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BOOK REVIEW

JUDICIAL METHODS OF INTERPRETATION OF THE LAW. By Julio C. Cueto-Rua. Baton Rouge, The Publications Institute, Paul M. Hebert Law Center, Louisiana State University, 508 pp., 1981.

*Shael Herman**

As lawyers and law students routinely point out, law school is an inhospitable place to philosophize about justice.¹ In American law schools, the term "axiology," the branch of philosophy that deals systematically with values, is virtually unknown. Of course, an occasional social theory course concerns the interplay of social values; and jurisprudence courses, if their orientation is not unduly positivistic, discuss what is just. For most students and teachers, however, law school implies professional training; the average student, seeking mastery of the intricacies of the Federal Rules of Civil Procedure, as well as initiation into the mysteries of the Civil Code, the Uniform Commercial Code, and the Internal Revenue Code, quickly discounts the benefits of theorizing about justice. Law practice requires him to know what the law is, not to speculate about what it might be. Fortified by a steady diet of Socratic dialogues, cases and hornbooks, he trains to do battle with his eventual adversaries, apparently on the implicit assumption that whatever results from the adversary system is just. If, as Sir Henry Maine claimed, "substantive law is gradually secreted in the interstices of procedure,"² then in law school, notions of justice and value are gradually secreted in the interstices of technicality. The essential point of Dr. Julio Cueto-Rua's new volume, *Judicial Methods of Interpretation of the Law*, is that judicial method in both civil and common law secretes issues of philosophy and value as naturally as bees make honey.

Professor Cueto-Rua's book is an inquiry into the anatomy of

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1. There are exceptions to this statement like any other. See, for example, the symposium on legal scholarship in 90 YALE L.J. 955 (1981). But such philosophizing is exceptional even in exceptional schools because the basic curriculum is for the practicing lawyer, a career that law professors have consciously rejected. The tension between the goals of teachers and students is well discussed in Kronman, *Forward: Legal Scholarship and Moral Education*, 90 YALE L.J. 955 (1981).

2. H. MAINE, EARLY LAW AND CUSTOM 389 (1883), quoted in Maitland, *The Forms of Action at Common Law* in EQUITY 295 (1909). Like so many other quotations, this one has been rubbed smooth with time. The full quotation is: "So great is the ascendancy of the Law of Actions in the infancy of the Courts of Justice that substantive law has at first the look of being gradually secreted in the interstices of procedure."

hard cases; it makes us conscious of the variety of techniques for judicial decision making when there are no clear solutions. This is not to imply that lawyers never think about hard cases. Sometimes we do, but we do not do so systematically or consciously. We may puzzle over a hard case, and if it supports our position, we cite it; if it is against us, we distinguish it. But we generally do not ask why the judge thought as he did and what his range of choices included. For this attitude there are several explanations. First, we live in an intensely pragmatic society concerned more with the marketability of ideas than with their consistency and aesthetic appeal. Legal training orients us towards achieving results rather than meditating upon ultimate values. Second, a type of legal realism bordering upon nihilism has made it increasingly easy for us to say that rational explanations for judicial decisions do not necessarily exist. (This view is capsulized in the familiar refrain, "To understand the decision, find out what the judge had for breakfast.") According to a more moderate version of this realist attitude, it is futile to attempt to rationalize decisions delivered by judges who attended different law schools, lived at different times, and came from diverse social strata.³ *Quot judices tot sententiae.*

Try as we might to do otherwise, the daily demands of practice usually keep us from attaining higher status than that of workers in the vineyard. By contrast, Professor Cueto-Rua is a botanist, for he scientifically sifts through seemingly disparate legal decisions, deftly sorts them into units susceptible of examination, classifies them, and demonstrates their inner workings. He also collects a number of interesting specimen opinions in the second half of the book. He clarifies issues of axiology that we as lawyers see through a glass darkly if we see them at all. As John Dixon, Jr., Chief Justice of the Louisiana Supreme Court, reports in the preface of the book, even the judges themselves might miss the axiological issues embedded in their decisions: Their "efforts to balance the legitimate inter-

3. For some scholars, the futility of rationalizing decisions has its own ideological implications because the process of rationalization constitutes suppression of contradiction. According to Morton Horwitz,

[h]istory came to be subvers[on] [when] . . . the analytic tradition committed itself to the suppression of contradiction—to the basic attempt to reconcile the irreconcilable by showing that X and not X can exist at the same time, which is essential to demonstrating that an unjust social order is capable of being rational.

