# Judicial Decision-Making, Community and Consented Values: Some Remarks on Braithwaite's Republican Model

KLAUS A ZIEGERT*

## 1. Courts and "Gaps in the Law"

More than a hundred years ago, sociological jurisprudence made its uninvited appearance in the solemn world of legal doctrine with Eugen Ehrlich's critical observations on "gaps in the law".[1] Ehrlich claimed that there was a deficit in legal doctrine which it could not mend, but had mainly his new cure in mind — social science methodology for lawyers. He failed to impress the European law professors with his arguments but his sociological concepts detailing a "living law" in contrast to official legal doctrine had a considerable influence on Roscoe Pound, who reduced the distinction to "law in action" versus "law in the books", and the American sociological jurisprudence and legal realists. It seems that the observation of "gaps in the law" serves John Braithwaite[2] with a similar launch-pad for advocating a cure, and in this respect his reference to the American realist Brandeis is no coincidence. However, with that reference any link to sociological jurisprudence ends. Like Eugen Ehrlich a hundred years ago, Braithwaite has his mind set on a much larger project while drawing our attention to the quandary of judges, but unlike Ehrlich, Braithwaite is not concerned with sociological theory and methodology for lawyers. While I have a great respect for Braithwaite's rich and fruitful contributions to a better understanding of the processes and effects of legal regulation and criminal law, I am decidedly uneasy about his suggestions of a "Republican model" for judicial decision-making, especially when it comes in the disguise of a diagnosis of how the law needs "fixing". My unease is not about the (political) value of republicanism but about Braithwaite's choice of arguments in order to promote it. A political discussion as to how the sovereignty of a people finds its way to be represented in legal decision-making should not take the back-seat in an array of speculations about what judges do or should not do when faced with an impasse, perhaps a "gap in the law", and a discussion of "gaps in the law" would have required a more thorough analysis of the complex processes of legal decision-making than Braithwaite is prepared to undertake.

Either way, the focus on the operation of "community values", to which courts (judges) should be responsive, is presented as the (only) "hard evidence" for the argument that a "Republican" method of law-making needs to be devised. This evidence, in turn, is assumed to hold for a discussion of the

* DPhil Mün, Associate Professor and Head of Department of Jurisprudence, Faculty of Law, University of Sydney.

1 Ehrlich, E, "Über Lücken im Recht" ["About gaps in the law"] (1888) *Juristische Blätter* 447.
2 Braithwaite, J, "Community Values and Australian Jurisprudence" (1995) 17 *SydLR* 351. All following references to Braithwaite are references to this article.

broader ramifications of how "undominated dialogue" expressed in "community values" can lift the "moral reasoning" of judges to higher and allegedly "Republican" levels. This is a bold trajectory — but one must concede, with old Chinese wisdom, that a journey of a thousand miles has to start with the first step.

My objection is that Braithwaite's first step, his exposition of the operation of "community values", gets it wrong and makes us head in the wrong direction. This leads subsequent argumentative steps into disarray. In order to make my comments as brief as possible, I shall focus on three questions only: What social phenomenon is "a value"? How can values be assessed scientifically? And, is such a scientific assessment of any concern for judges? It will emerge from this discussion that a judicial response to community values of the kind which Braithwaite advocates is neither necessary nor, in fact, desirable. It is also, fortunately, unlikely.

## 2.  On Values

A rough sketch of a standard sociological map of the complex fabrics of social structures may help to approach the social phenomenon[3] "value" for a closer examination. I ask those readers for whom this exposition appears to be unduly long to bear with me because it sums up basic theoretical concepts which, I claim, are missing from Braithwaite's account.

