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The Editors Dedicate this Issue to the Memory of Chaim Perelman.
DEDICATION

CHAIM PERELMAN AND THE NEW RHETORIC

Rhetoric has been defined as "the art of using words impressively, especially in public speaking; impressive language,"1 as "the art or science of using words effectively in speaking or writing,"2 as "the faculty of discovering in every case the available means of persuasion,"3 and as "a theory of argumentation."4 While there are numerous other definitions of the word, these listed span a thousand years of "confusion" and illustrate the very point Professor Chaim Perelman made throughout the many years he devoted to the fields of philosophy and law—"rhetoric (as well as philosophy) is a confused idea."5

Chaim Perelman, in many respects a giant in the field of philosophy, also devoted his efforts to the field of law. Of course, there are interfaces between the two fields and while he was interested in law, this interest manifested itself primarily in the sub-category of the philosophy of law—jurisprudence. He served as visiting professor at several law schools6 and devoted his efforts while at these schools to Jurisprudence.7

Chaim Perelman was born in Warsaw, Poland in 1912 and relocated in Belgium in 1925. He attended high school in Belgium and obtained both the J.D. and Ph.D. degrees at the Free University of Brussels.8 He accepted an appointment at the Free University of Brussels in 1939 and remained there as Professor of Logic, Ethics and Metaphysics until his formal retirement in 1978.

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5. Perelman also taught that philosophy was a study of confused ideas.
6. He visited at the law schools of the University of Pennsylvania, State University of New York at Buffalo (Stoney Brook), University of McGill (Montreal, Canada), University of Jerusalem, (Israel), University of Sydney, (Australia) and the Salmon P. Chase College of Law, Northern Kentucky University.
7. In most of these visitorships Professor Perelman performed double duty. Often he was available at his host university for lectures, seminars, and informal meetings and discourse with faculty members and students in philosophy departments and communications departments.
8. Perelman received his J.D. degree in 1934 and Ph.D. degree in 1938.
During Germany’s World War II occupation of Belgium, Perelman was an active member of the underground with significant experiences, many of which were life threatening. After the war, Perelman resumed his professorship at the university and proceeded to research, study, and write in the fields of philosophy and law. “When faced with the challenge of writing a book on Justice at the end of World War II, I saw the limitation of formal reasoning, as articulated by Gottfried Frege—the father of modern logic—as a means of discussing values.” At the time this book was published, Perelman stated in his remembrance of the event, “I was completely ignorant of the importance of rhetoric.” Shortly thereafter Perelman developed a keen interest in rhetoric and his research resulted in his first publication on the subject. Constant study and thinking about the topic of rhetoric and almost ten years of research resulted in the publication of the book that established his reputation in the field of philosophy more firmly than any of his prior efforts. Between 1945 and 1980 Perelman published numerous books and articles both on the topic of rhetoric and in the field of law. Finally in 1982 Perelman published his last book, The Realm of Rhetoric.

Throughout his career in teaching, research, and publication, Professor Perelman maintained his primary level of interest in the topic of rhetoric. He applied the principles and definitions that he developed to other fields, the primary one being law. He eventually developed his ideas in the field of rhetoric to such a level of sophistication that he was the primary advocate among a small group of researchers of a new view on the subject of rhetoric, called "The New Rhetoric." His construction of this new rhetoric began with a thorough historical examination of the topics stemming from the classical Greek period and extending through the Middle Ages to the modern period. In order to fully understand his contribution to argumentation it is helpful to trace his thought processes from his early years.

In the classical Greek period Plato distinguished false rhetoric and true rhetoric. In that day rhetoric was defined as "the art of persuading an ignorant multitude about the justice or injustice of a matter without imparting any real instruction." In short rhetoric, as practiced and perceived, was an art involving style, appearance, deception, and salesmanship rather than a vehicle for conveying truth. In order to change this definition, Plato distinguished between false rhetoric and true rhetoric. The former was the then current definition and the latter Plato established by distinguishing true rhetoric as a part of philosophy. Plato's characterization included the following approach:

Methodology of dialectic is:

a. It is the art of asking questions and providing answers for the questions.
b. It is "the art of dialogue."
c. Dialectic seeks to clear the mind of common sense ideas in order to achieve purity of thought.
d. Philosophical rhetoric as opposed to dialectic is based on truths and has the power to sway gods.

Rhetoric has as its purpose to communicate the truths developed by philosophy:

a. It is designed only for those who know the truth and wish to communicate it to others.
b. Although it can communicate what is known it cannot engage in the art of discovery or of invention.

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17. Id. at 428.
In effect, Plato considered rhetoric to be a part of philosophy, that is, the discovery and communication of truth.

Aristotle distinguished two types of reasoning—analytic and dialectic. The approach taken in analytics was to establish forms of valid inference and specifically the syllogism. In the dialectic, Aristotle states that dialectical reasoning presupposes premises which are constituted by generally accepted opinions. The purpose of dialectic is to persuade or convince the person to whom it is directed. The practical distinction between analytical reasoning and dialectical argument is that the former deals with truth and the latter with justifiable opinion. Aristotle further opposed rhetoric to dialectic by stating that dialectic is concerned with arguments used in a controversy or discussion, while rhetoric concerns the orator's technique in addressing a crowd gathered in a public square—a group of people who lack both specialized knowledge and the ability to follow a lengthy claim or argument.

When viewing the period extending from Aristotle to the end of the 19th Century, it is difficult to find any scholars who appreciate Aristotle's formulation. For the most part rhetoric was thought to be merely a vehicle to communicate ideas and did not in any significant manner relate to truth or reasoning. Chaim Perelman, after much study and thought, sought to remedy this situation. Perelman stated his purpose clearly when he said,

To restore rhetoric to its elevated position, as outlined by Aristotle in his discussion of dialectical reasoning, I began to do a series of studies on what I call the New Rhetoric. This new rhetoric has several important rationales and features related to reasoning in human affairs: (1) it is primarily concerned with argument or practical reasoning, (2) it suggests that figures of speech may be arguments instead of merely ornaments, (3) with its goal to influence minds, new rhetoric is a dynamic field of study, (4) it is capable of discovery or the generation of knowledge, (5) it is complimentary rather than in opposition to formal reasoning.

In short the new rhetoric that Perelman and Mme. Olbrechts-Tyteca expounded was a theory of argumentation.

18. REALM, supra note 15.
19. Id.
20. Id.
21. Id.
22. Id.
Perelman characterizes the new rhetoric as having,
[as its central concern, the audience. When we fail to adapt respon-
sibly to an audience, we are guilty of begging the question. Ar-
terests are grounded in the beliefs of the audience. Arguments
may be addressed to audiences that are ignorant, well-educated, or
highly specialized. In some instances, a communication may have a
universal audience in mind (the universal audience is composed of
all reasonable beings).23

In 1977 Perelman wrote The Realm of Rhetoric which was
translated into Dutch, German and Japanese. In 1982 this book
was translated into English. Essentially the "realm" is a further
explanation and development of The New Rhetoric, published in
1958 by Perelman and Mme. Olbrechts-Tyteca. The book attempts
to provide an approach to finding a solution to the problem of the
justification of values. The core of Perelman's approach is argumenta-
tion. As Perelman states it,

The theory of argumentation conceived as a new rhetoric or dialecti-
cic, covers the whole range of discourse that aims at persuasion and
conviction, whatever the audience addressed and whatever the sub-
ject matter. The general study of argumentation can be augmented
by specialized methodologies according to the type of audience and
the nature of the discipline, should this appear to be useful. In this
manner we can work out a juridical or a philosophical logic that would
be the specific application of the new rhetoric to law or philosophy.24

The relationship of the new rhetoric to a process to discover truth
is stated by Perelman to be based on the difference between for-
mal logic and argumentation.

An argument is never capable of procuring self-evidence, and there
is no way of arguing against what is self-evident. Whoever states
a self-evident proposition is sure that it will compel everyone with
the same evidence. Argumentation however, can intervene only
where self-evidence is contested. Aristotle had already noticed this;
he recognized that it is absolutely necessary to resort to dialectical
reasoning when the first principles of a science, which normally are
self-evident and contested. The same thing happens when people
dispute a definition.25

23. Id.
24. REALM, supra note 15.
25. Id.
In the remainder of the "Realm," Perelman develops a great deal of specificity concerning argumentation and the audience. The basic "premises" of the book include:

a. Argumentation is not formalized, but rather, flows out natural language.
b. Argument is intended to act upon an audience, therefore the speaker must adapt to the audience.
c. Successful argumentation involves the preliminary selection of facts and values, their specific description in a given language, and an emphasis which varies with the importance given them.
d. Interpretation of data and the presentation of facts must be given signification.
e. Verbal techniques are used to accomplish the fundamental purposes of argumentation. These techniques include:

   (1) Quasi-logical arguments which are defined as those which have something in common with formal reasoning but which, because they include matters which are controversial, are less rigorous and precise.

   (2) Arguments based on the structure of reality such as those which appeal to liaisons of succession, cause and effect or liaisons of co-existence.

   (3) Arguments using examples, illustrations and models.

   (4) Arguments using analogies and metaphors as a means to clarify one concept by the comparison to another.

   (5) Arguments using the disassociation of one idea from another so as to separate elements which language or a recognized tradition have previously tied together.

   (6) Arguments which carefully structure and order the presentation of ideas or steps to be pursued in reaching for an idea.26

Chaim Perelman through his concentration on rhetoric, is considered to be among the foremost of contemporary scholars struggling to reunite philosophy and rhetoric and to argue that rhetoric should not be viewed as merely "the technique of an external persuasion" but as the basis of rational thought.27

The articles in this dedicatory issue are examples of the influence Chaim Perelman has had on both philosophical and jurisprudential scholarship. They range over the wide field of scholarly inquiry

26. Id.
and constitute a substantial contribution to the literature of the subjects of philosophy and jurisprudence. The following is a brief capsule of the included articles designed merely to illustrate the threshold of each article:

Professor Funk, in his article, professes to build on Perelman's "New Rhetoric" by recognizing its great contribution to the solution of some legal philosophical problems and by extending Perelman's revival of an ancient approach to social scientific approaches to Jurisprudence. In developing his topic Professor Funk "... attempts to lay the groundwork for social scientific approaches to Jurisprudence which the author expects to develop in the 21st century. Each of them is like a rhetorical argument in contributing a perspective to the study of law which suggests rather than dictates legal philosophical problems and possible solutions."\(^{28}\)

Professor Bodenheimer's article "sets out to describe the accustomed and deeply-ingrained approach to scientific methodology which provided the target for Perelman's reformatory effort." In developing this theme the author traces through a rather complete history of philosophical and scientific inquiry. He discusses Perelman's challenge to the Cartesian theory\(^ {29} \) and the significance that such challenge has for legal methodology. Professor Bodenheimer then discusses the application of the Perelman approach to argumentation to legal reasoning and the resulting effects on legal system.\(^ {30} \)

Professor Stone, in his article, focuses his attention on the judicial decision making process from the perspective of sources of choices faced by appellate courts dealing with disputed questions of law. In distinguishing "principles" from "rules," Professor Stone uses the concept of tort duty of care as exemplified in two cases, *Dorset Yacht Case*\(^ {31} \) and *McLoughlin v. O'Brien*\(^ {32} \) to examine the "fact-value complex, which is characteristically found embodied in a principle." The article is an in-depth treatment of an important aspect of the path of the development of precedent law.\(^ {33} \)

29. That philosophical and scientific statements whose validity cannot be proved by irrefutable evidence are to be rejected.
Professor Hermann applies Chaim Perelman's concept of argumentation (The New Rhetoric) to display its effectiveness as a tool to be used in legal reasoning by examining in detail three cases. He applies many of the concepts and techniques developed by Perelman throughout his research and resulting publications in the field of rhetoric. Professor Hermann states in his conclusion, through close study of a series of opinions of the Court of Appeals for the District of Columbia dealing with the question of whether an exhibitionist is properly classified as a sexual psychopath, one can identify the forms of argumentation which constitute the rhetoric of legal reasoning. One can observe in these opinions not only the operation of argument, but also identify special features of law which make possible authoritative decisions.

Professor McBride's article challenges Perelman's treatment of authority. He questions some of the conceptional implications that he claims Perelman has drawn from his statement that "within the Judeo-Christian tradition, authority is a moral and not a legal notion; it is tied to respect." Specifically, Professor McBride disagrees with Perelman on the value of the notion of authority in social life and the concept that the underpinnings of authority lie in ideologies.

Professor Pattaro, in his article, considers the function, in legal realistic thought, of jurists and judges in relation to valid law, in the work of one exponent of this current. To emphasize this approach, Professor Pattaro focuses his attention on one of the foremost Scandinavian realists, Alf Ross. In developing a picture of Scandinavian realism Professor Pattaro delves into the basic foundation of the school and explores some of its ramifications for legal reasoning.

Professor Valauri's article, "Confused Notions and Constitutional Theory," applies an aspect of Perelman's new rhetoric to contemporary American constitutional theory. He shows how Perelman's idea of "confused notions" helps illuminate the nature and, hence, the interpretation of the ambiguous "open-ended" clauses of the

37. Alf Ross' most important work published in Danish in 1953 and English in 1958 was ON LAW AND JUSTICE.
United States Constitution, such as the due process and equal protection clauses of the fourteenth amendment.\textsuperscript{39}

The articles in this issue together with the thought underlying its dedication are an appropriate tribute to an outstanding philosopher and jurisprudent, Chaim Perelman. Both the fields of Juridical Science and Philosophy will benefit for years to follow from the innovative exploration of Chaim Perelman into the realm of rhetoric.

Chaim Perelman was a philosopher born in Poland who taught most of his life at the University of Brussels, Belgium. He was one of the directors of that University's Center for Legal Philosophy. Although he was well versed in the law, especially comparative law, his scholarly activity was of an inter-disciplinary character and reached into many branches of the physical and social sciences. In order to understand Perelman's distinctive contribution to legal methodology, it is necessary to analyze it against the background of his general conception of scientific method. Perelman's view of legal reasoning and argumentation was in fact the byproduct of a comprehensive theory of rational discourse which challenged many traditional assumptions. This is the reason why this Article, before delving into the specific problems of the legal process, sets out to describe the accustomed and deeply-ingrained approach to scientific methodology which provided the target for Perelman's reformatory effort.

I. THE GENERAL PHILOSOPHICAL BACKGROUND

There exist three different avenues to the apprehension of truth and rightness in the natural and social sciences, including the law: intuitive insight, verified certainty, and reasoned conviction. These three ways for the apperception of truth and rightness have in our western civilization taken turns in a historical sequence; but there are no persuasive reasons for denying that all three instrumentalities for the gaining of knowledge may coexist at a given period of time.

During the Middle Ages, theology was considered the queen of the sciences. Theology was, among other matters, concerned with obtaining cognitive access to the plan by which the Supreme Governor administers the world. According to St. Thomas Aquinas, who became the most authoritative spokesman for the medieval church, human beings are capable of obtaining some knowledge

* Professor of Law Emeritus, University of California, Davis. Dr. Jur. 1933, University of Heidelberg; LL.B. 1937, University of Washington.
of the Divine plan which enables them, for example, to grasp the basic distinction between right and wrong. According to St. Thomas, this knowledge is limited to the truly fundamental principles of rightness and truth. 1

The (incomplete) participation of the human mind in the eternal law of God assumed by St. Thomas is obviously not based on sense perception or empirical observation. It cannot be other than an intuitive, a priori insight into some fundamental precepts of Divine wisdom. This type of general knowledge cannot, as St. Thomas pointed out, provide us with an “unerring” certainty. In order to teach people in some detail what they are allowed or disallowed to do in their daily lives, it is therefore necessary to enact positive laws, which may not in every respect correspond to the mandates of the Divine law. 2

After the demise of the Middle Ages, philosophy became secularized and turned away from the speculative method of medieval theology. Intuitive insight divorced from concrete proof was no longer considered an acceptable tool of philosophical and scientific cognition. A quest for certainty in truth-finding arose which on the European continent took on a rationalistic hue, while an empiricist temper tended to prevail in England. Of particular importance for the purposes of this Article is the thought of René Descartes, a French philosopher frequently referred to in the works of Perelman. We shall denominate the attitude Descartes took toward the problems of philosophical and scientific methodology the “Cartesian approach.”

The first rule of philosophical and scientific inquiry which Descartes imposed upon himself was “never to accept anything as true if I had not evident knowledge of its being so.” 3 As a corollary to this principle of truth-seeking, Descartes was resolved to “reject as if absolutely false anything as to which I could imagine the least doubt, in order to see if I should not be left at the end believing something that was absolutely indubitable.” 4 Thus, the discovery of some reason for doubting a certain proposition entailed for Descartes an intellectual duty to repudiate the proposition in its entirety. 5 Descartes admitted, of course, that a person might

2. Id. at qu. 91, art.3.
4. Id. at 31.
5. Id. at 61.
deceive himself in believing a certain fact or combination of facts to be unquestionably true. In that event, the fault might lie in an incomplete development of that person's rational faculties. But the possibility also exists, said Descartes, that a person endowed with perfect rationality may make a misjudgment because the problem he is concerned with is beyond the ken of the human powers of comprehension. In order to avoid or at least reduce such misjudgments, Descartes suggested that "we must occupy ourselves only with those objects that our intellectual powers appear competent to know certainly and indubitably."

It is obvious that the criteria set by Descartes for the pursuit of successful rational inquiry into truth are extremely stringent. A rational conclusion in this area of intellectual activity, according to him, is one that is evident and beyond a reasonable doubt. If we become convinced that a certain proposition, or an inference from such a proposition, is not clearly verifiable by irrefutable proof, we should refrain from asserting it. Combined and closely connected with this demand was Descartes' denial that two inconsistent statements might under certain conditions both be true, or at least partially true. "Whenever two men come to opposite decisions about the same matter one of them at least must certainly be in the wrong." It was this Cartesian contention in particular against which Perelman directed his fire, as we shall see later.

The quest for infallible certainty, which was characteristic for the philosophical thinking of Descartes, was extended to the field of ethics by the Dutch philosopher Benedict Spinoza. This is of considerable significance in the context of this Article because ethics, like law, is to a large extent a normative discipline concerned with problems of proper human conduct, i.e., propositions of "ought" rather than descriptions of empirical reality. We are strongly inclined today to take the position that ethical discussion would be rather frustrating, or perhaps entirely futile, if we must dismiss from consideration any question of moral conduct that does not admit of an unassailably correct answer.

6. Id. at 93.
7. Id. at 153.
8. An example of two inconsistent statements which, according to the position of modern physics, are both true is the following: (1) A neutron is stable; (2) A neutron is unstable. A neutron is stable when it forms part of an atom; it is unstable when it exists outside an atom. In the latter case, it may turn into a proton or an electron. See also Cohen, infra note 50, at 166.
We find it under these circumstances quite surprising that Spinoza wrote a book entitled *Ethics Presented in the Mode of Geometry*. Geometry appears to us as a science in which—notwithstanding the fact that in our day there exist several competing systems of geometry—unanimity at least on fundamental postulates is infinitely higher than in the social sciences or humanities. What Spinoza did was to enunciate a large number of apodictically formulated axioms, each of which he sought to support by a list of "proofs" apparently deemed by him to be compelling and uncontestable. Although we must today gravely question Spinoza's method of presentation, it is generally conceded that his treatise is a work of very high intellectual stature.

