

## Logical Method and Law<sup>†</sup>

John Dewey

Human conduct, broadly viewed, falls into two sorts: Particular cases overlap, but the difference is discernible on any large scale consideration of conduct.

[1] Sometimes human beings act with a minimum of foresight, without examination of what they are doing and of probable consequences. They act not upon deliberation but from routine, instinct, the direct pressure of appetite, or a blind 'hunch'. It would be a mistake to suppose that such behavior is always inefficient or unsuccessful. When we do not like it, we condemn it as capricious, arbitrary, careless, negligent. But in other cases, we praise the marvellous rectitude of instinct or intuition; we are inclined to accept the offhand appraisal of an expert in preference to elaborately calculated conclusions of a man who is ill-informed. There is the old story of the layman who was appointed to a position in India where he would have to pass in his official capacity on various matters in controversy between natives. Upon consulting a legal friend, he was told to use his common-sense and announce his decisions firmly; in the majority of cases his natural decision as to what was fair and reasonable would suffice. But, his friend added: "Never try to give reasons, for they will usually be wrong."

[2] In the other sort of case, action follows upon a decision, and the decision is the outcome of inquiry, comparison of alternatives, weighing of facts; deliberation or thinking has intervened. Considerations which have weight in reaching the conclusion as to what is to be done, or which are employed to justify it when it is questioned, are called 'reasons'. If they are stated in sufficiently general terms they are 'principles'. When the operation is formulated in a compact way, the decision is called a *conclusion*, and the considerations which led up to it are called the *premises*.

Decisions of the first type may be reasonable: that is, they may be adapted to good results; those of the second type are reasoned or rational, increasingly

so, in the degree of care and thoroughness with which inquiry has been conducted and the order in which connections have been established between the considerations dealt with.

Now I define logical theory as an account of the procedures followed in reaching decisions of the second type, in those cases in which subsequent experience shows that they were the best which could have been used under the conditions. This definition would be questioned by many authorities, and it is only fair to say that it does not represent the orthodox or the prevailing view. But it is stated at the outset so that the reader may be aware of the conception of logic which underlies the following discussion. If we take an objection which will be brought against this conception by adherents of the traditional notion, it will serve to clarify its meaning. It will be said that the definition restricts thinking to the processes antecedent to making a decision or a deliberate choice; and, thereby, in confining logical procedure to practical matters, fails to take even a glance at those cases in which true logical method is best exemplified: namely, scientific, especially mathematical, subjects.

A partial answer to this objection is that the especial topic of our present discussion is logical method in legal reasoning and judicial decision, and that such cases at least are similar in general type to decisions made by engineers, merchants, physicians, bankers, etc., in the pursuit of their callings. In law we are certainly concerned with the necessity of settling upon a course of action to be pursued, giving judgment of one sort or another in favor of adoption of one mode of conduct and against another. But the scope of the position taken will appear more clearly if we do not content ourselves with this *ad hoc* reply.

If we consider the procedure of the mathematician or of any man of science, as it concretely occurs, instead of considering simply the relations of consistent implication which subsist between the propositions in which his finally approved conclu-

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sions are set forth, we find that he, as well as an intelligent farmer or business man or physician, is constantly engaged in making decisions; and that in order to make them wisely he summons before his mental gaze various considerations, and accepts and rejects them with a view to making his decision as rational as possible. The concrete subject with which he deals, the material he investigates, accepts, rejects, employs in reaching and justifying his decision, is different from that of farmer, lawyer, or merchant, but the course of the operation, the form of the procedure, is similar. The scientific man has the advantage of working under much more narrowly and exactly controlled conditions, with the aid of symbols artfully devised to protect his procedure. For that reason it is natural and proper that we should, in our formal treatises, take operations of this type as standards and models, and should treat ordinary 'practical' reasonings leading up to decisions as to what is to be done as only approximations. But every thinker, as an investigator, mathematician, or physicist as well as 'practical man', thinks in order to determine *his* decisions and conduct – his conduct as a specialized agent working in a carefully delimited field.

