be contrasted with the moral principles or moral ideals which may govern an individual's life, but which he does not share with any considerable number of those with whom he lives.²²

This is perhaps the most critical aspect of our inquiry. The judge must screen out personal bias, passion, and prejudice, and attempt always to distinguish between a personal cultivated taste and the general notions of moral obligation. Such standards of conduct reflect an obligation to respect rules of society. They are, in Hart's formulation, primary rules of obligation because of "the serious social pressure by which they are supported, and by the considerable sacrifice of individual interest or inclination which compliance with them involves."²³ And Professor Wellington said that the way in which one learns about the conventional morality of society "is to live in it, become sensitive to it, experience widely, read extensively, and ruminate, reflect, and analyze situations that seem to call moral obligations into play."²⁴

The line of inquiry proposed by Rostow, Friedman, Hart and others is similar to that proposed by Wellington to determine what is "socially desirable" for common law adjudication.²⁵ The attempt to base a decision on social consensus, however, is fraught with peril and, in the interpretation of constitutional precepts, may be inappropriate. As Professor Jaffe once inquired:

How does one isolate and discover a consensus on a question so abstruse as the existence of a fundamental right? The public may value a right and yet not believe it to be fundamental. The public may hold that the rights of parents are fundamental and yet have no view whether they include sending a child to a private school. There may be a profound ambiguity in the public conscience; it may profess to entertain a traditional ideal but be reluctant to act upon it. In such a situation might we not say that the judge will be free to follow either the traditional ideal or the

22. H.L.A. Hart, *The Concept of Law* 165 (Oxford U. Press 1961).

23. *Id.*

24. Wellington, *supra* n. 12, at 246.

25. See *supra* nn. 7-22 and accompanying text.

existing practice, depending upon the reaction of his own conscience? And in many cases will it not be true that there has been no general thinking on the issue?²⁶

A classic example of judges mistaking the public consensus is the position perennially espoused by Justices Brennan and Marshall in death penalty cases. Their concurring opinions in *Furman v. Georgia*²⁷ took the position that the death penalty was unconstitutional “cruel and unusual punishment” because it was out of step with contemporary community values.²⁸ The rush of state legislatures to impose the death penalty after their 1972 statements, however, showed an unmistakable community reaction, at least in the immediately following years, that was in complete opposition to their statements.²⁹ The tendency for judges to find society’s values in their own is a constant danger. Much adjudication in the federal courts, especially in constitutional interpretations based on concepts of public policy, moral standards, and public welfare, is little more than the conscious or unconscious imposition of certain judges’ personal values. Many of us who purport to be objective in identifying community values, and who are indeed sincere about it, are actually intent on attaining immediate social ends that we personally see as moral imperatives.

Adherence to the principle of neutrality in judicial decisionmaking provides a check against the temptation to substitute personal for social values. As Professor Greenawalt

26. Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 Harv. L. Rev. 986, 994 (1967).

27. 408 U.S. 238 (1972).

28. *Id.* at 295-300 (Brennan, J., concurring); *id.* at 360-69 (Marshall, J., concurring).

29. In *Opinion Writing 1990*, I noted that a Gallup Poll taken in November 1985 disclosed that three out of four Americans favored the death penalty, seventeen percent opposed it, and eight percent were undecided. See *Opinion Writing 1990*, supra n. 2, at 42, n. 25 (citing *Gallup Poll Finds Sharp Rise in Support for Death Penalty*, 134 N.Y. Times A20 (Nov. 28, 1985)). Analysis of a Gallup Poll taken in October 2007 notes that although sixty-nine percent of Americans were then still in favor of the death penalty for a murder conviction, over the years support for the sentence of life without parole as an alternative to the death penalty has steadily increased. When the Gallup question provides the respondent with an explicit alternative to the death penalty (“life imprisonment, with absolutely no possibility of parole”), support for the death penalty typically has registered in the range of forty-seven percent to fifty-four percent. See Frank Newport, *Sixty-Nine Percent of Americans Support Death Penalty*, Gallup News Release (Oct. 12, 2007), <http://www.gallup.com/poll/101863/Sixtynine-Percent-Americans-Support-Death-Penalty.aspx> (accessed Oct. 14, 2009; copy on file with Journal of Appellate Practice and Process).

has observed,

[s]erious moral choices typically involve some conflict between an action that would serve one's narrow self-interest and an action that would satisfy responsibilities toward others. The dangers of bias are extreme; either we value too highly our own interest or over-compensate and undervalue it. The discipline of imagining similar situations in which we are not involved or play a different role more nearly enables us to place appropriate values on competing considerations.³⁰

