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Resilience in Law—Managing Rule, Resistance and Reform in Decision-Making

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Abstract

Decision-making in legal matters rests on the application of rules of law, process and a "feeling" or "guess" based on suspicion and confirmation. Discretion, legitimacy and judgment are often mediated by "juridical intuition" which is not to say intuition is the result of divination but is the product of the ability to understand something without the need for deeper reasoning with the possibility always existing that conclusions reached will be reinforced after rational critical deliberation. Intuitive thinking makes legal decision-making stronger not less or more legitimate.

Keywords: Decision-making, Inarticulable and Opaque, Formulaic process, Reliabilism, Humanitarianism

Introduction

Decision-making in legal matters rests on the application of rules of law, process and a "feeling" or "guess" based on suspicion and confirmation. Discretion, legitimacy and judgment are often mediated by "juridical intuition" which is not to say intuition is the result of divination but is the product of the ability to understand something without the need for deeper reasoning with the possibility always existing that conclusions reached will be reinforced after rational critical deliberation. Intuitive thinking makes legal decision-making stronger not less or more legitimate. No matter the legal theory or analytic approach taken, be it originating in Classicist, Formalist or Realist thought; deciding legal cases is a serious responsibility with heavy consequence and while it can be a process "inarticulable and opaque" even to learned hand decision makers who exercise sound judgment not reducible to "mechanical or formulaic process", it often reaches acceptable results because it relies on tool kit instruments of practical wisdom, abstract logic, accumulated experience and reflection while avoiding biasing factors that diminish legitimacy (Wright, 2006, pp. 1420-1422). The Classicist, Formalist and Realist methods of legal analysis and application provide foundational basis for producing a more accurate perspective on democratic processes of decision-making in social systems. Still, certain decision-making forms are more appropriate for particular facts and circumstances compared with others. Judgment and decision-making are legitimate when reason and logic elucidate a clear foundational pathway for resolving disputes. The questions arise—what is the proper role of judgment formulation in the absence of reliance on conscious thought to facilitate "good" decisions? is theorizing from generalities to specific conclusions a more reliable approach than the opposite? will reliance on intuition for good legal decision-making generate appropriate results? is conscious inferential reasoning the only reliable method for accurate decision-making? and does intuition provide sufficient justification for suspending individual liberties in exigency? Good decision-making is characterized as justifiable results perceived to be based in fairness, efficiency, transparency and public interest with perception being determined after some measure of discourse transpires.

Methods of Inquiry

Exceptional circumstances demand reliabilism to justify the process through which a decision was reached even as "many apparently false, even abhorrent moral beliefs were formed carefully and are thus thought to be justified even though the belief-formation process may not count as reliable" (Wright, 2006, p. 1409, n. 162, critiquing reliabilism). Methods of inquiry are used to justify conclusions reached. They are comparable in the sense that each follows the scientific method of observing, repeating and identifying predictable patterns for more effective results in choices made; but they are distinct in that each indicate schools of thought with differing views on the best suited "theoretical bases and practical methods" to achieve positive social results and avoid negative/ antisocial results (Canals, 1960, p. 541). Case law books, replete with prior decisions, constitute a body of law that provides

guidance for present action. The process of making "good" decisions follows from application of rational-critical analysis to facts and rules of law understood in context. It is interesting how certain historical theories of legal analysis and judicial decision-making collide in effort to better understand legal decision-making in all its complexity. History shows "the attendant evils of inequality, inquisition and ignorance had been avoided or minimized" through the enlightened humanitarianism expressed in legal pronouncements that set down in writing those tenets that apply with clarity to be universally comprehensible (Canals, 1960, p. 542). However, this approach requires judicial discretion be stifled, strictly applying the laws as promulgated by the legislature (Canals, 1960, p. 542), even if this method were imperfect. Under this view of sociological jurisprudence, judicial discretion was to be minimized, in part because the codes of law represented "distillation of the right reason of the ancients" and had to be protected from tampering reducing the role of judges to handlers of scientific application of observable fact to corresponding results (Canals, 1960, p. 543). This touches on the reliability of resolution of legal disputes in terms of the efficacy of decision-making processes. The legal model of explaining how judges make decisions requires reimagining incorporating and resolving the challenges presented in the attitudinal and strategic models. The disciplines of political science and sociology that view law as a form of social control and judges as social engineers will have exceeded the limits of proper influence on legal development from the Classical perspective. Law is a social system. It is more accurate to view law as a co-equal partner to economy, polity and society than a tool to be manipulated. There is more to legal thinking than the methodology of Classicist, or for that matter, Formalist and Realist expressions presented. Under the classical view, the computation of results "is almost mathematical" and compared with the positivist approach, it is objective but the ultimate resource in society is people associating for betterment, and so, an approach to judicial decision-making that accounts for subjective idiosyncrasy is essential. The positivist approach holds the individual plays "the major role in the judicial tragedy, therefore his personalty should be the main concern" in developing a theory of social or legal responsibility that accounts for individualization (Canals, 1960, p. 545); although the fact remains that individuals comprise society and none can exist successfully in modern terms beyond its reach. Individuals are emotional, social beings concerned with safety, satisfaction of wants and needs and rely upon others for resources even as they offer nurture and sustenance. Individuals understand the world experientially. No man is an island onto himself. Learning is primarily based on experience of association with others and individuals continually seek the opportunity to grow and learn by associating with others who have achieved a measure of prior-acquired knowledge in fields of related interest and can serve as mentors or guides. The purpose of sharing knowledge is to improve understanding even as persons in civil society constitute economy, state and society.

