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Impartiality and Legal Reasoning

Catherine Z. Elgin

Abstract
Any viable legal system should respect two principles.

CONSISTENCY: Like cases should be treated alike.

PUBLICITY: Justice must not only be done, it must be seen to be done.

These principles set constraints on the roles that emotions, imagination, and virtues can legitimately play in judicial decisions. I explore the ways emotion imagination and virtue might contribute to judicial decision making without violating the constraints.

Keywords
Impartiality, consistency, publicity, legal reasoning, exemplification, fiction, imagination, connoisseurship, fallibility

I. Requirements

Any viable legal system should respect the following principles:

CONSISTENCY: Like cases should be treated alike.

PUBLICITY: Justice must not only be done, it must be seen to be done.

CONSISTENCY is a logical principle; it is not peculiar to the law or to even to practical reason. It applies in science, journalism, football, and ethics, as well as law. In ethics, it emerges as a principle of fairness; to treat relevantly similar cases differently would be unfair. In law, it is a principle of justice; to treat relevantly similar cases differently would be unjust. PUBLICITY is a principle of transparency. In a legal setting, it is not enough that like cases actually be treated alike, it should be manifest that they are treated alike. Otherwise, those who lose their cases have no grounds for confidence that they were treated justly.

This of course is hideously vague. I have said nothing about what makes two cases alike in such a way that they should be treated alike. Every two cases are alike in some respects and different in others. To render the principles capable of implementation requires specifying which similarities and differences are relevant. Thus the law specifies that being alike in being a felony, a theft, a breach of contract, or a late payment are legally relevant, while being alike in being committed by a member of a particular race, gender, or sexual orientation are not. To

render the liberties and constraints the law underwrites acceptable further requires making it clear why the similarities and differences it recognizes are relevant.

Impersonal Judgment

The two principles push in the direction of a rule-based conception of the law. They suggest that our legislative goal should be to frame articulate, satisfiable, publicly justifiable rules and articulate, satisfiable, publicly justifiable penalties for failing to abide by them. These rules might be accompanied by a list of acceptable exemptions and a list of acceptable excuses for failing to comply with them. Further refinements are apt to be wanted. We might want to recognize that for some infractions there are different degrees of failure – that going five miles per hour above the speed limit is not relevantly the same as going 30 miles per hour above the speed limit, that children should be subject to different penalties than adults who commit the same infraction, that first offenders should be subject to different penalties than repeated offenders. Whatever the nuances, CONSISTENCY and PUBLICITY apply. If, for example, there is a milder penalty for a first offense, it applies to everyone convicted of a first offense, not just to likable defendants. This should be manifest to all involved. The idea is that we could spell out exactly what is required or forbidden, and then apply the rules automatically.

That would make the law impersonal – indeed, practically mechanical. When we devise an impersonal system, we off-load deliberation and judgment onto rules and procedures. Under such a system, there is little if any room for discretion. To the extent that legislation can do this, it straightforwardly satisfies CONSISTENCY. This does not make things easier. For a good deal of imagination is required in framing the requisite laws. If we want a system where the application of the laws is virtually automatic, legislators need to decide in advance where various lines are to be drawn. They need to imagine circumstances where the law, as framed, would yield a decision that strikes them as unjust, unwarranted, or unworkable. Suppose they frame a law with a mandatory one-year sentence for anyone found in possession of an unlicensed hand gun. Then it applies to the nun who found a gun in the park and promptly brought it to the police station. During the interval between the time she found it and the moment she turned it in, she was in possession of an unlicensed gun. Clearly the legislators did not intend to jail such civic-minded people, but the law as written would apply to her. To frame a just law requires carving out the proper exceptions.

