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Incorrect Judicial Decisions

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Title: Incorrect Judicial Decisions
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Supreme Court decisions, especially those that touch on controversial social matters, are frequent targets of criticism. Several recent cases are good examples. (As of this writing, these cases are not yet formally published. The opinions were found at <http://supct.law.cornell.edu/supct/>).

- In *United States v. Playboy* (decided May 22, 2000) the court examined whether §505 of the Telecommunications Act of 1996, which requires cable television operators primarily dedicated to sexually oriented programming to either block those channels, or limit their transmission to hours when children are unlikely to be viewing. The Court struck down §505 as violating the First Amendment because the law failed to employ the least restrictive means for addressing the problem. Some parents have decried this decision as a bad policy for children.
- In *Sternberg v. Carhart* (decided June 28, 2000) the Court struck down a Nebraska law criminalizing “partial birth abortions” because the law placed an undue burden on the woman seeking an abortion by limiting her options to less safe procedures and because the law provided no exception for cases where the health of the mother was at risk. Pro-life groups have condemned this decision as court-sanctioned infanticide.
- In *Boy Scouts of America v. Dale* (decided June 28, 2000) the Court held that applying New Jersey’s public accommodations law to require the Boy Scouts to admit James Dale, a scoutmaster whose membership in the Scouts was rescinded when he came out as a homosexual, violates the Boy Scouts’ First Amendment right of association. Civil rights groups say that the decision endorses discrimination.

However such criticisms do not in themselves assert that the justices in these cases misinterpreted or misapplied law. A judicial decision could propound bad policy, or give legal protection to immoral activities, or endorse discrimination—and still correctly apply existing laws. I want here to investigate the narrow charge that a judicial decision got the law wrong. This is usually the central fault alleged in a dissenting opinion.

- Justice Scalia, for example, in his dissent to *Playboy*, tells us that the court in several cases—mainly *Ginzburg v. U.S.* (1966) and *Miller v. California* (1972)—has already “recognized that commercial entities which engage in ‘the sordid business of pandering’ by ‘deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed,’ engage in constitutionally unprotected behavior.” He then argues, “Since the Government is entirely free to *block* [the Playboy channel’s] transmissions, it may certainly take the less drastic step of dictating how, and during what times, they may occur.”
- Justice Kennedy, dissenting in *Sternberg*, claims that the Court’s decision is inconsistent with *Planned Parenthood of Southeastern Pa. v. Casey* (1992) which insured that “the political processes of the State are not to be foreclosed from enacting laws to promote the life of the

unborn and to ensure respect for all human life and its potential.” Nebraska’s legislation, according to Justice Kennedy, “is well within the State’s competence to enact.”

- In his dissent in *Dale*, Justice Stevens wrote, “In fact, until today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State’s antidiscrimination law. To the contrary, we have squarely held that a State’s antidiscrimination law does not violate a group’s right to associate simply because the law conflicts with that group’s exclusionary membership policy.”

When is a judicial decision wrong? Different theories of jurisprudence offer different answers, of course. I’ll look at the answers given by the theories of H. L. A. Hart and Ronald Dworkin, though as will be seen, which theory of jurisprudence we use to determine a wrong answer is immaterial to my result.

The law in a community, on H. L. A. Hart’s theory, is the set of rules picked out by that community’s “rules of recognition” which is supposed to distinguish rules of law from rules of etiquette, moral rules, religious rules, and so on (Hart 1994, Ch. VI). A simple legal community might have as its rule of recognition something like: *Laws are the commands inscribed on the stone tablets that sit in the tabernacle*. A more complex legal community such as ours would direct us to acts of legislatures, constitutions, and judicial decisions. But picking out certain rules as rules of law (rather than, say, rules of etiquette or morality) is only the beginning.