Social structures are clearly real and deceivingly static, as manifested in their manifold and diverse effects. However, they are tangible only in human communication and interaction. Communication, though always in flow, is a more or less stable meeting-place between people to express themselves and to make themselves understood. It is also the only meeting place between people to make themselves understood. This means that communication, and only communication, between people "is" the social sphere, "is" social process, and all the elements of the structure of social process are contained only in communication. Anything about which humans cannot communicate does not exist for them and cannot be operated by them. Anything that does not speak to humans (the universe, the body, the eco-system, et cetera) is outside the ambit of social structure, does not "obey" humans and remains an object for exploration and mystery. Conversely, most things about which humans communicate, exist only in social structure and by communication, and have no direct subject or any representation in the material world or anywhere else. In other words, communication, and with it social structure, are the exclusive creations of the interactions between humans over time, and they bear no relation to the material continuum in which they take place other than through communication. A first consequence for the observation of the operation of "values", therefore, is to draw a distinction between, on the one side, a concept of value, communicatively constructed and upheld on the social level and between people, and, on the other side, how individuals may or may not respond to the propositions conveyed by communication on the personal level.

---

3  Notably, this means (Greek for) "something that can be observed".

This distinction is important because, evidently, people often do not need to understand what certain propositions, for instance, the proposition of certain (concepts of) "values", mean for them, let alone need to respond to such propositions. They keep quiet and that is taken as "consensus" — *qui tacet consentire videtur*. However, all sociological research shows that people rarely match each other in the way and intensity in which they understand, embrace and act upon the proposition of "values". In fact, given the actual diversity and complexity of the contexts of individual human development, people simply cannot share exactly the same understanding of a (concept of) value, even if they do the same thing, and all appearances of social harmony are, in this sense, a highly improbable "cultural achievement".

How is it achieved? Socialisation research and studies of human development show that human individuals are "hooked on" communication: individuals, by default, cannot but use communicated, that is, socially constructed concepts in order to construct their concepts of self, as a "person" with certain desirable and undesirable characteristics, among them gender, race, "our way", and pleasure and pain. Such communicated concepts are internalised by infants long before they are aware of the processes of internalisation and patterned selection.[4] This means that human beings are internalised social structure, even if, and importantly, this is a personally selected and individualised social structure. The need of human individuals to form and maintain the self-concept in the currency of social structure, early put in train in infancy, as the "interlacing of language and emotions" by long parental nurture, and as such the phylogenetic trademark of humankind among organic life,[5] explains to a high degree why humans need to co-operate before they can stage conflicts with each other and why they band together, rather than resist, to kill each other.

A further important factor for the effectiveness of communication to engineer outcomes is its structuring effect. This effect is brought about by the operative design of restricting the undetermined variance of possible responses to communication, and channelling them into a few choices which can be handled. Stress and anxiety are directly and positively related to the openness of choices, and sociological research shows that normative "closure" of communication has the operative benefit[6] of reducing complexity and variance of possible choices to a comforting level on which individuals have to cope with only a manageable few. Such a design of normative "closure" of communication lies at the foundation of:

norms    concepts of actions which are communicatively immunised against the fact that time passes and that things change over time; norms convey the experience of the "eternal yesterday";[7]

---

4 For the most comprehensive overview of self-concept construction see Rosenberg, M, *Conceiving the Self* (1979).

5 Maturana, H, in a lecture presented at the ISA World Conference, Bielefeld, June 1994.

6 Luhmann, N, *Soziale Systeme. Grundriß einer allgemeinen Theorie* ["Social systems. Outline of a general theory"] (1984).