The Synthesis of Sustainability

Once a thesis is presented with its antithesis it soon becomes clear that the natural order will gravitate toward acting upon both to produce a synthesis that accounts for the varying degrees of influence important to each under distinct facts and circumstances to permit a measure of discretion used to reconcile diverse approaches for better results and to undo it. This activity points to a certain fluidity or flexibility in legal thinking that enables the sharing of values and identity of methods needed to achieve resource conservation and recovery, climate management and environmental protection generally; but the rights of persons, risk in markets and impact on social relations equally accounted for as required to achieve statis in circular fashion. Interestingly, it is posited that courts sometimes work cases in both directions meaning beginning with evidence to elucidate conclusions and beginning with tentative conclusions to justify them based on the evidence. Is it possible that legal reasoning "works backward from the result to the rule rather than from the rule to the result"? (Wright, 2006, p. 1414, citing Butcher v Miller at 99, quoting Board of Church Extension v Eads at 917). The tension between human rights and cultural values and economic development arising in legal disputes in the context of governance would justify an analysis that moves in both directions. Securitization appears to be a public good because perception colours reality, interpretations generate results and law mediates the ensuing conflict. The idea or conception of a de-securitization is thinking in reverse representing a turn toward liberty through the unmaking of securitization to restore personal rights that are temporarily lost in a period of crisis when democratic process is suspended by necessity or a sense of urgency. This is where good governance comes into play and so the possibility of "coherentist, multidirectional, web-like judicial reasoning" is certainly realistic (Wright, 2006, pp. 1414-1415). The police power is the ultimate state authority used in taking coercive action against persons to safeguard rule of democracy in civil society. But when is the use of such authority justified and how does one know the threshold for reaching excuse has arrived? Perhaps it makes sense to conclude that "the judge first intuits the right result, and only then applies coherentist methods to confirm, or rationalize, the result" (Wright, 2006, p. 1415, n. 192, referencing Butcher at 99). In crisis, such authority is overruled by the exception. The police power represents the right of the state to take coercive action against individuals restricting liberty to benefit society (Richards, et. al., 1999). So how do the rights and interests of society become juxtaposed to those of individuals, and with what result? A recurring debate concerns how best to balance individual rights against social interests. There is inherent distrust of government and concern with the collective welfare that has made achieving balance particularly difficult. Whether the issue involves quarantining

Individuals suspected of contagion and contact-tracing in a pandemic, limiting rights, imposing restrictions on movement or other logic-based restrictions, public health practice must coexist with political considerations, and liberty and human dignity must be respected. This is where judicial discretion and intuition play a role in dispute resolution. Achieving a social consensus is necessary for peaceful coexistence. This is the definition of consistency and accuracy. Increasing population density, dependence on common sources for food and improvements in transportation have all resulted in enhanced opportunities for the spread of disease and requires careful management to avoid degradation. The ability to manage healthcare under these conditions is dependent on broadening awareness of the legal and scientific basis for public health. The enemy to society must be identified, named and decisions about how to respond to threats arrived at before an effective policy can be established to protect the public. The police power is the core constitutional authority for effective governance in this synthesis of schools of thought to secure safety while promoting progress. Fear is the motivating factor to impose public control over individual liberty and is sometimes warranted. Courts exist to review conflicts among individuals and policy rules and regulations announced by governmental agencies affirming their authority to restrict personal autonomy and the continued legitimacy of the use of state power to protect the public health, safety and welfare. Discretion and judicial intuition about it is often required.

Critical Legal Thinking

Judicial judgment is based on values, statutory or common law purposes, societal or other public policies or individual rights and interests. According to some scholars, "law is vague, internally inconsistent, revisable, or otherwise not amenable to a formal process of neutral application or logical deduction" (Gillman, 2001, pp. 468-469, citing Cardozo, Dewey and other scholars). This understanding of legal decision-making prioritizes personal elements and minimizes doctrinal analysis with a focus on behaviour that is meant to suggest that legal variables are less important, that one need not "worry about the law", that legal reasoning is "no more a science than creative writing" or "finger painting" and what matters most in judicial decision-making are the "attitudes, values or personal policy preferences" of the judges themselves (Gillman, 2001, p. 470). This approach to understanding legal decision-making is based on the premise law is a set of clear determinate rules, which is a formalist conception that rejects a mechanical jurisprudence that explains law as focused on non-legal variables such as sociological, psychological and political factors that control legal decision-making processes. While this approach makes good sense, it trivializes the significance of legal variables in the decision-making process and fails to account for the fact that judicial decision-making typically results in "predictable outcomes from clear rules" (Gillman, 2001, p. 473-474). On review of judicial decision-making results, it appears oftentimes, public authority conflicts and subsumes individual rights. Situational leadership is an effective response to this problematic, encouraging application of the highest and best method suited to the task at hand to resolve conflict. The problem is there are diverse interpretations about what constitutes appropriate means to achieve legitimate ends. Additionally, the means selected should be least drastic possible. Thus, flexible adaptation is necessary to approach resilience and can be guided by utilitarian purpose.