Horwitz, *The Historical Contingency of the Role of History*, 90 YALE L.J. 1057, 1058 (1981).

ests of society are usually crude, elemental and narrow because axiology . . . is foreign" to them.⁴

This work, the by-product of a series of seminars for Louisiana's appellate judges, proceeds on the view that "[p]rofessionally trained judges in both civil law and common law countries appear to apply methods of interpretation of law which follow the same basic pattern."⁵ Though no one seriously maintains that judges, under either civil law or common law, are only what they eat or that their judgments are merely the rules they embody, explaining exactly what they do is a challenge. As the author acknowledges, his work deviates from the "prevailing approach" in studies of judicial method which focuses "attention on the general rules of law as though the question of interpretation was concerned exclusively with the discovery and statement of the meaning of . . . general rules."⁶ This last comment indicates the author's intellectual debt to Holmes' and Jhering's commonly held view, later popularized by the legal realists, that legal rules could not be understood in isolation from daily reality.⁷ Thus, the author seeks to avoid the errors committed by Jhering's *Begriffsjurist*,⁸ a caricature of the German Pandectists, by starting his investigation into judicial interpretation where the judge starts—in the concrete facts of the case. In reality, Cueto-Rua argues, judicial interpretation involves more than manipulation of heavenly concepts; it implicates a dialectical process whereby the judge alternates between facts and law in an effort to achieve a rapprochement between them.⁹ For Cueto-Rua, as for philosophers since Plato, dialectical reasoning is a mode of interpreting reality whereby the human mind gains successive views of being and seeks to interrelate them. Once the views are connected, reality appears to us as a motion picture though we are also aware that individual and successive glimpses of reality are like static

4. J. CUETO-RUA, *JUDICIAL METHODS OF INTERPRETATION OF THE LAW* at X (preface by Dixon, C.J.).

5. *Id.* at 1.

6. *Id.* at 2.

7. According to Holmes, "The life of the law has not been logic; it has been experience." *THE COMMON LAW*, 1 (1881). Jhering's locution was strikingly similar: "Life is not here to serve concepts, concepts are here to serve life. What will come to pass is not postulated by logic but by life," quoted in Zweigert & Siehr, *Jhering's Influence on Development of the Comparative Method*, 19 *AM. J. COMP. L.* 215 (1971). [hereinafter cited as *Jhering's Influence*].

8. On Jhering's reaction to the arid conceptualism of the Pandektenschule, see *Jhering's Influence*, *supra* note 7, at 216-17 and citations therein.

9. J. CUETO-RUA, *supra* note 4, at 4.

frames or snapshots. As the great Spanish philosopher Ortega y Gasset noted, dialectical reasoning is a fundamental way of learning. "Knowledge in its ultimate and radical concretion is dialectics . . ."¹⁰

Dialectical reasoning presupposes a radical discontinuity of value and fact, of the human intellect and the empirical universe outside the intellect. As Ortega noted, "philosophy begins by bisecting a seemingly single world . . . leaving us with two worlds on our hands."¹¹ Dialectical reasoning is closely allied to legal reasoning, for the judge mediates between the physical world outside the mind and the values that appear as categories of the mind. He grasps the facts of the case and squares them with legal concepts as well as ethical precepts he already knows. This squaring of concepts and facts is no idle pastime. Because the legal labels he assigns to facts dictate consequences for the litigants and eventually for the whole society, a judge must shift back and forth many times to assure his full grasp of the dispute. His eventual decision is normative in the sense that it links facts to legal consequences by means of the logical copula "ought." For example, because X harmed Y, he is liable to Y and ought to repair the damage. The values discovered by the judge in the facts of a dispute dictate his determination of liability.