7 It should be noted, in passing, that the consequence of this understanding is that "norms" gain their importance in everyday life not by any "higher quality" of normative communication, say, a location in a "higher" sphere of "ought" versus a profane sphere of "is" — all communication, including normative communication, takes place in the same sphere and uses the same mechanisms — but by their counterfactual, operative quality of

institutions          concepts of actions which are communicatively immunised
                      against the fact that people who are acting are unreliable,
                      forgetful, and change over time or may be exchanged;
                      institutions convey the experience of everything that people
                      are not: impartial, attentive around the clock, untiring,
                      unerring, unforgiving and never forgetting;

identifications       concepts of actions which are communicatively immunised
                      against the fact that situations and settings in which they are
                      done change and are different all the time. Such concepts are:

                      person-concepts:    which convey the experience that one
                      "knows" what a "good girl" does, and what a "bad boy", a
                      "criminal", a "hero", a "saint" is and what they are not;

                      value-concepts: which convey the experience of a point of
                      preference or priority attributed to an action regardless of
                      changing settings and, often, "at any costs";

                      role and procedure-concepts: which convey the experience of
                      reliability of actions in an adaptable framework such as the "duty
                      statement" of a role actor; for instance, a judge; or the sequence
                      of "steps" in a procedure; for instance, in legal process;

                      program-concepts — which convey the experience of
                      flexibility of actions in an integrative framework such as a
                      statute, or a code, or a plan for the reorganisation of a
                      business firm, or a plan for public health and well-being.

This long-winded *tour d'horizon* in an attempt to put the phenomenon of "value" on a sociological map was conducted to direct attention to the complex concert of the many elements of social structure which needs to be kept in mind, and in which the use of value-concepts is pervasive but never an isolated event. Above all, such a concert suggests that the communication of value-concepts can never have an effect, whatever effect it may have, in isolation and without the back-up of other elements of social structure.

With this concert of social structure in mind, we can now turn to the specific difficulties which one has when one wants to observe the phenomenon of "values in the community".

Acceptance of values rests on a commitment to them, typically a belief, but — once values are accepted — normative closure of the communication of value concepts is rather hermetic, as is reflected by the often emotional, and ultimately violent, commitment to values, for instance, killing in the name of a "right to life" by criminal law and anti-abortionists. Power can be seen as the very medium for the closure of communicating values, and the success of power — that is, to accept or to be committed to values — rests clearly on the functioning of an interdependent two-way traffic of communication: a given source of values — say a government — depends, in order to be seen to have power, on a target — say a citizen — who accepts these values as his or her own values in order to act on them; in turn, the citizen depends, in order to share the power of being able to act — say, to walk the streets without fear —

closure versus a factual open-endedness of on-going social process.

on the acceptable formulation of values by a given source of values, the government in our example and its definition of the value-concept "security".

Power works where the values of the communicator are accepted more or less unquestioned by the recipients and share-holders of power as the basis for their own actions, for instance, in the case of good citizens and tax-payers. As mentioned earlier, "consensus" in this communication is not an agreement of individuals which is concretely established by a division bell — which is highly unlikely and at any rate more often than not unfeasible — but the communicated effect of closure, namely a communicatively established and maintained assumption that everybody agrees, or pays taxes, as long as they are not perceived to the contrary.

Power comes to its limits where threat must be used to terrorise recipients into acceptance of values, for instance in the case of a contempt of court ruling,[8] or of paying "protection money" to the Mafia; and power degenerates into coercion — and is no longer power but violence — where it loses all communicative effects as to what values are actually transmitted to disenfranchised recipients, and with counterproductive outcomes, for instance in the case of corporal punishment or a prison sentence. In both cases it is not the physical harm per se which has the devastating effect on the self-concept of recipients but it is the perceived and unnerving rejection of allegedly promoted values of personal integrity, human dignity, and social support by the coercive, that is, violent, and therefore unprincipled and inconsistent, communicator of value-concepts.[9]

A further consequence for the observation of the operation of "values", therefore, is to draw a distinction between the operation of value-concepts and the operation of other normative devices along the line of the specific operative quality which these concepts have for communication. Such a distinction does not leave any room for connecting the operation of value-concepts to something like "moral truth", whatever that may be; and neither is there any room for dissecting "deeper" levels of the operation of values versus "superficial" ones,

