PAPERS

Some Thoughts on the Meaning of "Public Action" and the Concerns of Public Action Adjudication

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Introduction

Our topic today is intervention in "public law litigation." I want to inquire as to what that term means, what concerns such litigation raises, and what implications these questions pose for those who advocate procedural reforms to accommodate such litigation. I propose to do this by using another term, "public action," which I think is both more neutral and more traditional.[1]

When we speak of the adjudication of public actions, there are at least four kinds of inquiry we should distinguish. The first inquiry asks what is meant by "public action" and how a "public action" is different from a "private action." The second inquiry asks what concerns are raised by the adjudication of public actions and how such concerns are different from those raised by private actions. The third inquiry assumes that in pursuing the first and second inquiries, we have recognized differences between public and private actions; it asks what reforms of process are necessary to adjudicate public actions in conformity with the concerns of such adjudication. The fourth inquiry assumes that some reforms of process are necessary; it asks whether such reforms may change public actions into a form of decisionmaking that cannot legitimately be regarded as adjudication.

I leave to my distinguished co-panelists the task of discussing the third and fourth inquiries. This paper makes some brief remarks about the first and second inquiries only. These remarks are from works in progress and are working thoughts; I hope this

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[1] *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 119-20 & n.5 (1968) (Harlan, J., dissenting).

opportunity to make them briefly will help me later to make them more fully and correctly.

I. On the Meaning of "Public Action"

We should not assume that we know what "public action" means; this risks discussion of the problems of public action adjudication from unstated premises, and leads to some confusion. We fail to discern that discussion of "public" as opposed to "private" actions describes a spectrum of litigation, and that few actions fall neatly on either end of that spectrum. Most significantly, we perhaps fail to consider separately what are more important public actions and what are less important ones, which I distinguish by the terms "strong" public actions and "weak" public actions. I intend to state some of the unstated premises and to offer a too brief critique of them.

Some persons use the them "public action" in the context of litigation *against* governmental bodies or officers; some include litigation brought *by* such bodies or officers.[2] Others, however, use "public action" in the context of litigation grounded upon constitutions and statutes.[3] Still others use "public action" in the context of litigation seeking to reform governmental institutions, ordinarily through constitutional litigation.[4]

Persons who use "public action" in these particular contexts would if pressed, I think, say that they do not confine the use of "public action" only to these contexts, and would concede that some actions within these contexts are not properly considered "public actions." They would say, I think, that they use the term "public action" where an action affects the behavior of a large number of persons in a significant way. Sometimes such an action directly affects the behavior of persons. Sometimes it affects their behavior indirectly by ordering the operation of an institution that itself makes daily decisions affecting the behavior of a large number of persons in a significant way. Persons who use "public action" would, if pressed to elaborate, say the context they have identified is only a weak indication of something im-

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[2] *See* Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 Calif. L. Rev. 983 (1979).

[3] *Cf.* H.R. 5103, 96th Cong., 1st Sess. (1979) (providing for "public and class compensatory actions").

[4] *See* Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979); Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 Harv. L. Rev. 465 (1980).

portant about such litigation, and that there are other things that are a stronger indication of significant effects upon the behavior of a large number of persons.

In offering models for public action adjudication, several authors help us understand the meaning of "public action." For example, Professor Chayes[5] suggests that a "public action" is one which decides issues of public policy. If pressed, I think Professor Chayes would concede that every adjudicated action decides an issue of public policy. He would assert, however, that "public action" should only be used in the context of broad and important issues of public policy. Acknowledging the subjectivity of such an inquiry, Professor Chayes might limit "public actions" to those in which the relief granted extends beyond the parties. Such suggestions parallel my earlier assertion that "public actions" significantly affect the behavior of a large number of persons. But Professor Chayes' suggestions go further, insofar as they identify things in the adjudicatory process itself which cause the effect.

By examining various usages of "public action," I find that the term is employed by persons where litigation has a significant effect upon the behavior of a large number of persons.[6] This effect might be: 1) a direct result of the action; 2) a result of the establishment of an adjudicatory body within the community to make decisions having such behavioral effects; or 3) a result of the reform of an existing community institution which already makes such decisions. Such a usage captures the meaning of "public" by focusing upon the behavior of a sufficiently large number of persons to properly be styled "public." This usage is also somewhat more objective than mere consideration of public policy, though both necessarily entail some degree of subjectivity. Such usage further helps us understand why some common law actions may be "public" while many actions to which a governmental body or officer is not a party (or at least not an original party) are also "public actions." Finally, by focusing upon significance and scope, this usage helps differentiate between strong and weak public actions. In so doing, it may be helpful in speaking about adjudicatory concerns and procedural reforms.