It may be replied, of course, that this is an arbitrary notion of logic, and that in reality logic is an affair of the relations and orders of relations which subsist between propositions which constitute the accepted subject-matter of a science; that relations are independent of operations of inquiry and of reaching conclusions or decisions. I shall not stop to try to controvert this position, but shall use it to point the essential difference between it and the position taken in this article. According to the latter, logical systematization with a view to the utmost generality and consistency of propositions is indispensable but is not ultimate. It is an instrumentality, not an end. It is a means of improving, facilitating, clarifying the inquiry that leads up to concrete decisions; primarily that particular inquiry which has just been engaged in, but secondarily, and of greater ultimate importance, other inquiries directed at making other decisions in similar fields. And here at least I may fall back for confirmation upon the special theme of law. It is most important that rules of law should form as coherent generalized logical systems as possible. But these

logical systematizations of law in any field, whether of crime, contracts, or torts, with their reduction of a multitude of decisions to a few general principles that are logically consistent with one another while it may be an end in itself for a particular student, is clearly in last resort subservient to the economical and effective reaching of decisions in particular cases.

It follows that logic is ultimately an empirical and concrete discipline. Men first employ certain ways of investigating, and of collecting, recording and using data in reaching conclusions, in making decisions; they draw inferences and make their checks and tests in various ways. These different ways constitute the empirical raw material of logical theory. The latter thus comes into existence without any conscious thought of logic, just as forms of speech take place without conscious reference to rules of syntax or of rhetorical propriety. But it is gradually learned that some methods which are used work better than others. Some yield conclusions that do not stand the test of further situations; they produce conflicts and confusion; decisions dependent upon them have to be retracted or revised. Other methods are found to yield conclusions which are available in subsequent inquiries as well as confirmed by them. There first occurs a kind of natural selection of the methods which afford the better type of conclusion, better for subsequent usage, just as happens in the development of rules for conducting any art. Afterwards the methods are themselves studied critically. Successful ones are not only selected and collated, but the causes of their effective operation are discovered. Thus logical theory becomes scientific.

The bearing of the conception of logic which is here advanced upon legal thinking and decisions may be brought out by examining the apparent disparity which exists between actual legal development and the strict requirements of logical theory. Justice Holmes has generalized the situation by saying that "the whole outline of the law is the resultant of a conflict at every point between logic and good sense – the one striving to work fiction out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust."<sup>1</sup> This statement he substantiates by a thorough examination of the development of certain legal notions. Upon its surface, such a statement implies a different view of the nature of

<sup>1</sup> *Collected Legal Papers*, p. 50.

logic than that stated. It implies that logic is not the method *of* good sense, that it has as it were a substance and life of its own which conflicts with the requirements of good decisions with respect to concrete subject-matters. The difference, however, is largely verbal. What Justice Holmes terms logic is formal consistency, consistency of concepts with one another irrespective of the consequences of their application to concrete matters-of-fact. We might state the fact by saying that concepts once developed have a kind of intrinsic inertia on their own account; once developed the law of habit applies to them. It is practically economical to use a concept ready at hand rather than to take time and trouble and effort to change it or to devise a new one. The use of prior ready-made and familiar concepts also give rise to a sense of stability, of guarantee against sudden and arbitrary changes of the rules which determine the consequences which legally attend acts. It is the nature of any concept, as it is of any habit to change more slowly than do the concrete circumstances with reference to which it is employed. Experience shows that the relative fixity of concepts affords men with a specious sense of protection, of assurance against the troublesome flux of events. Thus Justice Holmes says, "The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is an illusion."<sup>2</sup> From the view of logical method here set forth, however, the undoubted facts which Justice Holmes has in mind do not concern logic but rather certain tendencies of the human creatures who use logic; tendencies which a sound logic will guard against. For they spring from the momentum of habit once forced, and express the effect of habit upon our feelings of ease and stability – feelings which have little to do with the actual facts of the case.

However this is only part of the story. The rest of the story is brought to light in some other passages of Justice Holmes. "The actual life of the law has not been logic: it has been experience. The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good

deal more to do than the syllogism in determining the rules by which men should be governed."<sup>3</sup> In other words, Justice Holmes is thinking of logic as equivalent with the syllogism, as he is quite entitled to do in accord with the orthodox tradition. From the standpoint of the syllogism as the logical model which was made current by scholasticism there is an antithesis between experience and logic, between logic and good sense. For the philosophy embodied in the formal theory of the syllogism asserted that thought or reason has fixed forms of its own, anterior to and independent of concrete subject-matters, and to which the latter have to be adapted whether or no. This defines the negative aspect of this discussion; and it shows by contrast the need of another kind of logic which shall reduce the influence of habit, and shall facilitate the use of good sense regarding matters of social consequence.