---

8  The fine line between the tacitly assumed authority of a court and the exposure of the fact of its limited power by the need to use force is generally recognised in the practice of using force only sparingly and as a last resort, and in the "almost universal judicial preference for settlement", cf McEwen, C A and Maiman, R J, "Coercion and Consent: a Tale of Two Court Reforms" (1988) 10 *L Policy* 3 at 20. Paradoxically, to have to use force in order to convey value-concepts of authority remains a challenge to authority (not only of courts), and is not a demonstration of power. This paradox is, of course, masterly exploited by movements which employ civil disobedience (non-acceptance of power) to promote their value-concepts, and by teenagers. For a similar argument backed up by most recent research on procedural justice, see also Lind, E A, "Procedural Justice and Culture: Evidence for Ubiquitous Process Concerns" (1994) 15 *Zeitschrift f Rechtssoziologie*.

9  This link between promotion of violence as a value-concept and corporal punishment, and not the abuse per se, is the basis for Swedish legislation on a prohibition of corporal punishment, notably through the *Parental Code* and not through the *Criminal Code*; cf Ziegert, K A, "The Swedish Prohibition of Corporal Punishment. A Preliminary Report" (1983) 45 *J Marriage and the Family* 917, and is further supported by most recent research on supportive parenting; cf Simons R L, Beaman, J, Conger, R D and Chao, W, "Childhood Experience, Conceptions of Parenting, and Attitudes of Spouse as Determinants of Parental Behaviour" (1993) 55 *J Marriage and the Family* 91. For the dilemma of "violent justice" as a communicator of confusing value-concepts see Lind, ibid, and Sarat, A, "Speaking of Death: Narratives of Violence in Capital Trials" 27 *Law Soc R* 19.

or for distinguishing "dominated" versus "undominated" operation of values — values are either operated as generalising, powerful and empowering devices for the identification and communication of priorities, or they are not — and then they are not values. Or, in other words: values are constitutive concepts for power, while "truth" is a value-concept which empowers to hold positions of intersubjectivity and debate.

## 3.    On Values, Consensus and the Community

In view of: a) the operative meaning which sociological theory and research have attributed to the concept of "value"; and b) the "split level" on which value-concepts — as socially constructed and socially active concepts — are operated on the personal level by acceptance and commitment, and communicated on the social level as a generalised, abstract identification of priorities, the question arises how the operation of values and the outcomes of such operations can be observed or even measured. Here Braithwaite suggests following the research of the sixties and its replication in Australia in the seventies. In his opinion, and for the purpose of his argument, this research has produced reliable and useful results. The methodology of this research proposes to distinguish "pure" value-concepts on the one side and operated value-concepts on the other side. Such operated value-concepts are seen to be reflected ("observable") in the value-perspectives of respondents regarding certain things or actions, that is, in their attitudes. The strength of Braithwaite's argument that there is something "superior", "undominated" and "deeper" in "values" rather than "attitudes" rests squarely on demonstrating the high degree of consistency and consensus among the responses of a random sample of Australians. He insists that later studies applying the same methodology have not returned any different findings. However, he fails to offer for comparison and for further information, any contrasting study of how the observation of the operation of values at the personal level of respondents (attitudes), would have returned findings which could support his claim of the "superficiality" of these beliefs and which would show, above all, why the — presumedly negligible — value operations reflected in attitudes should be any more "dominated" and any more insignificant "cognitive standards" for the respondents, than what was measured in the reported study as "undominated" beliefs and "strong cognitive standards". There is a cursory reference to opinion polls and surveys which are deemed to show the "superficiality" of attitudes, however, we must suspect that "superficiality" here refers to the methodology of these surveys rather than to the observed beliefs, but we cannot tell because no further details are reported.