In conclusion of this general philosophical prelude, it should be mentioned that the world-famous epistemology of the German philosopher Immanuel Kant was decisively influenced by the Cartesian approach. Kant asserted that it was beyond the powers of the human mind to gain true knowledge of the external world. All we can talk about, he argued, are "appearances" and "phenomena;" we have no ascertainable perception of things as they really are. This conclusion is at odds with our commonsense conviction that the tree we watch in front of our window is not a mere "appearance" but an actually subsisting part of reality. It is most likely that Kant was led to his theory by the impossibility of furnishing a Cartesian-type, infallible proof of an object's existence, as divorced from our observation of it.10

II. THE CONSEQUENCES OF THE CARTESIAN APPROACH FOR SCIENTIFIC RESEARCH AND LAW

The Cartesian approach described in the preceding section had a strong impact on scientific thinking and method from the seventeenth to the twentieth century. The metaphysical speculation pursued in many areas of human endeavor during the Middle Ages gave way to an insistence on rigorous experimental testing of any asserted scientific position. In physics, the Cartesian attitude was aptly reflected in Sir Isaac Newton's famous dictum *Hypotheses non fingo* (I frame no hypotheses). Classical physics rested its findings on supposedly ironclad proofs, and the physical laws enunciated by Newton were, until the time of Einstein, regarded as

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unchallengeable results of true scientific methodology. In biology, the Darwinian theory of evolution, at least in its major conclusions, was received by the scholarly community as a kind of gospel. The attacks that were directed against Darwinism stemmed almost exclusively from some segments of religious fundamentalism, rather than from the ranks of professional biologists.

In the social sciences, certain influential publications in the field of sociology were viewed by their authors, and by the disciples of these authors, as unshakable accounts of the dynamics of societal development. This characterization applies, for example, to the works of August Comte and Herbert Spencer. These two authors did by no means reach identical or even similar conclusions regarding the laws controlling societal evolution. Comte's sociological thought was imbued with a distinctly communitarian ideology, while Spencer's sociology represents a radical defense of laissez-faire individualism. According to Descartes, when two thinkers reach opposite conclusions, one of them must be clearly in the wrong. But it would seem that a modern reader, without transgressing any laws of logic, might convince himself that elements of truth are contained in the ideas of both authors.

The Cartesian approach reached its apogee in the twentieth-century doctrine of logical positivism. The unbending rigidity inherent in the philosophy of Descartes was extended here to all fields of modern scientific activity. According to logical positivism, every statement of fact must have a basis in a verifiable sensation, although in some instances an indirect verification through tests producing clearcut results may be permissible. The high priest of logical positivism, Rudolf Carnap, outlawed all non-physicalistic statements about mental states, because such states cannot be directly observed by a scientist; he argued that propositions of empirical science cannot be about anything but physical objects.

Logical positivism suffered a jolt when the English philosopher

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12. See supra text accompanying note 9.
13. See supra note 8. It should be made clear at this point that use of the male gender throughout this Article is meant to include the female gender.
14. See V. Kraft, The Vienna Circle (1953) (presenting a comprehensive analysis of logical positivism).
15. Carnap, Psychology in Physical Language, in Logical Positivism 165-98 (A. Ayer ed. 1959); V. Kraft, supra note 14, at 165-68.
Sir Alfred Ayer pointed out that no empirical assertion about physical reality can claim final validity. No matter how often a factual assertion is verified in practice, there always remains the possibility that it will be refuted on some future occasion. The philosopher cannot therefore, according to Ayer, be concerned with the physical properties of things. He can be concerned only with the way in which we speak about such properties. Differently expressed, Ayer argued that "the propositions of philosophy are not factual, but linguistic" in character.16 This view became dominant in recent Anglo-American philosophical thinking; it is generally referred to as the "philosophy of language."17

It is obvious that logical positivists as well as linguistic philosophers are compelled to exclude value judgments entirely from the domain of theoretical discussion. Such judgments are deemed to be expressions of an emotional state and as such devoid of any cognitive value. For example, in the view of Carnap the statement "Killing is [an] evil," since it is not verifiable, "has no theoretical sense."18 In legal philosophy, the rejection of normative philosophy took the form of a refusal to discuss problems of justice. According to Hans Kelsen, "justice is an irrational ideal," representing nothing but the subjective predilections and value preferences of individuals and groups.19 Alf Ross went so far as to state: "To invoke justice is the same thing as banging on the table."20 The theory of law cannot, from this point of view, answer the question of what constitutes justice, because no scientific tests are available for substantiating an answer.

In the domain of the law, the prima facie appeal of the Cartesian approach is apt to be particularly strong, because certainty and predictability are widely regarded as important legal values. The realization of a person's life plan would often be impeded or frustrated if legal control were exercised in a way that permits unpredictable and capricious interferences by governmental agen-

17. Quinton, Linguistic Analysis, in Philosophy in the Mid-Century 146-57, 177-78 (R. Klibansky ed. 1961); Warnock, The Philosophy of Wittgenstein, id. at 203-06; G. Warnock, English Philosophy Since 1900, at 74, 85, 163 (1958). See also C. Mundle, A Critique of Linguistic Philosophy 263 (1970) expressing the opinion that, "If homo sapiens does not destroy himself before the end of this century, the Linguistic Revolution in Philosophy will, I think, be recognized by then as one of the most curious curios in the history of ideas."
cies with the execution of human purposes. As early as 1837, a Massachusetts commission headed by an eminent jurist and judge, Joseph Story, recommended a codification of the state's law on the ground that the proliferation of judicial decisions and the frequent occurrence of conflicts between them were diminishing the clarity of the law and impairing its practical usefulness as a guide to individual decisionmaking. In the second half of the twentieth century, the legal philosophy taught at the Harvard Law School under the deanship of Christopher Columbus Langdell was dominated by the conviction that the fundamental principles of the common law, as developed by the courts of England and the United States, insured a degree of certainty and calculability sufficient to provide firmly-grounded signposts for the legal profession.

A school of jurisprudence known as the "jurisprudence of conceptions" hypostatized the goal of legal certainty into the supreme ideal of legal ordering. Paton characterized the program of this school as follows:

In the golden age of rationalism men wished to construct the legal system analogous to Euclidean geometry, the basis of which is the assumption of self-evident truths or axioms and the deduction by rigorous logic of the whole system from this base.

Many representatives of this movement were convinced that the basic concepts with which the legal system operates had an a priori foundation in the bedrock of human reason, and that all important rules and principles found in statutes and judicial decisions could be derived by deductive reasoning from these basic concepts. Proper classification, careful dissection of the concepts into their constituent elements, and syllogistic application of the rules thus gained were deemed to be the foremost instrumentalities of legal reasoning and decisionmaking.

The jurisprudence of conceptions was particularly influential in Germany during the latter part of the nineteenth century. Known as Pandektenwissenschaft (pandectology), this branch of science

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likened legal concepts to the concepts of mathematics; it proceeded from the hypothesis that the legal order was without gaps, so that by proper logical operations a correct decision could always be derived from the existing body of positive law. It might be stated that the jurisprudence of conceptions in general, and German pandectology in particular, symbolized the most consistent application of the Cartesian approach to the methodological problems of the legal order.

III. THE DRAWBACK OF THE CARTESIAN APPROACH

As was pointed out earlier, the Cartesian approach had a strong impact on scientific thinking and method in the Western world. But it turned out that the Cartesian insistence on the goal of absolute certainty and consistency in the pursuit of empirical research produced considerable drawbacks and difficulties in both the natural and social sciences. The law, which should properly be considered a branch of the social sciences, was strongly affected by this development.

In physics, Sir Isaac Newton's rejection of the use of hypotheses as a tool of scientific inquiry became the target of criticism. It was discovered in the course of time that physics, like many other human disciplines, had a speculative edge. Albert Einstein, who is generally viewed as the greatest physicist since Newton, specifically rejected the latter's *Hypotheses non fingo* apothegm. Einstein stressed the speculative element in physical theorizing and declared that physicists are often not distinguishable from metaphysicians. What he meant to say was that in physics, as in metaphysics, it was sometimes necessary to set up a creative hypothesis which, although not clearly and immediately verifiable, awaited the support of future testing through experience. It should be noted in this connection that Einstein's theory of Mercury's shifting orbit was confirmed more than ten years after it was announced, and his field equation theory, dealing with the structure of space-time, is still the subject of vivid controversy. Other key problems of physics, which exist today in the form of


26. On Newton see *supra* § II, first paragraph.

hypotheses awaiting verification in the future, are the nebular theory concerning the formation of the solar system; the belief, supported by a great deal of evidence, that there exists a single ultimate particle of which the presently known particles are derivatives; the reality of black holes, which is made probable by much indirect proof; and the causes of supernova explosions, which according to the prevailing but not fully demonstrated theory must be sought in the collapse of the center of stars. 28

The widespread use in physics of assumptions subject perhaps to prolonged testing finds its explanation in the fact that the great complexity of physical phenomena makes a slow and patient approach to the acquisition of full-blown truth necessary. If physical science had abided by the Newtonian injunction, progress would have been impeded by a reductionist attitude toward scientific methodology.

A comparable situation prevails in a novel discipline which has attracted a great deal of attention in recent years: the branch of biological science known as sociobiology. According to its most prominent representative, Edward O. Wilson, sociobiology is "the systematic study of the biological basis of all social behavior." 29 As such it is concerned with the genetic substratum of group behavior in the animal and human world. Sociobiology seeks to determine certain biologically-induced characteristics of living beings, including the members of the human race. 30 It has also developed a theory of interaction between human genetic and cultural phenomena. 31 The anthropologist Marshall Sahlins has made the charge that many of sociobiology's conclusions rest on extrapolations from animal behavior to human social conduct, and that the theories of human nature produced by sociobiology are insufficiently supported by trustworthy empirical evidence. 32 This does not mean, however, that the hypotheses advanced by sociobiology are without scientific value; they may be regarded as stepping stones to a future integrated and well-substantiated theory of human behavior.

The complexity and multidimensionality which permeate the natural sciences such as physics and biology have also become

28. Information supplied by my son, Peter H. Bodenheimer, Professor of Astrophysics, University of California, Santa Cruz.
characteristic features of modern systems of law. In American law, for example, the open-ended nature of constitutional interpretation, the existence of many ambiguous statutes, and the large number of inconsistent court decisions have put the traditional ideals of legal certainty and logical coherence to a severe test. It can be no surprise, under these circumstances, that the role which certainty, predictability, and logical rigor play in the administration of law has been subjected to incisive questioning.

The chief medium through which the critique of the Cartesian approach expressed itself in American legal theory was a movement called “legal realism.” The patron saint of the movement was Justice Oliver W. Holmes, who had taken the position that “certainty generally is [an] illusion, and repose is not the destiny of man.”33 For Max Radin, a follower of Holmes, it was “experience” rather than reason or deductive logic that was the key to judicial decisionmaking, although he did not explain how experience could be an adjudicatory lodestar without a reasoned elaboration of its beneficial or adverse consequences for the solution of specific legal problems.34

The most radical attack on certainty as an ideal of the legal order was made by Jerome Frank. He described legal certainty as a “myth,” and the search for it as a psychologically unsound and immature yearning for parental authority.35 “Much of the uncertainty of law is not an unfortunate accident: it is of immense social value.”36 He reached this conclusion despite his pessimistic appraisal of the judicial process, which he saw shot through with idiosyncrasies, prejudices, emotional reactions, and serious errors in fact-finding on the part of the judiciary.37

Judge Joseph Hutcheson claimed that the essential facet of the judicial method was not logical rigidity or exactitude, as he had assumed in his younger years, but “feeling” or “hunching.”38 To him intuitive insight was the most important ingredient of judicial

34. M. Radin, Law as Logic and Experience 1-33 (1940).
36. Id. at 7.
37. See J. Frank, Courts on Trial 146-64, 406-15 and passim (1950). After Frank had become a member of the federal bench, he toned down his radical views to some extent, especially in his judicial opinions.
decisionmaking. Other authors took a less negative attitude toward the rational, deductive element in adjudication, without denying that the choices of alternative solutions often open to the judges impede the attainment of Cartesian certainty in law. 39

IV. PERELMAN'S CHALLENGE TO THE CARTESIAN APPROACH

It has been shown that the Cartesian rejection of philosophical and scientific statements whose validity cannot be proved by irrefutable evidence found a great deal of resonance in Western civilization. It has also been pointed out that the acceptance of the Cartesian approach in England and the United States curtailed the scope of mainstream philosophy to the making of factual statements and finally to a mere analysis of language, while its effect on legal philosophy was the removal of justice from the agenda of jurisprudential topics. Furthermore, it was suggested that Cartesian reductionism was highly detrimental to the natural sciences: the reason being that without the framing of hypotheses, which provided programmatic directions and ascertainable goals for research and testing, scholarly initiative becomes stifled and progress through long-term experimentation jeopardized.

It is not surprising, under these circumstances, that a strict compliance with Cartesian postulates was gradually abandoned in the natural and social sciences. This abandonment of the Cartesian approach was not accompanied, however, by a thorough reconsideration of the basic principles of scientific methodology. In order to understand the seminal significance of Perelman's work, it is necessary to realize that the notion of rational inquiry remained for a long time unaffected by the anti-Cartesian revolution that took place in the sciences. To Descartes, a rational statement was one that was purged of every vestige of vagueness, ambiguity, or doubt. 40 The antonym of rationality is, quite obviously, irrationality. A definition of rationality which excludes propositions that are probably true because of the existence of persuasive (but not conclusive) proof relegates many assumptions, hypotheses, and tentative theories in the natural and social sciences to the realm of the irrational. In the area of law, for example, any conclusion that does not rest on a logically compelling deduction from an unam-

40. See supra text accompanying notes 3-5.
biguous major premise could not, under the Cartesian approach, qualify as a rational conclusion.

It might be argued that, as long as the Cartesian approach is no longer operative as a shackle on research in the actual practice of the sciences, a definition or elucidation of the terms "rational" and "reasonable" is a theoretical question without much pragmatic value. There exist, however, weighty counterarguments to this position. Generally speaking, if human beings are imbued with the conviction that the bulk of everything that happens in this world is of an irrational character, this assumption may affect the rationality of conduct not only of the average person but also of the leaders of nations. Due to a phenomenon comparable to the self-fulfilling prophecy, actions with momentous consequences may under these circumstances be engendered by emotional reactions rather than by sober and judicious reasoning. In the sphere of the law, a belief on the part of the judiciary that, in the absence of the compelling force of a statute or precedent, there is freedom of unconstrained choice may lead to decisions induced by prejudice or ideological predilection. Wherever it bursts its proper bounds, the cult of irrationality may produce consequences that a sane society would wish to avoid at all costs.

We have now painted the background necessary to put Perelman's trailblazing achievements into proper relief. Perelman posed an all-out challenge to the Cartesian approach because he felt that its continuing (though perhaps slackening) hold on scholarly thinking was muddying the waters of philosophical, scientific, and legal methodology. He presented this challenge without attempting to tamper with the Cartesian concept of rationality as such—a feature of his theory that will be criticized later in this Article.41 But he accomplished a decisive breakthrough by opening up a wide area located between Cartesian rationality and emotion-controlled irrationality: the area of reason and reasoned justification.

Perelman took issue with the Cartesian assumption that intellectual inquiry must produce a system of necessary propositions concerning which agreement is inevitable. He declared that Descartes had created "a perfectly unjustified and unwarranted limitation of the domain of action of our faculty of reasoning and proving."42

41. See infra text accompanying notes 89-95.
He deplored the fact that the Cartesian concepts of reason and rationality caused irrational elements to intervene every time the object of knowledge was not self-evident. It was not, in his opinion, only self-evidence or apodictic proof that made a certain statement reasonable, but also plausible, credible, and persuasive argumentation establishing the probability of its truth. Unless we take this broad view of reason, he argued, we will arrive at an unfortunate dichotomy of demonstrated truth on the one hand and arbitrariness on the other, with a distinct prevalence of arbitrariness in most of our argumentative statements. For Perelman, argumentation supported by facts was a legitimate complement to formal logic, different in character but still within the ambit of reason.

Perelman was of the opinion that not only descriptive propositions but also value judgments were a proper subject for rational discussion. He rejected the view of the logical positivists that value judgments depended solely on irrational choices, based on personal interest, passion, prejudice, or myth. This aspect of Perelman' thought will be dealt with more extensively when we come to analyze his reflections on justice.

Perelman also combated the Cartesian assumption that disagreement was a sign of error on the part of at least one of the discussants. He was convinced that statements apparently indicating polarization of the adversaries in dialogue were frequently complementary rather than contradictory. He was in agreement with the view that Morris Cohen had expressed in the following words: "When opposing statements are completed by reference to the domains wherein they are true, there is no logical difficulty in combining them."

43. Id. at 3-4.
44. Perelman, Justice and Justification, 10 NAT. L.F. 5 (1965).
45. As I mentioned earlier, Perelman meant to retain the narrow Cartesian meaning of rationality, but he was not always consistent in his use of the term "rational." See infra note 94. It is in the broad sense that the term will be used hereafter in this Article, unless otherwise indicated.
47. See infra text accompanying notes 69-76.
48. See supra text accompanying notes 8-9.
50. M. COHEN, REASON AND NATURE 166 (2d ed. 1953). See supra note 8, illustrating that two contradictory statements may both be true, depending upon the context in which they are made.
A concept which plays a cardinal role in Perelman's theory of argumentation is the notion of the "audience." An audience is an assembly of those whom the speaker wishes to influence by his arguments. The goal of every argumentation is to win (or to strengthen) the adherence of the audience. The ideal audience, according to Perelman, is one whose adherence can be gained only by truly "rational" arguments. It is an audience consisting of enlightened, reasonable persons. This audience Perelman calls the "universal audience." The acceptance of a proposition by the universal audience is for Perelman the touchstone of argumentative reasonableness.

V. PERELMAN'S SIGNIFICANCE FOR LEGAL METHODOLOGY

It was pointed out at the beginning of this Article that Perelman's views on legal methodology cannot be understood in isolation from his general theory of rational discourse. It was, for this reason, necessary to provide the reader of this Article with a great deal of background information in order to set the stage for a discussion of problems relating specifically to the argumentative techniques used in the processes of the law.

The antecedents of Perelman's theory of argumentation in general and legal argumentation in particular must be sought in part in the Aristotelian doctrine of dialectical reasoning. In contrast to Descartes, Aristotle did not assume that all knowledge was demonstrative, that is, resting on incontrovertible proof. He was of the view that reasoning often proceeds from opinions that are believed to be true or probably true. Such opinions, he pointed out, may be held by all, or by a majority, or by knowledgeable and illustrious persons.

It is, of course, entirely possible that an opinion that is held by a majority is not shared by well-educated and knowledgeable individuals. It is also possible that an intellectual elite is split over

52. C. PERELMAN & L. OLBRECHTS-TYTECA, supra note 42, at 31-33; Perelman, What the Philosopher May Learn From the Study of Law, 11 NAT. L.F. 1, at 12 (1966); C. PERELMAN, supra note 51, at 86-87.
53. C. PERELMAN & L. OLBRECHTS-TYTECA, supra note 42, at 5.
54. ARISTOTLE, Analytica Posteriora, in THE BASIC WORKS OF ARISTOTLE 114 (R. McKeon ed. 1941).
55. Aristotle, Topica, id. at 188.
whether a certain opinion is true, partially true, or false. In such situations it will often be the case that the problematic opinion faces competition from one or more rival opinions. It will then be necessary for those arguing a certain proposition to make a choice between two or more premises for their argument.56 Such a choice, in order not to be arbitrary, must be based on convincing reasons.