Another worry concerns how the law is applied. In 18th century England, farmers were required by law to pay a certain number of bushels of grain to the lord who owned the land they farmed. That seems sort of legal requirement that impersonal rules could accommodate. You owe the lord 17 bushels, you pay him 17 bushels; otherwise you are in breach of the law. But 'everybody knew that grain could be packed more densely by pouring it from a greater height'.[1] Even if poured from the same height, if one pours gently, the basket will contain less grain than if one pours with a heavier hand. Thus rules for determining whether grain had been properly poured had to be introduced as well. Then they needed rules for telling whether the pouring rules had

1 Porter (1995), 24.

been properly followed. And so on. It is evident that we embark on a dangerous regress, if we restrict our legal resources to the formulation and application of impersonal rules.

Problems of implementation can also undercut systems that seek to be wholly impersonal. Suppose the law mandates that only children who reside in a particular town are eligible to attend the town's public schools. Whether homeless children who live in cars currently parked on the twon's streets count as living in the town may be uncertain. The law as written seems to deliver no verdict on this case. We can neither foresee nor regiment everything that would be required. We cannot formulate rules that are sufficiently nuanced to draw all the distinctions that a just and efficacious legal system needs. As Amaya says, 'It is the ever present possibility of exceptions and the impossibility of reducing the understanding of what such exceptions would be – and what makes them exceptions – to rules or principles that renders any system of general formulations (and, more generally, any decision procedure) unfit to capture a good choice'.[2] Unless judicial discretion is an ineliminable element of the application of law, we will have to live with unforeseen but manifestly unjust findings.

Virtuous Judgments

This makes a virtue theoretic model of legal reasoning seem attractive. If judicial discretion is mandatory, then the moral/intellectual character of the judge is important. Amaya maintains that the virtuous judge, an Aristotelian phronemos, is one who sees how the particulars of the case bear on how it should be decided.[3] He detects the salient factors and assigns them appropriate weights. He uses his finely tuned perceptions and emotions to see the case aright. She suggests, following Wallace,[4] that 'virtue may be understood as a form of 'connoisseurship' for the connoisseur or expert has precisely the ability to discern case-specific reasons for choice by means of perception, and can, in every case, provide a reason for her choice'.[5] She accepts McDowell's characterization of virtuous perception[6] as 'one in which some aspect of the situation is seen as constituting a reason for acting in some way; this reason is apprehended, not as outweighing or overriding any reason for acting in other ways which would otherwise be constituted by other aspects of the situation . . . but as silencing them.'[7]

Amaya recognizes that her account of proper legal reasoning is schematic. More needs to be done. As it stands, however, her position strikes me as problematic. It threatens to violate both CONSISTENCY and PUBLICITY. The threat to PUBLICITY comes from the model of connoisseurship. Connoisseurs can often discern what ordinary audience members cannot. In the arts, this is not a problem. When Roger Fry says that Cézanne's *Le Compotier* is about the construction of pictorial mass out of gradations in color[8] and we do not understand why he thinks so, we simply conclude that he does not see the picture the way we do. We do not immediately conclude that

2 Amaya (2011), 125.
3 See Aristotle (1998).
4 See Wallace (2006).
5 Amaya (2011), 129.
6 See McDowell (1998).
7 Amaya (2011), 128.
8 Fry (1952), 13.

we are wrong to see it as we do. When Clement Greenberg disagrees with Fry and insists that *Le Compotier* is concerned with the ineluctable flatness of the picture plane,[9] that causes no problems either. Each connoisseur can, we assume, point to features of the painting that support his reading. We may never appreciate what he is getting at. Or we may appreciate what he is saying, but disagree. Moreover, we do not insist that the dispute be resolved. Although reasons can be given, disagreements in the arts may be interminable.[10] Because responses to works of art are susceptible to refinement without limit, there is no expectation that consensus can or should be reached. But if neither ordinary people nor other legal connoisseurs can see what a judge is getting at, or having seen it, can remain unpersuaded of its legal validity, the situation is different; the relevant parties cannot appreciate why the judge ruled as he did. The loser in a case has no reason to think that he was treated fairly. Reliance on finely honed perception thus seems to cut sharply against PUBLICITY.

