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Book Review: The Logic of Choice, by G. Gottlieb Galt; Consequences of Utilitarianism, by D. H. Hodgson

Paul Weiler
Osgoode Hall Law School of York University

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Organization of American States, while Professor Dupuy describes the interplay of the United States, the Organization of American States and the United Nations in the Dominican crisis, primarily from a factual standpoint, but emphasizing the competition that appeared to exist among these three parties. Perhaps the paper that will have the widest appeal of all, and that because of its political overtones and not its legal importance, is that by Dr. Isoart on the legal position of the United States in Vietnam. In his view the Geneva Accords brought an end to the war which began in 1946, and the war in which the United States is involved he regards as an international conflict between the two Vietnamese Republics, with the Democratic Republic of Vietnam as the aggressor, although he emphasizes that the United States refuses to accord to the authorities in Hanoi any title which would suggest that they constitute a state or a government. He is highly aware of the political issues involved, placing the situation squarely in its setting as part of the struggle between the United States and China. Dr. Isoart draws attention to the three contentions of the United States: (i) South Vietnam is the victim of external aggression, (ii) the United States is assisting in its legitimate defence, and (iii) the United States seeks nothing but a peaceful solution of the conflict. By and large he is not so much concerned with estimating the validity of the American contentions as explaining the basis on which they are put forward, and his final conclusion is political in the extreme. Given the postures of the North and the United States in 1966 "Les positions semblent bien irréductibles".

For anyone interested in the French attitude towards international law and what French writers consider important issues of that legal system, the books under review provide an excellent guide.

L. C. GREEN*

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One of the key problems in modern jurisprudence is the role of legal values in judicial decision-making and their compatibility with judicial concern for social values. Each of these books presents helpful insights into the precise nature of the issue and the manner in which it might be resolved. However, they deal with

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*L. C. Green, of the Department of Political Science, University of Alberta, Edmonton.
only pieces of the puzzle and legal philosophy still has a long way to go in finding some satisfactory answers.

The jurisprudential issue is particularly exacerbated at the present time because judicial decisions involve choices about human conduct which require a selection between competing values. Modern epistemology suggests that such choices must be irrational at their very roots. Hence a dichotomy appears established. If a judge wants to be rational, scientific and objective, his decision must be based on purely (and narrowly) legal grounds. If a judge wishes to be concerned with the wider policy implications of what he is doing, his reasoning and his decision becomes personal, subjective, non-communicable, and irrational. Recent efforts of legal philosophers have been directed at closing this gap, at suggesting that a viable middle way is possible.

Gottlieb has set himself the task of showing how reasoning with rules can be denominated "rational". In accordance with recent Anglo-American philosophy he rejects the idea that all forms of reasoning must conform to one univocal concept of rationality. Hence, legal reasoning need not be condemned as irrational simply because it has been amply demonstrated to fall short of the ideals of quasi-mathematical deduction. It is commonly held now that there are a plurality of logics, each with different standards of rationality, dependent on the field of inquiry in which they are used. Individual conclusions are judged by the internal logic appropriate to the area, which itself is justified by general notions of rationality. Gottlieb is concerned with formulating a logic of choice according to rules, relevant to the fields of law, morality, and so on.

The most important facet about the logic of reasoning with rules is that the latter do not express statements of fact, capable of being true or false. Rather rules guide decisions about action, they warrant inferences which are required or obligatory, where there can be a choice of alternatives. Components of rules include (1) a statement of the circumstances in which the rule is applicable, (2) the type of decisions which ought or may or must be made, and (3) the type of inference contemplated (permissive, obligatory, or prohibitory).

All this is relatively "old-hat" in terms of modern philosophical logic. Gottlieb's special contribution is his formulation of, and concentration on, a key problem in the application of rules. This is the appropriate type of correspondence between the protasis of a rule (the general statement of its circumstantial facts) and the relevant facets of the actual situation. Because rules are generalizations, and because there is a logical gap between a general statement and a concrete situation, there can never be total correspondence. Yet the relationship cannot be allowed to deteriorate
into irrelevance either, as sometimes happens in the case of "mechanical" decision-making. Legal rules are intended to regulate the human, social activities into which they are inserted, to settle disputes and channel conduct within a context that has great, non-legal significance.

Using the example of a rule which prohibits vehicles going into a park, and a situation where a person drove his car into a park to take an injured person to the hospital, Gottlieb argues for a wider kind of rationality in determining the "material" facts to which the rule must be applied. He asserts that rules should not be taken as determinative of judgment. Rather they are guides in a process of reasoning which warrants an inference about the proper decision. The jump from statement of a general rule to a concrete decision requires an act of personal judgment which is informed by a conception of the purpose of the rule. Rules are always designed to achieve certain ends-in-view and these are the main standards for assessing the materiality of facts that fall outside the protasis of the rule. In interpreting, elaborating, and reformulating a rule, the adjudicator's task should not be conceived of as a search for a meaning somehow inhering in a rule or statute. Rules are devices designed to guide inferences in making concrete choices. Hence it is more appropriate to conceive of the decision-maker's task as making a reasonable choice in the light of what the relevant rules and their aims authorize.