At this point, Perelman's concept of the "audience" comes to the fore.57 Whether the audience is a particular or universal one, whether the speaker or writer deals with a problem of philosophy, physics, politics, or law, it will be the aim of his argumentation to win the adherence of his audience. If the audience consists of experts, or of intelligent persons desiring to be persuaded by credible and well-substantiated reasons, the argument will generally proceed by presenting the pros and cons of a certain proposition. It will also be necessary to weigh the merits of this proposition against the strong and weak points of alternative solutions. The speaker will then attempt to convince his audience that the preponderance of the evidence favors acceptance of the proposition advocated by him. This argumentative technique is the essence of dialectical reasoning.

It is obvious that dialectical reasoning plays a prominent role in the administration of justice. As Perelman points out, dialectical reasoning has resort to arguments of all kinds (such as equitable or pragmatic arguments and appeals to the dictates of justice) that cannot be reduced to deductive or simple inductive schemes.58 In the latter two situations the goal of Cartesian certainty can normally be achieved so that dialectical reasoning is not required.

Every lawyer is aware how small the percentage of cases is in which a legal problem can be solved by straight deduction from the text of a statutory or judge-made rule. Statutory provisions, it has been observed, often exhibit an "open texture";59 the key terms used in a statute may be either broadly or restrictively interpreted, and after an appellate court has undertaken such an interpretation it may still remain doubtful whether a certain fact

56. Aristotle, Analytica Priora, id. at 65.
57. See supra text accompanying notes 51-52.
situation ought to be subsumed under a provision previously clarified in its meaning. It may also happen that a court will engraft an equitable exception upon a statute in cases where the text but not the spirit of the statute applies to a litigated fact situation.  

Judge-made rules have an even more iridescent character than statutory provisions. Even a lower court may rephrase such a rule if it concludes that a higher court had formulated the ratio decidendi of a case more broadly than was necessary for the decision invoked as a precedent.

Turning now to inductive reasoning, it must be realized that this mode of argumentation is possible only if there exists a string of decisions involving similar fact situations, from which a rule covering all of these cases can be extracted. What Perelman calls "simple induction" is a process by which a judge infers a precise, well-delimited rule from a cluster of homogeneous decisions. If the decisions that might possibly serve as controlling precedents are not in harmony with respect to their outcome, this mode of reasoning will fail the attorney or judge. Induction also provides no certainty if the rule distilled from a set of precedents may be broadly or narrowly phrased.

Reasoning by analogy is another widely used legal device. But whether or not a certain state of facts is similar enough to another state of facts to warrant an analogous application of a rule is often a matter of doubt or dispute. Furthermore, analogy is rarely used in the statutory area in Anglo-American jurisprudence.

How do judges proceed if the techniques of deduction, induction, and reasoning by analogy are not available to them in the decision of lawsuits? The English jurist A.G. Guest suggests that in such situations the decision is "the product of intuition, emotion, or prejudice." This view corresponds to the positions taken by Jerome Frank and Judge Hutcheson, which were discussed earlier. Guest's

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60. See E. Bodenheimer, supra note 11, at 363-67.
64. Guest, supra note 62, at 182.
65. See supra text accompanying notes 35-38.
statement also provides a noteworthy illustration of the immense extension of the sphere of irrationality under the Cartesian approach, which was previously characterized as undesirable and even dangerous.\textsuperscript{66} Regrettably, the belief that rationality evaporates when a judge is forced to go beyond the traditionally recognized techniques of legal reasoning has gathered many adherents in the last few decades of Anglo-American jurisprudence.

At exactly this point Perelman's theory of argumentation moves effectively into the legal limelight. He was rightly appalled by the thought that a lawyer or judge who draws moral principles or considerations of social welfare into his armory of ratiocination indulges in an exhibition of irrationality. As we have seen, Perelman interposed a wide stretch of reason and reasoned justification between the narrowly defined Cartesian notion of rationality and the realm of intuitive and emotional responses to human problem-solving. According to Perelman, law does not lose its status as an instrument of reason if it becomes impregnated with argumentative methods that are not consonant with the Cartesian standards of certainty or the time-honored devices of legal reasoning. Law under such circumstances hopefully remains—to use an Aristotelian apothegm—"reason free from all passion."\textsuperscript{67} Trying to convince the parties to a lawsuit, or the legally interested community generally, by well-considered arguments designed to support a certain decision is an act of reason, while irrationality is characterized by stubborn, unthinking clinging to opinions that are not substantiated by persuasive evidence or even disproved by incontrovertible facts.

Perelman's approach to legal reasoning has also had the salutory effect of restoring an aura of respectability to jurisprudential discussions about justice. It was pointed out earlier that the influential doctrine of logical positivism excised all value judgments from the domain of legitimate scholarly endeavors.\textsuperscript{68} Normative statements about justice—as distinguished from purely descriptive accounts of views on justice held by certain individuals or groups—involve value judgments as to what the maker of the statement considers fair and right. Logical positivism considered such statements to be mere expressions of emotional reactions, devoid of cognitive value.

\textsuperscript{66} See supra text accompanying notes 40-41.
\textsuperscript{67} ARISTOTLE, THE POLITICS, Ch. 15, 1287a (E. Barker ed. 1946).
\textsuperscript{68} See supra text accompanying notes 18-20.
Under the influence of positivistic thinking, many books on jurisprudence and legal philosophy in the twentieth century limited themselves to an empirical, value-neutral analysis of law and legal systems, eschewing what their authors viewed as the no-man's land of justice. The positivistic wave hit England with a particularly strong force. Due to its impact, comments on judicial decisions appearing in English legal periodicals for a long time avoided evaluations of court decisions in terms of the desirability of the result reached by them. In the United States, a certain counterweight to legal positivism was presented by Roman-Catholic jurisprudence, which had never banished axiological concerns from the philosophy of law.

In one of his earlier works on justice, Perelman stayed close to the positivistic line of thinking. He defined the notion of justice in purely formal terms: "The rule of justice requires that those who are essentially similar should be treated alike." He noted that this conception of justice was not subject to any ethical criterion; "the only condition it must comply with is purely logical in character." He was willing to concede that the absence of moral content in the notion of justice left room for arbitrariness in the administration of the law. Let us assume, for example, that a certain legal system authorizes the infliction of extremely cruel punishment for the commission of a minor crime. If the cruel punishment is applied, without respect of persons, to everybody who has committed this crime, the formal rule of justice is complied with. But does it make sense to reach this conclusion without paying any attention to the content of the penal law?

Taking account of this predicament, Perelman did not remain satisfied with his original attitude toward justice, and he moved further and further away from it as time went on. Is it really true, he asked, that the values and ethical principles presupposed in the establishment of justice are nothing more than the expressions of passions and subjective interests? Is the formal rule of justice really sufficient? Or is it possible to reason about values and norms in a philosophically legitimate way?

Fortunately, Perelman's own theory of argumentation provided

70. Id. at 45.
71. Id. at 50-54, 60.
72. C. PERELMAN, supra note 51, at v. 78; PERELMAN, JUSTICE, LAW, supra note 49, at 56-59.
the answer to this problem. The legal philosopher, by appeals to reason and common experience, may convince his audience by powerful arguments that a particular view of justice may be more conducive to the general welfare than any conceivable alternatives. Thus, the legal philosopher, notwithstanding the objections of logical positivism, may take a normative stand. He may even be able to convert the "universal audience," consisting of the aggregate of all reasonable human beings, to certain solutions for the problems of justice. "The specific role of philosophy is, in effect, to propose to humanity objective principles of action that will be valid for the will of all reasonable men." This is a far cry from Perelman's earlier view that a philosopher must limit himself to the articulation of a purely formal notion of justice.

Although Perelman repeatedly stressed that no set of substantive principles of justice could claim absolute and eternal validity, he seemed to assume that, at least in a particular period of time and in a particular culture, a certain order of justice could be proven superior to potentially competing systems. "Just as a judge, after he has heard the parties, must choose between them, a philosopher cannot grant the same validity to all opinions." But the philosopher must be cautious enough to realize that the principle of res judicata has no application to a theory of justice: such a theory must remain open-ended and flexible, it must adapt itself to the changing circumstances of human experience.

It thus appears that Perelman's theory of reasoning was meant to cover not only the processes of adjudication but also the fashioning of philosophical blueprints for the just society. The question arises, however, whether there exists a difference between normative reasoning in the judicial process on the one hand and the propagation of theories of justice on the other. Reasoning about the just society is normally dialectical because the basic axioms are for the most part not preestablished but must be found in response to varying social and economic conditions. Is the reasoning of the judge in the adjudicatory process also predominantly dialectical? At one point Perelman contends that "the reasoning of the judge is dialectical and opposed to the reasoning of

73. PERELMAN, JUSTICE, LAW, supra note 49, at 70.
74. See, e.g., id. at 74.
75. Id. at 71.
76. Id. at 75.
mathematicians." But this statement was induced by Perelman's highly restrictive view of analytical reasoning, which will be challenged in the concluding section of the Article. In terms of substance rather than semantics, Perelman was well aware that the judge, as contrasted to the speculative thinker, is tied down by many authoritative sources of law which he cannot disregard by freewheeling dialectical arguments about the fairness or unfairness of a certain result.

Dialectical reasoning in the judicial process is necessary when the judge, by thorough and often complex arguments, must creatively establish a major premise serving as a proper rationale for a legal conclusion. In the majority of adjudicated cases there exists, however, a major premise, or combination of major premises, providing for the judge a starting point for deductive, inductive, or analogical reasoning. Whenever the judge bases his arguments on a major premise, such as a constitutional provision, statute, or precedent, his reasoning is analytical rather than dialectical. Analytical reasoning is not precluded by the fact that the major premise in question requires interpretation before its proper meaning and scope can be established.

There are, on the other hand, a substantial number of cases in which the court (1) must make a choice between conflicting sources of authority, or (2) decides to overrule a precedent, or (3) is faced with the necessity of laying down a new rule in a case of "first impression." In such instances the court will have a rely on dialectical reasoning.

A good example illustrating the use of dialectical reasoning is the decision of the California Supreme Court in the case of Muskopf v. Corning Hospital District. In this case, the court overruled earlier decisions recognizing the doctrine of sovereign immunity, a doctrine which denied the responsibility of the state for tortious acts committed by its agents. The court pointed out that the principle of sovereign immunity originated in England as a personal prerogative of the Stuart kings, was thoughtlessly received into American law, became riddled with exceptions in the course of

77. Perelman, supra note 52, at 10.
78. See infra text accompanying notes 96-101.
time, and caused many serious and unnecessary injustices. Should this kind of reasoning (which was neither deductive, nor inductive, nor analogical) be likened to a "hunch" or be considered "the product of intuition, emotion, or prejudice?" Or should it be viewed, with Perelman, as an example of reasoned justification of the abandonment of an unfair principle?

The dichotomy of analytical and dialectical reasoning is recognized, under a different nomenclature, in the theory of legal reasoning developed by Robert Summers. He distinguishes between authoritative and substantive reasons for reaching a judicial decision. Authoritative reasons, in the areas of common law and equity on which Summers focuses his attention, consist primarily of appeals to precedent. They may also be based on the internal logic of concepts immanent in the Anglo-American legal system (such as the nature of a contract or the structural characteristics of a trust). Substantive reasons, on the other hand, are reasons that derive their justificatory force from moral, economic, political, institutional, or other social considerations. Such reasons may relate to social goals (such as general safety, community welfare, promotion of family harmony, public health), or to sociomoral rightness norms (such as due care, justified reliance, restitution for unjust enrichment, comparative blame), or to institutional requirements (such as efficient working of the judicial machinery, division of function between legislatures and courts, practicability of legal remedies). It is clear that substantive reasons in Summers' terminology for the most part do not constitute analytical applications of authoritative legal sources but qualify, at least in many instances, as dialectical forms of argumentation which in the end lead to the adoption of a norm or combination of norms suitable for the decision of a case.

Summers emphasizes the complexity and novelty of this methodological approach, which owes a great deal to Perelman. Because of its novelty, not many writers in the legal field have

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81. See supra text accompanying note 38.
82. See supra text accompanying note 64.
84. Id. at 724-25.
85. Id. at 716.
86. Id. at 717-24, 730-35, 752-59.
87. Id. at 712.
thus far taken up the thread of Perelman's theory of reasoning. Inasmuch as Perelman's approach represents a faithful reflection of certain pervasive realities of the legal process and should also have great appeal to the commonsense of lawyers and judges, it is to be hoped that his ideas will meet with increasing acceptance in the future.

VI. SOME CRITICAL COMMENTS ON PERELMAN'S THEORY

A general acceptance of Perelman's approach to the problems of juridical argumentation does not, of course, exclude a critique of certain aspects of his theory. It should be emphasized, however, that the critical comments made in this section of the Article deal with matters that are not part of the central core of Perelman's thinking.

(1) It was pointed out earlier that Perelman challenged the Cartesian test of truth and rightness without tampering with the Cartesian concept of rationality. The "rational," Perelman said, corresponds to mathematical reason. He thus continued to associate the concept of rationality with self-evident truths and compelling, incontrovertible reasoning. He opposed to this concept the notion of "reasonableness," which denoted to him argumentation based on commonsense, plausibility, or probable validity. With respect to the law, the rational elements are in this view the deductive and simple inductive arguments, characterized by immaculate logic and coherence, while the "reasonable" ingredient points to the acceptability of a legal decision by public opinion and to its equity and socially useful consequences.

This sharp distinction between rationality and reasonableness made by Perelman is not necessitated by either semantic or pragmatic considerations. It may be that in Perelman's adopted principal language, French, the shades of meaning associated with the words "rational" and "reasonable" are sufficiently different so

88. The advocates of "reasoned elaboration" of decisional law, who combated the irrationalism of American legal realism, took positions bearing some similarity to Perelman's thought. For an interesting account and evaluation of this jurisprudential movement see White, The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change, 59 VA. L. Rev. 279 (1973).
89. See supra text accompanying note 41.
90. C. PERELMAN, supra note 46, at 117.
91. Id. at 119-20.
92. Id. at 121.
as to make a conceptual distinction desirable. This is not true for the English language. According to Webster's Dictionary, rationality means "acceptability to reason: Reasonableness." This definition thus treats rationality and reasonableness as synonyms. This is consistent with ordinary English language use: when we say that a person acted rationally, we do not mean to imply that he acted under a compulsive force leaving him no choice. It is of interest to note in this connection that Perelman himself occasionally lapsed into inconsistency by using the terms "rational" and "rationality" in their broader sense.94

From the vantage point of utility, too, it is preferable to equate rationality and reasonableness. The difference between a rational and irrational opinion or action is obscured by the intercalation of a large gray area of "reasonableness." This leaves the boundaries of the irrational indeterminate and may affect the behavioral patterns of human beings through an inflated belief in the pervasiveness of irrationality.95 There is natural wisdom in the time-honored assumption that conduct that is induced by judicious deliberation and therefore cannot be assigned to the domain of the irrational should be termed rational.

(2) Related to Perelman's narrow conception of rationality is his highly restrictive view of analytical reasoning. He has more or less equated analytical arguments with those types of reasons that Descartes would have accepted as being in accord with his ironclad criteria of rational discourse. "Analytical arguments," Perelman said, "are those which, starting from necessary or at least indubitably true premises, lead by the force of valid inferences to conclusions equally necessary or true."96 This definition confines the scope of analytical reasoning chiefly to those cases in which a legal conclusion is reached by the deductive, syllogistic subsumption of a proven state of facts under an unambiguous source of law, such as a statute with crystal-clear language or a precedent containing a well-articulated rule of law.

This narrow view of the analytical element in the judicial process caused Perelman to allocate an exaggerated importance to the

93. WEBSTER'S THIRD NEW INT'L DICTIONARY 1885 (1971).
94. See Perelman, supra note 44, at 3, 5; Perelman, supra note 52, at 8, 11.
95. See supra text accompanying notes 40-41, in which the danger of allocating to rationality an extremely narrow field of operation was also discussed.
dialectical component. His statement to the effect the "the reasoning of the judge is dialectical and opposed to the reasoning of mathematicians" was quoted in the preceding section of this Article. According to this view, dialectical reasoning controls adjudication whenever the judge is unable to draw conclusions from firmly established norms with quasi-mathematical cogency. This position would, for example, have the consequence of extending the reach of legal dialectics to the situation where a judge interprets an ambiguously-worded statute in the light of its legislative history. It would also withdraw a great deal of inductive reasoning from the domain of analytical argumentation because the extraction of a rule from a set of precedents rarely offers complete certitude: there exists almost always the possibility of formulating the extracted rule broadly or narrowly. Thirdly, the analogous application of a statute or other norm of law would be a dialectical process, because the making of an analogy rarely imposes itself upon a judge with irresistible compulsion.

We learned that, according to Aristotle, a dialectical conclusion normally involves a choice between contradictory premises. We also found that dialectical reasoning is imperative when a judge lays down and endeavors to justify a novel rule of law in a case unprovided for by the legal order. In that situation, too, the judge frequently is confronted with a choice between conflicting alternatives, or between making a judicial rule and leaving the problem to the legislature. On the other hand, the cases mentioned above to which Perelman, contrary to professional usage, would extend the notion of dialectical reasoning do not involve a choice between conflicting legal sources of authority. They involve single sources of law (or possibly a combination of such sources) which the judge will either have to interpret, or infer inductively from a set of adjudicated facts, or use as a basis for analogy. Judicial actions of this type have traditionally been viewed as operations of an analytical character. There appear to exist no linguistic or policy reasons calling for a revision of this terminology.

(3) It was pointed out earlier that, for Perelman, the chief objec-

97. See supra text accompanying note 77.
98. See supra text accompanying note 62.
99. See supra text accompanying note 56.
100. See supra text accompanying note 79.
101. E. BODENHEIMER, supra note 11, at 386-91. See also the text accompanying supra note 78.
tive of argumentation was to win the adherence of an "audience."\(^\text{102}\) He suggested that a philosopher should attempt to gain the approval of the "universal audience," an ideal configuration symbolizing the consensus of all reasonable human beings.\(^\text{103}\) The audience at which legislators and judges should direct their appeal, on the other hand, was in his opinion a more concrete and earthly one. "The legislators, executives, and judges who are elected or appointed by those who possess the confidence of the people must exercise their mandates in conformity with the aspirations of the community which they represent."\(^\text{104}\) Does this mean that, as far as a judge is concerned, he must defer in his decisions to the wishes and convictions of the community even if he finds them based on prejudices engendered by partisan propaganda? It looks as if Perelman's answer is in the affirmative. He quotes with approval Carl Friedrich's statement: "The most just act is the one which is compatible with the greatest number—and the greatest intensity—of values and beliefs," adding that the values and beliefs in question are those of the community in whose name political (including judicial) power is being exercised.\(^\text{105}\)

It cannot be admitted that a judge must enforce community opinion if he finds that it is based on error, prejudice, or misleading information. The judge is primarily a servant of justice. Although he is normally bound to take community consensus on what is fair and just into account in rendering his decisions, he should not be obliged to do so if he is convinced he would thereby perpetrate a serious injustice.\(^\text{106}\)

(4) Perelman subsumes his theory of argumentation under the heading "The New Rhetoric." He thus fails to make a firm distinction between rhetoric and dialectic. To Aristotle, rhetoric was merely an offshoot of dialectic.\(^\text{107}\) Rhetoric was for him concerned with persuasion rather than with the elicitation of truth, whereas non-rhetorical dialectical reasoning represented a "groping" for the truth.\(^\text{108}\) It is obvious that, according to this distinction, the argumen-

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102. See supra text accompanying notes 51-52.
103. PERELMAN, JUSTICE, LAW, supra note 49, at 48.
105. Id.
108. For a discussion of the textual sources of this distinction see Bodenheimer, supra note 79, at 380.
tation of an attorney representing a client in court is primarily rhetorical: the attorney seeks to persuade the court by arguments favoring his client's case, ignoring those that might be detrimental to his position. The judge, on the other hand, uses dialectical reasoning under certain circumstances to reach a result which he deems objectively right and just, although he cannot support this result by reasons whose correctness is beyond a reasonable doubt. Perelman's all-embracing use of the term "rhetoric" tends to blur this distinction.