CONSISTENCY is also threatened. If two seemingly similar cases result in different verdicts, there should be some available reason why. It will not do for a judge to rest on his exquisitely tuned judicial sensibility and assure us that he can detect a relevant distinction that is beyond our ken. The idea that competing considerations should be silenced strikes me as untenable. Rather, the judge should be in a position to explain why the considerations that seem to favor a different ruling are overridden or outweighed. Amaya recognizes the difficulty. She says, 'The perceptual capacity may be construed as a sensibility that enables the virtuous judge to appreciate the reasons which obtain in a particular case and provide the corresponding justification for her decision'.[11] The difficulty is that neither perception nor emotion in itself provides reasons. If you see a camel in broad daylight in the middle of your visual field, you can give no justification for your claim to see it beyond the fact that you see it, and the fact that you can recognize a camel when you see one.

Amaya's position introduces subjectivity into legal decision-making. Even if the subjectivity is the subjectivity of a phronimos, there is a problem. One reason is that we want a *system* of law that is stable across time. Even Ruth Bader Ginsburg is a phronimos, we have no assurance that her successor will be one too. Moreover, even a virtuous judge is fallible. That being so, a judge's rulings and reasoning should be subject to review. They should be publicly available and consist of accessible reasons. We would not and should not trust her assurance that she used her exquisitely refined, virtuous sensibility, which enabled her to see aspects of the case that were imperceptible to the rest of us. Arguably, if she is a phronimos, justice would be done via her rulings. But unless she could provide reasons that others could understand and countenance, justice would not be seen to be done. In the passage I quoted above, Amaya said that in the legal case the connoisseur 'can provide, in every case, a justification for her choice' of case-specific reasons.[12] But it is not clear how the refined-perception model of discernment, particularly combined with silencing, will allow for that.

Nor is it clear that a case-by-case justification would ensure or even favor consistency across cases. Case-specificity invites bias. There are always differences between cases. If the judge is

9 Greenberg (1961), 103
10 See Kant (1987).
11 Amaya (2011), 129.
12 Ibid.

given free rein, he may treat features as salient in one case but not in another, when in fact the cases are relevantly alike. In the US, it is, for example, common (but clearly unjust) that white, middle-class rapists get more lenient sentences than impoverished black rapists, even when we control for the quality of their defense attorneys. We should be very skeptical if a judge justifies the divergence by saying that she can simply see that the black defendant is more dangerous than the white one, and at least equally skeptical if she does so by saying that she is more afraid of the black defendant than of the white one. If reasons are narrowly case-specific, there are bound to be differences she can point to. The issue is whether they are differences that ought to matter. Amaya might reasonably respond that such a judge would not be virtuous. That may be true, but harder cases lurk nearby. She speaks of a judge with sufficient discernment to recognize the rights of a pregnant women in a legal circumstance where they are not clear.[13] (Perhaps it is not obvious whether the relevant disability law applies to someone whose disability is temporary.) She takes such a judge to be virtuous. But suppose the judge ruled against the woman. Suppose he concluded that although it is reasonable to expect businesses to make accommodations for employees who are permanently disabled, the expense of accommodating the temporarily disabled would put an unreasonable burden on the employer. One can make up a fairly compelling case that might go either way. The idea that the virtuous judge can simply balance the competing concerns by looking at case specific details is perhaps a bit optimistic. Whichever way he rules, the loser would want to know why.

Impartial Judgment

We seem caught in a bind. An impersonal, wholly rule-based approach to legal reasoning is too impoverished to serve. A personal, entirely virtue-based approach threatens to undermine both CONSISTENCY and PUBLICITY. Is the situation hopeless? I suggest not. Impersonality is achieved by off-loading judgment onto rules, standards, and techniques whose application is automatic. That requires setting limits on precision and on the number of dimensions and the fineness of distinctions to be considered. This means, of course, that legislators had to exercise a good deal of judgment of setting the standards, formulating the rules, and devising the techniques that produced the results. In an effort to make life easy for judges, we make it hard for legislators. Even if this sometimes works, there are areas where we are unwilling or unable to off-load judgment completely. We want or need to preserve the possibility of more complicated, fine-grained descriptions and assessments than available mechanical procedures afford. At the same time, though, we do not want to open the floodgates to idiosyncrasy, bias, and chance.