Similarly, a consideration of the first principles of legal philosophy may place a particular issue of public concern in a broader, more principled context and may force us to recognize any inconsistencies between our intuitive moral values and the more general philosophy of law to which we may subscribe. Indeed,

[w]e may discover that some of our intuitive moral views are not consistent with other intuitive views or with generalized principles to which we subscribe. As we test our intuitive reactions to particular situations against our accepted principles, both may give a little, until we arrive at what John Rawls calls a "reflective equilibrium," in which our sense of right for particular issues matches our principles.³¹

An important component of our jurisprudential temperament is the threshold at which judges are willing to act in disregard or contravention of prevailing social norms, the extent to which they are willing to confront the antimajoritarian difficulty.³² In those instances in which social consensus is

30. Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 Colum. L. Rev. 982, 997 (1978).

31. *Id.*

32. Professor Laurence Tribe contends that this problem is inherent in constitutional government:

Whether imposed by unelected judges or by elected officials conscientious and daring enough to defy popular will in order to do what they believe the Constitution requires, choices to ignore the majority's inclinations in the name of a higher source of law invariably raise questions of legitimacy in a nation that traces power to the people's will. . . . In its most basic form, the question in such cases is why a nation that rests legality on the consent of the governed would choose to constitute its political life in terms of commitments to an original agreement—made by the people, binding on their children, and deliberately structured so as to be difficult to change. Since that question would arise, albeit

asserted as an appropriate basis for judicial declarations of public policy, how should a judge reconcile what Professor Fuller called the “inner voice of conscience”³³ with prevailing community standards?

II. JUDICIAL DECLARATION WHERE THERE IS NO CONSENSUS FOR PUBLIC POLICY

In seeking an answer, I first distinguish between circumstances in which there is a consensus and those in which there is not. We should agree that free societies will change because it is their nature to do so. New ideas can gather strength in the social or intellectual marketplace and achieve the consensus. When these ideas are admitted and so absorbed, the legal system should expand to hold them. Conversely, the legal system should contract to squeeze out old policies that have lost the consensus they once held. The expansion or contraction of the legal system to reach these goals is what we call judicially declared public policy. So perceived, social consensus demands sympathy from the court.

Where the legislature has not acted in accordance with changing social policies and seemingly does not so intend to act, the courts have not only the authority, but possibly the duty, to keep pace with the change in consensus. Individual legislators then function in only one direction: to ensure their own reelection with the kind of Darwinian instinct that tells animals they must fight to preserve their genetic stocks. The prevailing tendency among most legislators is to avoid a vote on any controversial issue likely to produce differences in opinion among their constituents back home. Richard Neely, a former justice of the West Virginia Supreme Court and a former state

less dramatically, even without the institution of judicial review, its answer must be sought at a level more fundamental than is customary in discussions of why judges, appointed for life, should wield great power. For even without such judges, it must be stressed, lawmakers and administrators sworn to uphold the Constitution must from time to time ask themselves, if they take their oath seriously, why its message should be heeded over the voices of their constituents.

Laurence Tribe, *American Constitutional Law* 10 (2d ed., Found. Press 1988).

33. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 635 (1958).

legislator, is more blunt:

[A] legislature is *designed* to do nothing, with the emphasis appropriately placed on the word “designed.” The value of an institution whose primary attribute is inertia to politicians who wish to keep their jobs is that a majority of bills will die from inactivity; that then permits legislators to be “in favor” of a great deal of legislation without ever being required to vote on it. When constituents seek to hold a legislator responsible for the failure of a particular bill, he can say, plausibly, that it was assigned to a committee on which he did not serve and that he was unable to shake the bill out of that committee. If he has foreseen positive constituent interest, he can produce letters from the committee chairman in answer to his excited pleas to report the legislation to the floor; correspondence of this sort is the stock in trade of legislators. Notwithstanding the earnest correspondence, it is quite possible that when the legislator and committee chairman were having a drink before dinner, the legislator indicated his personal desire to kill the bill in spite of the facade of excited correspondence.³⁴

But this does not mean that the judge must act only when public opinion reflects a majoritarian viewpoint, or even a plurality viewpoint. Had the Supreme Court waited for public consensus we might never have had *Brown v. Board of Education*;³⁵ in 1954 there was no national consensus for the compulsory integration of the public school system. This was one of those times that call for judicial intervention—or more properly, judicial operation—in advance of the consensus, which the judge may therefore properly outrun. In doing so, however, he or she must tread delicately.