Perelman has given an explanation why he has chosen to employ this terminology. He has pointed out that the term "dialectic," under the influence of Hegel and his followers, has acquired a meaning remote from the original Aristotelian signification, whereas "rhetoric" has retained the meaning it had under the classical Greek and Roman tradition. He apparently felt that, because of the existence in the Anglo-American culture of a widespread antipathy to Hegelianism and its intellectual progeny, which includes Marxism, the word "dialectical" has become encumbered with a certain stigma.

This position lacks convincing force. It is true that there is a wide gap between the Aristotelian and Hegelian understanding of the dialectical method. For Hegel, the term dialectic referred to the structure and dynamics of the entire organic world, while for Aristotle it merely denoted a theory of reasoning. But this should not make the phrase "dialectical" forbidden or suspect territory for the non-Hegelian author, as long as he makes it clear in his writings that he employs the concept in the restricted Aristotelian sense.

The foregoing critical comments on Perelman's theory of argumentation are for the most part semantic in character and do not detract from the impressive achievements of Perelman's work. As Harold Berman has pointed out, Perelman challenged the unwholesome assumption that what we cannot know with mathematical certainty is necessarily arbitrary, irrational, and subjective. Perelman recognized "reasoned conviction" as a bridge to knowledge, although he was aware that it was a less perfect

source of cognition than verified certainty. 111 By this approach he helped to restore reason to its proper place in human affairs.

In the domain of the law, especially, the belief that adjudicatory arguments not based on formal, syllogistic logic were nothing but rationalizations of emotive reactions and idiosyncratic predilections produced a skepticism or nihilism not conducive to an understanding of the proper functions of law. Perelman's painstaking and thoroughgoing elucidation of the essentially rational foundations of judicial and jurisprudential argumentation—provided, of course, that such argumentation is carried out with integrity and detachment—is apt to give back to the science of law a respectability which it lacked under the reign of an irrationalist legal philosophy. Perelman therefore deserves to be honored not only as an original and creative thinker, but also as a benefactor of scientific, scholarly, and practical undertakings in many fields of human activity, including the administration of justice.

111. See supra in this connection the first paragraph of § I.
JURIDICAL SCIENCE PARADIGMS AS NEWER RHETORICS IN 21st CENTURY JURISPRUDENCE*

David A. Funk†

"The deductive method may be the best when setting forth the results of a science whose outlines are already settled, but in order to discover, as well as to test, the outlines of a developing science, the method of dialectical proofs should be used." 1

I. THE NEW RHETORIC AND JURIDICAL SCIENCE

The greatest contribution of Professor Chaim Perelman to twentieth century legal philosophy has been his revival of an ancient and long-neglected way of thought—classical Greek rhetoric or dialectic—and its application to problems of law and philosophy. His treatise on argumentation, first published in 1958 with the collaboration of Mme. L. Olbrechts-Tyteca,2 is a classic, both with respect to its specific subject matter and as a brilliant example of how truly creative advances in legal philosophy are made. Strictly speaking, classical rhetoric and dialectic are not sciences analogous to modern natural and social sciences, but ancient forms of logic,3 and logic is a science only in a broader sense.4 Nevertheless, The New Rhetoric5 demonstrates how methods of thought not utilized in legal philosophy for centuries, can produce a revolution in legal thought analogous to those which occur from time to time in the

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3. M. ADLER, Introduction to Part Ten: Knowledge Become Self-Conscious, in PROPAEDIA: OUTLINE OF KNOWLEDGE, THE NEW ENCYCLOPEDIA BRITANNICA 445 (1985), that "the science of logic does provide the underpinnings for our study of the methodology of the other learned disciplines, including history and philosophy as well as the various sciences." Id.
4. "Like logic, mathematics belongs here not only for its usefulness in other sciences, but also for its own sake as a science." Id.
5. C. PERELMAN, supra note 2.
natural and social sciences. In the remaining years of his life, Professor Perelman adequately illustrated the fecundity of his newly revived approach, by applying it to various fundamental problems in legal philosophy, most notably the problem of justice.

At first glance, the fundamental theme of the new rhetoric of Professor Perelman seems to be antagonistic to all attempts to apply social scientific approaches to law. This is due to his normal treatment of all science as essentially based on Cartesian rationalism. The basic Cartesian view was "that knowledge is a kind of vision or intuition, that there are certain first intuitions (first cognitions), and that further knowledge consists of consequent intuitions elicited from or founded upon these." Professor Perelman obviously presents his new rhetoric as a much better form of logic than Cartesian deductive, stringent reasoning, at least where law is concerned. In the opinion of this writer, however, Professor Perelman has used Cartesian science as a "straw man" to destroy in promoting his own approach—the new rhetoric.

7. See generally C. PERELMAN, supra note 1; C. PERELMAN, JUSTICE (S. Rubin trans. 1967); C. PERELMAN, LE PROBLÈME DES LACUNES EN DROIT (1968); C. PERELMAN, JUSTICE, LAW AND ARGUMENT (J. Petrie, S. Rubin, G. Bird, M. Dalgarno, H. Relihan & W. Kluback trans. 1980); Perelman, Juridical Ontology and Sources of Law, 10 N. Ky. L. REV. 387 (D. Aemmer trans. 1983) [hereinafter all bibliographical lists will be arranged by year of publication].
8. See, e.g., C. PERELMAN, supra note 2.

[The domain of argumentation is that of the credible, the plausible, the probable, to the degree that the latter eludes the certainty of calculations. Now Descartes' concept, clearly expressed in the first part of The Discourse on the Method, was to "take well nigh for false everything which was only plausible." It was this philosopher who made the self-evident the mark of reason, and considered rational only those demonstrations which, starting from clear and distinct ideas, extended, by means of apodictic proofs, the self-evidence of the axioms to the derived theorems. Reasoning more geometrico was the model proposed to philosophers desirous of constructing a system of thought which might attain to the dignity of a science. A rational science cannot indeed be content with more or less probable opinions; it must elaborate a system of necessary propositions which will impose itself on every rational being, concerning which agreement is inevitable.

Id. at 1-2.

[Our procedure will differ radically from that adopted by those philosophers who endeavor to reduce reasoning in social, political, and philosophical matters by taking their cue from the models provided by the deductive or empirical sciences, and who reject as worthless everything which does not conform to the schemes which were previously imposed. Quite the opposite: we will draw our inspiration from the logicians, but only to imitate the methods which they have used so successfully for the last century or so.

Id. at 10.

10. See generally C. PERELMAN, supra note 2, at 242-47, on Arguments by Comparison.
More careful reading of Professor Perelman discloses that he occasionally recognized that not all science is Cartesian, so that modern, probabilistic science turns out to resemble the new rhetoric much more than Professor Perelman is inclined to admit. At one point Professor Perelman observes that the process of discovery and testing in a developing science "is a question of considering various possible formulations of principles and of weighing carefully their advantages and inconveniences." Thus such an investigation "must perforce adopt the form of a dialogue containing questions and replies, objections and rejoinders, whether this be undertaken by several persons or be confined within the limits of a private deliberation." Developing science, then, is a dialectic process. At another point, Professor Perelman even questions whether the Cartesian method is truly applied in modern sciences. He correctly observes that widespread employment of the calculus of probability has profoundly modified the methodology of the natural sciences, so that they cannot "dispense with assumptions and hypotheses and, as in law, when proof is not a simple didactic exercise but aims at establishing the truth of a doubtful proposition, it will be a counter-proof to certain accepted assumptions." Thus he concludes that "the role of decision is far from negligible in philosophy, in the natural sciences and in the human sciences."

The foregoing observations on the philosophy of science of Professor Perelman are not meant to detract from the value of his basic distinction between demonstration and argumentation, nor from the utility of his emphasis on argumentation in legal philosophy. Nevertheless, the occasional statements of Professor Perelman concerning current scientific methodology leave one wondering whether other novel ways of thinking about law—even "newer rhetorics"—might be found among the social sciences. Like

11. See infra, notes 81-84 and accompanying text.
12. See C. PERELMAN, supra note 1, at 164.
13. Id.
14. Id.
15. Id. at 106.
16. Id. at 107.
17. Id. at 91. But see the more typical statement in C. PERELMAN, JUSTICE, LAW AND ARGUMENT, supra note 7, at 166 that "[t]hose philosophies which take sciences as a model leave no room for the idea of rational decision. They are built in terms of the idea of truth, either certain or probable."
18. See, e.g., C. PERELMAN, supra note 2, at 13-14.
Thomas Kuhn, 20 Professor Perelman recognizes that the growth of science is a social process in which previously accepted opinions are replaced by others regarded as more suitable to express our beliefs. 21

The new rhetoric of Professor Perelman has contributed greatly to the solution of some legal philosophical problems, by reviving a logic appropriate to their solution. This logic grew out of the failure of positivist philosophy to help Professor Perelman deal with the idea of justice in particular cases. 22 Thanks to Professor Perelman we now have the new rhetoric for dealing with that question and many other value questions in legal philosophy.

In many respects the logic of the new rhetoric is similar to that used in law. 23 As Professor Perelman points out, the logics of the social sciences are different in some respects from thought processes used in law: science knows no rules of jurisdiction

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20. T. KUHN, supra note 6.
21. But if we assume that the sciences develop on the basis of opinions previously accepted—and replaced by others either when difficulty results from some contradiction or in order to allow of new elements of knowledge being integrated in the theory—then the understanding of scientific methodology requires us to be concerned not with building the scientific edifice on the foundation of self-evident truths, but with indicating why and how certain accepted opinions come to be no longer regarded as the most probable and the most suitable to express our beliefs, and are replaced by others. The history of the evolution of scientific ideas would be highly revealing in this regard.

C. PERELMAN, supra note 1, at 94.
22. C. PERELMAN, JUSTICE, LAW AND ARGUMENT, supra note 7, at 149, states that “after the years of Nazi rule inspired by the ‘Myth of the 20th Century’ and the cult of violence, I, in collaboration with Mrs. L. Olbrechts-Tyteca, began a search for a logic of value judgments.” He recalls:

It was in 1944 that I undertook my first study of a confused notion, the idea of justice. At that time, I was still imbued with positivistic philosophy. I believed that the only acceptable method for studying this idea was to clarify it by emptying it of its emotive aspect which shows itself every time one discusses the notion of justice, because this notion designates a universal value which everyone respects but which everyone conceives in his own way.

Id. at 99.

This led Professor Perelman only to formal justice, in which situations which are essentially the same are treated in the same way, but did not answer the question whether two situations were essentially similar. Id. Perelman defines “formal or abstract justice as a principle of action in accordance with which beings of one and the same essential category must be treated in the same way.” C. PERELMAN, supra note 1, at 16.

23. See, e.g., C. PERELMAN, supra note 1, at 125-35 on legal reasoning, and at 163-74 on what philosophers may learn from the study of law.
(competence), knows no separation of powers, and may suspend judgment if the evidence is unclear. Nevertheless, if the logics of modern social sciences can contribute to the solution of additional problems in legal philosophy in the future, addition of these further perspectives, in a large sense, will be carrying forward the work which Professor Perelman did so brilliantly in his classic treatise.

The remainder of this article attempts to lay the groundwork for social scientific approaches to jurisprudence which the author expects to develop in the twenty-first century. Each of them is like a rhetorical argument in contributing a perspective to the study of law which suggests, rather than dictates, legal philosophical problems and possible solutions. A corps of disciples working out more detailed implications of the new rhetoric would be one fitting memorial to Professor Perelman. An even more appropriate one, in the opinion of the writer, would be to encourage others to do as he did, to search among the various approaches to knowledge, for new and fruitful ways of thinking about law and its philosophical problems.

II. THE NEW RHETORIC AND GENERAL TRENDS IN JURISPRUDENCE

The new rhetoric of Professor Perelman links ancient, medieval and modern jurisprudence, in its search for a new approach to the philosophy of law. One can scarcely follow the rise, flowering and decline of various schools of legal philosophy, without noticing major shifts in the fundamental issues about law which have agitated legal philosophers in various eras. Similarly, one can scarcely help wondering how jurisprudential thought in our era

24. C. PERELMAN, supra note 1, at 92.
25. Id. at 107.
26. Id. at 91. The Roman legal system, however, allowed the declaration non liquet where liability was in doubt. See e.g., J. DAWSON, THE ORACLES OF THE LAW 112 n.14 (1968).
27. C. PERELMAN, supra note 2.
28. See, e.g., id. at 5-9.
29. See, e.g., id. at 338.
30. See, e.g., id. at 34-35.
31. "Jurisprudence" is used here in the American sense of legal philosophy or legal theory, not in the French sense of the course of case decisions on a particular subject. See generally D. WALKER, THE OXFORD COMPANION TO LAW 678-81 (1980), s.v. "Jurisprudence." Also, "jurisprudence," "legal philosophy," and "legal theory" are treated here as synonyms.
resembles, and differs from, all that has gone before. Finally, one can ask why these revolutions in legal philosophy have occurred, and whether any trends are discernible in the twentieth century which might enable us to foresee the fundamental jurisprudential issues which are likely to preoccupy legal philosophers in the twenty-first century.

The various major schools of jurisprudence may be grouped under a few fundamental questions about law. Julius Stone, for example, has arranged his encyclopedic survey of jurisprudential literature around three basic issues. Much of the ancient Greek and Roman legal philosophy revolved around the first question: What is good law, or justice? With the rise of the doctrine of sovereignty and analytical positivism in modern times, the basic focus of jurisprudential inquiry shifted to a second question: What is law? Historical jurisprudence in the nineteenth century, followed by Marxist and sociological jurisprudence in the twentieth century, appear to be concerned primarily with a third issue: How do law and society, in general, interact? These three basic issues now are relatively well-developed foci of discussion.

The main problem in applying these three questions to twentieth century jurisprudence, however, is the “leftovers.” Insofar as current legal philosophers are not still dealing with these three fundamental jurisprudential questions, what basic issue may be said to be agitating them? More modern schools of jurisprudence,

32. The subtitle for J. STONE, THE PROVINCE AND FUNCTION OF LAW (1950) was LAW AS LOGIC, JUSTICE AND SOCIAL CONTROL. Professor Stone later expanded this work into three volumes: J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS (1964); HUMAN LAW AND HUMAN JUSTICE (1965); and SOCIAL DIMENSIONS OF LAW AND JUSTICE (1966).

33. Western ancient and medieval authors concerned primarily with justice include the early, middle and late Stoics, from Zeno of Citium through Marcus Aurelius, Plato in THE REPUBLIC, and the scholastic tradition from St. Augustine through St. Thomas Aquinas. For analogous inquiries in Jewish, Islamic, Hindu, Chinese and Japanese jurisprudence, see generally D. FUNK, ORIENTAL JURISPRUDENCE (temp. ed. 1974).

34. Notable works on sovereignty include J. BODIN, SIX BOOKS OF THE REPUBLIC (1576), and T. HOBBES, LEVIATHAN (1651). More recent works of analytical positivism include, for example, J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832), and H. HART, THE CONCEPT OF LAW (1961).


36. See generally supra note 32.
such as American legal realism, psychological and Scandinavian legal realism, jurimetrics and numerous theoretical applications of social sciences to law, basically involve attempts to answer a fourth fundamental question: What juridical sciences are possible? Some of these modern schools of legal philosophy approach this problem negatively, and attempt to show that science and law are incompatible, or at least that certain previous attempts to found juridical sciences have failed. Other modern legal philosophers respond positively, and supply theoretical justification and support for some or all attempts to develop new scientific approaches to law. In either event, application of the modern philosophy of science in legal philosophy appears to be the new element in twentieth century jurisprudence which cannot easily be subsumed under the three fundamental questions already examined. Moreover, this approach seems to be the one most likely to be expanded in the century to come. The remainder of this article is an attempt to develop this thesis in some detail.

This article is neither a full-scale history of twentieth century legal philosophy, nor an attempt to predict fully the future intellectual history of twenty-first century jurisprudence. Rather, it attempts to identify a new trend in twentieth century legal philosophy, not always recognized as such, which the writer expects to become a major jurisprudential concern in the twenty-first century. This scientific trend in legal philosophy probably will include additional attacks on legal formalism in the American legal realist tradition, general attempts to reconcile scientific and legal thought, claims by devotees of one or another social science approach to law that theirs is the most promising one, disputes of these claims by devotees of other approaches, and, finally, a

37. Perhaps only a believer in legal futurology would hazard such an enterprise. See generally Funk, Legal Futurology: The Field and Its Literature, 73 LAW LIB. J. 625 (1980).

continuing chorus of naysayers of various varieties who question whether any application of the philosophy of science to legal philosophy can be very fruitful.

Identifying this new trend may make it a more legitimate part of current legal philosophy, and even may hasten the thought revolution by which it will become a major part of twenty-first century jurisprudence. On the other hand, continuing discussion of more traditional legal philosophical issues will not necessarily cease. Certainly the new rhetoric teaches us that the age-old jurisprudential issues will not be settled once and for all. Instead, jurisprudence is more likely to expand to accommodate increased attention to new questions of juridical science, while preserving at least some continuing interest in the old ones: What is good (just) law, What is law, and How do law and society, in general, interact?

III. THE HISTORY AND SOCIOLOGY OF IDEAS AND LEGAL PHILOSOPHY

General surveys of jurisprudence, like most histories of ideas, describe major and minor turns of legal theory in particular periods as though thought revolutions could be explained adequately by identifying the individual creative accomplishments of the legal philosophers who are credited with inaugurating them. Thus, the story usually told is primarily one of jurisprudents, not jurisprudence. Little attention generally is paid to explaining why one approach, rather than another, was accepted by contemporary and later legal philosophers, except perhaps an assumption that the accepted ideas contributed something useful to the ongoing jurisprudential conversation. The usual unspoken presupposition is that a kind of ideational social Darwinism is operating, so that

39. See generally J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS (1964); HUMAN LAW AND HUMAN JUSTICE (1965); and SOCIAL DIMENSIONS OF LAW AND JUSTICE (1966); W. FRIEDMANN, LEGAL THEORY (5th ed. 1967); E. BODENHEIMER, JURISPRUDENCE (rev. ed. 1974).

40. The author has adopted this stance. D. FUNK, supra note 33, at viii admits that, in the sense that philosophers do not necessarily represent their cultures, “we have here Oriental jurisprudents, not Oriental jurisprudence, strictly so called.”

41. See, e.g., T. HOULT, DICTIONARY OF MODERN SOCIOLOGY 296 (1969) that “social Darwinism” is “[t]he theory that among men, as among plants and other animals, those best suited to existing living conditions are the ones that survive and prosper . . . .” To mix metaphors slightly, the social Darwinism of ideas may be compared with Justice Holmes' famous statement in Abrams v. United States, 250 U.S. 616 (1919), that “the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .” Id. at 630.
the "best" ideas are bound to survive in the long run, and that those ideas which did survive in fact were the "best." An author operating on this assumption has little choice at the end of his story other than simply to end it, though occasionally a few hesitant comments may be added about the ongoing process of jurisprudential inquiry and the difficulties of dealing with this process in the absence of proper historical perspective.\textsuperscript{42} It is not surprising, therefore, that attempts to extend current jurisprudential trends into the future are rare, and even those few which have been attempted are quite tentative.\textsuperscript{43} More substantial jurisprudential futurology requires a serious attempt to deduce some general principles governing the creation and dissemination of fundamental ideas about law, analogous to "covering law" theories of history.\textsuperscript{44} These general principles then have to be extended into the future. Admittedly, both of these operations are extraordinarily difficult tasks.

