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The Ideology of Legal Reasoning in the Classroom

Jay M. Feinman*

The other papers in this symposium stress the importance of expanding our inquiry into cases such as *O'Brien v. Cunard Steamship Co.*¹ In this essay I discuss how the process of legal reasoning, as it ordinarily is conducted in first-year classes, introduces its own element of ideological distortion. My proposition is that, because of that ideological distortion, the moves suggested by the other symposiasts are important but limited.

In a first-year class, *O'Brien* typically would be approached as a case that requires the court to balance the interests involved: the victim's interest in the security of her person, the interest of the physician and his employer in being able to reasonably infer consent to be vaccinated, and the social interest in promoting vaccination. The Banks, Lande, and Shalleck papers suggest that we should be performing that balancing procedure in a more enlightened way. We now understand that there is more at stake in this case than the Massachusetts Supreme Judicial Court originally thought. In deciding the case, we have to consider more facts and alternative approaches and listen to different voices in order to reach an appropriate decision. Perhaps the decision will be the same, perhaps different, but we will have arrived at the answer through better methods.

I want to suggest that the process of enlightened decisionmaking is much harder than that. Even if we employ a pluralistic approach that takes account of race, class, gender, and economic concerns, many elements of the process of legal discourse constrain our ability to do the kind of things that the other authors suggest. Too often, we ignore those constraints in the first-year classroom.

We see in *O'Brien* a conflict of interests in a particular setting which reflects a conflict of social norms. It is very hard to recognize and then to balance the different kinds of interests raised here, much harder than the other authors suggest. It is particularly difficult to contest the traditional approach to this case because of a variety of elements of the legal reasoning process as it is carried on in the typical torts class. These elements include (1) the structure of legal doctrine; (2) the pictures that animate the doctrine; (3) the

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This essay is essentially the text I presented at the symposium. I have taken advantage of the essay format to refrain from citing the burgeoning literature on legal reasoning relevant to this topic.

1. 28 N.E. 266 (Mass. 1891), reprinted at 57 MO. L. REV. 347.

themes and argumentative techniques that run through the doctrine; and (4) the limited attention to the effects of legal process. These elements interact in complex ways in the practice of legal discourse. None of them determines the result in the case, but each of them influences its outcome. In the remainder of the paper I will briefly describe each of them and discuss how they are implicit in *O'Brien*.

I. LEGAL DOCTRINE

The most obvious element of the legal reasoning process that structures our inquiry is legal doctrine—the rules, principles, and authorities relevant to the decision of the case. Of course, because we are all enlightened post-realists, we know that the doctrine does not decide the case. Nevertheless, as Maitland, the great scholar of English legal history said, "Taught law is tough law."² The basic understanding of law that we acquire in the process of legal education has a profound influence on our approach and ultimately on our decisions in cases such as this one, and the doctrinal structure is the crucial element of that legal learning.

We begin with a basic level of doctrinal distinction. *O'Brien* involves the tort of battery, an intentional tort to the person. We have a body of learning which flows from that distinction to suggest a range of appropriate resolutions to such issues. Suppose we decide that this case should be treated under the law of trespass—a mixed tort/property concept—instead of battery. We would have then redefined the interest of the plaintiff, from a tort interest in personal security to a property interest in her body. The law of trespass provides more stringent requirements for intentional invasion of a property interest than the law of battery does for a personal security interest. Ordinarily, an actor does not have a right to invade someone else's property interest simply because the actor proceeds under a reasonable but mistaken belief of consent, unless the mistake is caused by the property owner's conduct.³ This difference between the law of battery and the law of trespass introduces the possibility of limiting the physician's claim of privilege in *O'Brien*. The traditional doctrinal characterization pushes us in one direction in evaluating the interests involved in the case; moving to a different doctrinal characterization would make it a different case.

The effects of the doctrine can be seen at a different doctrinal level as well. *O'Brien* is an intentional tort case taught within the subject of privileges. We teach the rule that consent privileges what would otherwise be an intentional tort. In particular, *O'Brien* illustrates the rule that the law

2. FREDERICK WILLIAM MAITLAND, ENGLISH LAW AND THE RENAISSANCE 18 (1901).

3. RESTATEMENT (SECOND) OF TORTS § 164 (1986).

focuses not on the subjective consent of the victim, but on the physician's objective interpretation of her consent from the surrounding circumstances as the court sees them. That rule is usually explained, as it is in this opinion, as an almost-inevitable product of the interest balancing. An enlightened teacher might even link this rule to the general rise of objective standards, in contract as well as in tort.