For the scheme of values he employs in this book, Professor Cueto-Rua is indebted to the Argentine legal philosopher, Carlos Cossio. Occurring in interdependent pairs, Cossio's hierarchy of values consists of solidarity and isolation, cooperation and uncooperativeness, peace and discord, power and anarchy, security and insecurity, and order and disorder. According to Cossio, these values have various degrees of axiological dignity or priority. Peace, solidarity, and security outrank power, cooperation, and order. According to Professor Cueto-Rua, disputes related to acquisitive and liberative prescription usually involve questions of order because members of the community must know when tensions will end and relationships will stabilize. Likewise, cases dealing with the rights of bona fide purchasers raise questions of party security because no market can operate without an assurance of security for honest buyers. Cases on vicinage involve communal solidarity. In most cases, several values in the axiological hierarchy are at stake.

Cases concerning whether . . . a contract is invalid because of

10. J. ORTEGA Y GASSET, *THE ORIGIN OF PHILOSOPHY* 44 (T. Talbot trans. 1945). [hereinafter cited as *ORIGIN*].

11. *ORIGIN*, *supra* note 10, at 67.

one party's false representations about the value of the object will present issues involving security of transactions as well as cooperation and peace. . . . [C]ases treating the donation of blood, skin or human organs may put both security and [social] solidarity in issue.¹²

Earlier we noted that dialectical reasoning is characterized by a radical discontinuity—a seemingly unbridgeable gap—between the facts of the case and the values the judge finds in them. The application of Cossio's axiological hierarchy underscores the judge's task of bridging the gap between fact and value and our corresponding concern with finding criteria by which to evaluate his approach. To put a political point on the question, if the judge is the human face of the state, what guarantees that he does not find facts and apply law as he pleases? If, as Cueto-Rua argues, the judge in every case must choose a single right solution, what assures that he will not choose a solution in the same way he chooses breakfast?

According to the author, the judge is bound to follow objective guidelines. In a given case, some facts are declared relevant by legislation, others by judicial precedent, and still others by customary rules. Thus, if a line of decisions, or a statute, sets a time limit for a particular action regardless of the plaintiff's age, it is pointless for the judge to find that the party seeking to avoid the effect of the limitation is a minor. Sometimes, however, a case is so exceptional that neither precedent nor statutory law address it. In other words, a gap in the law exists because either history does not repeat itself or the legislator is fallible. In case of a gap, if the judge tries to ignore an unprovided for fact, he will distort the case; if he tries to distort it, he becomes conscious of being unfair. Thus, argues the author, the judge, in order to maintain his equilibrium, may seek guidance in monographs and doctrinal works¹³ that may have advanced a daring hypothesis in anticipation of the peculiar facts he confronts. He may employ the plain meaning doctrine,¹⁴ investigate the historical context of the disputed legislation,¹⁵ or apply a pragmatic result-oriented analysis¹⁶ compelled by the competition of axiological factors.¹⁷

To some readers, Professor Cueto-Rua's description of judicial method in a hard case may seem too sanguine. Certainly his descrip-

12. J. CUETO-RUA, *supra* note 4, at 245.

13. *Id.* at 192-204.

14. *Id.* at 96-102.

15. *Id.* at 146-75.

16. *Id.* at 176-91.