Management to Secure the Public Good

In this age of global pandemic, infectious diseases tap into deep-seated human fears and threaten society itself, not just the well-being of individuals, but this reality is also a metaphor for legal decision-making that constrains individual liberties. In this regard, fear is the enemy. The state has a special duty to protect its citizens from dangerous threats to health and safety. Fear of harm can be appropriated to legitimize protective authority allowing for special legal rights to do whatever is necessary to achieve lawful ends. This duty to protect public health and safety is the police power, which is broad and extensive and that touches not only on traditional public health but also has an impact on environmental considerations as well. In Kansas v Hendricks (1997), the Court held the state may involuntarily confine an individual to prevent threatened commission of future crimes because the individual named presents a danger to others (Richards, et. al., p. 351, citing Jacobson v Massachusetts), which ruling is important because it indicates that constitutional protections of liberty do not provide absolute right to be wholly free from restraint and persons who present a risk of harm to public good may be subject to restraint. In that case the Court found an individual could be forced to submit to vaccination to promote the public good and an individual may be required to sacrifice personal freedoms in exchange for the benefit of citizenship (Richards, 1999, p. 352). Was this case decided using Realist judicial decision-making? Realists seem to suggest judges decide the outcome of a case before "deciding whether the conclusion is, in fact, based on an established legal principle" (Capurso, 1998, p. 5, citing Jerome Frank at 845). According to this view on legal decision-making, a judge reviews the facts and decides how to rule without first analysing the law. After reaching a conclusion, the judge will then "look for existing principles in case law or statutory regulations that support the conclusion" (Capurso, 1998, p. 5). This approach suggests judges rely on "a perspicacious flash termed the 'judicial hunch' [] that makes the jump-spark connection between question and decision" which amounts to a decision by feeling and not

judgment (Capurso, 1998, p. 6, n. 7 citing to Hutcheson at 278. Is this the proper approach to legal decision-making? The question also arises—how best to manage rule and resistance, and if law is necessary to justify policy, can the ends be used to justify the means? Some would say when the greater good depends upon it, the answer to that question is unequivocally yes. Society after-all is the sum of a multitude of parts which in totality is greater than the individual components that constitute its essence and so, protecting the "whole" is the priority. In this understanding of social systems, the parts are legitimately sacrificed to achieve the holistic objective of attaining a greater good even as individual liberties are sacrificed to protect society. The Copenhagen School recognizes this. A social group lacking productivity might benefit from order, rules and clearly defined objectives. A productive social group might benefit society with license of independent thought and action. Where there are complex and unfamiliar tasks involved, greater specificity and guidance is necessary to achieve proper effect. At the same time, available resources dictate the possible methods and approaches that are best applied according to circumstance. In this regard one ought to compare the urgency of a situation with legality, obligation and organizational needs to make policy choices. The "threat" to individual liberty in the concept of "security-as-contingency" is at stake when security is viewed as a proper response to risk. Courts have limited this power, but when politics is framed in exceptionalist terms and security-as-applied consists of declaring existential threats and measures to meet them; what remains is how to achieve survival of the "whole" and at what acceptable individual cost?