The simple fact is that thorough and considered sociological research does not and cannot show that any given group of beliefs is any more superior or more "moral" than any other given group of beliefs. This puts in serious doubt that the suggested methodology of a distinction of "values" and "attitudes" provides any "analytic and normative [?] advantage". What sociological research does show is that value-concepts are not operated in a vacuum or in a sphere "which transcends all domains". Braithwaite's findings in the reported study are an artefact of the applied methodology. The aggregated sample of disparate respondents is not an interactive "working" community, and their reported consensus is not about the operation of values. It is about statements which respondents have little choice not to reject.

Statements in this form are known in sociology as doxic arguments. They reflect that

> when there is a quasi-perfect correspondence between the objective order and the subjective principles of organization (as in ancient societies) the natural and social world appears as self-evident. This experience we shall call *doxa*, so as to distinguish it from an orthodox or heterodox belief implying awareness and recognition of the possibility of different or antagonistic beliefs.[10]

The problem of measuring responses to these statements lies not in their motherhood claim. The problem of this kind of measurement is that the proposed concepts have no operative consequence for the respondents and that their commitment to any of them is not challenged. What has been measured here are the mechanisms which hold values in place, but about which we are not told anything because they do not appear in the theoretical concept of social psychology on which the study is based. The more doxic the propositions which are put to the respondents are, the more difficult it is for them to reject them. The questionnaire, by presenting doxic statements and by asking to accept or to reject them as the only choice available has taken care of those value-concepts which cannot be easily rejected, or only rejected at the risk of making a fool of one-self, or worse, and it has withdrawn a reasonable rationale for rejecting them.

What understanding of the operation of consented values in the community can we gain from such a list of "consented" statements? For comparison, in order to answer this question, I summarise the findings from another study.

A study by Ketil Skogen[11] presents data on the value orientation of teenagers in Norway, based on the results of a nationwide survey on adolescents.[12] Students in schools were asked to rank 12 possible "priorities for the country" according to the importance which they attributed to each political goal. Such goals were, among others: "to increase economic growth", "to increase the defence of the country", "to give people more say in decisions on jobs and housing" and "to protect the nature against pollution and other damage". Overall, the young Norwegians ranked the "protection of nature" as their top priority and they ranked other priorities closest to this value as presented in Figure 1.

---

10  Bourdieu, P, *Outline of a Theory of Practice* (1977) at 164.

11  Skogen, K, "Ungdom og natur. Postmoderne identitetskonstruksjon eller reproduksjon av klassekultur?" [Youth and nature. Postmodern construction of identity or reproduction of class culture?] (1995) 36 *Tidsskrift for samfunnsforskning* 75

12  The survey "Ung i Norge" addressed 12 287 primary and secondary school students in the age groups 13 to 19. A sample of 67 schools was drawn from all primary and secondary schools in Norway, stratified according to district and size of school (correlating with degrees of urbanisation). The return rate was 97 per cent. About half of the students (5476) were 16 to 18 years old and provided responses with regard to the issues which are discussed by Skogen's study. In the year of the survey (1992), 85 per cent of all Norwegians aged 16-18 went to secondary school with 90 per cent aged 16, and 77 per cent aged 18, cf Skogen, ibid at 79.

**Figure 1**: Highest Priority Ranking by Norwegian School Students

| Highest priority | All students (in %) |
|---|---|
| Protection of nature | 69.6 |
| Increase of economic growth | 14.2 |
| More participation | 10.1 |
| Increase of defence | 6.2 |

Evidently and overall, students uniformly value the protection of nature, by far the highest.[13] However, as hypothesised above, values are not operated uniformly by the respondents or as a "consensus". To establish this variance, the study employs a sensitive and careful design. In order to explore the way in which the young Norwegians were committed to the value "protection of nature", the author uses the information of the survey regarding the membership of students in those youth organisations which are, as an organisation, committed to the value "protection of nature": the Scouts, hunting and fishing organisations and environment protection groups. These data were then compared with data on the socio-economic status of the students' families, judged by the father's occupational status.[14]