In other words, there are different logics in use. One of these, the one which has had greatest historic currency and exercised greatest influence on legal decisions, is that of the syllogism. To this logic the strictures of Justice Holmes apply in full force. For it purports to be a logic of rigid demonstration, not of search and discovery. It claims to be a logic of fixed forms, rather than of methods of reaching intelligent decisions in concrete situations, or of methods employed in adjusting disputed issues in behalf of the public and enduring interest. Those ignorant of formal logic, the logic of the abstract relations of ready-made conceptions to one another, have at least heard of the standard syllogism: All men are mortal; Socrates is a man; therefore, he is mortal. This is offered as the model of all proof or demonstration. It implies that what we need and must procure is first a fixed general principle, the so-called major premise, such as 'all men are mortal'; then in the second place, a fact which belongs intrinsically and obviously to a class of things to which the general principle applies: Socrates is a man. Then the conclusion automatically follows: Socrates is mortal. According to this model every demonstrative or strictly logical conclusion 'subsumes' a particular under an appropriate universal. It implies the prior and given existence of particulars and universals.

It thus implies that for every possible case which may arise, there is a fixed antecedent rule already at

<sup>2</sup>*Ibid.*, p. 181.

<sup>3</sup>*The Common Law*, p. 1.

hand; that the case in question is either simple and unambiguous, or is resolvable by direct inspection into a collection of simple and indubitable facts, such as, 'Socrates is a man'. It thus tends, when it is accepted, to produce and confirm what Professor Pound has called "mechanical jurisprudence"; it flatters that longing for certainty of which Justice Holmes speaks; it reinforces those inert factors in human nature which make men hug as long as possible any idea which has once gained lodgment in the mind.

In a certain sense it is foolish to criticise the model supplied by the syllogism. The statements made about men and Socrates are obviously true, and the connection between them is undoubted. The trouble is that while the syllogism sets forth the *results* of thinking, it has nothing to do with the *operation* of thinking. Take the case of Socrates being tried before the Athenian citizens, and the thinking which had to be done to reach a decision. Certainly the issue was not whether Socrates was mortal; the point was whether this mortality would or should occur at a specified date and in a specified way. Now that is just what does not and cannot follow from a general principle or a major premise. Again to quote Justice Holmes, "General propositions do not decide concrete cases." No concrete proposition, that is to say one with material dated in time and placed in space, follows from any general statements or from any connection between them.

If we trust to an experimental logic, we find that general principles emerge as statements of generic ways in which it has been found helpful to treat concrete cases. The real force of the proposition that all men are mortal is found in the expectancy tables of insurance companies, which with their accompanying rates show how it is prudent and socially useful to deal with human mortality. The 'universal' stated in the major premise is not outside of and antecedent to particular cases; neither is it a selection of something found in a variety of cases. It is an indication of a single way of treating cases for certain purposes or consequences in spite of their diversity. Hence its meaning and worth are subject to inquiry and revision in view of what happens, what the consequences are, when it is used as a method of treatment.

As a matter of fact, men do not begin thinking with premises. They begin with some complicated and confused case, apparently admitting of altern-

ative modes of treatment and solution. Premises only gradually emerge from analysis of the total situation. The problem is not to draw a conclusion from given premises; that can best be done by a piece of inanimate machinery by fingering a keyboard. The problem is to *find* statements, of general principle and of particular fact, which are worthy to serve as premises. As matter of actual fact, we generally begin with some vague anticipation of a conclusion (or at least of alternative conclusions), and then we look around for principles and data which will substantiate it or which will enable us to choose intelligently between rival conclusions. No lawyer ever thought out the case of a client in terms of the syllogism. He begins with a conclusion which he intends to reach, favorable to his client of course, and then analyzes the facts of the situation to find material out of which to construct a favorable statement of facts, to *form* a minor premise. At the same time he goes over recorded cases to find rules of law employed in cases which can be presented as similar, rules which will substantiate a certain way of looking at and interpreting the facts. And as his acquaintance with rules of law judged applicable widens, he probably alters perspective and emphasis in selection of the facts which are to form his evidential data. And as he learns more of the facts of the case he may modify his selection of rules of law upon which he bases his case.

