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There are numerous perspectives from which to examine the jurisprudence of a Supreme Court Justice, and each perspective offers its own particular insight into the judicial process. I have suggested elsewhere that the jurisprudence of Justice Byron White can be explored effectively by reference to the methods and philosophy of legal realism.[1] This suggestion is premised on the utility of realism as a device for examining the underpinnings of a judicial opinion as well as on a perception that to some extent Justice White practiced the art of realism in his decisionmaking. I do not claim that Justice White was a legal realist in the freewheeling style of Justice William O. Douglas, nor would it be accurate to freight Justice White's opinions with all the baggage of legal realist philosophy.[2] White's opinions do, however, exhibit certain characteristics of the realist tradition.[3] In particular, Justice White tended to approach cases from the facts up rather than from the doctrine down. The driving force behind doctrine was, generally speaking, not concepts, but facts and policies. Similarly, the legitimacy of any particular doctrine rested upon that doctrine's effectiveness in exposing those facts and policies that percolated beneath the surface of legal controversies.

White's approach to rationality review under the Equal Protection Clause provides a good example of his realistic style. While the traditional model of rationality review is characterized by a judicial deference that presumes the

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1. Allan Ides, *The Jurisprudence of Justice Byron White*, 103 YALE L.J. 419 (1993).

2. *See* JAMES E. HERGET, AMERICAN JURISPRUDENCE, 1870-1970: A HISTORY 147-227 (1990); LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 3-44 (1986); Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

3. Ides, *supra* note 1, at 422.

existence of circumstances justifying the legislative classification being challenged, White's applications of rationality review did not rest on hypothetical possibilities, but instead required a factually supportable link between the legislative judgment and the challenged classification. The distinction is between rationalization and reasoned judgment. The former rests upon speculation; the latter requires a consideration of actual facts. Of course, the exercise of reasoned judgment involves something more than the application of a mathematical formula, and the policies animating the judgment are as much a part of the reasoning process as are the factual underpinnings of that judgment. Consistent with the foregoing, Justice White's equal protection opinions reflect an insistence upon a rational connection between facts and law as well as an appreciation of the policy issues at stake in the underlying controversies.

San Antonio School District v. Rodriguez[4] involved an equal protection challenge to a state's school-financing plan. Under the plan, the amount of financing available to a school district depended on the real property wealth of that district. The result was the creation of large disparities between the funding of relatively rich and relatively poor school districts. In assessing the constitutionality of the discrimination, the Court applied a standard "two-tiered" doctrinal analysis. The upper tier of strict scrutiny was available only to that limited class of cases involving either a suspect classification or a fundamental right. All other cases would be assessed under a minimal rationality test that presumed the legitimacy of government action. Since the Court found neither a suspect class—the law did not discriminate against any definable class of poor people[5]—nor a fundamental right—education was not deemed to be such a right[6]—it applied the rational basis test and concluded that the disparate funding rationally advanced the state's legitimate goal of encouraging "a large measure of participation in and control of each district's schools at the local level."[7] The Court did not explain how the state's interest was rationally advanced by limiting the ability of certain localities to raise funds for education; rather, the Court seemed

4. 411 U.S. 1 (1973).
5. *Id.* at 18-28.
6. *Id.* at 35-37.
7. *Id.* at 49-53.

to set the facts aside in order to fully implement the policy of deference thought to be at the heart of the rational basis test.

Justice White's dissent was fact-intensive and far from deferential. He specifically described the "major disparities in spendable funds" available to property-rich districts and to property-poor districts and explained how the state's financing scheme made it impossible—by virtue of a state-imposed ceiling on the maximum tax rate—for property-poor districts to match the funds available to property-rich districts.[8] He noted as well that the magnitude of differences could not be ignored, "particularly since the State itself consider[ed] it so important to provide opportunities to exceed the minimum state educational expenditures."[9] As to the legitimacy of the state's interest of preserving local control over education, White voiced no disagreement. The question for White, however, was whether the financing plan rationally advanced that interest. "It is not enough that the Texas system before us seeks to achieve the valid, rational purpose of maximizing local initiative; the means chosen by the State must also be rationally related to the end sought to be achieved."[10] In applying that test, White looked to the reality of the circumstances:

> The difficulty with the Texas system, however, is that it provides a meaningful option to Alamo Heights and like school districts but almost none to Edgewood and those other districts with a low per-pupil real estate tax base. In these latter districts, no matter how desirous parents are of supporting their schools with greater revenues, it is impossible to do so through the use of the real estate property tax. In these districts, the Texas system utterly fails to extend a realistic choice to parents because the property tax, which is the only revenue-raising mechanism extended to school districts, is practically and legally unavailable.[11]