**Figure 2**: Socio-economic Class and Value-Commitment (Membership in Youth Organisation which are committed to the protection of nature)

| Socio Economic Class | Scouts | Hunting & Fishing | Environment Protection Groups |
|---|---|---|---|
| Higher Administrative Pos. 4.1 | 4.2 | 3.7 | |
| Humanistic-Social Middle | 4.0 | 4.2 | 5.9 |
| Technical-Economic Middle | 6.6 | 3.9 | 2.9 |
| Lower Functionaries | 1.8 | 3.2 | 1.2 |
| Primary Industries | 2.7 | 6.5 | 1.4 |
| Worker | 2.4 | 5.5 | 2.0 |

---

13  It should be noted that the methodology here does not force the students in a doxic situation, that is, to simply accept or reject the goal "protection of environment". Therefore, the resulting figure of "only" 69.6 per cent of all students ranking this goal highest is a more reliable figure than those reported in Braithwaite's table and interpreted as "deep, consented values". At the same time, it is remarkable that the top priority of the nineties ("protection of nature") is reflected in Braithwaite's 1975 list only negatively as "domination of nature", putting to doubt the claim of a "universality of values".

14  The code for socio-economic status was specially constructed for this study. The resulting six-fold social group model is based on the international standard of the ILO (International Labour Office, ISCO 88) and on information from the students on a job profile of the occupations of mothers and fathers. It consists of the categories "higher administrative positions", "humanistic-social middle class", "technical-economic middle class", "lower functionaries", "primary production" and "worker", cf Skogen, ibid at 80. There are strong sociological arguments for classifying occupations in this way, according to their social characteristics, rather than following the conventions of statistical bureaus which cannot be discussed in the framework of this article.

The findings show that children from families with parents in an occupation with humanistic-social orientation were committed highest (5.9 per cent), followed by children of parents in higher administrative positions (3.7 per cent), with children of parents in primary industries (1.4 per cent) and lower functionaries positions (1.2 per cent) the least committed (see Figure 2).

At closer inspection, the top ranking of the value "protection of nature" is exercised differently by the students according to the orientation of the parents' occupation, with small but statistically significant differences between the groups (see Figure 3). Most remarkably, girls invariably rank the "protection of nature" priority highest more frequently compared with boys in respective socio-economic groups.

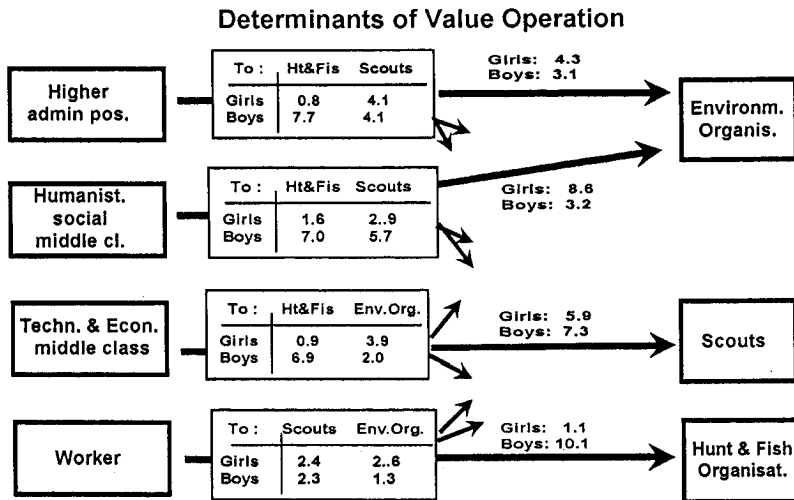Figure 3: Highest Priority for Value "Protection of Nature"
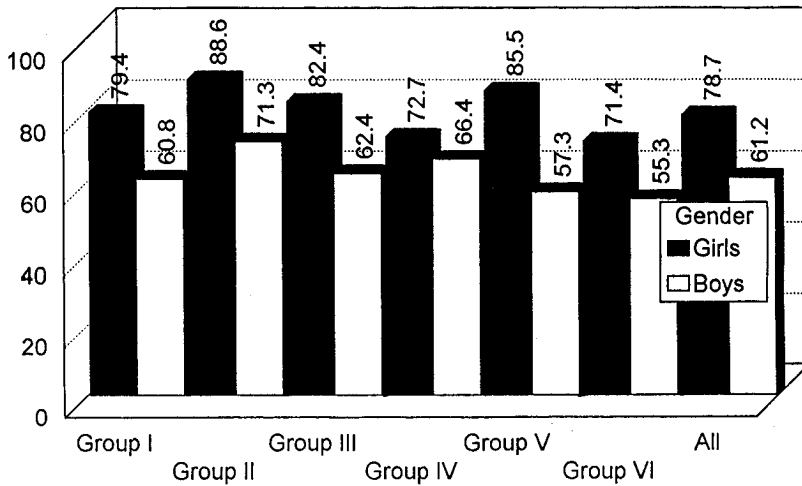