I do not for a moment set up this procedure as a model of scientific method; it is too precommitted to the establishment of a particular and partisan conclusion to serve as such a model. But it does illustrate, in spite of this deficiency, the particular point which is being made here: namely, that thinking actually sets out from a more or less confused situation, which is vague and ambiguous with respect to the conclusion it indicates, and that the formation of both major premise and minor proceed tentatively and correlatively in the course of analysis of this situation and of prior rules. As soon as acceptable premises are given and of course the judge and jury have eventually to do with their becoming accepted – and the conclusion is also given. In strict logic, the conclusion does not follow from premises; conclusions and premises are two ways of stating the same thing. Thinking may be defined either as a development of premises or development of a conclusion; as far as it is one operation it is the other.

Courts not only reach decisions; they expound them, and the exposition must state justifying reasons. The mental operations therein involved are somewhat different from those involved in arriving at a conclusion. The logic of exposition is different from that of search and inquiry. In the latter, the situation as it exists is more or less doubtful, indeterminate, and problematic with respect to what it signifies. It unfolds itself gradually and is susceptible of dramatic surprise; at all events it has, for the time being, two sides. Exposition implies that a definitive solution is reached, that the situation is now determinate with respect to its legal implication. Its purpose is to set forth grounds for the decision reached so that it will not appear as an arbitrary dictum, and so that it will indicate a rule for dealing with similar cases in the future. It is highly probable that the need of justifying to others conclusions reached and decisions made has been the chief cause of the origin and development of logical operations in the precise sense; of abstraction, generalization, regard for consistency of implications. It is quite conceivable that if no one had ever had to account to others for his decisions, logical operations would never have developed, but men would use exclusively methods of inarticulate intuition and impression, feeling; so that only after considerable experience in accounting for their decisions to others who demanded a reason, or exculpation, and were not satisfied till they got it, did men begin to give an account to themselves of the process of reaching a conclusion in a justified way. However this may be, it is certain that in judicial decisions the only alternative to arbitrary dicta, accepted by the parties to a controversy only because of the authority or prestige of the judge, is a rational statement which formulates grounds and exposes connecting or logical links.

It is at this point that the chief stimulus and temptation to mechanical logic and abstract use of formal concepts come in. Just because the personal element cannot be wholly excluded, while at the same time the decision must assume as nearly as possible an impersonal, objective, rational form, the temptation is to surrender the vital logic which has actually yielded the conclusion and to substitute for it forms of speech which are rigorous in appearance and which give an illusion of certitude.

Another moving force is the undoubted need for the maximum possible of stability and regularity

of expectation in determining courses of conduct. Men need to know the legal consequences which society through the courts will attach to their specific transactions, the liabilities they are assuming, the fruits they may count upon in entering upon a given course of action.

This is a legitimate requirement from the standpoint of the interests of the community and of particular individuals. Enormous confusion has resulted, however, from confusion of *theoretical* certainty and practical certainty. There is a wide gap separating the reasonable proposition that judicial decisions should possess the maximum possible regularity in order to enable persons in planning their conduct to foresee the legal import of their acts, and the absurd because impossible proposition that every decision should flow with formal logical necessity from antecedently known premises. To attain the former result there are required general principles of interpreting cases – rules of law – and procedures of pleading and trying cases which do not alter arbitrarily. But principles of interpretation do not signify rules so rigid that they can be stated once for all and then be literally and mechanically adhered to. For the situations to which they are to be applied do not literally repeat one another in all details, and questions of degree of this factor or that have the chief weight in determining which general rule will be employed to judge the situation in question. A large part of what has been asserted concerning the necessity of absolutely uniform and immutable antecedent rules of law is in effect an attempt to evade the really important issue of finding and employing rules of law, substantive and procedural, which will actually secure to the members of the community a reasonable measure of practical certainty of expectation in framing their courses of conduct. The mechanical ease of the court in disposing of cases and not the actual security of agents is the real cause, for example, of making rules of pleading hard and fast. The result introduces an unnecessary element of gamble into the behavior of those seeking settlement of disputes, while it affords to the judges only that factitious ease and simplicity which is supplied by any routine habit of action. It substitutes a mechanical procedure for the need of analytic thought.

