McGill Law Journal
Revue de droit de McGill

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Volume 66, Number 1, September 2020

URI: https://id.erudit.org/iderudit/1082057ar
DOI: https://doi.org/10.7202/1082057ar

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Publisher(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (print)
1920-6356 (digital)

Explore this journal

Cite this article

Antaki, M. (2020). Values. *McGill Law Journal / Revue de droit de McGill*, *66*(1), 169–172. https://doi.org/10.7202/1082057ar

VALUES

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It might be surprising to some that a word like "values" would have a place in a legal dictionary or encyclopedia. We do not typically think of "values" as a legal word or term of art. Perhaps more importantly, however, we simply do not think of "values" at all: it is one of the words we rely on enormously in our everyday and specialized discourses—including legal—but take completely for granted, not giving it a second thought. We do this despite its prominence in legal language games (and even formal legal instruments), and despite its close ties to our specific ways of imagining and practicing rights adjudication and judgment more generally.

"Values" is our "*groundword*" *of ethics*, designating what's important to us, what we hold dear—what, in short, allows us to evaluate. (The South African constitution, for example, widely hailed as one of the world's most progressive constitutions, accords values a place of prominence not only in its preamble, but also in its "Founding Provisions" and "Bill of Rights.") However, this use of "values" is a recent phenomenon, both in law and more generally. The rise of "values" signifies the transformation of the good, what is worthy of being desired, into something we pose for ourselves, and is an appropriate word for the fate of the good in an age of positive law.

Like the word "culture," the word "value" gained a distinctive use in the plural only recently, in the late nineteenth century. Until then, there were not different cultures, just more or less cultured human beings. Similarly, until then, there were not different values, just different things with more or less value. It was impossible to speak of "my values" as opposed to "your values." According to some authors, such as Edward G.

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* Associate Professor, Faculty of Law, McGill University. The original version of this entry was adopted as part of the *McGill Companion to Law* at a meeting in December 2011. This text is substantially similar to Mark Antaki, "The Turn to 'Values' in Canadian Constitutional Law" in Luc B Tremblay & Grégoire C N Webber, eds, *La limitation des droits de la Charte : essais critiques sur l'arrêt* R. c. Oakes / *The Limitation of Charter Rights: Critical Essays on* R. v. Oakes (Montreal: Thémis, 2009) 155.

Citation: (2020) 66:1 McGill LJ 169 — Référence : (2020) 66:1 RD McGill 169

Andrew, values-talk is a product of the split of philosophy and economics. Paradoxically, this split led philosophers—who were now more ignorant of economics—to write of the good life using the language of values, all the while excluding economics from the heart of their inquiries. This split came along with a subjectivist value theory in which the figure of the consumer replaced that of the producer. Moreover, as argued by Andrew, the rise of values is tied to a "subjectivist flight from economics to aesthetics." To this day, the rise of values is, following Nietzsche, bound up with the problem of nihilism: nothing is (intrinsically worthy). Things do not have value; rather, we evaluate things. In a world of values, intrinsic value is an oxymoron, an impossibility.

"Values" likely took some time in making its way into legal discourse. For example, the language of values is a relative latecomer to the judgments of the Supreme Court of Canada and other Canadian courts. The Supreme Court has, for a long time, referred to value as a property or characteristic of, for example, witnesses or testimony, or goods, or even electrical current, but it is only in the 1960s and 1970s that values—i.e. the values we have, and with or through which, presumably, we evaluate—begin (but only begin) to find their way into Supreme Court judgments. And it is only in the 1980s, with the *Canadian Charter of Rights and Freedoms*, that values-talk truly explodes onto the judicial scene. (Not only is values-talk a newcomer to the judicial scene but the rise of some other significant keywords of contemporary *Charter* adjudication largely tracks that of values.)

Paradoxically, the *Charter*—a document ostensibly entrenching fundamental *rights and freedoms*—was translated into a values-document from its birth. As opposed to the jurisprudence related to the American Bill of Rights, the Supreme Court of Canada has, from the beginning, systematically translated "rights" into "interests," "principles," and, of course, "values." The Court has routinely spoken of rights and freedoms as not only *issued from* or *grounded in values*, but has also identified them as values. In other words, rights are reducible to values and rights-talk is essentially values-talk. This systematic translation of rights, particularly into interests and values, suggests a movement to *demystify* rights, often tied to the influence of pragmatism and sociological thinking on law. Values or interests are, supposedly, what legal instruments *really* signify or entrench, and they are what judges, supposedly, *really* consider in their acts of judgment.