Thus White's conclusion that the state law violated the Equal Protection Clause did not rely upon strict scrutiny or upon the sliding scale of values described in Justice Marshall's dissent.[12] Rather, White's conclusion derived from a realistic

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8. *Id.* at 64-67.
9. *Id.* at 69.
10. *Id.* at 67.
11. *Id.* at 64-65.
12. *Id.* at 70 (Marshall, J., dissenting).

appraisal of how the state financing system actually functioned, and the extent to which that system could be said to advance the legitimate goal of local initiative. Simply put, for White, a system of financing that both discourages and largely prevents local initiative cannot be said to advance the goal of local initiative in any rational fashion. From a policy perspective the law was equally irrational: the promotion of quality education is hardly advanced by a scheme that precludes reasonable latitude for the financial support of such education.

White's approach in *San Antonio School District* was not, apparently, the type to draw much academic attention. He discovered no suspect class and uncovered no fundamental right. Nor did he advocate a novel methodology for assessing equal protection claims. Instead, he used the facts to describe a reasoning process that led him to a particular conclusion consistent with the plain terms of rationality review. As with his approach to other doctrines, rationality review was not used as a construct distinct from the underlying transaction or as a thesis of deference that exalted theory over facts. Rather, rationality review was used as a means of fairly and reasonably assessing the circumstances giving rise to the claimed equal protection violation. Doctrine served the facts, and not the other way around. The majority, adhering to the more traditional "hands-off" approach, reversed these priorities in service to the deferential rational basis doctrine.

Justice White's fact-intensive approach to rationality review surfaced again in his dissent in *New York Transit Authority v. Beazer*.[13] In that case, the Court upheld the Transit Authority's blanket exclusion from employment of all persons receiving methadone treatment. The lower courts had held that certain methadone users—those that had successfully completed a year of treatment—should not be included within the excluded class since such individuals presented no special employment risks. The Court disagreed. According to the Court, even assuming that such individuals could be gainfully employed without risk, the policy judgment of where to draw the line on employment of former heroin addicts rested with the Transit Authority.[14] The Equal Protection Clause did not require the type of precision demanded by the lower courts. As

13. 440 U.S. 568 (1979).
14. *Id.* at 587-94.

such, the majority's approach was quite similar to that adopted by the Court in *San Antonio School District*, and consistent with that case a policy of deference promoted rationalization over reasoned judgment.

Justice White's dissent began with the facts. It focused upon the district court's findings of fact which, White pointed out, were affirmed by the court of appeals as having overwhelming support in the evidence:

> The District Court found that the evidence conclusively established that petitioners exclude from employment all persons who are successfully on methadone maintenance—that is, those who after one year are "free of the use of heroin, other illicit drugs, and problem drinking,"—and those who have graduated from methadone programs and remain drug free for less than five years; that past or present successful methadone maintenance is not a meaningful predictor of poor performance or conduct in most job categories; that petitioners could use their normal employee-screening mechanisms to separate the successfully maintained users from the unsuccessful; and that petitioners do exactly that for other groups that common sense indicates might also be suspect employees. . . . It bears repeating, then, that both the District Court and the Court of Appeals found that those who have been maintained on methadone for at least a year and who are free from the use of illicit drugs and alcohol can easily be identified through normal personnel procedures and, for a great many jobs, are as employable as and present no more risk than applicants from the general population.[15]

Since the Transit Authority claimed that employability was its goal, the question for Justice White was whether the discrimination against successful methadone users bore a rational relationship to that goal: "The question before us is the rationality of placing successfully maintained or recently cured persons in the same category as those just attempting to escape heroin addiction or who have failed to escape it, rather than in with the general population."[16] Given the findings of fact, White concluded that the only reasonable categorization of successful methadone users was in the general population. The majority's contrary conclusion was premised on the legitimacy of the overall exclusion of drug users; but, according to White,

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15. *Id.* at 602-04 (citation omitted; footnote omitted).
16. *Id.* at 605.

regardless of the legitimacy of that policy, rationality review required an assessment of the precise classification before the Court—the exclusion of successful methadone users—and some reasonable showing that that exclusion advanced the state's interest in employability. The Transit Authority had made no such showing.