We thus devise methods that are impartial but not impersonal.[14] When a method is impartial but not impersonal, people – qualified people – apply it and generate results. What makes the method impartial is that it does not matter who in particular those qualified people are. Such methods ground their findings in interrater agreement, where the criterion for acceptability is agreement with other members of the community rather than answering to some wholly agent-independent standard.

13 Ibid.
14 See Elgin (2017), especially chapter 7.

An example of an impartial procedure is the judging of competitive diving. Each dive is to be assessed along multiple dimensions which are spelled out in advance. To that extent it is rule-based. Along each of these dimensions a dive can be done well or badly. And what it is to do well or badly in a given dimension is also spelled out in advance. These specifications remove a good deal of opportunity for idiosyncrasy and bias. The judge is required to attend to the extension of the diver's legs. He is not permitted to give or take away points for the grace with which the diver climbs the ladder. But further, more nuanced assessments need to be made within the domains marked out by the explicit standards. For example, the rules specify that entry to the water should be vertical, with the diver's body straight and her toes pointed. When these conditions are not met, diving judges are instructed to deduct points. How many points is left to each judge's discretion. There the judge is instructed to use her own judgment.[15] That discretion is needed is no surprise. Individual judges have to decide just how far from the specified ideal a given dive deviated in each of several respects. Although the rules tell them what dimensions to attend to, they cannot not tell them precisely how to assess or balance divergences from the ideal.

The diving judge is trained. She is not just some passer-by randomly recruited off the street. And the way she was trained involves having her initial verdicts calibrated against those of someone who is already an expert judge. The newly appointed diving judge acquires the tacit knowledge that guides more experienced judges. Even this is not the end of the story, though. A diving competition has multiple judges – typically 7 or 9 – and to obtain the overall rating for a dive, they drop the highest and lowest scores and average the rest. So although a diving judge's personal, finely tuned assessment has a role to play, but it is not an overriding role. If her assessment is out of sync with the assessments of her peers, it will simply be dropped.

In the US, we do not conduct legal trials before multiple judges. But findings are subject to appeal. So each judge knows that her findings must respect the laws and precedents, and must do so in a way that is discernible and justifiable to other judges. Appellate courts issue rulings that articulate the reasons for their decisions, again grounding them in laws and precedents. Judicial discretion therefore is constrained by COHERENCE and PUBLICITY.

Although agents are ineliminably involved in the assessment, in impartial proceedings, we have devised methods to control for bias and idiosyncrasy. They may take the form of rules. If so, assessors need criteria to determine how to tell whether the rules have been followed, and what margin of error there is for following the rules. They may also take the form of exemplars. Rather than an articulate or articulable rule, we may rely on instances that exemplify the features we seek to match. This is the role of precedents. They show how other judges have applied the law in the past, thereby exemplifying the features that previous judges thought should be salient. The novice diving judge who knows the rules is well served by being shown clear cases. He would see what a perfect dive is supposed to look like. He might be presented with foils that show what should count as a definite mismatch. This would enable him to figure out how far an instance can deviate from the exemplar without being defective. There will, no doubt, be border-line cases. But with suitable exemplars and foils, the range of uncertainty is narrowed. Similarly in the legal case. A precedent shows what counts as a clear case of tax evasion and how it

15 USA Diving (2013), 14.

compares with a clear case of mere tax avoidance. The precedents give direction to judicial attunement. The more relevant precedents she is aware of, the more accurately fine tuned her capacity to discern the difference gets. This guides the judge in making further rulings. The suggestion then is that the articulate laws, procedural rules, and precedents constitute an impartial system that satisfy COHERENCE and PUBLICITY.