adapted from Skogen 1995, in per cent

| Group I | Higher administrative positions |
|---------|--------------------------------|
| Group II | Humanistic-social middle class |
| Group III | Technical-economic middle class |
| Group IV | Lower functionaries |
| Group V | Primary industries |
| Group VI | Workers |

When, finally, correlating the data on the commitment of students, their top-ranking of the value "protection of nature" and the data of the socio-economic status of their families, the following consistent and significant picture emerges (see Figure 4): students of parents in primary industries and worker positions who value the protection of nature highest are predominantly organised in hunting and fishing organisations; students of parents in technical-economic middle class positions who value the protection of nature highest are predominantly organised in the Scouts, and students of parents in humanistic-social middle class positions who value the protection of nature highest are predominantly organised in environment protection groups, followed by students of parents in higher administrative positions. And while overall boys are generally more frequently organised in all youth organisations than girls (and

especially in hunting and fishing organisations and in the Scouts), girls are significantly more frequently joining the environment protection groups. The strong commitment of children from families with a humanistic-social orientation, and especially of girls, confirms that their key-concept in the constitution of the value "protection of nature" here is caring,[15] while the key-concept of children of parents who are farmers, workers or in positions with a technical-economic orientation, and especially of boys, is control.

Figure 4: Highest Priority for Value "Protection of Nature" by Commitment and Class

### Determinants of Value Operation



| | To : | Ht&Fis | Scouts | | Girls: 4.3 Boys: 3.1 | |
|---|---|---|---|---|---|---|
| **Higher admin pos.** | Girls | 0.8 | 4.1 | | | **Environm. Organis.** |
| | Boys | 7.7 | 4.1 | | | |

| | To : | Ht&Fis | Scouts | | Girls: 8.6 Boys: 3.2 |
|---|---|---|---|---|---|
| **Humanist. social middle cl.** | Girls | 1.6 | 2..9 | | |
| | Boys | 7.0 | 5.7 | | |

| | To : | Ht&Fis | Env.Org. | | Girls: 5.9 Boys: 7.3 | |
|---|---|---|---|---|---|---|
| **Techn. & Econ. middle class** | Girls | 0.9 | 3.9 | | | **Scouts** |
| | Boys | 6.9 | 2.0 | | | |

| | To : | Scouts | Env.Org. | | Girls: 1.1 Boys: 10.1 | |
|---|---|---|---|---|---|---|
| **Worker** | Girls | 2.4 | 2..6 | | | **Hunt & Fish Organisat.** |
| | Boys | 2.3 | 1.3 | | | |