III. FOUR CONCERNS TO BE ADDRESSED IN JUDICIAL DECLARATION OF PUBLIC POLICY

I suggest that judges must address the following concerns when declaring public policy:

34. Richard Neely, *How Courts Govern America* 55 (Yale U. Press 1981) (emphasis in original).

35. 347 U.S. 483 (1954).

1. Judges must be impartial and independent in both the decisionmaking process and the process of justification.
2. Judges must convey the distinct impression and appearance of impartiality.
3. Judges must fulfill the obligations of neutrality and the obligations of both justice *in rem*, socially desirable because it is based on some pre-eminent moral principle, and justice *in personam*, individually desirable because it yields justice for the parties to a given lawsuit.
4. Judges must identify and evaluate the relevant private, social, public, and governmental interests. These must be not only evaluated, but compared, accepted, rejected, tailored, adjusted and, if necessary, subjected to judicial compromise.

Judges must be especially careful to cleave to the first principle of the reasoning process, which starts the march to the specific conclusion (or declaration of public policy): It must be a concept universally held and uniformly respected. It must be related to at least one of what I have described elsewhere as supereminent principles of the law: creating and protecting property interests; creating and protecting liberty interests; fulfilling promises; redressing losses caused by breach or fault; and punishing those who wrong the public.³⁶

36. Cf. Ruggero J. Aldisert, *House of the Law*, 19 Loy. L.A. L. Rev. 755 (1985).

IV. WEIGHING OF INTERESTS IN JUDICIAL DECLARATION OF PUBLIC POLICY

More often than not, public policy derives from a sub-process of the judicial process now popularly known as “balancing interests.” With a seemingly inexhaustible inventory of social interests pressing upon judges and jurists for attention, judicial “balancing” seeks a reasoned accommodation of the competing interests and the resolution of their conflicts. Perhaps most critical to this process, judges and jurists must first identify and categorize the various individual, public and social interests. As Dean Pound recognized, the validity of the technique depends, in the first instance, on whether all relevant identifiable interests are placed on the scale.³⁷

The expression “balancing interests” is useful, perhaps, but seriously misleading. It implies that the subject matter of the judicial process is somehow *quantifiable*. It is not subject to such quantification, notwithstanding the itch in this computer age to put numbers to every phenomenon. The best that can be hoped is that all the interests at stake in a case are *identifiable*. Having identified the interests at stake, judges can at least consider them, as I doubt that they can ever really be “balanced.” Before the accommodation takes place, however, like types of interests must be identified. As there are fruits and fruits, e.g., apples and oranges, so are there interests and interests.³⁸

37. Roscoe Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1, 4 (1943).

38. See Ruggero J. Aldisert, *The Judicial Process* 478-81, 524-28, 604-13 (West 1996). It seems appropriate to note here that although courts frequently use the expression “interests,” there is little judicial explanation of the word. This is very unusual, for all current judicial decisions involve a recognition, stated or unstated, of certain interests. In fact, most decisions involve a weighing of competing interests that have been unquestionably identified and recognized. For myself, I have gone through an evolving process that now leads me to define an interest as a social fact, factor, or phenomenon reflected by a claim, demand, or desire that human beings, either individually or as groups, seek to satisfy and that has been recognized as socially valid by authoritative decision makers in society. Compare my earlier formulation in *id.* at 489, where I stated that “[a]n interest is a social fact, factor or phenomenon reflected by a claim or demand or desire which human beings, either individually or as groups or associations or relations, seek to satisfy and which has been recognized as socially valid by authoritative decision makers in society.”

We then get to the question of how judges identify the groupings of behavior and values that will influence their decisions. Justice Cardozo recognized that

[t]he whole of the judicial function . . . [involves] the subjective sense of justice inherent in the judge, guided by an effective weighing of the interests of the parties . . . and in weighing conflicting interests, the interest that is better founded in reason and more worthy of protection should be helped to achieve victory.³⁹

Other than by an exercise of a threshold value judgment on certain factual phenomena, either in the record or in the judge's experience, I can find no other point at which judicial decisionmaking can begin. This threshold judgment continues to color a judge's thinking as he or she gropes toward a decision in the case.

Once judges designate an interest, they then make a value judgment as to whether it is worthy of protection. If that is the tentative inclination, they then summon relevant precepts that command a definite legal consequence. If specific rules in the narrow sense are found wanting, the judges range further to the generalized precept of legal principle or a still more abstract precept known as a doctrine or dogma. If rules of law, principles, or legal doctrines fail to provide an answer, the courts then look to a moral principle and make a judgment as to whether it should be converted into a legal precept.⁴⁰ Where a satisfactory legal precept is then found or articulated on the basis of these facts, the courts have wrapped legal protection around the designated social facts or factors.