Virtue, Emotion, and Imagination

What room does this leave for virtue, emotion, and imagination in legal reasoning? No one would deny that judges should be virtuous. The thinking of such a judge may be informed by emotion and enhanced by imagination. A good judge may us her imagination to reconfigure the facts of the case – to see a new pattern in them, or to imagine different motivational structures underlying the events. It may enable her to see how the residency law for public school attendance can be extrapolated to apply to the unanticipated case of the children living in a car. She may use her imagination to extend her conception of what qualifies as someone's home. Her emotions may be in play, guiding her to discern features she would otherwise miss. She may thereby bring aspects of the situation to the fore and appreciate their significance in ways that she otherwise would not.

Imagination and empathy can, however, be a two-edged sword, as is vividly illustrated in the 2015 Stanford Rape Case.[16] Brock Turner, a wealthy, white, Stanford University swim team member was convicted of sexually assaulting an inebriated, unconscious young woman. Judge Aaron Peresky, himself a well-to-do, white, former Stanford swimmer, sentenced Turner to a mere six-month term in the county jail, followed by three years probation. He noted that Turner had ruined his once promising future, and seemed to think that given that fact, a longer sentence would be unduly punitive. Judge Perskey evidently strongly empathized with the perpetrator, with whom he identified, but seemed to have little empathy for the victim. Turner's sentence was widely seen as a miscarriage of justice.

The question is whether it is possible to recruit the emotions in judicial deliberation without inviting such partiality. Martha Nussbaum holds that it is.[17] She suggests that the emotional dexterity of readers of novels provides a good model for judicial flexibility. She recognizes that what one might call egocentric emotions might be problematic. If an agent has an investment in the outcome, her emotions might be swayed. This is one reason why a judge ought not be a judge in his own case. But, Nussbaum notes, the emotions of fiction readers are detached. Readers have no personal investment in the situations they react to. They display the profile that Adam Smith characterized as judicious spectator.[18] A reader of fiction is adept at shifting stance, taking up the perspectives of the different characters and experiencing (in a detached way) the emotions proper to each perspective.[19] Thus, a judiciously spectatorial judge would not so strongly identify emotionally with one party that he blinded himself to the claims of the other.

16 I am grateful to Mfundo Redebe for this example.
17 See Nussbaum (1995).
18 See Smith (1976).
19 Nussbaum (1995), 74-75.

Still, one might wonder what good recruiting the emotions of the judicious spectator does. If the judge's empathy for the victim counterbalances his empathy for the perpetrator, doesn't that leave him in the same state as the mechanical, unfeeling judge? It would, if the function of emotion in judicial reasoning was to tip the scales. Then balancing the scales would give the emotions nothing to do. But this is not the function of emotions in deliberation. Nor should it be. How badly the judge feels for the victim and how much outrage he feels toward the perpetrator should not weigh in his decision. What role can emotions legitimately play?

Elsewhere I have argued that emotions are sources of salience.[20] They highlight features we might otherwise minimize or overlook. Thus, for example, a frightened pedestrian, walking down a dark, lonely street, may become sensitized not just to how dangerous her situation is, but also to the presence or absence of opportunities for, and obstacles to fight or flight that the situation affords. Those opportunities and obstacles were there all along, but at midday, when the sun is shining, the shops are open, and other pedestrians are strolling about, she never noticed them. The same shifts in salience occur through emotions evoked by fiction. When we take up a protagonist's perspective, we become emotionally engaged with her predicament and sensitized to the opportunities and obstacles available to her. We then shift our gaze and do the same for another protagonist. Nussbaum's point is that when we do this in response to a novel, we do it in a detached, non-partisan way.[21]

Emotions disclose; they do not typically confabulate. The features and patterns they disclose are there to be seen, even if we ordinarily overlook them. So if a judge recruits her emotions in deliberating about a case before her she can discern patterns and features she might otherwise miss. If she is a judicious spectator, she can dexterously shift her stance, so that by empathizing with different parties, she can discern features available from multiple points of view. Empathy, moreover, enables her to access other emotions and their deliverances – the fear, rage, greed, indifference, or whatever, that the subjects feel, and access the patterns and features of the situation that these emotions afford.