Historians of ideas in theoretical fields other than jurisprudence have not gone very much further in solving these problems. The situation is not much better in general philosophy, for example, which is the parent discipline of political philosophy, which in turn is the parent discipline of legal philosophy. General histories of philosophy have been written since the 1600's.\textsuperscript{45} Most of these, however, like most histories of legal philosophy, make little attempt to explain the birth, maturity, and death of various schools of philosophical thought, or extend them into the future, though

\textsuperscript{43} See, e.g., Bodenheimer, Seventy-Five Years of Evolution in Legal Philosophy, 23 AM. J. JURIS. 181, 203-11 (1978), though the explicit emphasis of this article is more on future jurisprudential needs than on probable future developments in legal philosophy.
\textsuperscript{44} "Covering law" theories of history treat predictions of the future as extensions of general historical laws discovered through study of the past. See Funk, supra note 37, at 626 n.8; and Weingartner, Historical Explanation, in 4 THE ENCYCL. OF PHILOSOPHY 7, 8-11 (P. Edwards ed. 1967) [hereinafter cited as ENCYCL. OF PHIL.]. See generally Funk, Legal History as Empirical Social Science in Theory and Practice, 21 HOUS. L. REV. 311 (1984).
\textsuperscript{45} Passmore, Philosophy, Historiography of, in 6 ENCYCL. OF PHIL. 226 traces doxographical histories of philosophy, i.e., historical collections of extracts from philosophical writings, to 350 B.C., though the first general histories of the modern type date from 1655. Id. at 227. G. Hegel, Hegel's Lectures on the History of Philosophy 111 (E. Haldane trans. 1892 of GESCHICHTE DER PHILOSOPHIE 2d ed. 1840) likewise lists T. Stanley, History of Philosophy (1655) as one of the first histories of philosophy. But see H. Smart, Philosophy and Its History 2 (1962) which places G. Horn, Historiae Philosophicae at 1645, ten years earlier than Passmore does, and therefore regards this as the first general history of philosophy.
a few at least aspire to this goal. Similarly, most histories of social theory, such as sociological theory, political theory, economic theory, and psychological theory, are not very explanatory. Like "great man" theories of political history, they usually approach their subject mainly as a series of creations of individual thinkers who may be grouped into "schools" and who may influence one another to a greater or lesser degree. Otherwise the course of general intellectual development portrayed in these specialized histories of ideas remains largely inexplicable.

General intellectual history purports to treat the influence of general public opinion or culture on individual creative thought, and the influence of individual creative thought on popular culture. This approach fills part of the gap in supplying explanations for

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46. See, e.g., B. Russell, A History of Western Philosophy ix (1945), though Passmore, supra note 45, at 228, claims that in practice B. Russell, supra, like G. Hegel, supra note 45, paid very little attention to anything except internal logical relations among theories.

B. Fuller, A History of Philosophy 510-12 (rev. ed. 1945) includes a section subtitled "Prospect," dealing with the possible impact of relativity and quantum theory in physics, and Freudian psychology, on the future of philosophy.

47. See, e.g., F. House, The Development of Sociology 421-29 (1929), on "Present Sociological Trends and Tendencies."

48. See, e.g., 3 W. Dunning, A History of Political Theories 409-23 (1920), on "The General Course of Political Theory."

49. J. Schumpeter, History of Economic Analysis 33 (1954) was to include "The Motive Forces of Scientific Endeavor and the Mechanisms of Scientific Development," though this section was never completed.


51. On the "great man theory of history," see, e.g., E. Carr, What Is History? 66-68 (1964). If we assume that the supply of "great men" is relatively constant in each historical era, the important historical fact to be explained is not the rise or influence of a particular "great man," but the historical conditions under which such a man rose to prominence and had such influence. If the same reasoning applies to theorists, the supply of creative theorists in each historical era must be relatively constant, so the important historical fact to be explained is not the thoughts of a great thinker, but the historical conditions under which the thoughts of such a person were recognized as creative and had such influence on subsequent thought.

52. See, e.g., F. Baumer, Main Currents of Western Thought 5 (2d ed. 1964) that "[t]he intellectual historian ... studies clusters of ideas, ideologies, rather than single ideas... [H]e studies 'climates of opinion' and the way they change from age to age... [H]e studies these climates in relation to milieu or social context..." See generally M. Curti, The Growth of American Thought (3d ed. 1964). "Intellectual history begins to shade into cultural history when it explores the ideas held by all members of a society or by large groups within the society." A. Lichtman & V. French, Historians and the Living Past 116 (1978). See generally id. at 116-18.

For a comprehensive bibliographical note on intellectual history, see F. Baumer, supra at 739-46.
the rise and fall of particular theories. The focus of intellectual history on popular culture and whole societies, however, makes it difficult for intellectual historians to supply explanations for the development and dissemination of more specialized ideas within more particular scholarly communities.

Where specialized histories of theory and general intellectual histories falter, sociologists of knowledge provide at least a few general principles of thought revolutions in specialized disciplines to use in understanding the growth and development of new theoretical paradigms.\(^{53}\) If such sociological principles apply to jurisprudence as well as to other theoretical disciplines, then they should provide an initial outline for a new sociology of jurisprudence, a subject which at present scarcely exists.\(^{54}\)

Sociology of knowledge itself has made little progress in developing either a psychology or a sociology of creativity, to explain why and how new ideas are developed in the first place.\(^{55}\) Presumably

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53. T. Kuhn, \(^{supra}\) note 6, publicized scientific paradigms as “universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners.” Id. at viii. Sociological paradigms (“the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community”) are distinguished from shared examples or exemplars (“one sort of element in that constellation, the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science”). T. Kuhn, The Structure of Scientific Revolutions 175 (2d ed. 1970).

L. Sklair, Organized Knowledge (1973) and F. Jevons, Science Observed (1973) review the controversy spawned by Kuhn’s view that scientists see nature exclusively through one paradigm or another.

Early general work in the sociology of knowledge was done by Max Scheler and Karl Mannheim. See generally M. Scheler, Problems of a Sociology of Knowledge (M. Frings trans. 1980) and K. Mannheim, Ideology and Utopia (L. Wirth & E. Shils trans. 1936).


54. D. Lloyd, \(^{supra}\) note 38, at 7-8 discusses the relevance of T. Kuhn, \(^{supra}\) note 6, to social science including jurisprudence, but uses Kuhn’s reasoning to explain legal change rather than jurisprudential change. D. Lloyd, \(^{supra}\) note 38, at 7 n.23 & 40 n.21.

55. Edwards, Creativity: Social Aspects, in 3 Int'l Encyc. of the Social Sciences 442 (D. Sills ed. 1968) deals with social conditions favoring or impeding individual creativity, especially in art, as well as the process by which creative products become cultural objects.
the total "stock" of new ideas in a particular field varies from time to time and from place to place. Nevertheless, sociologists of knowledge are unable to explain very precisely why this is so. Therefore this article will take the existence of a smaller or larger "stock" of new, creative ideas in jurisprudence as a given, and will not attempt to explain why its size varies from time to time and from place to place. Instead, this section will deal with a much simpler sociological problem: how it is that one, rather than another, of the new jurisprudential thoughts included in this ever shifting supply of ideas, such as the new rhetoric of Professor Perelman, becomes influential in altering the general course of jurisprudential thought.

Scholarly disciplines develop relatively fixed definitions of the problems with which they are concerned, acceptable methods for solving them, standards by which solutions are evaluated, and the specialized language in which members of the discipline speak to each other.56 Workers in the discipline address other discipline members as their primary audience, so that the scholarly discipline forms both a reference group and dispersed scientific community or hermeneutic circle of shared goals and methods.57 New theories which challenge basic community ways of thought are subjected to a subtle system of social rewards and punishments within the discipline.58 What is wanted are new ideas, but not very new ones,
because the latter are too upsetting to established ways of thought. 59

In the natural sciences, disciplinary standards provide relatively
certain criteria by which problems accepted in the discipline as
appropriate for study, may be seen to be satisfactorily solved for
the time being, or not. 60 When a new theory enables a new and
more satisfactory solution, the natural science community is
pressed by its value system to accept the new approach, even
if this upsets old ways of thought. 61 Even in the natural sciences,
however, older members of the discipline are reluctant to accept
the new approach, and basic change is more likely to result from
more impartial evaluation of the new and old approaches by
younger scientists who have a smaller intellectual investment in
the existing thought structure. 62 This process is facilitated by the
existence of a set of “disciplines,” 63 and a suitable employment role
for those who embrace the new paradigm. 64

The same general processes operate in the social sciences and
humanities, except that the criteria for ascertaining when a prob-
lem is solved are less clear, so that several paradigms may be used
simultaneously within a particular discipline. 65 Still, the number
of accepted and acceptable paradigms is finite, and not every
paradigm will do. 66

The general history of ideas and the sociology of knowledge in
other disciplines is relevant to the present inquiry only if legal
philosophy follows the general course of theoretical development
observed in other disciplines. Extensive consideration of this ques-
tion is beyond the scope of the present article. Nevertheless, until
special historical, psychological and sociological principles are
discovered for jurisprudence, it should be safe to assume that the
general tendencies operating with respect to the acceptance of new
theories in philosophy and the social sciences also are likely to
be operating with respect to new ideas in jurisprudence. This is

59. See, e.g., Maruyama, Wanted: New Ideas (But Not Very New), 14 THE FUTURIST 35
(1980); F. Znaniecki, supra note 57, at 134-35; and T. Kuhn, supra note 6, at 5.
60. See, e.g., id. at 205-06.
61. Id. at 186, 204. Coser, supra note 53, at 636.
62. Id. at 203.
63. See, e.g., F. Znaniecki, supra note 57, at 122.
64. See, e.g., Ben-David & Collins, supra note 53, at 452, 459.
65. See, e.g., A. Simonds, supra note 57, at 143.
66. See generally supra note 56 and accompanying text.
a factual assumption, not an epistemological one.\textsuperscript{67} If jurisprudence as a discipline can be shown to develop differently from the theoretical components of other scholarly disciplines, then the entire thesis of this article will have to be reexamined. Until that occurs, however, this article will proceed on the assumption that general tendencies in the development of theoretical paradigms observable in other disciplines, especially in philosophy and the social sciences, indicate, however faintly, the general course of development which legal philosophy is likely to take in the foreseeable future.

IV. BASIC PREMISES IN JURIDICAL SCIENCE

In the natural sciences, a new paradigm usually supplants an old one.\textsuperscript{68} In jurisprudence, however, the process seems to be additive: adherents of older paradigms are likely to go on developing the familiar perspectives, while other legal philosophers address the newer ones.\textsuperscript{69} Also, those who work with one or more (or all) of the juridical science approaches in jurisprudence today must contend with detractors who deny the value of any of these approaches in legal philosophy. No doubt this situation will continue. Thus, twenty-first century jurisprudence probably will include continuing discussion of whether juridical science paradigms are appropriate in dealing with basic philosophical issues in law at all. On the other hand, the relative number of those who deny the applicability of all social scientific notions to law should decline as juridical science approaches become more common.

The methods of argument used by proponents of juridical science approaches in jurisprudence differ somewhat from those used by opponents of all such approaches. Proponents usually argue initially for the utility of one, some, or all juridical science approaches primarily by applying them to the study of one or more specific issues in legal philosophy. Thus enthusiastic supporters of juridical

\textsuperscript{67} The history and sociology of science, social science, and philosophy, should be distinguished from epistemology and the philosophy of science, social science, and philosophy. "Epistemology, or the theory of knowledge, is that branch of philosophy which is concerned with the nature and scope of knowledge, its presuppositions and basis, and the general reliability of claims to knowledge." Hamlyn, \textit{Epistemology, History of}, in 3 ENCYCL. OF PHIL. 5, 8, 9. "The sociology of knowledge is concerned with determining whether man's participation in social life has any influence on his knowledge, thought, and culture and, if it does, what sort of influence it is." Stark, \textit{Sociology of Knowledge}, in 7 ENCYCL. OF PHIL. 475.

\textsuperscript{68} See, e.g., T. KUHN, supra note 6, at 178. See \textit{generally} Hesse, \textit{Models and Analogy in Science}, in 5 ENCYCL. OF PHIL. 354.

\textsuperscript{69} See \textit{generally} supra notes 32-36 and accompanying text.
sciences often go beyond general theoretical justifications for them, and on to applied solutions of concrete problems. They pass rather quickly from legal philosophy to legal science.\textsuperscript{70} Thereafter, their general philosophical discussions usually are limited to rebuttals of arguments of opponents who claim that the particular juridical science at issue is ill conceived or not very productive. Opponents of all juridical science approaches, on the other hand, are more likely to remain primarily legal philosophers. They often use general philosophical arguments to show that scientific approaches to legal philosophy cannot accomplish much, by their very nature. Their arguments are less likely to attack specific applications of a particular juridical science approach to jurisprudence, and therefore their positions seem more philosophical.

Arguments among proponents of different juridical science approaches to jurisprudence also do not seem very philosophical. Often those who favor one particular approach attack those who favor other juridical science approaches. This internecine warfare goes forward on a rather specific plane. The ensuing discussions deal primarily with the specific advantages and disadvantages of one juridical science approach compared to its rivals. These discussions seem more like scientific quibbling than philosophical argument. No doubt some degree of generality is a \textit{sine qua non} of philosophical argument, and hence, of legal philosophy. Each of these types of discussion, however, has a philosophic aspect. Whether proponents of one or more juridical science approaches are arguing for their favorite approach, arguing against other juridical science approaches, or answering opponents who see no value in any juridical science approach at all, the basic legal philosophical issue is the same: whether one or more juridical sciences are possible.

Wherever possible, this article will attempt to avoid evaluating the various juridical sciences to be discussed. To some extent, however, merely writing an article like this implies an evaluation of sorts. The writer has explicitly taken a stand in favor of various scientific approaches to law in some of his previously published works,\textsuperscript{71} and does not mean to disavow those positions here. Never-

\textsuperscript{70} As Kemeny put it, "the philosopher found himself in a dilemma. If he asked a question, he was a philosopher; if he answered it he was a scientist." J. KEMENY, A PHILOSOPHER LOOKS AT SCIENCE ix (1959).

\textsuperscript{71} See, e.g., Funk, Pure Jurimetrics: The Measurement of Law in Decision-Regulations,
theless, this article is not primarily an attempt to justify juridical science approaches in some Hegelian manner, or see twentieth and twenty-first century jurisprudence as approaching ever more closely some ultimately correct set of issues for jurisprudential discussion.

Any sympathetic treatment of scientific approaches to knowledge contains some built-in biases toward positivism and philosophical realism—the view that empirical facts exist and that ideas are metaphysical. This article shares these biases insofar as it argues that juridical science approaches to jurisprudence are worthy additions to legal philosophy. Otherwise, the writer does not intend to adopt positivism or philosophical realism as the only appropriate ontological position, or foreclose further consideration of philosophical idealism and other viewpoints concerning the nature of reality.

Similarly, some geographical bias may be implicit in the choice of subject matter. Judging from the literature most readily available here, many of the juridical science approaches most appropriate


72. G. HEGEL, supra note 45, vol. 3 at 552 claimed that:

throughout all time there has been only one Philosophy. . . . [T]he succession of philosophic systems is not due to chance, but represents the necessary succession of stages in the development of this science.

Id. at 552.

This work of the spirit to know itself, this activity to find itself, is the life of the spirit and the spirit itself. Its result is the Notion which it takes up of itself; the history of Philosophy is a revelation of what has been the aim of spirit throughout its history.

Id. at 57.

73. See generally Abbagnano (N. Langiulli trans.), Positivism, in 6 ENCYC. OF PHIL. 414.

The characteristic theses of positivism are that science is the only valid knowledge and facts the only possible objects of knowledge; that philosophy does not possess a method different from science; and that the task of philosophy is to find the general principles common to all the sciences and to use these principles as guides to human conduct and as the basis of social organization. Positivism, consequently, denies the existence or intelligibility of forces or substances that go beyond facts and the laws ascertained by science. It opposes any kind of metaphysics and, in general, any procedure of investigation that is not reducible to scientific method.

Id.

74. See, e.g., Hirst, infra note 80, that “realism” in modern philosophy “is used for the view that material objects exist externally to us and independently of our sense experience.” Id. at 77.

75. See, e.g., Acton, Idealism, in 4 ENCYC. OF PHIL. 110 that “[i]dealism, in its philosophical sense, is the view that mind and spiritual values are fundamental in the world as a whole.”
for jurisprudence seem to have originated in the United States or to have been most fully developed in this country. Perhaps this only proves that an American author has a tendency to emphasize American developments and produce essentially American jurisprudence. This is a special danger with respect to the development of juridical sciences in the twentieth century.

Perhaps other basic premises lurk beneath the surface of this essay. Nevertheless, the writer hopes that he has made his most basic presuppositions explicit in this section, so that readers may be forewarned concerning the fundamental assumptions underlying his argument.

V. SCIENCE, SOCIAL SCIENCE AND JURIDICAL SCIENCE

Science, in a broad sense, refers to knowledge of all kinds, regardless of how it is acquired. Science as the term is used in this section, however, has a much more limited meaning. It refers to systematized knowledge of observable features of the natural and human world around us. Naturally each of us can observe this world only from his or her individual human perspective.  

76. H. REUSCHELIN, JURISPRUDENCE—ITS AMERICAN PROPHETS (1951), for example, is a frank attempt to describe only American jurisprudence, some of which deals with twentieth century attempts to formulate new juridical sciences.

77. See, e.g., Verden-Jones, Cook, Oliphant and Yntema: The Scientific Wing of American Legal Realism, 5 DALHOUSE L.J. 3, 249 (1979); Schlegel, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 BUFFALO L. REV. 459 (1979); Schlegel, American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore, 29 BUFFALO L. REV. 195 (1980).

78. Our word "science" is derived from the Latin scientia, referring generally to knowledge. WEBSTER'S THIRD NEW INT'L DICTIONARY 2032 (P. Gove ed. 1971).

79. For a similar lexical definition of science, see, e.g., THE NEW COLUMBIA ENCYCLOPEDIA 2450 (W. Harris & J. Levey eds. 4th ed. 1975) that: "[f]or many the term science refers to the organized body of knowledge concerning the physical world, both animate and inanimate, but a proper definition would also have to include the attitudes and methods through which this body of knowledge is formed," which usually is called "the scientific method." For a more extensive attempt to define "science" and "the scientific method," see generally J. KEMENY, supra note 70, at 174-76. "Science" is defined as "all knowledge collected by means of the scientific method." Id. at 175. The scientific method is defined "by the cycle of induction, deduction, and verification, and by its eternal search for improvement of theories which are only tentatively held." Id. at 176. See generally M. COHEN & E. NAGEL, AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD 391-99 (1934). But see A. KAPLAN, THE CONDUCT OF INQUIRY 27 (1964), which expressly refuses even to attempt a definition.

80. Hirst, Realism, in 7 ENCYCL. OF PHIL. 77 refers to "the 'egocentric predicament'—that one can never eliminate the 'human mind' from knowledge and discover what things are like apart from one's consciousness or, indeed, whether they exist when they are not known, for the discovery itself involves consciousness and thus would be knowing."
Nevertheless, through imperfect intersubjective communication, each of us can compare, to some extent, his or her individual impressions with those of other observers, and thereby gain some rough notion of what these external entities and processes are like.  