Gottlieb uses his theory of rule-guided choices to discuss very capably certain permanent problems of jurisprudence. He deals with the problem of the proliferation of purposes in interpreting legal rules, the debate between legal positivism and natural law about the necessity of moral limitations on the rule of recognition, and the problem of the judicial role in constitutional adjudication. In these discussions there are many tantalizing hints thrown out about the obvious gap in his account. Yet he never does come firmly to grips with this problem. Gottlieb has given an account of how judges should reason with rules and, so far as it goes, I agree with it. However, he has not shown why judges should use rules at all. He would not convince a policy-oriented theorist who says judges should not be "guided" by rules in their decisions at all. If he did attempt to show why reasoning under the authority of rules is more rational than decision-making without them (in appropriate cases), then he would have to answer the legal positivist who would claim that accomplishment of these objectives demands a different logic than that propounded by Gottlieb (in particular, a non-purposive logic).

Professor Hodgson's book is devoted, in part, to answering the first of these questions. His inquiry is principally concerned with an argument against the logical tenability of a utilitarian form of
ethics. He purports to demonstrate that the acceptance of a utilitarian system of ethical choice is inconsistent with such social practices as truth-telling or promising. These institutions depend on an accumulated degree of trust, confidence, and expectation that the truth will be told, or a promise will be kept, whatever be the estimate of the consequences at the time for action. He then argues, convincingly, that an ability to rely on a person keeping his promises or telling the truth is far more useful than the consistent application of utilitarianism.

Of far more interest to lawyers is his comparison of the relative utilities of a utilitarian justification of judicial decisions and the common law system of justification. Two forms of utilitarianism can be distinguished, act and rule utilitarianism. The first would require the judge to justify his decision by inquiring whether his order would have better consequences than the alternatives available. This has the inevitable disutility of precluding the good consequences that depend on expectations of certain forms of conduct.

For instance, a system of punishment is justified mainly by its deterrent effects. Deterrence, however, is possible only if the actors rationally believe it will follow convictions. If the judge is an “act-utilitarian”, he will punish the defendant only if he believes that this has the best consequences on balance. Since punishment has an obvious bad effect on the defendant, this justification can only be the maintenance of the system of deterrence. However, deterrence depends on the expectation of the actor that the judge will believe the actor expects punishment. But the actor will expect punishment only if he believes the judge will feel he expects it, that is, the actor believes that the judge believes the actor expects it. Because the argument is lost in an infinite vicious circle, punishment can never be rationally justified.

The only way these expectations can be maintained is for judges to act on an avowed non-utilitarian criterion or rule. What if judges believe that following rules has utility and justify their decisions by rules, but use only those rules which are justified by the best general consequences? The difficulty is the uncertainty as to which rules will have the best consequences, especially in a rapidly-changing society. Actors will not, at the time they act, be able to predict what rules will be believed best at the time their conduct might be disputed and litigated. This is unaffected by the fact that many cases go to court because of uncertainty in the relevant law. Still more disputes are settled out of court and infinitely more situations never become disputed because of certainty about the rules that would be applied. If the presence of a case in court were to be taken as an index of the uncertainty of the prevailing rules, such that they could be ignored by a court
looking at “policy” considerations, then anyone who was relatively worse off under a rule would have an incentive to get into court and have it changed.

Much more debatable is Hodgson’s rejection of the thesis that the good consequences of predictability can themselves be taken into account in judicial decision-making and weighed against the substantive gains that might be achieved if an existing rule were overturned. Hodgson turns the same vicious circle argument against this variant of rule-utilitarianism. The virtues of predictability depend on an expectation that judges will respect it. However, a utilitarian judge will justify his decisions only in terms of consequences. The good consequence of predictability, which can be achieved only if the expectations exist, will be sought only if judges believe it is possible. However, judges can only rationally believe this is possible if the actors’ expectations do exist. But, as the judges know, these expectations can exist only if the actors believe the judge will feel they exist, because only then will the judge take them into account as a good consequence. This vicious circle renders illogical any attempt to balance the good consequences of over-ruling against their effects on the certainty in the law because the latter could not rationally exist.