Achieving Resilience

Reflection on what is private versus public provides guidance with respect to maintaining freedom, while promoting security. When a state interest appears to require decisions that result in confinement of an individual, that individual has the right to a habeas corpus hearing to have a judge determine whether restrictions on liberty are proper, or not; but in the interest of urgency, this occurs after the confinement, and so the individual remains subject to the possibility of restricted freedoms until his case is heard. This approach is a conservative one, as is the concept of precedent. To what degree is judicial decision-making influenced or constrained by the force of precedent and to what degree should it be so constrained? One of the earliest theories of judicial decision-making is that attributed to Sir William Blackstone who posited that "the duty of a judge is simply to ascertain the law in the situation before the bench and to apply that law to the case" relying on the ability of judges to perceive or discover the eternal, flawless and perpetual laws that originate from divine creation meaning the law is ascertained by a judge but carries with it the weight and force of a divine mandate" (Capurso, 1998, p. 8, citing Blackstone Commentaries, p. 41). Building upon the natural law concept is the Formalist view that rules of law established by precedent or statutory authority are applied to the facts of a case guiding judicial thinking and resulting in a legal decision (Capurso, 1998, p. 9). Formalists conceive of legal decision-making as scientific in nature because it is based on a mathematical formula consisting of facts multiplied by law result in decision and rely on the supposition that the truth will emerge from conflicting testimony and the decision will be accurate based on the independent interpretation of a neutral, disinterested decision-maker (Capurso, 1998, p. 10). For example, while preventing harm to the community is a proper legal standard for restricting individual liberty, benefit to the individual may influence a court concerned with balancing the costs and benefits of state-directed security measures (Richards, et. al., 1999, p. 353-354), and if a decision-maker interprets the facts in such a manner as to suggest the application of law to those facts should favors one or other party, then the decision reached will be accurate. Public health considerations put community interest before individual rights as a matter of public policy. While the health and autonomy of the individual are protected as possible, these remain secondary in a state of emergency. So, a judge might reason under such facts that impositions on individual liberties are justified in the interest of promoting the public good. In democratic civil society, free choice is the preeminent value, but public health concerns elevate community interests above those of any individual because the public health emphasis is on protecting society, while the rights of individuals are based on personal autonomy (secondary to societal survival). Therefore, while public health considerations may be imposed to reject a patient's right to have sole control over his treatment and refuse a necessary treatment to remain free to spread disease; this is permitted to promote the public good. Does a judge voting or writing in support of this approach vote based on precedent or is the judge merely "citing precedent in support of personal preference?" (Gillman, 2001, p. 477). Realists would argue "the facts of a lawsuit are not fixed variables; rather, they are an unknown element, incapable of accurate prediction" and "a rule of law (assuming it exists) can be ignored or preempted at a judge's discretion, and is, therefore, illusory" thus the realist would conclude neither facts nor law are dispositive and rather, the judge's preferences will combine with external factors to result in a judicial determination (Capurso, 1998, p. 10). Is the Realist view accurate or does it even matter? Some would say it does matter because "determining the influence of precedent requires examining the extent to which justices who disagree with a precedent move toward that position in subsequent cases" (Gillman, 2001, p. 477, citing Spaeth and Segal's research design). Gillman (2001) notes that not surprisingly, "the data overall demonstrates that justices who dissent from a precedent-setting case generally maintain their opposition in related cases decided subsequently" (2001, p. 479). This is taken to signify the jury remains out on how disputes are truly resolved.

Strategic and Attitudinal Models

It is suggested that "a legal state of mind does not necessarily mean obedience to conspicuous rules; instead, it means a sense of obligation to make the best decision possible in light of one's general training and sense of professional obligation" (Gillman, 2001, p. 486). In this regard, judges make legal decisions upon sincere belief the decision taken represents their best understanding of what the law requires which runs contrary to the positivist conception of law that holds law is made up of a set of legal rules and when a case cannot be decided by applying the law because the case is not clearly covered by such a rule or none seems appropriate then a judge must reach beyond the law for some other sort of standard to guide him in manufacturing a new legal rule or supplementing an old one (Gillman, 2001, p. 487, citing Dworkin at 17). At issue is the definition of discretion with behavioralists positing "when judges realize that existing rules are indeterminate they exercise discretion in the sense that they are free to proceed in accordance with their idiosyncratic preferences without any sense of obligation to conform their behaviour to a set of authoritative legal standards" or alternatively "the standards an official must apply cannot be applied mechanically but demand the use of judgment" (Gillman, 2001, p. 488, citing Dworkin at 31-33). One way to understand this distinction is by analysing the definition of citizenship. Being a citizen requires members to subordinate individual priorities and even sacrifice them because if a perceived threat is not managed effectively, the community itself may be destroyed (Guillaume & Huysmans). Security relates to contingency insofar as the construct of state as referent object authorizes the executive to act beyond the ordinarily imposed constraints of rule of law, even as the logic of necessity is prioritized over the logics of freedom and deliberation (Guillaume & Huysmans). Securitization is for the good of the order, for the people. While it is true that some in society resist movements that sacrifice personal autonomy, the ultimate objective is to minimize risk of harm to society by promoting stability and progress through order in society. Individuals who accept the social contract believe sacrifice is in their best interest. Social unity in crisis is accomplished by postponing deliberative politics and the freedom to articulate alternative courses of action in exigency due to the necessity of taking a direct and unified action to unite against a common enemy in a precise and deliberative manner. This is the logic of securitization of citizenship, and it signifies identifying the necessary and proper methods for best managing risk in uncertainty. The state is referent object and constancy its purpose. The thesis I propose here is to view securitization understood as both a private and a public interest meaning it is acceptable that in certain situations "normal solutions" are ill-advised, and this is consistent with the logic of seeking resolution of certain problems that require urgent, extreme responses. The focus must be on separating emotion from logic with decision-making rising above emotion. Fear is not a proper motive and as such, "high-risk" problems require urgent, decisive solutions and measured sacrifice. For example, with respect to immigration policy, the individual labelled as "Migrant" or "Other" is not defined as such by law, but rather, is defined as such by society. When immigration is deemed a violation of law, then legal principles are triggered and law responds in accordance with societal preferences by describing the legal nature of the classification status of a social being, and the results that follow from such status. Thus, the individual is sublimated into the social sphere to encapsulate the signification of entry into civil society as a danger or threat that requires de-escalation (Bigo, 2002). The necessary response to such apparent threats is to apply measured, reasonable actions designed to deflect perceived danger to "defend" society even as immigrants who arrive from the beyond are strangers and not necessarily known or understood to automatically pose a risk of harm, therefore the situation "posed" must be analysed anew. Bigo (2002) argues this approach is a political strategy of exercising control through identity but what is interesting about this formulation is the creation of unintended consequences that may follow. I argue exceptionalism is sometimes warranted but is not always necessary and suspending democracy carries with it risk of harm to liberty. Believing, as positivists do, that inarticulate rules allow fundamental value judgments "to flow mechanically and impersonally from the language of the document" (Weiler, 1968, p. 406), to miraculously resolve a dispute, does not account for the fact that perceptions influence decision-making and because reality is truth, based on interpretation, what constitutes reality changes constantly. Thus, genuine threats need to be distinguished from false positives. I argue freedom can lead to innovation and resistance to rule must be analysed for intention. Of course, resistance to effectuate positive, useful reform is beneficial; but resistance for the sole purpose of bringing about change is a mere deflection. The problem is distinguishing what is genuine from what is not. Timing is an important factor for resilience to be achieved. Climate change, development, energy and food security, migratory flows, population and poverty controls all require optimal regulation to achieve socially beneficial results but utility demands that regulation remains subject to adjustment. Thus, the pathway to a better future is paved with a state that defends society and secures safety by actualizing speech in a measured manner. The politics of securitization seeks stability through exclusion of those labelled as a threat. There are two models of the role of judges important in this regard—one being that of "adjudicator" and the other of "policy-maker" with one suggesting a judge