Suppose, however, that we were to reverse the position of the parties under the doctrine. Suppose that uniformly we are concerned with the subjective consent of victims of force. Even if there are objective manifestations of consent, the objective manifestations are trumped by her lack of subjective consent. In this case, we quickly reach issues such as those involved in the related controversy over consent to rape.⁴ Of course, this approach would render a much, much different reading of the case. We would have a more favorable view of the victim's interest, an approach which is made less available by the traditional doctrine's structuring of the inquiry.

II. PICTURES

A second element of legal reasoning is what I like to think of as pictures that are represented in cases—pictures about what happens in the world and the normative consequences of those events.⁵ There are, in fact, fancier terms for those pictures; they can be referred to as paradigms, prototypes, or idealized cognitive models; but the essential notion in all of these terms is the same. We don't come to this case, with all of its possibilities for factual and normative interpretation, fresh, new, and with a clean slate. Instead, we begin reading the opinion (or the court begins listening to the lawyer's arguments, or the lawyers begin thinking about the case) and pictures immediately jump into our heads. The pictures are descriptions of factual settings in an idealized but concrete form, and the pictures carry with them normative implications for the way in which we approach those factual settings.

Consider two examples of the kinds of pictures that are involved in *O'Brien*: the picture of intentional tort and the picture of individualism. The picture of an intentional tort is summoned up by the description of battery, typically (and not coincidentally) the first intentional tort discussed in the torts course:

A simple and workable definition of the modern concept of battery is the intentional, unprivileged, and either harmful or offensive contact with the person of another. The basic parameters of the battery concept are best

4. See SUSAN ESTRICH, *REAL RAPE* (1987).

5. See Jay M. Feinman, *The Jurisprudence of Classification*, 41 *STAN. L. REV.* 661 (1989).

described by a hypothetical example. Assume that A is walking along the sidewalk and sees B, whom A dislikes intensely, approaching from the opposite direction. A strikes B on the jaw with his fist, knocking out three of B's teeth and rendering him unconscious.⁶

When torts professors teach this picture, they inevitably point out that it is only a prototype, and that there are many other kinds of batteries and other kinds of intentional torts that radiate from it. A battery, for example, can arise from a simple offensive touching and does not have to involve serious physical injury. But the picture of someone punching someone else as the prototype of an intentional tort is so powerful that as we move away from cases that closely resemble the prototype, it becomes harder and harder to think of them as intentional torts.

One of the things lurking in the background in *O'Brien* is the effect of describing battery by way of this picture rather than by way of a formal, Restatement-like, black letter definition. There is some resistance to treating this case as a battery, even though it may meet the formal definition, because it departs from the prototypical picture. The physician's act here simply isn't like punching someone. We understand that battery is a technical concept and that an unconsented touching, even if it is non-violent and does no immediate physical harm, constitutes a battery. Nonetheless, we easily intuit this case as a battery.

We can see the significance of these pictures and their interaction with other forms of value distortion by particularly focusing on cases involving women. Many of the indignities women suffer are not seen as tortious in part because the law consistently privileges the interests and perceptions of men over those of women. In part, however, this situation occurs because the privileging is expressed through pictures of tortious behavior that accord with the experiences of men, at least as they are perceived by the dominant view of male and female roles. Being punched is the sort of injury easily understood by men; being verbally abused is less frequently encountered by them and, according to the traditional view of the stoic male, less easily understood as seriously injurious. Therefore, the ordinary abuses women suffer in everyday life—being verbally harassed by construction workers, having suggestive remarks made about their bodies—simply don't fit the picture of a tort.

The second kind of picture that we see in *O'Brien* is the picture we might characterize as individualism. What does the court see going on in the world in general? This court sees a picture entirely consistent with everything we know about the law of the period, the period of classical legal thought. We

6. JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, *THE TORTS PROCESS* 16 (3d ed. 1988).

have a world of isolated individuals, each of whom may act as he chooses, so long as he (and the "he" is really powerful here) does not invade the sphere of personal autonomy and integrity of another; the picture often used to express this social vision is the picture of the market. So we start out with the presumption that the physician and the victim are somehow separate, and the physician can do anything so long as he doesn't violate the victim's rights. There is, of course, an alternative picture: the notion of relationship described in Professor Shalleck's paper, the world in which people start out not with rights against each other, but responsibilities towards each other, often embodied in the picture of the family. Here that picture would suggest that the physician should take greater care for the situation of the victim.