In some cases, she will discern fine-grained features that are ordinarily invisible – how offensive what passes for sexual banter might be to someone relentlessly subject to it in the workplace.[22] In other cases, insight might come from moving to a coarser grain – noticing that if we ignore sexual orientation, there is no relevant difference between heterosexual and homosexual couples who seek to marry. In yet others, it may be a matter of restructuring the realm, being able to see, for example, how a long-term victim of domestic violence might construe killing her sleeping husband as self-defense, even though he is, at that very moment, not hitting her.

Imagination, emotion, and virtue can be valuable traits in a judge because they enable her to reconfigure the facts of a case, highlighting aspects that may otherwise be occluded. But her ruling should satisfy COHERENCE and PUBLICITY, so her thinking should be constrained by the bounds that they set. If she wants to point to fine-grained considerations that others have failed to notice, she needs to make them epistemically accessible to others, show why they are relevant and why they should be salient. In her ruling, she cannot simply silence seemingly salient and

20 See Elgin (1996, 2007).
21 See Nussbaum (1995).
22 Ibid. 104-111.

relevant considerations, so she is ill-advised to do so in her thinking. She should be able to explain why they are irrelevant, overridden, or outweighed, if they are. She should be able to show why the considerations she relies on are consonant with relevant laws and precedents. Her ruling is subject to judicial review, so it must consist of considerations that are susceptible of review – considerations that are accessible to others.[23] Even a wise judge is fallible, so she should reason and articulate her reasons in such a way that if mistakes are made they can be discovered and corrected. This may mean that she has to sacrifice some measure of the exquisite, fine-grained sensibility of the connoisseur, recognize her fallibility, and orient her thinking to the public domain.

23 There may be cases where the demands of justice per se diverge from the demands of PUBLICITY, so PUBLICITY is not a necessary condition on a just ruling. But divergences from PUBLICITY should be rare, since unless PUBLICITY is generally respected the people will lack reason to trust the judicial system. And even if legally valid considerations preclude full publicity (as, for example, might be the case if state secrets had to be admitted as evidence in an espionage trial), there should be a range of competent assessors to whom the considerations on which the decision is based are made public (for example, other jurists with appropriate security clearances). I thank Benjamin Zipursky for noting this limitation on PUBLICITY.

References

Articles and Books

Amaya, A (2011) 'Virtue and Reason in Law' in Maksimilian Del Mar (ed), *New Waves in Philosophy of Law* (New York, Palgrave) 123-143.

Aristotle (1998) *Nicomachean Ethics* (Oxford, Oxford University Press).

Elgin, C (1996) *Considered Judgment* (Princeton, Princeton University Press).

Elgin, C (2007). 'Emotion and Understanding' in Georg Brun, Uvli Dogouglu, Dominique Kunzle (eds.) *Epistemology and Emotions* (London, Ashgate) 33-50.

Elgin, C (2017). *True Enough* (Cambridge MA, MIT Press).

Fry, R (1952) *Cézanne* (London, Hogarth).

Greenberg, C (1961) *Art and Culture* (Boston, Beacon).

Kant, I (1987) *Critique of Judgment* (Indianapolis, Hackett).

McDowell, J (1998) *Mind, Value, and Reality* (Cambridge MA: Harvard University Press).

Nussbaum, M (1995) *Poetic Justice* (Boston, Beacon Press).

Porter, T (1995) *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life.* (Princeton, Princeton University Press).

Smith, A (1976) *Theory of Moral Sentiments* (Indianapolis, Liberty Press).

U.S.A. Diving (2013) *Official Technical Rules 2015-2017* <usadiving.org>.

Wallace, R. (2006) *Normativity and the Will* (New York: Oxford University Press).