LEGAL FORMALISM VS. LEGAL PRAGMATISM

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The institutions of the law provide processes wherein alternative views of cases and issues are argued and determinations are made. In a proper process, or what has been termed “due” process, the issues are not decided beforehand, but only through the course of the argumentation and examination of evidence. In the controversial Supreme Court case, *Stovall v Denno*, there are two immediate issues, and one more far-reaching controversy. The two immediate issues are (1) can improper official activity at a police line-up so bias the identification of witnesses that such evidence is not usable in the criminal prosecution’s argument; and (2) if such is the ruling in one case, does this ruling apply retroactively or consecutively to other cases. The far-reaching issue concerns the basic logic of the processes of the law; is such a logic formal thus necessitating the same determination of all cases that are the same, or is the operation of the law pragmatic and particular, allowing different determinations to be made in similar cases, through regard for problems of state criminal procedures? The institutions of the law are such that all three questions can be argued, although the third question is answered in a different way from the first two questions. Stovall’s fate is sealed when the present determinations of the law are said to have no retroactive effect, but the issues between the formal logicians and the pragmatists continue, and the argument goes on. The law is properly understood as process, and not as final solutions, as will be seen in tracing the convolutions of the debates.

H. L. A. Hart has made much recently of arguments delineating the law as rules. As a minimum, he has found that some rules are necessary to know who are the judges, and what is the jurisdiction of the court. He has attacked the sceptical realism of the Holmesian position that the law is what the judges say it is. He has separated law from moral feelings, and has indicated a certain intrinsic rationality discoverable in a going legal system.

The issue between Holmes and Hart, as well as the larger issues of moral and legal thought approached from whatever angle, can be focussed empirically on the actual developments in a recent Supreme Court decision, *Stovall v Denno*. After a fairly lengthy exposition of the determination of the law with respect to Stovall, the problem of the actual nature of the law can be faced, with Stovall’s case as evidence, and as instance. The actual relation of law to the moral feelings of society can be discovered. The method of second-order justification of Stovall’s execution can

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be delineated with finality. The relation of law to language, persuasive procedures, feelings, and time itself, can be comprehensively understood. The secondary case of Holmes v Hart will be decided without need of recourse to further appeal.

The particulars of Stovall's case are as follows. A Dr. Paul Behrendt was murdered and his wife seriously wounded by an assailant. The day after the murder of Behrendt, the police arrested Stovall. Without being given time to retain counsel, Stovall was taken handcuffed to the hospital room of Mrs. Behrendt. After observing him and hearing him speak as directed, she identified him as the murderer. Stovall was convicted and sentenced to death.

The Supreme Court, in the Escobedo and Miranda cases, had indicated concern over abuse of rights by police during investigation. To Stovall's attorneys it seemed that the identification in the hospital room was prejudicial to Stovall's basic rights, since there were no others in the lineup, as in typical police station identification situations; Stovall had no attorney to advise him of his rights, and his being handcuffed to a policeman insinuated to the witness that the police thought he was the guilty man. The same views occurred to the attorneys of a purported bank robber in Texas, Wade, and a purported bank robber and policeman-killer in California, Gilbert. All sought a writ of habeas corpus from the federal courts, on the ground that the police procedure of improper lineup, biasing the witness's identification, violated citizen's rights under the Fifth, Sixth, and Fourteenth Amendments.

Stovall's case was decided by the Supreme Court on June 12, 1967, following sequentially after United States v Wade and Gilbert v California. In the Wade case, the majority opinion of the Court was that Wade had been improperly convicted, because of the use as evidence of the identification made of Wade as the criminal at an improper lineup, where the federal agents made obvious to the witnesses whom they thought was the guilty man, and the accused had been given no counsel, prior to or during the lineup. Wade's conviction was vacated, as resting on procedures which violated his rights under the Sixth Amendment.

In the Wade case, the Stovall situation was described as just as improper as the biased procedure of that case:

And the vice of suggestion created by the identification in Stovall, supra [sic], was the presentation to the witness of the suspect alone handcuffed to police officers. It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police.

After the Wade case, Gilbert's case was decided, and Gilbert's conviction on charges of robbing a bank and murdering a police officer was vacated,

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4 388 U.S. 218, 234.