I believe that this accurately characterizes the anatomy of the judicial decisional process. I believe also that a critical component of the process is the interest identified or favored by a given judge in a given court reaching a particular result in a particular case. In consequence, one primary responsibility of

39. Benjamin Cardozo, *The Nature of the Judicial Process* 73-74 (Yale U. Press 1921) (quoting Johann Georg Gmelin, *Sociological Method*).

40. Examples of this process in constitutional law are plentiful. See e.g. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Conn.*, 381 U.S. 479 (1965); *Fay v. Noia*, 372 U.S. 391 (1963); *Monroe v. Pape*, 365 U.S. 167 (1961). The classic example in state tort law is the adoption of Restatement (Second) of Torts § 402A (1965) (providing for strict products liability), now superseded. See also Ruggero J. Aldisert, *The Nature of the Judicial Process: Revisited*, 49 *Cinn. L. Rev.* 1, 39-40 (1980).

the appellate advocate is the identification of the interests being weighed today by the courts. This, alas, often does not take place. Too often, briefs simply recite the various leading cases and attempt to bring the particular dispute within the boundaries of the decisions thought to be controlling. They address too briefly, if at all, the interests implicated in the decision. Such briefs are of little aid to the court. To be a success, Justice Brandeis wrote in his notebook, a lawyer must “[k]now not only the specific case, but the whole subject. . . . Know not only those facts which bear on direct controversy, but know all the facts and laws that surround.”⁴¹

Referring to his notable survey of social interests, in a magnificent abstraction of the nature and ends of law, Pound said:

Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands, either through securing them directly and immediately, or through securing certain individual interests, so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole.⁴²

The process derives from the writings of the German jurist Rudolf von Jhering, who designated the method as *Interessenjurisprudenz*, a jurisprudence of interests.⁴³ Under this method of dispute resolution, according to Professor Antieau, the court identifies the opposed societal interests, reconciles them if possible and, if reconciliation is not possible, rules that one societal interest under the circumstances must prevail over another, with an explanation of why this is so.⁴⁴ The process is

41. Melvin I. Urofsky, *Louis D. Brandeis and the Progressive Tradition* 6 (Little Brown & Co. 1981).

42. Pound, *supra* n. 37, at 39.

43. See generally Rudolph von Jhering, *Law as a Means to an End* (Isaac Husik trans., Boston Book Co. 1913).

44. Chester James Antieau, *The Jurisprudence of Interests as a Method of Constitutional Adjudication*, 27 Case W. Res. L. Rev. 823, 829 (1977) (quoting illustrative passages from *Cantwell v. Conn.*, 310 U.S. 286 (1940), *Thomas v. Collins*, 232 U.S. 516 (1945), and *Saia v. N.Y.*, 334 U.S. 558 (1948)).

very much at work today in many aspects of adjudication, especially in tort and constitutional law.⁴⁵

V. CONCLUSION

I believe that judges today do consider the pragmatic effects of alternative courses of decision. In their declarations of public policy, they attempt to accommodate the social needs of all who would be affected by their decisions, irrespective of whether those affected were the litigants before them. They look to the general state of contemporary legislative policy and the felt needs of the society—insofar as they can discern those needs in an increasingly pluralistic society. They consider economic forces, scientific developments, and identifiable expressions of public opinion. To be sure, this decisional process has deontological as well as axiological overtones. It bears a remarkable resemblance to classic natural law.⁴⁶



45. But of course not every judge and scholar endorses the method. See e.g. Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 Colum. L. Rev. 1022, 1022-23 (1978) (noting that “[s]ome have seen a tendency toward ‘lawlessness’ . . . in the growing resort by the courts to ‘balancing’ in constitutional adjudication,” and noting further that the author is here “reflecting on different uses of balancing in constitutional discourse” and attempting “to distinguish two kinds of balancing in constitutional jurisprudence”). For examples of how competing interests are weighed and reconciled in two antitrust cases, see *Tose v. First Penn. Bank, N.A.*, 648 F.2d 879 (3d Cir. 1981), and *Unger v. Dunkin Donuts of Am., Inc.*, 531 F.2d 1211 (3d Cir. 1976).

46. See Ruggero J. Aldisert, *The Role of the Courts in Contemporary Society*, 38 U. Pitt. L. Rev. 437, 445 (1977) (recognizing that “contemporary American courts are resorting more and more to the method of sociology as a primary decisional tool,” that “[t]his decisional process has deontological as well as teleological overtones,” and that it “bears a remarkable resemblance to classical natural law”).