I do not believe this argument tells against a much more sophisticated version of judicial activism. I would agree with Hodgson’s conclusions that substantive consequences should not be the controlling factor in judicial decision-making. Procedural or legal values should have an independent weight in the calculus of decisions. Such legal values include predictability but go well beyond it. The maintenance of a viable legal order and the appropriate role of adjudication within it may, in the long run, prove far more important than any short-term substantive gains we may realize within it.

When judges do respect the restraints imposed by a legal order, society gains by the channelling of conduct to avoid disputes, the settlement of disputes without litigation, the increased efficiency of courts in directing their minds to those issues which do need their authoritative disposition, the fairness of equality of results for litigants in equal positions, and the impersonality and consequent legitimacy which is perceived in judicial decisions. It is important to note, though, that these are not the only values that can be achieved in adjudication and that the social results of the rules that are used cannot be forgotten. Moreover, the secondary rules, or rules of recognition, which afford authoritative status to the primary rules of law, should not be applied in a mechanical, unthinking fashion. They have their own ends-in-view, the attainment of the various legal or institutional values of which the above are examples. As Gottlieb suggests, they should
be applied in a way which intelligently achieves these purposes in fact.

For instance, the distinction between the *ratio deciden
di* and the *obiter* dictum has as its function the separation of the authorita-
tive rules established by a judicial opinion from the other state-
ments which are of persuasive value only. Two purposes seem to
be the object of this device. First, it confines the law-making
powers of courts within limits that are most acceptable in a
democracy. Second, it enhances the substantive quality of the law
they create by capitalizing on the fact that judicial law-making
always operates in a concrete situation within which can be seen
the real implications of what a court is doing. Instead of trying to
devise a mechanical rule differentiating *ratio* from *obiter*, we
should recognize that all judge-formulated rules vary along a
spectrum from less to more persuasive to substantially authorita-
tive. The decision as to where a particular rule-proposition in an
opinion fits should be made in the light of the purposes of the
distinction and their implications for the instant problem.

The purposes we seek to achieve through authoritative legal
devices have more or less weight in different circumstances. Taking
the “reckonability” of the legal rules as an example, it is obvious
that in some areas (property, contract, tax) it is more important
than in others (evidence, negligence). It is less obvious, but
equally true, that in some areas predictability is enhanced, rather
than lessened, by the overturning of an out-dated legal rule. No
one would dispute, either, that the substantive gains to be achieved
from creating new legal rules can vary widely. I suggest that courts
should be able to make an informed judgment about whether these
substantive gains are worth the cost (if any) to the legal values
involved.

Nor do I think such a process is necessarily self-defeating, in
the light of the Hodgson argument. You will remember that he
asserted that a rational, utilitarian judge could not include the
consequences as to the predictability of the law in his calculus of
the consequences of overruling. The good consequences of pre-
dictability presupposed citizen expectation of judicial adherence to
old rules, the citizen expectations of adherence presupposed a
belief that judges would feel that the consequences of their own
adherence would be good, but judges would believe this only if
these expectations actually did obtain. Since they would only obtain
if the citizens believed the judges believed they would obtain, a
never-ending vicious circle is set up.

I suggest that a rational judge would make the judgment that
it is desirable that legal values (such as predictability) have great
moment in certain areas. The jurisprudential assumptions of the
judiciary would be known and could be shared by citizens (or
their lawyers). At the time of action, if it is important to know the relevant legal rules, the lawyers can make a rational judgment about the rule that would be applied by the courts if a litigated dispute arose. They could participate vicariously in the process of reasoning the courts would undergo because they can know beforehand the standards they would apply. As Gottlieb suggests, even in areas where no rational ordering of values can be demonstrated, the court can operate according to a pre-established commitment to priorities found in the constitution, statutory development, legal principles, and community mores.

How should judicial reasoning operate? Courts should not start by looking at the individual case and its equities, or even the individual proposed rule and its consequences. Rather, they should be prepared to act in accordance with the existing rule and principles, presuming that what has been done before should continue, for reasons of efficiency, incrementalism, and so on. The onus should be placed on the person wanting a change to show a clear case for it. Although this is necessary, it is not sufficient. The substantive gains must be weighed against the procedural costs. An understanding can be developed about when it is appropriate to overrule decisions in different areas of the law and lawyers, in planning their clients’ actions, can make a rational judgment about which are the dangerous issues in the law to be avoided.

To return to the questions left unanswered by Gottlieb, the reason why decisions according to rules are “rational” is because only in this way can legal values be achieved. The reason why a purposive interpretation of decisions, and a process of judicial development and innovation in the law, is “rational” is because, in this way, the best mix of institutional and substantive values can be achieved. I agree with Hodgson that such a system of judicial justification is not rule-utilitarianism. But it is not his preferred system of common law justification either and, I submit, is better than both of these.

Paul Weiler*

*Paul Weiler, of Osgoode Hall Law School, York University, Toronto.