Adapted from Skogen 1995:81, in per cent

The conclusions which we must draw from these findings are that not only are the same values operated differently by different respondents, but that there is also a systemic pattern in which value-concepts are interpreted and acted upon differently from group to group, and in which they are transmitted differently from one generation to the next. The distinguishing feature here is that of class culture. Not only does it cause the different operation of a "consented" value but it also makes groups to communicate this value differently, and in line with how one priority is constituted in concert with other priorities in the everyday life of the members of a given socio-economic group. Such a more complex analysis of the operation of "consented values in the community" can make us understand, finally, why — for instance, in the context of Australian debates on consented values — "Woodchippers" and "Greenies" do not talk the "same language" while consenting to the same value of the

---

15  Similarly, the value "to help others and the community" is significantly more frequently a reason to study law for female law students than for male law students in a sample of last year students at Sydney University (1995, report in preparation). Moreover, this difference is the only significant difference in values related to gender on a list of 15 reasons for studying law.

"protection of nature", and why, on the basis of the different class cultures expressed in the operation of that value in concert with other priorities, they simply do not understand, let alone accept, each others' concepts in their claim to power.

## 4.   On Judges and Values

Our analysis shows that the formation and operation of values is far more complex than Braithwaite suggests, and that it is not the distinction of "values" and "attitudes" which matters but a distinction of different socialisation paths in different socio-economic contexts.

What relevance do these findings have for judicial decision-making? We suggest: very little. Contrary to Braithwaite's arguments, we find no support whatsoever in sociological and sociolegal research for the assumption that there could be a "method" which would allow hard-pressed judges to tap sociological research findings for the assessment of what "community values" are. For the purpose of decision-making in court, here as always, judges must resort to accepted legal doctrine. The only help they would get from sociological research would be a better general understanding of the social dynamics, processes and mechanisms which result in specific distributions of given social phenomena and in certain probabilities for the representation of given social phenomena. This better understanding would not relieve judges of their duty to construct the legal relevance of these phenomena with reference to legal doctrine and with regard to the specific circumstances of the case in hand.

The major objection to Braithwaite's argumentation, therefore, is not against the inadequate methodology in establishing what "community values" are, but against the suggestion that a reliably objective listing of "values" exists which is readily available for implementation in judicial decision-making. This observation makes us suspect that we have been lured to witness a sideshow, that is, the discussion of the "truth" in "community values", while the centre-stage in Braithwaite's argumentation is occupied by his "republican model", that is, the idea of a direct participation of citizens in judicial decision-making. The vehicle for such a direct participation, according to Braithwaite, is "republican values", which convey essentially moral missives of a sovereign people to "their" judges to command them to recognise this sovereignty. However, while Braithwaite is vociferous on the moral truth in "deep" values, he is resolutely silent on explaining to us how a modern, democratic legal system could recognise and accept such missives. The focus of Braithwaite's model on a "transmission" to and through persons, the judges, is understandable because it is in the United States republican tradition and because it is simple,[16] but it is not a valid substitute for a thorough analysis of, again, a much more complex design of modern law to provide a highly differentiated society with both adequate and legitimate legal decision-making. Here, observations of a highly complex structure of the kind which was

---

16   Based on this logic — and on the information gained from the findings above — we might argue that a far more effective way to safeguard a "higher morality" of judicial decision-making than through the "republican" adoption of "community values" by judges would be to appoint only female judges.

sketched above and which interlaces norms, institutions and identifications into modern due process would be called for. Such an analysis would show a massive shift from person and value-concepts to roles, procedures and programs as the most remarkable feature of a modern, democratic and civil legal system.

In such a view, the fixation on values — important as they are for constituting political action — is a step in the wrong direction for thinking about modern law. The call for a free reign of "community values" against "tyranny", is, at best, a nostalgic recall by a failing memory. At worst, it treads a direct line from the founders of the United States constitution to the Michigan Militia, from deliberations of a bourgeois gentry to the supremacist anti-institutionalism and anti-statism of a disenfranchised lower middle class, from considered political debate to absurd political theatre. This cannot be the model for "Australian jurisprudence" and for a socially just and democratic Australia.