17. *Id.* at 205-72.

tion of judicial method does not account for the apparently arbitrary judicial behavior characteristic of a number of countries today. Even in the United States, though Cueto-Rua's account may explain how a judge *could* decide a case, it does not explain how he actually decides the case. To demonstrate the nature of this actual decision making process, the second half of the book presents thirty-three decisions selected from the jurisprudence of Louisiana courts as well as other state and federal courts throughout the United States. Each of these cases is "hard" in the sense that the judge found no ready answer in prior cases or legislation, and sharp competition among values and policies existed. The author prefaces each case with an explanation of its background and the values in conflict. He also links particular methodological problems presented in the first half of the book to illustrative cases reproduced in the second half. Thus, the discussion of Wurzel's doctrine of projection of concepts upon unforeseen phenomena¹⁸ refers us to *Prudhomme v. Savant*,¹⁹ in which the Louisiana Supreme Court decided if a typewritten nuncupative will was valid although the applicable Civil Code rule, enacted long before the invention of typewriters, required the notary to write the will in his own hand. When the author discusses the influence of custom on judicial decisions,²⁰ he reproduces a United States Supreme Court case that construes the meaning of "immoral practice" in the Mann Act.²¹ His discussion of the plain meaning doctrine²² guides us to a tax case concerning whether a gift in trust was "transferred" under applicable regulations though the settlor retained broad powers to revoke or modify the trust.²³ Analyzing interpretation by reference²⁴ and the problems arising when two or more sets of rules could logically settle a dispute, the author refers his readers to *Wilkinson v. Wilkinson*.²⁵ In this case, the Louisiana Supreme Court had to decide which of two apparently conflicting rules applied to a prenuptial marriage contract made by a 16 year old minor assisted by her mother but not her father. In the syllabus of issues after this case, the author points out that the court had to account for two compelling "public policies": first, the social value of upholding the validity of a marriage to assure a child's legitimacy

18. *Id.* at 39-40.

19. 150 La. 256, 90 So. 640 (1922).

20. J. CUETO-RUA, *supra* note 4, at 87.

21. *Caminetti v. United States*, 242 U.S. 470 (1916).

22. J. CUETO-RUA, *supra* note 4, at 101.

23. *Commissioner v. Guggenheim*, 288 U.S. 280 (1932).

24. J. CUETO-RUA, *supra* note 4, at 114.

25. 312 So. 2d 107 (La. App. 1st Cir. 1975), *rev'd*, 328 So. 2d 69 (La. 1976).

and second, the social value of protecting minors in their contractual arrangements.²⁶

Drawn from a broad variety of substantive topics, these decisions are highly instructive. Though they bring the reader closer to an understanding of how *some* particularly fascinating cases were decided, they inevitably fall short of showing us how judges actually decide cases. According to Justice Dixon's recent lecture to the Louisiana Bar, decision making is a more agonizing process than Professor Cueto-Rua allows, and he "has never consciously followed Cueto-Rua's method in deciding a case."²⁷ Justice Dixon authored the opinion in *Wilkinson v. Wilkinson*, and he did not make clear what factors impelled him to its result. Even if his reasons in *Wilkinson* were clarified, the reader might doubt whether any explanation of judicial methodology would render transparent the decisional process in an even harder case such as *Roe v. Wade*,²⁸ where the competing policies were incommensurable.

I do not want to be misunderstood as criticizing the author's explanation of judicial method. Instead I am expressing a widely-shared doubt that anyone—including the judges—can explain how cases are decided. In this iconoclastic era, we tend to be stubbornly skeptical about anyone's ability to give a full, rational account of any human experience, whether it is politics, economics, or physics. Faced with flawed explanations of judicial method, we sympathize with the frustrated speaker in Auden's "Law Like Love," who, after rejecting the guidance of his elders, his children, the church, and the academy, turns to an equally frustrated judge:

Law, says the judge as he looks down his nose,
 Speaking clearly and most severely,
 Law is as I've told you before,
 Law is as you know I suppose,
 Law is but let me explain it once more,
 Law is The Law.²⁹

A book review is not the place to detail the historical background of this skepticism. The erosion of traditional authority that led Auden's judge into solipsism also encourages us to distrust at least slightly

26. J. CUETO-RUA, *supra* note 4, at 388.

27. John Dixon, *Judicial Method in Interpretation of the Law in Louisiana*, p. 30. (speech delivered at the Royal Academy of Legislation and Jurisprudence, Madrid, Spain, Oct. 27, 1981) (on file with reviewer).