Rules of law such as statutes and constitutional provisions, on Hart’s account, are “open-textured,” which means they have a “determined” or “settled” core of meaning (clear and settled points of law), but also an “indeterminate” or “penumbral” area (Hart 1994, Ch. VII). Cases fall into the penumbra when they have some things in common with the core or settled instances, but lack some standard feature. Judges in penumbral cases have the authority to legislate to settle the issues. They are to decide “by choosing between the competing interests in the way which best satisfies us” (Hart 1994, 129). A decision in a penumbral case can’t in general be criticized as *legally* incorrect since it makes new law, hence can’t misapply existing law. Of course the judge could make a ruling that resolves the conflicting interests at issue in an unsatisfying way, for example by giving less important interests more weight over graver ones. This would *make* bad law (because it would give judicial backing to bad policy), but would not *misapply* existing law. It would not be an incorrect decision in the narrow sense.

Legal correctness for Hart is limited to the clear or settled areas of law. “At any given moment judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the center to supply standards of correct judicial decision. These are regarded by the courts as something which they are not free to disregard in the exercise of the authority to make those decisions which cannot be challenged within the system” (Hart 1994, 145). A decision that contradicts clear, settled law is thereby legally incorrect.

But speaking simply of “settled law” does not thereby establish a clear standard of legal correctness. In a sense, the totality of court decisions that bears on any case under consideration is settled law. Nearly everyone would agree with this, but controversy remains. What settled law governs *Sternberg*, for example? Is it that the state of Nebraska has, in *Casey*, already been given the right to outlaw certain types of abortion, as the dissent claims? Or that, given *Roe v. Wade* (1973), Nebraska’s law is potentially too restrictive, as the majority alleges? Both are

plausible enough descriptions of settled law. How are we to settle what is settled law? Hart's claim that legally correct decision must conform to settled law, then, needs further adumbration.

Ronald Dworkin compares a body of legal decisions bearing on a certain case with a chain novel. Both need interpretations of exactly what has been done in order to continue; and for each there is a best interpretation. Dworkin describes the British case of *McLoughlin v. O'Brian* (1983): "Mrs. McLoughlin's husband and four children were injured in an automobile accident in England at about 4 p.m. on October 19, 1973. She heard about the accident from a neighbor at about 6 p.m. and went immediately to the hospital, where she learned that her daughter was dead and saw the serious condition of her husband and other children. She suffered nervous shock and later sued the defendant driver, whose negligence had caused the accident ... for compensation for her emotional injuries" (Dworkin 1982, 24). Earlier decisions had awarded compensation for emotional damage to people who saw injury to a close relative, though they had been on the scene of the accident or had arrived within minutes. A wife had won compensation for emotional injury after she came upon the body of her husband after his fatal accident. Another man was allowed to recover when he suffered emotional shock trying to rescue victims of a train accident (to whom he was not related).

The precedents available for the *McLoughlin* judges are, Dworkin tells us, like the elements of a chain novel. Suppose *A Christmas Carol* comes to you incomplete, stopping, say, just after the visitation by the last spirit. You are given the task of completing the story. You might have to decide if the character of Scrooge is inherently evil or corrupted by capitalism and redeemable, and depending on your answer to *that* you would continue the story one way rather than another. This is not an arbitrary decision. As Dworkin describes it, "Your assignment is to make of the text the best it can be ..." (Dworkin 1982, 233). To which end you must consider carefully all the strands of the story as told thus far. This is not supposed to depend on what *you* think of human nature, but on what has been written already. So too the judge in *McLoughlin* is to take precedent and make from it "an interpretation that both fits and justifies what has gone before, so far as that is possible." Dworkin sets out six interpretations that should be considered by the judge in deciding whether Mrs. McLoughlin should receive damages from the negligent driver for her emotional shock at the hospital (Dworkin 1982, 240 ff.). One interpretation, for example, focuses on the overall cost of compensation in the long run. Another on what could be "reasonably foreseen." A third interpretation insists on physical presence at the accident scene, and a fourth disregards physical presence. And so on. In selecting the best interpretation the judge is concerned with what "fits the legal record better on the whole."