We can never be completely sure that these shared conceptions are not illusory; in this sense the scientist is a perpetual skeptic. As more notions are shared, however, and as more means of verifying them are devised and executed, we feel more sure that those notions which survive continued testing and analysis, must reflect external reality at least to some extent.

The underlying ontological assumption of natural philosophy, and the application of its methods to humans, is philosophical realism. If there were no external world, one might speculate about its possibility, but it would make little sense to speculate about it either as an existing entity or as a collection of existing entities. Actually most speculation in natural philosophy has been based on philosophical realism, and more specifically on one of three varieties of philosophical realism, namely naive, representative, and

81. See generally Alston, Language, in 4 ENCYCL. OF PHIL. 384, 85 on the use of language for interpersonal communication, though private languages also may be possible. See, e.g., Castañeda, Private Language Problem, in 6 ENCYCL. OF PHIL. 458. If interpersonal communication were impossible, we would be led to epistemological solipsism. See generally Rollins, Solipsism, in 7 ENCYCL. OF PHIL. 487, 490.

82. See generally Hamlyn, Epistemology, History of, in 3 ENCYCL. OF PHIL. 8, 9, on the role of skepticism in the history of epistemology.

83. See generally Popkin, Skepticism, in 7 ENCYCL. OF PHIL. 449.

84. See generally Hempel, Confirmation: Qualitative Aspects, in 2 ENCYCL. OF PHIL. 185; Schick Confirmation, Quantitative Aspects, in 2 ENCYCL. OF PHIL. 187; and Black, supra note 55, at 169.

85. See, e.g., Caws, Scientific Method, in 7 ENCYCL. OF PHIL. 339-40, that “a belief that sense data are ultimate” constitutes one of the common metaphysical principles in applying the scientific method; and Kim, Explanation in Science, in 3 ENCYCL. OF PHIL. 159, 161, that the “requirement of factual confirmation [in scientific explanation] excludes theological or metaphysical explanations of empirical phenomena . . .” On philosophical realism, see supra note 74.

86. See generally Harré Philosophy of Science, History of, in 6 ENCYCL. OF PHIL. 289. Recent speculation on the ontological status of scientific propositions, concepts and entities, and opposed to the world they purport to reflect, has been more diverse. See, e.g., Toulmin, Science, Philosophy of, in 16 THE NEW ENCYCL. BRITANNICA: MACROPAEDIA 375, 389-90 (1976) on realist, conventionalist, and operationalist views in the twentieth century.

87. See, e.g., First, supra note 80, at 78. Naive realism claims that our sense impressions are always the intrinsic properties of material objects. Id.

88. See, e.g., id. at 80. Representative realism distinguishes between “external material objects as the causes and ultimate objects of perceiving and private sensa which are the mental effects of brain processes due to the action of those objects on the sense organs.” Id.
or critical\textsuperscript{80} realism. This article also is based on philosophical realism, though hopefully not of the naive variety. Its underlying assumptions probably are closer to representative, than critical, realism. In any event it does not consider idealist thought systems as part of science, unless an effort has been made to connect them with an assumed external reality.\textsuperscript{90}

This ontological posture does not preclude altogether the use of ideas, even those which apparently do not directly correspond with any externally observable entities. Such ideas, in fact, guide empirical research by supplying the conceptual structure through which various sense impressions are harmonized into a relatively simple explanatory system.\textsuperscript{91} Also, such ideas enable predictions of the likelihood of similar future sense impressions under similar future conditions. All scientific theories are conceptual to some extent, though some of them are more conceptual than others.

Scientific theories of the mathematical-abstractive type,\textsuperscript{92} for example, merely correlate results, and therefore tend to be more con-

\begin{itemize}
  \item \textsuperscript{80} See, e.g., \textit{id.} at 81-82 that critical realism holds that “the data in perception (that is, what is intuited, what we are directly aware of) are not actually part of external objects but are ‘character-complexes . . . . irresistibly taken, in the moment of perception, to be the characters of existing outer objects,’” (quoting from D. Drake, \textit{et al.}, \textit{Essays in Critical Realism} 20 (1920)).
  \item \textsuperscript{90} This position is similar to “operationalism,” which is “a program which aims at linking all scientific concepts to experimental procedures and at cleansing science of operationally undefinable terms, which it regards as being devoid of empirical meaning.” Schlesinger, \textit{Operationalism}, in 5 \textit{Encycl. of Phil.} 543.
  \item \textsuperscript{91} See, e.g., M. Cohen & E. Nagel, \textit{supra} note 79, that “[every inquiry arises from some felt problem, so that no inquiry can even get under way unless some selection or sifting of the subject matter has taken place. Such selection requires, . . . . some hypothesis, preconception, prejudice, which guides the research as well as delimits the subject matter of inquiry.]” \textit{id.} at 392. A scientific hypothesis must “provide the answer to the problem which generated the inquiry,” and “becomes verified, but of course not proved beyond every doubt, through the successful predictions it makes.” \textit{id.} at 207-08. \textit{See generally A. Kaplan, supra} note 79, at 346-51, on explanation and prediction in scientific inquiry.
  \item \textsuperscript{92} See, \textit{e.g.}, A. Rose, \textit{Theory and Method in the Social Sciences} 3 (1954) that a theory contains an integrated body of definitions, assumptions, and general propositions concerning a given subject matter from which specific and testable hypotheses may be deduced logically, which permit both of causal explanation, and prediction.
\end{itemize}
ceptual, whereas so-called physical theories, which explain in detail how things work, tend to rely less on mere mental constructs. 93

Since this article is concerned primarily with scientific paradigms and their implications for twenty-first century jurisprudence, it cannot escape altogether from the conceptual element in science. Nevertheless, the concept of science on which it is based inevitably will influence the choice of those twentieth century jurisprudential developments which qualify as juridical science paradigms, and thus the scope of its thesis that these paradigms are likely to become more influential in twenty-first century jurisprudence. Paradoxically, as the definition of juridical science is narrowed, its probable influence on twenty-first century jurisprudence probably is lessened as well. Nevertheless, a clear idea of the scope of juridical science will facilitate precise analysis of current and future trends in legal philosophy, and, in the end, enable better extrapolation of these trends for extension into the future.

Historically the development of science, as distinguished from natural philosophy in general, has been closely associated with one particular method for learning about external reality—the so-called scientific method. 94 Recent philosophers of science claim that the historical formulation of the scientific method has been idealized, and masks the real thought processes scientists actually use in attempting to extend scientific knowledge. 95 Still, the scientific method, in essence, includes some mixture of logical construction and empirical observation, and some degree of fidelity to empirical evidence and simplicity of logical formulation, with fidelity to the evidence taking precedence in cases of conflict. 96 Thus there are two basic types of fundamental principle in science—substantive and methodological 97—and, as a matter of fact, the methodological

93. Physical theories include some hypothesis to explain the correlation of observable events or entities, though such hypotheses appeal to "hidden mechanisms" or unobservable events or entities. Id. In the gear box example, supra note 92, a physical theory would postulate gears, belts, chains, or some other mechanism, rather than little men or animals, to explain fully the ten-to-one rotation ratio between the two wheels.
94. See generally Caws, supra note 85, at 339.
95. See, e.g., A. Kaplan, supra note 79, at 6-11, which distinguishes the logics actually used by scientists in conducting inquiry, from the "reconstructed logics" setting out the results of their inquiries. The latter are closest to the "hypothetico-deductive method" commonly taken for the scientific method.
96. Caws, supra note 85.
97. Toulmin, supra note 86, explains that "there are those who distinguish two different kinds of fundamental principles in a science—marking off the basic theoretical assertions
principles probably are the more stable of the two. Strictly speaking, this article assumes that only substantive principles constitute scientific paradigms, and that methods of scientific procedure are important only insofar as they lead to new substantive paradigms reflecting external realities more accurately than the old ones.

Just as extreme philosophical idealists deny the existence of an external world, or one we can learn about, so there are those who claim that the scientific method cannot be used to study human beings. We assume that inanimate objects and most non-human living things do not know when they are objects of study. Humans, on the other hand, often behave differently than they otherwise would, when they are aware that they are being studied. Sometimes, however, research procedures can be devised to prevent human subjects from realizing that they are the objects of a scientific experiment. Similarly, we assume that inanimate objects and most non-human living things do not have free will and therefore cannot decide to do something, one thing rather than another, or nothing at all. Humans, on the other hand, often consciously decide to do certain things and we often are especially interested in these decisions. Finally, there is a private, internal aspect of human beings, and probably some other living things as well, to which no external observer can be privy. On the other

... from its methodological maxims and standards of judgment, such as 'All physical phenomena are to be explained in mechanical terms.' Id. at 386. Thus scientists, in this view, "recognize fundamental conceptual changes in the science as legitimate, just so long as they respect the methodological maxims that are definitive of the science in question." Id. See, e.g., Acton, supra note 75, that the philosophical idealist denies "the commonsense realist view that material things exist independently of being perceived." Id. at 110.

98. See, e.g., P. WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY (1958); Ayer, Man as a Subject for Science, in PHILOSOPHY, POLITICS AND SOCIETY 6 (P. Laslett & W. Runciman eds. 3d series 1969). See generally J. KEMENY, supra note 70, at 244-58.

100. See generally C. SELITZ, L. WRIGHTSMAN & S. COOK, RESEARCH METHODS IN SOCIAL RELATIONS 125-26 (3d ed. 1976) on the dangers of "reactivity," i.e., "an unwanted influence on a subject's responses, created by calling attention to the fact that this subject is being studied." This phenomenon is illustrated by the "Hawthorne effect," in which increased worker morale as a result of being selected as the work group being studied, resulted in increased productivity no matter what changes took place in working conditions. Id. at 126.

101. The main defense against reactivity is concealment of the fact that observations are taking place. Id. at 263-65.

Where the observer is in contact with the subject, sometimes subtle cues unknown even to the observer influence the behavior of the subject even though the subject does not know about the experiment. See, e.g., Lewis, Systems Theory and Judicial Behavioralism, 21 CASE W. RES. U. L. REV. 361, 420 (1970). This problem may be solved with "double blind" experiments, where neither the observer nor the subject know that an experiment is being performed.
hand, there remains an external aspect to human beings which can be accurately observed. Also some of the external behaviors of human beings provide more or less reliable clues to internal states and decisions. Hence, scientific methods can be utilized in studying human beings, and the social sciences truly are sciences, even though some special limitations govern the application of scientific methods in human affairs. 102

Some legal scholars object to the application of social science methods to law, 103 though most would recognize at least the traditional Rechtswissenschaft notion of legal science as a systematic arrangement of legal concepts and norms. 104 Followers of Hans Kelsen would consider his neo-Kantian analysis of the hierarchical relationships among norms as the only true science of law for jurists. 105 This writer views juridical sciences as including all extensions of social science methods to the human social behavior with which law deals, an enterprise which Hans Kelsen would label the sociology of law. 106 Hence the juridical science paradigms

103. See, e.g., F. Castberg, PROBLEMS OF LEGAL PHILOSOPHY (1957).
104. Rechtswissenschaft, the German science of legal norms, grew out of Roman law studies in the nineteenth century. See, e.g., Grueber, INTRODUCTION TO R. SOHM, THE INSTITUTES (3d ed. J. Ledlie trans. 1907), that,

[...] in addition to these two courses of lectures [Roman law and German private law], there is a third course of lectures which is of a rudimentary character and is known as the 'Introduction to the Science of Law' [Rechtswissenschaft]. These lectures serve to introduce the student to every branch of legal science alike, not only, therefore, to (1) the German Civil Law together with (2) Mercantile Law and Bills of Exchange, but also to (3) Civil Procedure and (4) the Law of Bankruptcy, (5) Criminal Law, (6) Criminal Procedure, (7) Constitutional (and Administrative) Law, (8) International Law and (9) Ecclesiastical Law.

Id. at xi, xii. Legal science, in this sense, occupies a relatively exalted position in Germany. See, e.g., C. Szladits, GUIDE TO FOREIGN LEGAL MATERIALS: FRENCH—GERMAN—SWISS 168 (1959).

W. Harris, LAW AND LEGAL SCIENCE 10-14 (1979) explains the special "logic" by which legal rules are related to each other in a rule system.

105. See, e.g., H. Kelsen, GENERAL THEORY OF LAW AND STATE xiii (A. Wedberg trans. 1945).

The obvious statement that the object of the science of law is the law includes the less obvious statement that the object of the science of law is legal norms, but human behavior only to the extent that it is determined by legal norms as condition or consequence, in other words, to the extent that human behavior is the content of legal norms.


106. See, e.g., H. Kelsen, GENERAL THEORY OF LAW AND THE STATE 174-78 (A. Wedberg trans. 1945). "[T]he object of a sociology of law is human behavior which the acting individual has adapted (orientiert) to an order because he considers that order to be 'valid' . . . ."

Id. at 175.
discussed here are applications to law of social science theories and methods of research. This view of juridical science excludes such fundamentally humanistic studies of law as historical jurisprudence,\footnote{107. The founder and the leading exponent of the historical school is Friedrich Carl von Savigny (1779-1861). . . . His main idea was that law was a necessary result of the whole history of a people, not something which speculation could bring forth full fledged from the head of a jurist, or legislation could bring forth by an arbitrary fiat.} though it includes historical sociology of law as one type of juridical science.\footnote{108. See, e.g., Funk, Historische Rechtstatsachenforschung in Theorie und Praxis, in RECHTSSOZIOLOGIE UND RECHTSTATACHENFORSCHUNG (M. Rehbinder & M. Killias eds. 1985). For an expanded and revised English language version of this essay, see Funk, supra note 44.} This definition of juridical science also excludes phenomenological,\footnote{109. See generally Friedmann, Phenomenology and Legal Science, in 2 PHENOMENOLOGY AND THE SOCIAL SCIENCES 343 (M. Natanson ed. 1973).} existentialist\footnote{110. See generally Bassis, Towards a Subjective Theory of Law: Some Legal Implications of Existentialism, 22 BUFFALO L. REV. 269 (1972).} and aesthetic\footnote{111. See generally A. Ehrenzweig, Psychoanalytic Jurisprudence 169-82, 201-05 (1971).} jurisprudence, though these recent trends in legal philosophy could be considered as possible rival tendencies to juridical sciences in twenty-first century jurisprudence.

Those who object to all science, all social science, and all juridical science can enunciate one unified theoretical objection to the scientific approach to nature, social affairs and law. Their natural protagonists, on the scientific side, would be the unified science movement in the natural sciences,\footnote{112. See, e.g., Toulmin, supra note 86, at 388-89; J. Kemeny, supra note 70, at 180-81. The unified science school holds that eventually all of science will be reduced to physics. Id. C. Perelman, supra note 1, at 94, treats the ideal of the unity of science as a consequence of the Cartesian conception of knowledge.} and any extensions of that approach to social and juridical affairs.\footnote{113. See, e.g., O. Neurath, Foundations of the Social Sciences (1944), which is volume 2, number 1, of the INTL ENCYCLOPEDIA OF UNIFIED SCIENCE (O. Neurath ed.). The writer is unaware of any attempt to treat juridical science as merely one element of a unified social science.} For the most part, however, the scientific enterprise has produced few overarching generalities and many detailed applications.\footnote{114. See Caws, supra note 85 that the search for a unique scientific method seems less urgent than it once did, because by now it is clear that in general it has already been discovered, while in detail there is no such thing. . . . The details . . . remain the object of a range of inquiries from the study of laboratory techniques to pure axiomatics.} Thus “science” in general breaks down...
rather quickly into a set of "sciences," whether natural, social, or juridical. Therefore this article anticipates twenty-first century applications to law of particular social sciences, such as economics, political science, sociology, psychology, and general systems theory, to produce various possible juridical sciences. To that extent idealist objections to all science, and general objections to extensions of the scientific method to social and juridical affairs, are met by mere examples of juridical sciences, rather than by a direct response to their general objections.

Progress in science often has depended on "bracketing" speculation and attempting to solve specific factual problems. The scientific method itself suggests that demonstrating a successful application of a social science method to a particular problem is preferable to endless wrangling about whether such an application is possible. Of course general criteria of success must be agreed on, and no scientific generalization which goes beyond the specific experimental result is completely justified. Nevertheless, within these limitations, such demonstrations represent at least small steps toward solution of the broader problem, whether any science is possible.

Juridical science paradigms for twenty-first century jurisprudence should be distinguished from the more usual law and social science approach to legal studies. A true juridical science paradigm may be expected to produce a thought revolution in jurisprudence resulting in a new way of looking at fundamental legal problems and a systematic new way of seeking answers.

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115. Phenomenologists "bracket experience" in order to suspend belief in objects so that they can be described as phenomena. See generally Schmitt, Phenomenology, in 6 ENCYCL. OF PHIL. 135, 140-144.

116. See, e.g., Toulmin, supra note 86 that

the task of science is to explain actual events, processes, or phenomena in nature; and no system of theoretical ideas, technical terms, and mathematical procedures—or mathematical procedures alone—qualifies as scientific unless it comes to grips with those empirical facts at some point and in some way and helps to make them more intelligible. Id. at 382.

117. See generally Ashby, Verifiability Principle, in 8 ENCYCL. OF PHIL. 240 (and 242 on falsifiability).

118. See, e.g., J. Kemeny, supra note 70, at 99, that observations are only approximate, so we are never certain that a scientific prediction has been verified. "The process of verification consists in checking predictions against observations, and assigning greater or lesser credibility to our theories on the basis of the outcome." Id.

119. See, e.g., H. Cairns, supra note 38.
to them. Strictly speaking, the law and social science approach merely uses specific and relatively isolated portions of the social science literature to suggest modifications in specific legal principles. Even the law and social science literature, however, occasionally deals with broader issues of theoretical interest to legal philosophers, and to that extent this literature is of interest here.

Finally readers need to keep in mind the great diversity in subject matters and scientific methods which characterize modern science. Too often non-scientists tend to think of physics, not only as the quintessential science, but also as nearly synonymous with science itself. Physics may be the ideal science in many respects, but it is scarcely typical even of the natural sciences today. Physics and astrophysics, for example, are quite mathematical, but other natural sciences, such as physical geography, botany, physiology and zoology, are not. Physics and chemistry make extensive use of laboratory experiments, but other natural sciences, such as astronomy and geology, do not. Physics and chemistry for example, produce scientific laws which enable relatively accurate prediction of future events, but this is not the case with other natural sciences, such as vulcanology and meteorology. In our search for social science influences on legal thought, we need not adopt physics as the archetypical natural science or as the standard which social sciences must meet in order to be “scientific.” Social sciences, and

120. See, e.g., id. that

[anthropology ... has definite contributions to make to the concept of the nature of law, to legal history and to colonial jurisprudence. Economics is a field which seems to offer considerable material for the advancement of the juristic understanding of many social institutions and associations with which the law is directly concerned. In the chapter on the contributions of sociology of law we saw that jurists, at least since the early Greeks, in their attempts to correlate social facts or to display their relations, have been practising sociology. We saw further that sociology would seem to have four points of contact with the law: (1) analyses of the nature of law undertaken by sociologists; (2) the “sociological method” as a tool in law making and legal analysis; (3) sociological analyses of socio-legal institutions; [and] (4) the theory of cultural change as an aid in adjusting law to changed material culture. ... [In some departments of the law it [psychology] is now prepared to make contributions of such definiteness and value that the law can neglect them only at the risk of promoting injustice. Political theory, which has long maintained an intimate connection with jurisprudence, appears to-day to have three important contacts with the law: the idea of sovereignty and the notion of law, the doctrine of the separation of powers, and the theory of rights.

Id. at 262-63.