The important task is to identify what factors in an action

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[5] *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[6] *See* J. VINING, LEGAL IDENTITY, ch. 2 (1978); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

significantly affect the behavior of a large number of persons. I suggest that these factors — or at least the more important factors — can be found in that which is decided. Some of our distinguished colleagues speak keenly about the process of finding "legislative facts"[7] and giving content to "non-textually-specific values."[8] Although my meanings may differ from those of my colleagues, my suggestions do parallel theirs to some degree. Two factors, I believe, are promising — the finding of legislative facts and the validation of legislative values. "Legislative facts" are facts about the behavior of persons and things within a community which form the basis for rules of general applicability. "Legislative values" guide the behavior of persons within a community when they purport to act according to rules of general applicability. Where legislative facts are found or legislative values are validated in order to support a rule of general applicability, the behavior of a large number of persons will likely be significantly affected.

If we focus our attention upon factors such as these, we can more clearly speak about the concerns of public action adjudication, procedural reforms and, eventually, the legitimacy of adjudication as so reformed.

II. On the Concerns of Public Action Adjudication

Persons interested in procedure discuss whether a process for finding facts is accurate. Persons interested in substance discuss the validity of a process for arriving at rules and at the values which these rules further. Few persons, however, discuss whether finding facts accurately and arriving at valid rules and values are the sole concerns of adjudication. Without a complete statement of adjudicatory concerns — a statement which distinguishes the concerns of "public action" from "private action" adjudication — there can only be confusion. Absent such a comprehensive statement, procedural reforms may be proposed which might conform process to the concerns of private action adjudication, but not to the concerns of public action adjudication.

In discussing the concern for accuracy, proceduralists generally focus upon modes of proof — what I call "structural accuracy." They focus upon who finds facts and how facts are found. Despite their focus, these proceduralists concern themselves with decid-

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[7] *See* Chayes, *supra* note 5, at 1296-98.

[8] *See* Fiss, *supra* note 4, at 5 *passim*.

ing "special" facts, not facts that support rules of general applicability.[9] Morever, they seldom discuss standards for proof — what I call "substantive accuracy." Proceduralists have infrequently taken account of the proposition that what is a fact varies with a finder's worldview.[10] Because of their narrow and limited focus, proceduralists neglect the concerns of public action adjudication arising from the finding of legislative facts. They have, by and large, neglected to consider who — other than judges, juries and masters — might find legislative facts. They likewise fail to discuss the possibility and advisability of conducting factfinding outside the context of trials and hearings. Also they disregard consideration of who decides, and how it is decided, within what worldview such findings are made.

In discussing the concern for validity, substantivists focus broadly upon sources of decision — what I call "substantive validity." While concerning themselves with the sources for rules and values, substantivists fail to adequately consider modes of decision — what I call "structural validity." They do not discuss who decides the sources to be used, how sources may be located and what forms of reasoning may be used.[11] Substantivists instead assume that these concerns are the same as those about who uses the sources and who does the reasoning. Because of this limited focus, substantivists neglect some of the concerns of public action adjudication arising in the validation of legislative values. They do not consider the method by which sources and forms of reasoning are chosen.

The structural concerns I have identified are important concerns of democracy where determinations of legislative facts and legislative values are at stake. These determinations so significantly affect the behavior of the public that democratic societies generally defer them to bodies which operate with modes of proof and decision different from traditional adjudication. But I am not now advocating any particular democratic theory. Our task is to identify the democratic theories of our society and to determine their concerns about modes of proof and decision. Is there a concern, for example, that determinations be made in a manner that maximizes "information" (*i.e.*, the information bearing upon a determination of a fact or value)

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[9] *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 45-51 (1977).

[10] *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

[11] *Cf.* H. KELSEN, GENERAL THEORY OF LAW AND STATE 116-17 (1946).

and "choice" (*i.e.*, the choices of the persons affected by a determination)?[12] Or are our democratic theories less demanding of information and participation?

CONCLUSION

As I said earlier, I leave my co-panelists to discuss what procedural reforms are necessary in public actions and whether adjudication as reformed is legitimate. I do believe, however, that it is important to discuss the inquiries described above before discussing reform and legitimacy. It has been suggested, for example, that decisions in public actions need not be strongly responsive to proof and argument.[13] Under some democratic theories, this is wrong. There are many examples — from standing through enforcement — where similar suggestions have been made without carefully considering democratic theories. Thus, it is important to carefully examine each procedural reform. Only then, after some experience, may we ultimately assess the legitimacy of public action adjudication.

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[12] *Cf.* C. MACPHERSON, DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL (1973).

[13] *See* Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410 (1978).