Now there are difficulties with Dworkin's view. In particular there is no clear-cut test for "fit." Controversies about what law has been settled will inevitably resurface as disagreements about what interpretation fits the legal record best. However, Dworkin at least gives us a framework in which to describe correct judicial decisions. If there is a best interpretation of the legal record, which includes both precedent and statute or constitutional clause, then that interpretation will state what settled law is; and a judge deciding a present case must base his decision on that interpretation. A judicial decision is correct only if it best continues the best interpretation of the legal record. Let's tentatively call this a theory of truth for legal decisions. (Such a theory is, of course, distinct from the epistemological issue of whether we can know which interpretation is best.)

What, though, of incorrect judicial decisions? Let me address the case of *Bowers v. Hardwick* (1986). *Bowers* probed the constitutionality of a Georgia statute that prohibited

consensual sodomy. Though the statute had been declared unconstitutional by the Court of Appeals for the Eleventh Circuit, the state of Georgia appealed, and was ultimately vindicated by the U.S. Supreme Court in a 5-4 decision. This seems to me a legal error. The *Bowers* decision contradicts settled law because it misreads the precedents on individual privacy from *Griswold v. Connecticut* (1965), which held that married people have a constitutional right to use contraceptive devices; from *Eisenstadt v. Baird* (1972), which extended the right in *Griswold* to unmarried people; and from *Roe v. Wade* (1973), which held constitutionally protected a woman's right to terminate her pregnancy at least through the first "trimester." Those three cases are construed by the *Bowers* court as finding in the constitution "a fundamental individual right to decide whether or not to beget or bear a child." The Georgia statute under review in *Bowers* is upheld because the court found "no connection between family, marriage, or procreation ... and homosexual sodomy."

But Americans *always* had the right to decide whether or not to bear a child. At no time in the U.S. were there ever laws restricting such a right, as there seem to have been in modern China. Certainly no such laws were ever under review in *Griswold*, *Eisenstadt*, or *Roe*. The issue in the *Griswold* line of cases is not whether there is a right to decide to bear a child but whether there is a right *to have sex* without begetting children. Those cases find that there is and that no law should interfere with that right. Since sodomy, homosexual or heterosexual, is sex without procreation, a decision against the Georgia statute is clearly supported by precedent. Hence *Bowers* was wrongly decided.

And yet can I speak *truly* when I say that the *Bowers* court made the wrong decision of law? I've just claimed that

(A) *Bowers* was an incorrect judgment regarding U.S. law.

Now (A) says that the Supreme Court made an incorrect judgment regarding the law on privacy. If (A) were true, it would logically follow that

(B) *Bowers* is not U.S. law.

But the latter is false. *Bowers*, for better or worse, *is* law in America. A clear and central rule of recognition of American law is that judicial decisions are legally binding—are law—unless overturned. If (B) is false, then (A) must be false, for (A) implies (B) and a valid inference cannot have a true premise with a false conclusion. That is, it is false that *Bowers* was an incorrect judgment regarding U.S. law.

This discordant result follows no matter what criterion one uses to determine the correctness of the judicial decision and no matter what judicial decision is being denounced. To switch political hats for a moment, consider the case that originalists seem to regard as a kind of constitutional original sin, *Griswold v. Wade*. Originalists decry the Warren Court's construal of the Bill of Rights in such a way as to belie the intentions of the ratifiers, who could never have intended any of the first ten amendments, singly or in concert, to forbid a state from criminalizing contraception. (See, for example, Bork 1990, 95 ff.) Yet even when the originalist claims that *Griswold* was incorrectly decided, his claim logically implies that *Griswold* is not law, which is, again, a manifest falsehood; and hence it cannot be true that *Griswold* was incorrectly decided.

There are, to be sure, other ways of claiming incorrectness in law:

(A1) Were the *Bowers* court to have read precedent correctly, it would have decided against the state of Georgia.

(A2) The Supreme Court had stronger legal grounds to rule against the state of Georgia in *Bowers* than to find in its favor and thus should have done so.

(A3) In the ideal realm of correct legal decisions, Georgia loses *Bowers*.