121. See generally the general outline of sciences, apparently largely the work of Dr. Mortimer J. Adler, supra note 3, at 5, 15-16, 692-93, 726-46.
hence juridical sciences, need not meet standards of quantification, mathematical expression, experimentation, and prediction which even many natural sciences have not achieved. If we keep firmly in mind the actual characteristics of the full range of natural sciences, we are more likely to discover analogous social science applications to law which are likely to serve as juridical science paradigms for jurisprudence in the twenty-first century.

VI. JURIDICAL SCIENCE PARADIGMS EXEMPLIFIED

So far the philosophical foundations for the development of juridical science paradigms as "newer rhetorics" in twenty-first century jurisprudence have been laid. This section will provide examples of those paradigms which seem most promising. Each of them deserves much fuller treatment in a separate article. Hence this section can only sketch the general outlines of each promising social science approach to law. Some references will be provided to show the historical development of each budding juridical science, from its early beginnings to a representative selection from the expanding current literature. In the course of this discussion only the most general legal philosophical issues which underlie each approach will be identified. These approaches generally have jurisprudential implications which go beyond providing particular empirical solutions for particular legal problems within the framework of existing legal thought. Often they suggest, or emphasize, new fundamental questions and thus add new dimensions to legal philosophy, either expressly or by implication. Fuller treatment of these jurisprudential implications, however, and the literature which is spawning them must await another occasion.122

The following discussion of illustrative juridical science paradigms could be arranged in some more conceptually satisfying order. Proceeding from social science applications to law which deal with the most basic human behavior, to those which deal with more

122. Portions of this article could well be expanded into a book on juridical science paradigms for twenty-first century jurisprudence. On October 19, 1970, as a graduate student at the Case Western Reserve University Law School, the writer prepared a brief sketch on "Prospects, Possibilities and Problems of a Science of Law" for Dr. Ovid C. Lewis in his jurisprudence seminar. Many of the writer's publications since then have dealt with that basic problem, including a book which attempts to explicate a new juridical science based on group dynamics and organization theory. Supra notes 44 and 71. Funk, International Laws as Integrators and Measurement in Human Right Debates, 3 CASE W. RES. J. INT'L L. 123 (1971).
complex and institutionalized behaviors, would yield a progression from psychology, through economic and political science approaches, to sociology and general systems theory. Instead these approaches will be discussed in the approximate order of their current stage of development as well-recognized juridical sciences.

A. Economic Analysis of Law

As early as 1897, Oliver Wendell Holmes, Jr., was urging lawyers to pay increased attention to economics.\(^{123}\) In a sense, John R. Commons heeded that call in 1924.\(^{124}\) It was not until the late 1950's, however, that economic analysis of law began its "take-off into self-sustained growth," as the developmental economists would say.\(^{125}\) By the early 1960's several classic studies had appeared.\(^{126}\) A spate of early efforts\(^{127}\) led by 1973 to the encyclopedic treatise of Richard Posner entitled Economic Analysis of Law.\(^{128}\) Professor Posner extended economic analysis of law far beyond the solution of specific problems in antitrust law and regulated industries. "Economics," he claimed, "is a powerful tool for analyzing a broad range of ques-

\(^{123}\) "Every lawyer ought to seek an understanding of economics. ... [In economics] we are called on to consider and weigh the ends in legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.

Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 474 (1897).

\(^{124}\) J. Commons, Legal Foundations of Capitalism (1924).


\(^{126}\) See, e.g., G. Becker, The Economics of Discrimination (1957); Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499 (1961); and Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1962), which was written in 1960.


tions of legal interpretation and policy." A great many works in this genre followed, though not all of them agreed with the specific conclusions of Professor Posner. Even the literature surveys for this juridical science are now fairly extensive.

It is hard to summarize in a few words the jurisprudential implications of such a vast literature. Also the technical jargon and mathematical models commonly used in this literature tend to obscure the more fundamental relationship between economics and psychology. Economics assumes that each man is a rational max-

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Economics is the science of human choice in a world in which resources are limited in relation to human wants. It explores and tests the implications of the assumption that man is a rational maximizer of his ends in life, his satisfactions. . . .

It is implicit in the definition of man as a rational maximizer of his self-interest that people respond to incentives. . . .

Id.


132. For the most part economic analysis of law relies on equilibrium models which show relationships between supplies of and demands for various things or intangible utilities valued by various producers and consumers of these utilities. Occasionally, however, economic analysis of law utilizes models from game theory. See generally J. Von Neumann & O. Morgenstern. Theory of Games and Economic Behavior (2d ed. 1964). For an application to law, see, e.g., Hoeftlich, Of Reason, Gamesmanship, and Taxes: A Jurisprudential and Games Theoretical Approach to the Problem of Voluntary Compliance, 2 Am. J. Tax Pol'y 9 (1983).

imizer of those things which have utility for him, especially wealth. A Freudian psychiatrist might question the extent to which conscious choices of utilities guide human behavior. Nevertheless, if the economists are largely right, then their social science provides a powerful positive and normative tool for understanding and evaluating law.

Economic analysts of law explain many choices of those in the legal system largely as rational utility maximizing behavior, even where those choices commonly are considered to be the result of non-economic decisions. Often the value premises of this approach remain implicit, but sometimes they are explicitly recognized; in either case the basic position is that, given a world where utilities are in short supply, the legal system should leave many choices to a free market exchange of utilities. Thus, economic analysis of law, like utilitarianism, tries to force its opponents to justify departures from institutional arrangements conducive to free market exchange of utilities among rational maximizers.

This juridical science paradigm seems so well established that it requires no prophet to predict its continuing influence on legal thought. Even a skeptic concluded that the expansion of deeper economic analysis into law is almost inevitable.135

B. Political Sciences of Law

American political science became primarily a social science after World War II as the "behavioral revolution" became pervasive.136 Three recent attempts to use empirical social science methods in


135. What does the economic analysis of law amount to? Is it the beginning of a true science of law, or is it a fad? Law will not be reduced to a science, but there is scope for building a science within law based upon fundamental concepts of economic explanation, namely maximization, equilibrium, and efficiency. The purpose of this science is to explicate the law. The accomplishments as exhibited in these books are shabby by comparison to the dream, but such discrepancies motivate the best efforts of intellectuals. If rigor drives out less structured modes of thought, as appears to be the case from recent intellectual history, then the expansion of deeper economic analysis into the law is inevitable.

Cooter, supra note 131 at 1269.

136. C. MERRIAM, NEW ASPECTS OF POLITICS (1925) sought to encourage empirical study of observable political behavior. INTRODUCTORY READINGS IN POLITICAL BEHAVIOR (S. Ulmer ed. 1961) and POLITICAL BEHAVIOR (H. Eulau, S. Eldersveld & M. Janowitz eds. 1956) were influential in bringing this perspective into American political science. See generally 1-5 THE HANDBOOK OF POLITICAL BEHAVIOR (S. Long ed. 1981). See generally F. SORAUF, POLITICAL SCIENCE 15 (1965) for a succinct description of the behavioral movement, mood or spirit.
studying American law may be considered applications of behavioral political science to law: (1) empirical studies of the legal process, (2) jurimetrics, and (3) judicial behavioralism.

The first political science of law is the social scientific analysis of the legal process, in the narrow sense of using social science methods to understand the impact of social forces on law and the internal operation of the legal system. Political sociologists also use the methods of behavioral science, and sociology of law in a broad sense often includes the impact of social forces on law as well as the impact of law on society. Nevertheless, this article will use sociology of law in a narrower sense and will treat the impact of law on society under sociological approaches to jurisprudence below. This leaves social scientific analysis of the legal process and various social influences on this process as a political science of law, whether the specific work is done by political scientists, political sociologists, legal scholars, or others.

Some early empirical work involving the legal process was done by legal scholars at Johns Hopkins University in the early 1930's. As the “behavioral revolution” became more prevalent after World War II, however, political scientists began to apply this perspective to American legislative, administrative, and judicial processes. As the field developed, however, social scientific analysis of American legislative and administrative processes has been left largely to political scientists, whereas both political scientists and

137. See, e.g., S. Lipset, Political Man: The Social Basis of Politics (1963).
139. See infra notes 161-70 and accompanying text.
140. Monographs in the Study of Judicial Administration in Ohio (1931-36). Report by the Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences (1932) also exemplifies early empirical legal process research.
142. See, e.g., H. Simon, Administrative Behavior (1945).
legal scholars have utilized empirical methods in studying the American judicial process. Soc. 4

Social scientific study of the legal, and especially the judicial, process received support from a recent American development in jurisprudence known as “jurimetrics.” In a seminal article, Lee Loewinger defined jurimetrics very broadly as “the scientific investigation of legal problems.” His specific proposals, however, advocated investigation of the behavior of witnesses, judges and legislators, as well as legal language and communications, legal procedure and recordation, and various forms of personal behavior in response to law. Others developed these ideas somewhat, and eventually applied them to a limited extent. 149

We have seen that mathematics, strictly speaking, is not a science. Nevertheless mathematical probability theory can be a tool pregnant with possibilities for advancing the program of jurimetrics. Probability theory had been applied to the study of jury behavior in the nineteenth century, but modern applications have extended it to other legal problems. 152

144. See supra note 143, and see, e.g., H. Zeisel, H. Kalven, Jr. & B. Buchholz, Delay in the Court (1959); M. Rosenberg, The Pretrial Conference and Effective Justice (1964); Vera Foundation, Toward Justice for the Poor (1964). See generally 1-2 F. Klein, The Administration of Justice in the Courts (1975-76) for a comprehensive annotated bibliography.
146. Id. at 483.
147. Id. at 484-88.
148. See, e.g., Jurimetrics (H. Baade ed. 1963); Communication Sciences and Law (L. Allen & M. Caldwell 1965); and Funk, Pure Jurimetrics: The Measurement of Law in Decision-Repetitions, supra note 71.
150. See supra notes 2-3 and accompanying text.
Finally, political science approaches to the judicial process have spawned an application of the behavioralist movement in political science known as judicial behavioralism. A few early studies attempted to go behind legal formalism and investigate factors other than legal doctrines which appeared to explain judicial behavior in deciding cases. This approach to the study of the judicial process expanded considerably after World War II. In the 1960’s and 1970’s political scientists, for the most part, produced an extensive literature seeking to explain judicial decision-making.


153. See, e.g., Haines, General Observations on the Effects of Personal, Political and Economic Influences in the Decisions of Judges, 17 ILL. L. REV. 96 (1922); Mott, Albright & Semmerling, Judicial Personnel, 167 THE ANNALS 143-55 (1933); Mott, Judicial Influence, 30 AM. POL. SCI. REV. 295 (W. F. Dodd ed. 1936); and Pritchett, Divisions of Influence Opinion Among Justices of the U.S. Supreme Court, 1939-1941, 35 AM. POL. SCI. REV. 890 (1941).

154. See supra note 136.


Some of it even attempted to predict the outcome of particular cases, based on "personal stare decisis" observed among particular judges, after taking into account any changes in judicial personnel.197 Ironically, this literature has found little acceptance in the teaching


157. Lawlor, supra note 156, correctly predicted that Betts v. Brady, 316 U.S. 455 (1942), would be overruled, and it was, in Gideon v. Wainwright, 372 U.S. 335 (1963). Kort, supra note 155, however, failed to foresee this turn of events. See generally Haar, Sawyer & Cummings, supra note 156.
materials commonly used in American law school courses in United States constitutional law.\footnote{158}

All three of the modern political science approaches—legal process studies, jurimetrics, and judicial behavioralism—tend to support and carry forward the American legal realist approach to jurisprudence. The American legal realist critique was essentially negative; it attacked legal formalism\footnote{159} and denied that legal doctrine could explain the course of legal development or predict its future to any great extent. Yet, when it came to identifying those factors which did explain this course of development, or which could be used to predict future developments, American legal realism had few concrete theories to substitute for the formal legal doctrines which it denigrated.\footnote{160}

The political science literature reviewed above is replete with specific theories for explaining the behavior of various actors in the legal process, and using such theories to predict their future behavior to some extent. As these political science approaches are further developed and applied, they are almost certain to complete the demolition of nineteenth century legal formalism, and also to supplement the rather feeble attempts of twentieth century American legal realists to develop alternative explanatory and predictive theories of legal behavior.

\textit{C. Sociology of Law}

Sociology of law, in the narrow sense of investigation of the impact of law on society,\footnote{161} is the natural juridical science outgrowth of sociological jurisprudence. Sociological jurisprudence in America is most closely associated with the life’s work of Roscoe Pound.\footnote{162} Since Dean Pound analyzed the legal process as a reflection and


159. See generally M. White, Social Thought in America (1947) on the revolt against formalism.


161. See supra notes 137-39 and accompanying text.

162. See generally 1-5 R. Pound, supra note 35.}
adjustment of individual and group interests in society, his sociological jurisprudence leads initially to legal process analysis of the type already discussed.\textsuperscript{163} However, Dean Pound also described law as “social engineering.”\textsuperscript{164} This facet of American sociological jurisprudence has encouraged sociologists, primarily, to apply their social scientific methods to the study of the impact of law on society.

Some of the early legal impact studies\textsuperscript{165} grew out of the “empirical wing” of American legal realism.\textsuperscript{166} After World War II, legal impact studies grew by leaps and bounds,\textsuperscript{167} and often were reprinted along with legal process studies as part of sociology of law in the more general sense.\textsuperscript{168}

Like legal process studies, legal impact studies generally apply social science methods to some specific law or legal institution. Nevertheless, these specific investigations usually lead to more general jurisprudential conclusions about the effects of law, and like the political sciences of law, tend to undercut legal formalism.\textsuperscript{169} Absent empirical investigation, there is a natural tendency to assume that what laws or jurists say will happen when a law is enacted, changed, or applied, actually will occur. Legal impact

\begin{itemize}
  \item \textsuperscript{163} See supra notes 140-44 and accompanying text.
  \item \textsuperscript{164} See, e.g., 3 R. POUND, supra note 35, at 286, 311.
  \item \textsuperscript{165} See, e.g., Clark, Douglas & Thomas, The Business Failures Project—A Problem in Methodology, 39 YALE L.J. 1013 (1930); Clark, Douglas & Thomas, The Business Failures Project—II. An Analysis of Methods of Investigation, 40 YALE L.J. 1034 (1931); Moore & Sussman, Legal and Institutional Methods Applied to the Debiting of Direct Discounts, (pts. 1-6) 40 YALE L.J. 381, 555, 752, 928, 1055, 1219 (1931); COMMISSION TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, REPORT TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES (1932); Moore, Sussman, & Brand, Legal and Institutional Methods Applied to Orders to Stop Payments of Checks, (pts. 1-2), 42 YALE L.J. 817, 1198 (1933); Allport, The J-Curve Hypothesis of Conforming Behavior, 5 J. SOC. PSYCHOLOGY 141 (1934); Moore, Sussman & Corstvet, Drawing Against Uncollected Checks, 45 YALE L.J. 1 (1935); A. JONES, LIFE, LIBERTY AND PROPERTY (1941); and Moore & Callahan, Law and Learning Theory: A Study in Legal Control, 53 YALE L.J. 1 (1943).
  \item \textsuperscript{166} J. Schlegel, supra note 38.
  \item \textsuperscript{168} See generally supra note 138.
  \item \textsuperscript{169} For some general conclusions growing out of sociology of law, see, e.g., D. BLACK, THE BEHAVIOR OF LAW (1976). See generally supra note 159 and accompanying text on the effects of political sciences of law on legal formalism.
\end{itemize}
studies question those assumptions. Finally, they invite comparison of what has actually happened with what was supposed to have happened, which in turn leads to general jurisprudential inquiry into general functions of law.\textsuperscript{170}

If anthropologists of law generally used empirical methods of social science, as that term is defined here,\textsuperscript{171} in the investigation of the law of various cultures, anthropology of law also would have much to contribute to juridical science in the twenty-first century. For the most part, however, anthropologists of law produce perceptive case studies with little sustained effort to verify across many cultures their general theories of legal process and legal impact.\textsuperscript{172} Thus anthropology may well contribute valuable theories\textsuperscript{173} and case studies\textsuperscript{174} to twenty-first century jurisprudence; but anthropology of law seems unlikely to become an independent juridical science paradigm like sociology of law.

\section{D. Psychological Jurisprudence}

In a sense, all of the juridical science paradigms discussed in this section ultimately are based on psychology, since all of them are applications of social sciences to law, and all social sciences ultimately depend on human psychology for their explanations of human behavior. Economics can be seen as the psychology of people with respect to the production and distribution of scarce utilities.\textsuperscript{175} Similarly, political science can be seen as the psychology of people

\begin{footnotesize}
\begin{enumerate}
\item[171.] But see, e.g., those who stress the limits and inefficacy of law, A. Allott, \textit{The Limits of Law} (1980); \textit{The Limits of Law} (J. Pennock & J. Chapman eds. 1974); R. Summers, \textit{Instrumentalism and American Legal Theory} (1982); H. Zeisel, \textit{The Limits of Law Enforcement} (1983).
\item[172.] See supra notes 106-11 and accompanying text.
\item[175.] For a comprehensive bibliography of the extensive literature on anthropology of law, see, e.g., Nader, Koch & Cox, \textit{The Ethnography of Law: A Bibliographical Survey}, 7 \textit{Current Anthropology} 257 (1966).
\item[176.] See, e.g., supra note 133 and accompanying text.
\end{enumerate}
\end{footnotesize}
with respect to governmental power. Obviously sociology is closely related to social psychology. In a narrower sense, however, psychology as distinguished from economics, political science and sociology has its own special fields of interest, and applications of psychology in a strict sense, to law have suggested some additional juridical sciences which may have jurisprudential implications in the twenty-first century.

Several twentieth century European legal philosophers may be considered pioneer theorists in the development of psychological jurisprudence. The Polish legal philosopher, Leon Petrazycki, was an early pioneer in psychological jurisprudence, and developed what might be called psychological legal realism. Similar approaches are found among the Scandinavian legal realists, most notably Karl Olivecrona, A. Vilhelm Lundstedt, and Alf Ross. The Scandinavians seemed unaware of the works of Petrazycki until his Russian works were translated into German beginning in 1907 and eventually came to their attention. Each of these legal philosophers sees laws in essence as creating real psychological pressures on those subjected to them. Some American legal philosophers have reached similar conclusions, largely independently of earlier European developments.

Specific applications of psychology to law usually have developed independently of these jurisprudential foundations, however, and have proceeded in three relatively independent directions: (1) per-

178. See, e.g., K. Olivecrona, Law as Fact (1939); Law as Fact (2d ed. 1971); and Legal Language and Reality (1962).
179. See, e.g., A. Lundstedt, Legal Thinking Revised (1962).
180. See, e.g., A. Ross, On Law and Justice (1959); and Directives and Norms (1968).
182. See, e.g., K. Olivecrona, Law as Fact 316 (2d ed. 1971) s.v. "Petrazycki (Petras'hitskiy)."
sonality theory in law, (2) group dynamic law, and (3) psychological analysis of the legal process. Each will be discussed in turn.

First, a few scholars have attempted to advance juridical science by applying personality theory to law.184 These efforts should be distinguished from various attempts to apply psychoanalytic theory to law.