As in *San Antonio School District*, White's approach in *Beazer* insisted upon a careful assessment of the facts as they related to the state's claimed goals. In *San Antonio School District*, the state's school-financing plan created a system that placed seemingly insurmountable obstacles in the path of local initiative—the purported state goal. In *Beazer*, the law categorized in a fashion that was premised upon assumed and factually inaccurate differences between various groups. In both cases, the legislative classification was entitled to no deference due to an absence of reasoned judgment on behalf of the legislature. A contrary conclusion would place the law above reality; it would exalt theory and doctrine over the actual circumstances to which the law was to be applied.

Justice White's dissents in *San Antonio School District* and *Beazer* provided a foundation for his majority opinion in *Cleburne v. Cleburne Living Center, Inc.*[17] At issue in *Cleburne* was a city's denial of a special use permit for the operation of a group home for the mentally retarded. Justice White, writing for the Court, declined to find mental retardation a quasi-suspect class, but nonetheless, applying the rational basis standard, found the denial of the use permit invalid. The opinion reveals two important characteristics of White's jurisprudence. First, his unwillingness to define mental retardation as a quasi-suspect class was premised on what he perceived as the general impropriety of close judicial scrutiny of legislative choices that are based on relevant considerations. The trait of mental retardation was, according to White, quite often relevant given the varieties and complexities of mental retardation as well as the need for distinctive treatment of some of those so classified. An elevated level of scrutiny, however, would place the judiciary in a position of second guessing relevant policy choices made by those in a better position to make such choices.

17. 473 U.S. 432 (1985).

Next, the absence of a suspect or quasi-suspect classification did not permit the controversy to trail off into the abyss of rationalization. Rationality review did not grant the city a license to classify the mentally retarded in an arbitrary or irrational manner. Again, the facts were of critical importance. The city claimed to have relied upon four factors in denying the use permit, none of which, the Court concluded, satisfied the standard of rationality. For example, the city's assertion that the home would be in "a five hundred year flood plain"[18] failed to show any rational distinction between a group home for the mentally retarded and other group living arrangements—nursing homes, homes for convalescents, sanitariums, hospitals—for which a permit would not be required.[19] Similarly irrational was the city's expressed concern with the size of the home and the number of occupants. Since the city imposed no such requirements on other group living arrangements, "[t]he question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent."[20] Overall, the gist of White's opinion was that the governmental action was based on nothing more than irrational, rank prejudice against the mentally retarded. As such the denial of a use permit was an exercise of arbitrary power and could not stand consistent with the Constitution.

The most surprising thing about the *Cleburne* decision is not that Justice White found the City's actions unconstitutional, but that the majority of the Court agreed with his less than deferential application of rationality review. From the perspective of Justice White's overall jurisprudence, *Cleburne* represents but one more example of his penchant for the realistic appraisal of fact and policy and of his insistence that the law reflect true, reasoned judgment. The Court's acceptance of this approach in the context of rationality review, on the other hand, represents a striking departure from the more formalistic jurisprudence of deference one usually associates with the post-*Lochner* era.

What is one to make of these three, relatively obscure opinions? None of them establishes new theoretical boundaries;

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18. *Id.* at 449.
19. *Id.*
20. *Id.* at 449-50.

none of them offers new doctrinal perspectives; none of them creates a novel model of analysis. Yet all of them provide powerful examples of reasoned analysis; and each of them demonstrates, in separate contexts, the ultimate importance of a realistic, fact-based jurisprudence. If a premise of legal realism is that law is sometimes nothing more than a subterfuge for the exercise of raw or arbitrary power, especially law stated in doctrinal abstractions, then White's opinions in *San Antonio School District*, *Beazer*, and *Cleburne*, can be seen as exemplars of legal realism's challenge to law as so constructed. Indeed, his opinion for the Court in *Cleburne* appears to incorporate, as part of the equal protection guarantee, the method of realism that exposes legal abstractions and thereby uncovers the mask of the law. The method is, of course, the philosophy.[21] As so conceived, rationality review is neither more nor less than a judicial technique used to determine whether the law being challenged is premised on reasonable, fact-based judgment or merely on unsustainable prejudice or arbitrary power. As such, rationality review, as practiced by Justice White, represents the quintessence of legal realism.

21. The words of Karl Llewellyn seem apropos: "*Realism* is *not* a philosophy, but a *technology*. That is why it is eternal. The fresh look is always the fresh hope. The fresh inquiry into results is always the needed check-up." KARL LLEWELLYN, THE COMMON LAW TRADITION 510 (1960). Of course, a belief in "fresh inquiry" is itself a philosophy of some sort. In this sense, the technology of realism is but a reflection of that underlying philosophy.