There is of course every reason why rules of law should be as regular and as definite as possible. But the amount and kind of antecedent assurance which

is actually attainable is a matter of fact, not of form. It is large wherever social conditions are pretty uniform, and when industry, commerce, transportation, etc., move in the channels of old customs. It is much less wherever invention is active and when new devices in business and communication bring about new forms of human relationship. Thus the use of power machinery radically modifies the old terms of association of master and servant and fellow servants; rapid transportation brings into general use commercial bills of lading; mass production engenders organization of laborers and collective bargaining; industrial conditions favor concentration of capital. In part legislation endeavors to reshape old rules of law to make them applicable to new conditions. But statutes have never kept up with the variety and subtlety of social change. They cannot at the very best avoid some ambiguity, which is due not only to carelessness but also to the intrinsic impossibility of foreseeing all possible circumstances, since without such foresight definitions must be vague and classifications indeterminate. Hence to claim that old forms are ready at hand that cover every case and that may be applied by formal syllogizing is to pretend to a certainty and regularity which cannot exist in fact. The effect of the pretension is to increase practical uncertainty and social instability. Just because circumstances are really novel and not covered by old rules, it is a gamble which old rule will be declared regulative of a particular case, so that shrewd and enterprising men are encouraged to sail close to the wind and trust to ingenious lawyers to find some rule under which they can get off scot free.

The facts involved in this discussion are commonplace and they are not offered as presenting anything original or novel. What we are concerned with is their bearing upon the logic of judicial decisions. For the implications are more revolutionary than they might at first seem to be. They indicate either that logic must be abandoned or that it must be a logic *relative to consequences rather than to antecedents*, a logic of prediction of probabilities rather than one of deduction of certainties. For the purposes of a logic of inquiry into probable consequences, general principles can only be tools justified by the work they do. They are means of intellectual survey, analysis, and insight into the factors of the situation to be dealt with. Like other tools they must be modified when they are applied to new conditions and new results

have to be achieved. Here is where the great practical evil of the doctrine of immutable and necessary antecedent rules comes in. It sanctifies the old; adherence to it in practise constantly widens the gap between current social conditions and the principles used by the courts. The effect is to breed irritation, disrespect for law, together with virtual alliance between the judiciary and entrenched interests that correspond most nearly to the conditions under which the rules of law were previously laid down.

Failure to recognize that general legal rules and principles are working hypotheses, needing to be constantly tested by the way in which they work out in application to concrete situations, explains the otherwise paradoxical fact that the slogans of the liberalism of one period often become the bulwarks of reaction in a subsequent era. There was a time in the eighteenth century when the great social need was emancipation of industry and trade from a multitude of restrictions which held over from the feudal estate of Europe. Adapted well enough to the localized and fixed conditions of that earlier age, they became hindrances and annoyances as the effects of methods, use of coal and steam, showed themselves. The movement of emancipation expressed itself in principles of liberty in use of property, and freedom of contract, which were embodied in a mass of legal decisions. But the absolutistic logic of rigid syllogistic forms infected these ideas. It was soon forgotten that they were relative to analysis of existing situations in order to secure orderly methods in behalf of economic social welfare. Thus these principles became in turn so rigid as to be almost as socially obstructive as "immutable" feudal laws had been in their day.

That the remarks which have been made, commonplace as they are in themselves, have a profound practical import may also be seen in the present reaction against the individualistic formulae of an older liberalism. The last thirty years has seen an intermittent tendency in the direction of legislation, and to a less extent of judicial decision, towards what is vaguely known as "social justice", toward formulae of a collectivistic character. Now it is quite possible that the newer rules may be needed and useful at a certain juncture, and yet that they may also become harmful and socially obstructive if they are hardened into absolute and fixed antecedent premises. But if they are conceived as tools to be adapted to the conditions in which they are employed rather than

as absolute and intrinsic “principles”, attention will go to the facts of social life, and the rules will not be allowed to engross attention and become absolute truths to be maintained intact at all costs. Otherwise we shall in the end merely have substituted one set of formally absolute and immutable syllogistic premises for another set.

If we recur then to our introductory conception that logic is really a theory about empirical phenomena, subject to growth and improvement like any other empirical discipline, we recur to it with

an added conviction: namely, that the issue is not a purely speculative one, but implies consequences vastly significant for practise. I should indeed not hesitate to assert that the sanctification of ready-made antecedent universal principles as methods of thinking is the chief obstacle to the kind of thinking which is the indispensable prerequisite of steady, secure and intelligent social reforms in general and social advance by means of law in particular. If this be so infiltration into law of a more experimental and flexible logic is a social as well as an intellectual need.