None of (A1) through (A3) implies (B). However, none of them is *exactly* what is meant by (A), which is descriptive in nature. (A) purports to state a legal fact—more accurately a mistake of legal fact. (A1) through (A3) are either predictive in nature or normative. It is a statement of the form of (A), however, that is generally intended when a court decision is criticized as incorrectly decided. When one criticizes a judicial decision in the narrow sense one tries to assert that the decision misstated what the law is. The surprising conclusion is that such a judgment can't in general be true. At least we non-judges can't state a truth by stating (A). The sole exception is when a later or higher court overturns a previous decision (as *Brown* overturned *Plessy*). Here the claim that an earlier decision is incorrect is made true by the fact that the later court's pronouncement is concurrently a falsification of the contrary decision and a true statement regarding what the (new) law is.

Some may be taken aback by the conclusion that we (non-judges) can't assert truly that a certain decision is incorrectly decided as a matter of law, and will think that there must be a misstep in the argument from (A) to (B). But that inference is valid. Consider the following case. A committee of nine schoolchildren is given the task of deciding " $16 \times 5/8$," and they come up with the incorrect answer "12." Now that equation is wrongly decided as a matter of ordinary arithmetic, and given that it is wrongly decided, it follows—does it not?—that " $16 \times 5/8 = 12$ " is *not* a truth of ordinary arithmetic.

(C) " $16 \times 5/8 = 12$ " is incorrectly decided as a matter of ordinary arithmetic.

(D) Therefore, " $16 \times 5/8 = 12$ " is not a truth of ordinary arithmetic.

(C) logically entails (D) and furthermore arrives at a true conclusion. Now the *logic* of the inference from (C) to (D) and the inference from (A) to (B) are exactly parallel; both, that is, are valid inferences. The difference is in the truth of the arguments' respective conclusions. " $16 \times 5/8 = 12$ " really is not an arithmetic truth—that is, conclusion (D) is true. But conclusion (B) is false. *Bowers* really is law, and hence (A) can't be true.

It may be thought that the purported falsity of (B) depends on a faulty conception of law. Is it sufficient for a judgment by a duly authorized court to be law, or must the decision additionally meet some other criterion, such as being a correct reading of precedent? Clearly, it does not describe our legal system to say that a judicial decision counts as law only if it *correctly* understands precedent. While there is a possible rule of recognition that requires correct reading of precedent for a judicial decision to count as law, a community that adopted such a rule would thereby lose the advantages of having a final court of appeal. Its disputes would simply start up again. Such a community would perpetually live in a legal limbo in which disagreement raged over the correct reading of precedent. Nothing would ever get settled.

I had tentatively called Dworkin's a theory of truth for judicial decisions. However, it can't really be the right theory of *truth* for judicial decisions if a decision that fails to meet its criteria

turns out to be true—because we boomerang back from the falsehood of propositions like (B) to the falsehood of propositions like (A). This result would befall *any* theory—some variety of originalism, for example—that construed itself as a theory of truth for judicial decisions. Any such theory, then, should really be thought of as a guide for judges to reach decisions. But it is a guide not in the way that the rules of arithmetic are a guide to getting the right answer in sums. The rules of arithmetic offer instructions on how to get the right answer as well as form a criterion of correctness (of truth) for what the right answer is. Rather, Dworkin’s theory (or the originalist’s or ...) is a guide in the sense that a road map is a guide. A road map can show you how to get to a certain place, but it doesn’t set a standard for the “correctness” of your destination.

Appendix

My critical remarks against *Bowers* developed out of conversations with Mr. Michael McFerren. Also, it has been brought to my attention by Mr. Wesley Person that the Supreme Court of Georgia has overturned that state’s sodomy statute “insofar as it criminalizes the performance of private, non-commercial acts of sexual intimacy between persons legally able to consent ‘manifestly infringes upon a constitutional provision’ ... which guarantees to the citizens of Georgia the right of privacy.” *Powell v. State* No. S98A0755 (Nov. 23, 1998). The case appealed was a conviction of heterosexual sodomy. While *Powell* makes the holding in *Bowers* moot in Georgia, it doesn’t overturn *Bowers* which concerns the U.S. Constitution, and the sixteen or so states that still criminalize sodomy can take legal succor from *Bowers*.

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