III. THEMES AND ARGUMENTS

A third element of legal reasoning includes the themes that flow throughout legal argument and the forms in which they are typically expressed. There are some general issues which run throughout the law, and we see the courts using them, explicitly or implicitly, over and over in familiar ways. These themes and forms of argument are the basis for what we ordinarily think of as "policy argument."

The court obviously is concerned about the reasonableness of the physician's action. Underlying that concern is a theme of autonomy. If the court was to develop this theme, it might talk about the necessity of protecting the physician's freedom of action, because protecting freedom of action encourages people to engage in socially productive behavior. People should not have to fear that they are going to be subject to legal liability or suffer some other terrible consequence for doing reasonable acts in everyday life.

A first difficulty with this argument is that it ignores the victim's concern for autonomy—the autonomy not to be vaccinated, the autonomy not to suffer this kind of indignity. A second difficulty is that the physician's interest in autonomy is met by the victim's interest in security—the security of her person. And these difficulties multiply the more the argument continues. We use themes and argumentative moves of this sort constantly, as if they had independent validity. However, we seldom understand the way that they relate to each other, and the extent to which they are inconsistent and contradictory.

IV. LEGAL PROCESS

Finally, the fourth element of legal reasoning is that it is not exclusively an intellectual process; instead, it is a social process situated in what we ordinarily think of as the legal process. Even if we are willing to take into account a broad range of considerations in deciding these cases, we know that the way the legal process works sometimes structures how much and in what

manner we take those facts and things into account. We know this, but very often we forget it, or at least put it aside in discussions of cases as doctrine, as we would discuss *O'Brien* in a first-year torts course. Consider two aspects of the legal process: access to lawyers and lawyers' professional training and orientation.

As Professor Shalleck discusses, *O'Brien* is a puzzling case in terms of how it came to court. It is not clear how serious a physical injury is involved, so the amount of damages to be gained may be small, especially discounted by the risk of loss where the outcome is so unpredictable. Further, the case arises out of the immigrant community in the 1890s in Boston, and the bar that served that community was still undeveloped. Yet this case comes to court and is litigated to the highest court in the jurisdiction. We would expect that there are many, many cases like this which never appeared in the courts. The structure of the legal profession, the economics of the legal profession, and the nature of what lawyers think of as contestable claims have a great deal to do with the possibilities for opening legal discourse discussed in the other papers in this symposium.

A second limiting dimension of the legal process is that even assuming a would-be plaintiff finds a lawyer, she still finds a *lawyer*. That is, lawyers typically are trained in certain ways, so that they see problems in certain ways. Most fundamentally, lawyers' perceptions of problems are shaped by the doctrine, pictures, themes, and arguments discussed above. Having seen the problems in these ways, the lawyers then tell certain stories about them. They tell these stories if they are good lawyers in part because they recognize who their audiences are. In many cases lawyers have two audiences: they have a lay audience (the jury) and a professional audience (the judge). They have to find a way of telling the story that will bring out the kind of reality that is talked about, but will fit the constraints of what the judge will allow the jury to hear. Thus it is hardly surprising that *O'Brien's* story was submerged in the legal process and only now is retold by Professor Banks.

In short, I applaud the effort to open up our understanding of cases such as *O'Brien* to other voices, but while we are doing that, we also need to focus on the process of legal reasoning itself, as a mode of discourse and as a product of the legal process in which it is situated. Without that additional focus, we will find it difficult to open ourselves fully to different voices and new approaches, and difficult to teach our students the three things that we ought to be teaching them.

First, we ought to teach students an understanding of what the law is and the way it works. Yet an understanding of the law based on doctrine or policy as it usually is presented is fundamentally misleading. "The way law works"—law as a practice among lawyers and judges and others in the world—depends much more heavily on the privileging of certain stories, on the structure of legal discourse, and on the context of the legal process than it does on doctrine or policy as those are usually conceived and presented.

Second, we ought to teach our students that law is a realm of moral discourse. Ordinarily, we flip our students back and forth between the two poles of certainty and cynicism; either the law is fixed or the law is meaningless. In fact, we are somewhere in the middle, and opening up the possibilities of different interests and different moral positions on these issues empowers our students as moral agents.

Third, we ought to train our students to be lawyers. Good lawyers understand both the manipulability of facts (and the limits on manipulation) and the constraints and structures that they have to employ as good lawyers to achieve desirable results for their clients.