> decides his cases by the somewhat mechanical application of legal rules which he finds established in the legal system [that are] binding on him completely apart from his own judgment as to their fitness of his purpose [and conceives of the

> judge] as the adjudicator of specific, concrete disputes, who disposes of the problems within the latter by elaborating and applying a legal regime to facts, which he finds on the basis of evidence and argument presented to him in an adversary process [and the alternative approach that conceives of judges as policy-makers or political actors who engage in] the creative exercise of [] judgment [avoiding] the mechanical application of rigid, automatic rules [that fail to account for the necessity of legal system collaboration] with other bodies in society in the development and elaboration of the law "as it ought to be" (Weiler, 1968, p. 407-410, 437).

This latter approach is how resilience is achieved. Emancipation is contrasted with risk of harm and threats are constructed for the purpose of being contained by securitization. The real risk is when securitization becomes a tool of power. When securitization is properly applied the language of it can be exercised to signal the need for more efficient deployment of scarce resources to better effect. These actions must be undertaken in ways that will promote health, safety and welfare while limiting restrictions on autonomy. Citizenship is therefore a license to sacrifice autonomy temporarily to safeguard a system that promotes autonomy. A measured balancing act is applied to ensure temporary suspension of rights to achieve the primary goal of securing safety and liberty for the majority. Freedom promotes innovation and knowledge but is dependent on security. Risk promotes innovation and is a tool for effective social relations. Therefore, it must be recognized there is a time and place for exception, particularly when genuine threats to health and safety arise; but these must be appropriately managed and resistance to rule only exercised to secure liberty. Resilience is the product of hard work representing successful adaptation under stress facilitated by flexible regulation that is always subject to review and adjustment. It is by these means that important sociological issues such as climate change, economic development, energy and food security, migration, population control and poverty may effectively be managed, and problems associated with them resolved. While concerns of this nature can never be fully reconciled with conflicting interests and will always remain as significant challenges to human progress, as with certain debilitating illnesses, they can be managed in ways that make them incrementally tolerable.

The Collaborative Role for Law

The adjudication model for legal functionality views the judicial decision-making process as one that is limiting and restrictive rather than creative. What this means is "the creative articulation of new legal rules is limited and incremental [, is] based on a moving background of established legal principles [] related to the dispute-settling focus of courts [and therefore] adoption of [any] new rule must be justified in a reasoned opinion which establishes the probable 'rightness' of the new rule" (Weiler, 1968, p. 437). Political theory recognizes the state consists of security, identity, order, border and fear of the unknown, and this understanding of economy, state and social relations influences governance, control and punishment inasmuch as the state frames relations of power and resistance to rule as it sees fit (Bigo, 2002). The freedom of movement within certain boundaries is an on-going concern because freedom promotes innovative economic development but is associated with a degree of risk to public health, safety and welfare. For example, the current COVID-19 global health crisis pandemic requires managed social distancing to promote public health, but the policy is antithetical to efficient relations of production and personal autonomy. People expect freedom of movement and opportunity to produce as a fundamental human right that permits self-actualization; but during this current health crisis, the flow of people and interactions between them presents a public health risk that must be managed or otherwise contained and restricted in the public interest. To decrease the risk of spreading a contagious disease, the state may lawfully restrict freedom of movement. The Copenhagen School approach to the study of securitization recognizes this to the extent it includes promoting innovative resilience to better manage available resources. All action must further public good. The construct avoids erroneous characterizations of risk. The "speech act" inherent in taking "exceptional measures" is a governance tool of collaboration that is applied to free people from the "dangerous other" by eliminating the risk of harm associated with that other. I elaborate on the Copenhagen School approach to explore alternative methods to resolve social problems using administrative law regulation to identify vulnerabilities, encourage the gathering of resources to effectively address social needs and implement reasonable responses to social problems. I assert each new construct should be understood in the context of speech-acts with the intention of explaining how security challenges may be resolved using risk minimization and adaptation techniques. An interesting question that arises from this approach is whether it is possible to identify a proper distinction between reactive "securitizing moves" on the part of government actors, as opposed to preventive necessary responses. Prevention is a more cost-effective approach than reaction. Society is constituted of economic and social relations and resistance by those who perceive they are disadvantaged can produce conflict. There are sites of undemocratic politics in securitization meaning the politics of exception within which authority speaks and acts absolutely which of course is antithetical to freedom of expression and liberty. In social relations there is always a possibility of resistance to rule. Wishnik