In addition to manifesting an urge to demystify, the rise of the language of values (and interests) is tied to the rise of a conception of judgment, and practical reason more generally, as a kind of *calculation* in which values and interests are optimized or balanced. The language of values would appear to go hand in hand with balancing and proportionality, which exemplify "calculative" judgment. In judicial opinions of the

Supreme Court of Canada, the "balancing" of interests emerged in the second half of the twentieth century, and particularly the last quarter. Like values-talk, balancing and proportionality truly exploded onto the judicial scene in the 1980s with the advent of the *Charter*. However, balancing itself is not new to judicial discourse. Before the 1970s, the Supreme Court was balancing testimony and evidence as well as probabilities—but it was rarely, if ever, balancing values and interests.

The rise of values-talk, then, leads away from an understanding of judgment, articulated or hinted at by thinkers as different as Aristotle and Kant, as a kind of perceptive or intelligent "seeing," itself grounded in patterns and experiences of fittingness. Many celebrations of analogy and of the common law rely implicitly or explicitly on this understanding of judgment. Indeed, this understanding reflects human finitude and our always-already belonging to a world which we cannot objectify and from which we cannot step back. With the balancing of values, however, the limits of analogical reasoning are sought to be overcome. Unlike analogy, values- and balancing-talk encourages us to abstract greatly from context before plunging right back into it. Paradoxically, the attempt to escape situated, human, and analogical reasoning leads to the problem of the incommensurability of values (or interests). Yet, this has not stopped jurists and judges from holding on to the metaphor of balancing without worrying about what might be lost in translation in moving from the qualitative to the quantitative. Indeed, what may account for the pervasiveness of values-talk is that it is ambiguous and multi-vocal—on the one hand, it is bound up with a so-called relativism in which the human being has become the ground of ethics and on the other hand, it carries the tone of something that is calculable or masterable—and thus suited to the task of courts in a scientific age.

It is worth, for a moment, focusing more closely on "values" as a keyword of contemporary adjudication, particularly the adjudication of constitutional rights. That the Supreme Court of Canada (but not only the Court) uses values interchangeably with both interests and principles may shed some light on the way in which "values" serves as the keyword not only of contemporary constitutional adjudication, but of our times more generally. While most readers likely do not blush when seeing values equated with interests (on the one hand) or with principles (on the other), the direct equation of interests and principles is much more likely to strike the reader as odd (even forced) and the listener as dissonant. Interests and principles are much more difficult to use interchangeably with one another. Whether in common parlance or in Supreme Court judgments, we never see or hear phrases such as "interests or principles" or "interests and principles." Yet phrases such as "interests and values" and "principles and values" are commonplace. This raises the question: what

is special about "values" that allows them to be equated with both (non-imperative) interests and (imperative) principles?

This brings us back to the ambiguity and multi-vocality of "values." Values oscillate between principles and interests, between—to echo Dworkin—a register of principle and a register of policy. In our contemporary understanding, this oscillation between principle and policy can be mapped onto an oscillation between objectivity and subjectivity. What is objective is binding, absolute. What is subjective is non-binding, relative. We sometimes associate values with objectivity. When we use values to designate what is highest or most important (i.e., what is morally imperative), we oppose (the objectivity of) values to (the subjectivity of) mere preferences or tastes. However, when we speak of our "core" values, their imperative character appears to flow from how strongly we hold on to them. In this way, we associate values with subjectivity, but we do so in other ways as well. For example, we oppose the subjectivity of values to the objectivity of facts. The ideal of value-free social science is built on this opposition. And sociologists, including sociologists of law, recognize that it is as subjects that we have or adhere to values. Crucially, the modern and metaphysical opposition of subjectivity and objectivity is built into values-talk.

While legal historians continue to debate the movement from so-called objective to subjective rights, rights-talk itself has given way to values-talk. We would do well to consider values-talk, for at stake in it is not merely the subjective as opposed to the objective but the very opposition itself.

References

Aleinikoff, T Alexander, "Constitutional Law in the Age of Balancing" (1987) 96:5 Yale LJ 943.

Andrew, Edward G, *The Genealogy of Values: The Aesthetic Economy of Nietzsche and Proust* (Lanham: Rowman & Littlefield, 1995).

Antaki, Mark, "The Rationalism of Proportionality's Culture of Justification" in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014) 284.

———, "The Turn to 'Values' in Canadian Constitutional Law" in Luc B Tremblay & Grégoire C N Webber, eds, *La limitation des droits de la Charte : essais critiques sur l'arrêt* R. c. Oakes / *The Limitation of Charter Rights: Critical Essays on* R. v. Oakes (Montreal: Thémis, 2009) 155.

Dworkin, Ronald, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).