28. 410 U.S. 113 (1973).

29. Auden, *Law Like Love*, in *SELECTED POETRY OF W.H. AUDEN* 63 (2d ed. 1971).

anyone claiming to explain complex psychological phenomena that dictate human behavior. Today the choice of legal and social values, like preferences in clothes, food, and lifestyle, is often defended with the maxim *de gustibus non disputandum est*. According to a commonly held view, embodied in Ortega y Gasset's image of the bisected world, reality outside the human mind is objective and values are subjective. Even this idea is further complicated by the fact that no one perceives any reality except by means of the mind. The radical discontinuity of fact and value implies that every human psyche is awash in solipsism, and hence that there are no legitimate criteria for evaluating assertions of value. The author himself, even as he proclaims the application of Cossio's hierarchy of values, is aware of these doubts, and clues to his awareness appear throughout his book. At several points, for example, he discusses the inherent vagueness and ambiguity of common words in natural languages including the language of law. Like the British philosopher, H.L.A. Hart, Cueto-Rua subscribes to the view that common words have clear essential or core meanings and uncertain halos or penumbras.³⁰ The author points out that the word "immovable," for example, has at least the following meanings:

- 1) incapable of being moved
- 2) not moving or not intended to be moved
- 3) steadfast, unyielding
- 4) real property³¹

Then he demonstrates the difficulty in pinning down the essential meaning of "immovable":

There is no question that land is an immovable, as is a building built on the land. But, what about a mobile home for which the wheels have been removed and which is fixed to the ground by short steel posts? What about wooden partitions in a house which are nailed to the walls and screwed to the floor? What about the central heating system installed in a building?³²

30. Hart has amplified the idea of core meanings and penumbras in H. HART, *THE CONCEPT OF LAW* 119-50 (1961) and in Hart, *Jhering's Heaven of Concepts and Modern Analytical Jurisprudence* in *JHERING'S ERBE: GOTTINGER SYMPOSIUM ZUR 150. WIEDERKEHR DES GEBURTSTAGS VON RUDOLPH VON JHERING* 76 (F. Wieacker & E. Wollschlager, eds. 1970). Students of constitutional law will recognize Hart's theory as the probable inspiration for Justice Douglas' discussion of penumbras of privacy in *Griswold v. Connecticut*, 381 U.S. 479, 479-86 (1965).

31. J. CUETO-RUA, *supra* note 4, at 97.

32. *Id.*

Even if a statutory term is clear on the day of its enactment, it can be distorted to account for new situations.³³ Thus, he asks, can there be a robbery of radiation or a warranty of fitness for transplanted organs?³³ If words in a statute tend to become spongy and porous over time, then inevitably the criteria employed to evaluate the application of these words, because they too come from natural language, lose their stability. To use one of the values from Cueto-Rua's hierarchy, does any clear and widely accepted meaning of "solidarity" spring to mind except for the technical one associated with liability of co-obligors *in solido*? Is there a consensus on the definition of justice? The author himself suggests at least ten such meanings. Having pointed out the inherent problems in rationally accounting for how judges render justice, I do not mean to give the impression that one should not try to give such an account. It is infinitely better to try than to slide into a slough of despondency declaring that if no account can be perfect, no account at all should be attempted. Human beings are rational animals; we would be less than rational if we stopped trying to understand such important aspects of human experience. Plato and Aristotle understood this point. Cueto-Rua's study is valuable for many reasons. For lawyers, it is a powerful antidote to the pragmatism and hypertechicality of daily practice. For students, it can counteract the typical tendency to read cases as if they were only rules, devoid of philosophical implications. Even when this book does not answer all our questions, it will certainly stimulate dialogue about a politically charged activity, which, if unchecked, could lead to tyranny. Socrates never achieved more.

33. *Id.* at 101.