(2010), for example, argues reactive mobilization is a "securitizing move" that runs counter to the preventive risk management strategy needed to successfully address the transmission of contagious, infectious diseases; but even so, Wishnik (2010), nevertheless recognizes the Copenhagen School favours de-securitization as a return to "normalcy" and that characterization factors into the analysis of collaborative technique. Should judges be perceived as political actors who continuously engage in the formulation of policy for society? If so, then accountability becomes a problem in need of resolution. Securitization, when imposed over an extended period, can undermine a citizen's faith in the legitimacy of state action purportedly applied to achieve public good purpose. State actors who govern in ways that impose restrictions that increasingly limit freedom in the name of safety can be said to abuse securitization practice. Urgency applied as an excuse to circumvent the slow deliberative decision-making process of democratic politics is justified in a narrow range of circumstances only. Securitization as a speech-act that narrates a method for survival of the social system, is authoritative to the extent it is believable; but the social system also depends on rational critical debate and elaborated discourse for legitimacy. Security reorders its priorities for social relations in response to fear. Exceptional politics turns to a dangerous undertaking when extraordinary measures are extended beyond limited scope. Securitization suspends usual democratic processes while de-securitization is a means to restore legitimacy. If slow procedures permit contestation, then the speed of urgent security eliminating the possibility of deliberative scrutiny must be short-lived. The solution is to enhance the collegiate character of judicial decision-making.

The Social Character of a Policy-Making Court

How then shall a court determine "preferable solutions to ambiguous problems" in light of "relatively objective (or neutral) rules and principles", and in so doing, is "it necessary or desirable to formalize its proceedings" such that "the collective products of its workings will be effectively accepted by other individuals and groups in society"? (Weiler, 1968, p. 452-453). Clearly acceptance of policy choices or decisions in private cases for that matter is based on legitimization which has historically been dependent on consistency with the rule of law. The securitizing speech-act remains within the framework of democratic politics the "pull" of contestation that works to return the system to normalcy using de-securitizing "moves" associated with preserving liberty when exigency expires (Wishnik, 2010, p. 455). This is conventionally acceptable. Typically, when securitization occurs, it is because risk management failed in some respect, necessitating a forceful reaction. Public health is a matter of social security and the literature on governance provides alternative frameworks for considering health as a national security issue, particularly within the framework of the migration "problem" which in turn identify health, safety and welfare issues of concern often identified or characterized as "threats". The Copenhagen School describes "security" as a threat to the state that essentially robs the state of its ability to govern effectively which is debilitating and then requires a securitizing "speech-act" to restore governing capacity. When this happens, state actors use the "language" of security to respond to perceived urgent threats describing them as "facts" in the interest of efficiency and utility. The referent object may be the state, a community or a class (Bigo, 2002); but the measure of a successful securitization is how the issue is authoritatively transformed into a perceived "existential threat" linked to a shared cultural or social value as fact. This measure of risk of harm is what constitutes the securitization. State actors may downplay a threat or de-securitize an issue, but it is the public perception that controls. The Copenhagen School describes de-securitization as the optimal condition because it implies the end of a state of emergency and "return to normalcy" which is significant because "de-securitization" represents restoration of democracy after a temporary authoritarian suspension in a period of exceptional politics which should end when the necessity for suspension of liberty is ended and order is restored. However, if and when exceptional politics become the norm, and de-securitization is resisted, democratic political systems are at risk and securitizing moves are hijacked for unlawful purpose.

Signaling, Framing and Reassessing Securitization

The primary unresolved problem in a model of judicial policy-making is the matter of compatibility of judicial institutions with democratic or representative government as courts are not typically viewed as representative and certainly do not function as such in due course. Still, some theorists have argued that courts are not "all that undemocratic and able to usurp illegitimate power" and as such, should be viewed "as an integral part of the whole political process which [] is more or less representative" (Weiler, 1968, pp. 467-468, italics removed). Thus, it bears recognition that the notion of accepting the use of the exception as normal or appropriate is itself undemocratic and any issue that can be viewed as a security threat implies an exceptional situation that may require/ condone exclusionary practices. For Wishnik (2010), epidemics are more aptly conceptualized as risks and the practices each state will adopt in response to them are derived from their approach to governance loosely defined. If freedoms are to be preserved, democratic principles must be secured and when safety is prioritized, suspending "normal" processes is understandable for better management of limited, essential resources. Migration has been articulated as a security problem but restrictions on migration are not the equivalent of safety. Conflating

the two is a mistake because security is supposed to function to minimize risk of harm, not enhance it; and there is no generally accepted correlation between increasing risk of crime and migration. Securitization is therefore a useful tool when it highlights threats and applies rational, temporary solutions. It succeeds when it finds support in social relations, but de-securitization can be just as effective. The sociological conception of risk captures non-traditional security challenges associated with administrative efforts to manage it, but state action must always be reasonable. This paper has explored risk in the context of state action designed to promote public good. Intuition as described by Justice Holmes' suggestion "the life of the law [is] experience", and Justice Stewart's phrase "I know it when I see it", referring of course to something taboo, rings true, in terms of suggesting some knowledge comes from "seeing as opposed to thinking" (Wright, 2006, p. 1382). Intuition is itself "inescapable" in the sense that what judges do in their judicial decision-making process is not simply reach and announce a good legal result, but "publicly and articulately" defend, validate or legitimize the judicial result announced to maintain "the stable authority of a presumably sound adjudicatory system"; and so, while intuition may be central to arriving at a judicial outcome, it is equally dependent on "nonintuitionistic or less-centrally intuitionistic techniques" in arriving at and legitimizing the case holding (Wright, 2006, p. 1384). What this means is the jury is out on the validity of intuition because while some consider intuition "derived from experience" as "better than their reasoning", others view intuition as "insufficiently analytic", "without sufficient empirical support" or simply "unscientific" (Wright, 2006, pp. 1387-1389). The question arises, how are social problems (that rise to the level of legal problems), best resolved? Some would say social problems are better addressed without an artificial securitization. Others would argue in terms of costs and benefits that there is value in securitizing an issue. Certainly, securitization adds complexity to problem-solving in ways that "may" prove useful, but maybe not. Benefits could include mobilization of needed resources when they would otherwise be inaccessible, cessation of ineffective practices by mandate, promoting public awareness and avoiding social instability. Costs could include restrictions on autonomy such as imposing limits on freedom of movement and speech-acts with corollary restraints on liberty to damaging effect. Security, with its logic of existential threat to survival, must be a tool, not a habit. This redirection can be accomplished by engaging authority with a different logic and a new rationality. "Unmaking" security is a possible avenue to preserving liberty but it will require reordering of alternative social relations, suspending the logic of vulnerability based on fear and rising above constraints that limit flexibility. The logic of security is in opposition to that of freedom. Personal autonomy can unmake securitization by refusing to recognize the necessity of extending the exception. This allows for reactivating democratic principles that promote individual liberties. Is this use of securitization "just the conclusion to a preceding mysterious and impenetrable intuitive process"? because if it is, then the intuition is not legally justifiable; and yet, securitizing moves are frequently viewed as "indispensable and inevitable" as it forms the justification for exercising authority even as intuition is the justification for exercising requisite balancing (Wright, 2006, p. 1394-1398). Thus, when securitization is triggered, counterproductive behaviour such as restrictions on civil liberties, excessive penalties and responses that may be ineffective without a sincere commitment to risk management follow; and when intuition is relied on those who criticize the results cry foul as to legitimacy. The context of risk emphasizes prevention and precaution rather than securitization which is typically focused on emergency mobilization in response to urgent dangers. Intuition is justified by "wisdom" and "a sense of knowing". There is an evident overlap between concepts of risk and those relating to security. The important question for analysis becomes, "what is the proper focus of attention, is it risk minimization or threat resolution?" is it ends or means? If risk minimization is the priority, then securitization may not be the proper remedy. Bigo (2002), argues against thinking of securitization as a speech-act because he understands securitization not as an exceptional speech-act, but rather, as a form of routinized administrative practices of risk assessment effected by language. Securitization, according to Bigo (2002), equates risk with fear. What then is an appropriate solution to this problematic? The Copenhagen School offers a plausible answer assuming a successful securitization involves convincing a "target audience" of the legitimate urgency of a threat. In such a case, securitizing actors then use positional power to persuade others their use of authority is lawful. Security, according to this conceptualization, is not limited to speech-acts as the speech-act is not defined by uttering the word "security"; rather, it is focused on the discourse to convey presence of an urgent threat requiring an emergency response (Wishnik, 2010, p. 459).

De-Securitization & Police Power in National Security

The separation of powers or police powers case, Youngstown (1952), raises the question of the necessity to suspend representative forms in exigent circumstances. There, the Court denied the President the power he claimed he needed to seize steel mills to prevent a threatened strike during time of war. The Court held the President "could not under the circumstances seize and operate private steel mills pursuant to" executive power and significantly, this "conclusion was arrived at not merely by applying algebraically or otherwise the logically relevant legal rules, but through the application of intuition as well" because "ascertaining the intent, at whatever level of generality, of the constitutional framers [] must depend crucially upon our own intuition" meaning logical inference must be supplemented by intuitive assessments of conflicting evidence or theories of intent to arrive at accurate conclusions

(Wright, 2006, pp. 1400-1401). Understood in this light, de-securitization is the reverse of securitization wherein a previously securitized matter is removed from the realm of active authority after a determination is reached to undo the doing that had been done. This represents an effort to reclaim liberty for those previously denied it when the time to restore normalcy is reached, which can only be determined using intuition. Security cannot guarantee safety. Shifting authority from autocratic to democratic control is a speech-act. The state is established to secure civil society by establishing a foundation for order and uses speech-acts to accomplish those ends. Society is faced with contingency and the state seeks to define identities, boundaries and meanings to structure order, but it cannot exceed ordinary authority indeterminately or perpetually. Securitization is lawful when lawfully applied, and it occurs when states reproduce an agreed-upon identity through discourses that seek to perpetuate a system of governance. Society is dependent on order and disorder, inclusion and exclusion. The production of security and identification of threats to society is part of the reproduction of identity and it is the province of states to determine when to intermittently securitize and de-securitize as part of normal functionality. De-securitization is the mere transfer of focus from one matter of concern to another replacing a familiar threat with a more salient and novel matter of concern that demands immediate attention. The designation of what is a threat as being "existential" is significant as images or other performative acts are used to "securitize" an issue. Bigo (2002) argues the tools security professionals use to describe a threat as "urgent" are a key part of the process, which is a movement emerging from the correlation between successful speech-acts of political leaders, the mobilization they create and a range of administrative practices. Passion is generated to secure the social contract and promote stability of the system under review. Securitizing moves actualize speech serving to more quickly mobilize resources for more effective application. To secure better results, policy must properly adapt to circumstances. Managers gather, evaluate, appraise and contextualize risk to identify vulnerabilities and reallocate resources more efficiently. In this way, actors articulate effective responses to redistribute risk. Against a sentiment of declining public trust and risk of terrorist threats, the state asks its citizens to sacrifice privacy for safety (Ball, et. al., 2019).

Conclusion

It is said that proper balancing requires intuition. This is because interests and facts must be calibrated or "described on the same level of generality, and on the right level of generality (Wright, 2006, p. 1401, n. 116, citing Tushnet, 1985, italics removed). Suspending rights in extreme exigency is a matter of intuitive balancing because determining first whether a exception exists requires intuition, determining next whether the exception applies also requires intuition and finally determining whether the exception is applicable under present circumstances further requires intuition (Wright, 2006, p. 1405). The question becomes, can the public trust the state to exercise authority appropriately? Trustworthiness mediates acceptance (Ball, et. al., 2019). To safeguard citizen and state security potential threats must be neutralized. The only means to safeguard privacy is to ensure transparency by accountability. This approach combines risk minimization with public administration to balance rights and restrictions. Is "security" viewed accurately as a "thick" public good in the sense of having multiple layers to enhance legitimacy or does securing privacy require placing fundamental rights at the core of public policy making governance "clunky" and thereby compromises safety? I conclude neither alternative is obviously correct—privacy and safety are critical, and neither should be sacrificed (unless necessary, in temporary, limited measures). A balancing test using a sliding scale is appropriate. Legitimacy is a function of not just concern for safety, but also depends on genuine risk to civil liberties. Effectiveness is correlated with accuracy, benefit, equity, cost, transparency and control. Intrusiveness is negatively correlated with acceptance which touches on balancing risk and reward. There is policy value in protecting privacy and security. To the extent possible, privacy should be integrated into security policy and measures should be assessed in relation to overall impact (Ball, et. al., 2019, p. 116). Due process is the key to fostering trust in state action which must be democratic, transparent and standards must go beyond profit-seeking to serve the public good. Government actors must safeguard private rights even as they act in the interest of the community. Private rights are a vital component of social life and so, the state must ensure appropriate mechanisms for protecting individual rights are incorporated into whatever response is ultimately implemented. Securitization is a linguistic, performative speech-act and tool of social relations that permits suspending of ordinary political discourse to promote safety, is concerned with expanding state authority and limiting autonomy, but also is dependent on performative speech acts that include commands to modify perceptions, claims and practices impacting social relations in negative ways. Securitization suggests threats can be so significant as to excuse suspension of ordinary process; but this is rare and judicial review of interpretations are available to clarify the application of authority remains lawful. Thus, securitization is an effective tool for practical legal and political law enforcement analysis and speech-acts can be appropriate based on what is intended when applied to promote the public good and to respond to legitimate exigency. The suspension of ordinary process is lawful when coupled with transparency. Safeguards require limited scope and duration of suspensions only reasonably necessary to respond to genuine threats. When proclaiming a referent object is threatened, the state is justified in utterances made by securitizing actors claiming extraordinary measures to ensure protection. In such cases, words may be used to convey information and carry out actions on a fast-track basis suspending binding

rules and deliberative rational-critical discourse. A legitimate securitization requires first identifying a genuine threat, next taking emergency steps to negate it and finally returning to normalcy. Such a securitization move is permissible once a state actor has convinced its audience of the legitimate need to proceed in accordance. It is a method based on responsible exercise of lawful authority but is subject to review after the threat is removed just as habeas corpus custody determinations are reviewable following reorder. De-securitization moves are to reverse risk of harm focusing on restoring the system. In this manner, securitization is a political tool applied in the interest of public good and private rights.

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