A great many attempts have been made to apply Freudian psychoanalytic analysis to actors in the legal system, and, at first glance, this approach resembles psychological applications of personality theory in law rather closely. Sigmund Freud often expressed skepticism concerning the practical and theoretical feasibility of applying his psychoanalytic theories to social phenomena.185 Many of his followers, however, have not been so reticent and have attempted to develop a full-fledged psychoanalytic jurisprudence.186 Whether this can serve as the foundation for a juridical science is more problematic. Like anthropology,187 psychoanalysis currently focuses on individual instances, without much attempt to verify general theories by rigorous observation of statistically significant numbers of cases. Like anthropology of


We have seen that particular applications of social sciences in the law and social science literature are not sufficiently general to provide juridical science paradigms for twenty-first century jurisprudence. See supra notes 119-20 and accompanying text. The law and psychiatry movement deals primarily with particular applications of psychiatry in law. See, e.g., J. Katz, J. Goldstein & A. Dershowitz, Psychoanalysis, Psychiatry, and Law (1967); Law, Psychiatry and the Mental Health System (A. Brooks ed. 1974); and Reisner's Law and the Mental Health System, Civil and Criminal Aspects (R. Reisner ed. 1985). Therefore, this literature is not general enough to provide the foundation for psychoanalytic jurisprudence, regardless of whether the general psychoanalytic approach is sufficiently scientific to provide the foundation for a juridical science.

187. See supra notes 171-74 and accompanying text.
law, psychoanalytic jurisprudence may contain perceptive and useful additions to legal thought. Nevertheless, without more scientific attempts to verify its theories, in the final analysis, psychoanalytic jurisprudence can scarcely serve as a juridical science paradigm for twenty-first century jurisprudence.

So far, psychological personality theory has not advanced very far beyond the stage of general theory either. Since its protagonists are further removed from the particularizing tendencies of diagnosing and treating specific patients for mental illnesses, however, personality theory appears to offer more hope for eventual development into a true psychological social science. Hence, unlike psychoanalytic jurisprudence, applications of personality theory to law appear to offer reasonable prospects for developing into a true juridical science paradigm in the future.

The second major type of psychological jurisprudence has grown out of the interest of social psychologists, sociologists, and others in the peculiar behavior of humans in groups and organizations. This new social science is often referred to as group dynamics or organization theory. Like so many other new developments in the social sciences, this sub-field of social psychology and sociology developed primarily after World War II. Social scientists in this field often draw a distinction between small groups containing about twenty persons or less, where each member can have some face-to-face contact with every other member, and larger

188. See generally Theories of Personality (G. Lindzey & C. Hall eds. 1965).
189. See, e.g., Group Dynamics (D. Cartwright & A. Zander eds. 3d ed. 1968).
190. See generally Handbook of Organizations (J. March ed. 1965).
organizations where this is unlikely.192 Thus group dynamics often is distinguished from organization theory on this basis.193 For applications to law, however, a single term, such as "group dynamic law,"194 can apply to all groups regardless of size.

For group dynamic law two further distinctions should be useful. One is based on the type of group or organization involved. Private law groups and organizations, such as partnerships, corporations, cooperatives, labor unions, nonprofit organizations, marriage and the like, can be distinguished from public law groups and organizations, such as political parties, legislatures, administrative agencies, government corporations, multijudge courts, juries, and the like.195 The second distinction is based on the type of law which is the focus of inquiry in connection with a particular type of group or organization. What may be called "internal group dynamic law" focuses on the internal rules which groups and organizations seem to generate spontaneously for their members, whereas what may be called "external group dynamic law" focuses on external rules of the state at large which affect the behavior of the members of a public or private law group or organization.196

Literature applying the methods of group dynamics and organization theory to law in all of these respects is relatively recent and sparse. An early work by Dr. Joseph Taubman laid the foundation both for internal and external group dynamic law with respect to private law groups.197 Dr. Walter O. Weyrauch and a few others have developed the internal group dynamic law perspective with respect to private law groups.198 There has been only one extensive attempt to develop external group dynamic law with respect to private law groups,199 and that exploratory study is limited to those private law groups which have originated in a "constitutive

192. See, e.g., D. Funk, supra note 71, at 67.
193. Id.
194. See, e.g, D. Funk, supra note 71.
195. See, e.g., id. at 11.
196. See, e.g., id. at 8-10, 80.
197. Taubman, Law and Sociology in the Control of Small Groups, 13 U. Toronto Fac. L. Rev. 23 (1959-60).
199. D. Funk, supra note 71.
contract."

Finally, some more or less explicit attempts to apply group dynamics and organization theory to public law groups have grown out of political science approaches to law, such as those referred to above.

From its inception jurisprudence has proceeded primarily on the assumption that its field of interest involved individual citizens and lawmakers in their relations with the most inclusive national group—the state. Application of group dynamics and organization theory to law undermines that basic premise by interposing between the individual and the state a tertium quid, either as an independent maker and enforcer of law-like rules (as in internal group dynamic law) or as a relatively independent social structure of individuals which the law of the state must take into account in making and enforcing its laws. Even the state itself, under this type of analysis, loses its monolithic similarity to a solitary monarch, and is seen as a congeries of public law groups and organizations in which individuals act somewhat differently from the way they would act if they were acting alone. Thus, the jurisprudential implications of this juridical science, though not very extensively explored to date, may well prove revolutionary in legal philosophy in the twenty-first century.

Finally, a third basic type of application of psychology to law, brings psychological theories and methods of inquiry to bear on the legal process, and especially on the behavior of various participants in courtroom activities. In a sense this is another type of jurimetrics, though it has been the work primarily of psychologists, rather than political scientists, and thus tends to focus on more basic principles of human behavior. Again, despite some early work along these lines, most of this literature has

200. Id. at 11-12.


202. See supra notes 138-58 and accompanying text.

203. See supra notes 145-49 and accompanying text.

204. See, e.g., E. ROBINSON, supra note 184; Robinson, Psychology and the Law, 1 J. Soc. Phil. 197 (1936).
been published after World War II. This might be called "law and psychology" literature, analogous to the "law and psychiatry" literature already noted. Similarly, ascertaining public perceptions about law and various legal actors using modern public opinion testing methods, though a useful tool in many social science approaches to law, probably will generate insufficient general theory to constitute a separate juridical science paradigm for twenty-first century jurisprudence. The remainder of the psychological literature just reviewed, however, like political science approaches to law, probably will augment general legal


207. See supra note 186 and accompanying text.


209. See supra notes 203-05 and accompanying text.
thought by carrying forward the program of American and Scandinavian legal realism to which we have already alluded.\textsuperscript{210}

\textbf{E. Geographical Jurisprudence}

Geographical jurisprudence, though not very extensively developed to date, ultimately draws its inspiration from Baron Montesquieu,\textsuperscript{211} who attempted to identify climatic geographical influences on laws.\textsuperscript{212} If this point of view could be developed into a juridical science, it would be a scientific paradigm for twenty-first century jurisprudence.

A few scholars have attempted work along these lines.\textsuperscript{213} On the other hand, others have merely mapped variations in laws or legal systems to discover variations in human jural geography which might suggest other social factors accounting for observed geographical variations.\textsuperscript{214} Mere mapping of law currently seems unlikely to lead to a separate human geography of law. Correlation of geographical variations in law with climatic variations, on the other hand, might lead to reconsideration of existing explanations for legal variations among different geographical areas. To this writer, however, neither legal mapping nor correlation with climatic variations seem very promising as juridical sciences. Therefore geographical jurisprudence in its present stage of development does not seem very likely to provide a new juridical science paradigm for jurisprudence in the twenty-first century.

\textbf{F. Cybernetic and General Systems Theories of Law}

General systems theory, and its close relative cybernetics, seem more like ways of integrating specific scientific findings into more

\textsuperscript{210} See supra notes 178-83 and accompanying text.


\textsuperscript{212} See generally L. Pospisil, supra note 173, at 128-38.


integrated theoretical wholes than independent sciences. Each of these approaches sees discrete events or systems as parts of much larger systems in which many events and systems are interacting simultaneously, often with feedback effects from one event or system to other parts of the larger system.

Cybernetic jurisprudence grew out of cybernetics which, in turn, was the product of operations research involving self-guiding weapons systems during World War II. The term "cybernetics" refers to the Greek steersman who guided a ship. Thus cybernetics deals with systems of guidance or control. A home heating system is a familiar example. In winter, when a house cools, the thermostat "calls for" heat until a certain maximum temperature is reached. At that point, the furnace automatically turns off. A very small part of the heat from the furnace operates the "steering" or "guidance" mechanism which controls the operation of the heating system. A few authors have applied this analogy to legal systems, trying to identify interrelationships and "feedback loops" which explain more adequately the "self-guided" operations of the legal system as a whole. Inputs, outputs, "withinputs," feedback loops, and communication nets figure prominently in this approach.

General systems theory developed out of attempts to deal with interactions among biological systems, but has been applied to social systems and political systems as well. Dr. Walter O.

220. See, e.g., D. Easton, THE POLITICAL SYSTEM (1953); and A FRAMEWORK FOR POLITICAL ANALYSIS (1965).
Weyrauch, a pioneer in internal group dynamic law,\textsuperscript{221} also was an early advocate of the systems approach to law.\textsuperscript{222} An early study utilized this approach.\textsuperscript{223} The first extensive exposition of this point of view, however, was by Dr. Ovid C. Lewis,\textsuperscript{224} though one of his students published a second specific application of this approach two years before his teacher.\textsuperscript{225} A number of additional attempts to apply this point of view to law have followed.\textsuperscript{226}

The integrated contextual, configurative approach to political science of Harold D. Lasswell,\textsuperscript{227} which he and Myres S. McDougal have applied extensively to law,\textsuperscript{228} bears some resemblance to cybernetic jurisprudence and general systems theory. Their programmatic cognitive mapping attempts to provide a comprehensive frame of reference for all interacting aspects of the policy and legal processes simultaneously. Professors Lasswell and McDougal do not explicitly rely on cybernetics or general systems theory to any great extent, however, and carefully distinguish their

\textsuperscript{221} See generally note 198 supra and accompanying text.


\textsuperscript{223} Navarro & Taylor, \textit{An Application of Systems Analysis to Aid in the Efficient Administration of Justice}, 51 Judicature 47 (1967).


A comprehensive approach to the policy sciences from the natural sciences where separate investigation of analytically discrete problems is possible. Therefore, strictly speaking, the configurative approach of Professors Lasswell and McDougal, and their collaborators, is not an application of cybernetics or general systems theory to law. Further, though they provide an ambitious agenda for juridical science research, they mainly call for value clarification and comprehensive process analysis rather than the creation of a new juridical science.

Cybernetic jurisprudence and general systems theories of law, on the other hand, anticipate the combination of more specific juridical sciences into a more comprehensive theoretical framework, which will take account simultaneously of more interrelationships among various actors and processes in legal systems. Therefore, this approach offers some promise of providing a new juridical science paradigm for twenty-first century jurisprudence. Like psychoanalytical jurisprudence and anthropology of law, cybernetic jurisprudence and general systems theories of law provide primarily perceptive theories and very little rigorous empirical testing of these theories. Unlike psychoanalytical jurisprudence and anthropology of law, however, cybernetic jurisprudence and general systems approaches to law, attempt to build on findings of other juridical sciences to the extent this is possible. Cybernetic and general systems theories of law, therefore, combine more particular juridical sciences into comprehensive explanations of the operation, maintenance, and change of legal systems. At least in conjunction with their component juridical sciences, cybernetic and general systems theories of law appear to provide promising juridical science paradigms for twenty-first century jurisprudence.

VII. CONCLUSION

No amount of stringent, deductive reasoning can determine whether any or all of the juridical science paradigms exemplified in the preceding section truly are promising paradigms for thought revolutions in twenty-first century jurisprudence. In this sense, each of them can only serve as a possible “newer rhetoric,” serving the same function perhaps in twenty-first century jurisprudence.

229. Note, supra note 228, at 555.
230. See supra notes 185-86 and accompanying text.
231. See supra notes 171-74 and accompanying text.
as the new rhetoric of Chaim Perelman has served in the twentieth century. Moreover, the new rhetoric of Chaim Perelman provides the only method by which these "newer rhetorics" can become influential: the persuasive method which Professor Perelman and Mme. Olbrechts-Tyteca have described so well in *The New Rhetoric*. In a sense, then, the newly revived logic of Professor Perelman has opened the door of legal philosophy to influences of the new juridical sciences now being developed. Though this revived logic is not itself a juridical science, it may serve as the master tool by which modern philosophy of science, and recent applications to law of various social sciences, can add a totally new dimension to jurisprudence in the future. Nothing could be a more fitting memorial than this to the life and work of this creative legal philosopher.

233. *See supra* notes 3-4.
LEGAL REASONING AS ARGUMENTATION

Donald H. J. Hermann*

I. LEGAL REASONING: CONVENTIONAL ANALYSIS AND CONTEMPORARY CRITIQUE

A. Traditional View

The integrity of legal reasoning, which is central to the legitimacy of the rule of law, has been subjected to relentless challenge for half a century.¹ The traditional view of legal reasoning maintains that there is a distinct mode of reasoning and analysis in law which leads to determinate solutions involving correct characterization of facts and proper deduction from established principles.² A conventional account of the process maintains that:

The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.³

More recently it has been suggested that even where the case law falls short of providing a basis for analogical reasoning, there exist bases for determination of the proper decision; this requires identification of “a particular conception of community morality as decisive of legal issues; this conception holds that community morality is the political morality presupposed by the law and in-

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¹ The principal challenge to the integrity of legal reasoning was made by the legal realists who viewed the judicial opinion as the formal manifestation of the process of legal reasoning which was viewed as a rationalization of judicial preferences or intuitions rather than as an account of a formal process of reasoning from legal rules to legal decision. See, e.g., Hutcheson, The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision, 14 Cornell L.Q. 274 (1929) where the author endorses the view that “[T]he judge really decides by feeling, and not by judgment; by ‘hunching’ and not by ratiocination, and that ratiocination appears only in the opinion.”


stitutions of the community." This view leads to the conclusion that there is a determinate correct decision even in "hard cases" for according to this view:

It is no longer so clear that either common sense or realism supports the objection that there can be no right answer, but only a range of acceptable answers, in a hard case... The "myth" that there is one right answer in a hard case is both recalcitrant and successful. Its recalcitrance and success count as arguments that it is no myth.6

B. Contemporary Analysis

The contemporary challenge to the integrity of legal reasoning first maintains that the scheme of legal rules and opinions produces a state of affairs in which decisions are indeterminate. According to this view:

Our legal norms are broadly and vaguely stated. They do not logically lead to particular results or rationales concerning most important or difficult issues. A wide variety of interpretations, distinctions, and justifications are available; and judges have the authority and power to choose the issues they will address and to ignore constitutional provisions, statutes, precedents, evidence, and the best legal arguments.

Moreover, there are prior decisions similar or related by analogy to both sides of almost any difficult or important issue. This should not be surprising, since issues are difficult or important largely because there are significant policies, rooted in social reality and/or legal doctrine, supporting both sides. Each such policy, or a closely related policy, will have been favored or given high priority in some context and/or during some period. Usually the various relevant precedents will provide some support for both sides rather than lead to a particular rule or result.6

The critical view of legal reasoning further entails the premise that there is no identifiable community moral or political consensus which can be invoked to support determinate legal outcomes but instead there is only a possibility to attain power to impose legal decisions. Thus is it maintained that:

[People struggle for power through law... To understand law is to understand this struggle as an aspect of class struggle and as

5. Id. at 290.
6. KAIRYS, supra note 2, at 13-14.
an aspect of the human struggle. . . . The outcomes of struggle are not preordained by any aspect of the social totality, and the outcomes within law have no "inherent logic" that would allow one to predict outcomes "scientifically" or to reject in advance specific attempts by judges and lawyers to work limited transformations of the system.7

II. CHAIM PERELMAN'S DEFENSE OF LEGAL REASONING

A. Legal Reasoning as Argumentation

Chaim Perelman has correctly identified the falacious nature of the position which would assimilate legal reasoning to formal logic through a process of identification or adoption of basic premises of univocal meaning from which determinate legal conclusions can be deduced.8 Similarly, Perelman identifies the fallacy of the position that legal decisions are necessarily arbitrary and without a defensible reasoned basis.9 Rather than the determinate deduction of formal logic or the arbitrary assertion of those who see legal conclusions established only with the assertion of power, Perelman characterizes legal reasoning as a practice of argumentation, within the conventions of the legal profession, supported by the authority vested in legal functionaries, which is dependent upon the legal conclusion and the reasons given in support of it being accepted by the audience or constituency to which such argumentation is directed.10

7. Kennedy, Legal Education as Training for Hierarchy in KAIRYS, supra note 2, at 40-50.
8. See Perelman, Legal Reasoning in C. PERELMAN, JUSTICE, LAW AND ARGUMENT (1980) [hereinafter cited as JUSTICE, LAW AND ARGUMENT] (where the author identifies a principal reason why legal reasoning cannot be subsumed within the rubric of formal logic.)

Does formal logic allow us to resolve judicial controversies? Certainly not. It is quite exceptional that the controversies come about from the fact that one of the antagonists commits an error in formal logic. . . . In fact, the rules of logic, to be applicable, require that certain conditions be observed. The first of these conditions, preliminary to the application of logical formalism, demands that the same sign preserve always the same meaning without which the most self-evident logical laws cease to be valid, i.e., an identity is no longer true and a contradiction no longer necessarily false.

Id. at 126.
9. See C. PERELMAN, JUSTICE (1967) at 97 where it is argued:

[ Neither the legislator nor the judge makes purely arbitrary decisions: The statement of motives indicates the reasons for which a law was voted and, in a modern system, each judgment should be accounted for in terms of the law. Positive law has as a correlative the notion of a decision which, even if not rational in the sense of its conformity with formal deduction, should be reasonable, or at least reasoned.

10. See Perelman, Law and Rhetoric in JUSTICE, LAW AND ARGUMENT supra note 8, at 120-21, where the function and operation of rhetoric by legal authorities is described:
B. Argumentation Distinguished from Demonstration

Perelman maintains that legal reason is best characterized as rhetoric. This rhetoric entails a practice of “argumentation” which is to be contrasted to a process of “demonstration.” A demonstration involves an analysis made in conformity to a set of rules. A demonstration leads to a conclusion which is valid if it can be reached by means of a series of correct operations which begin with a series of premises or axioms. To properly deduce a true or probable conclusion, the premises must be accepted as true, self-evident, necessary or hypothetical; furthermore the process of deduction depends upon a fully coherent system of axioms. Perelman makes clear that “we need good reasons to accept the premises from which we start” which are given by intuition or evidence judged by the natural light of reason or merely accepted by those judging them.

The nature of law and the choice of values legal decisions presuppose preclude the use of demonstration as a method of reasoning or justification. Demonstration is not possible in law because...

The role and importance of rhetoric clearly increases with the growth and independence of the judiciary power. This occurs when the judiciary power attempts to motivate its decisions and not forcibly impose them: It is the same with the legislative power. When the latter recognizes that the laws which it enacts are not self-evident—and not wishing to arbitrarily impose them—it furnishes reasons which would give them public acceptance.

The role of the judge, servant of existing laws, is to contribute to the acceptance of the system. He shows that the decisions which he is led to take are not only legal, but are acceptable because they are reasonable. Each time he must settle conflict of opinions, interpretations, interests and values, he must seek those solutions which are both in conformity to the law and acceptable.

Id. 11. JUSTICE, LAW AND ARGUMENT, supra note 8, at 130 where the author asserts that: “Legal reasoning is thus a specific application of the theory of argumentation, a generalization of the Greco-Roman dialectic and rhetoric.”


14. Id.

15. Id.

16. Perelman, The Justification of Norms in JUSTICE, LAW AND ARGUMENT, supra note 8, at 111-12 where it is observed:

When general principles are applied in a normative context, they play a very different role from mathematical norms. We can develop an arithmetic or geometry indepen-
competing premises can be cited and because every premise is open to interpretation. According to Perelman: "[W]hen the premises are contested or furnish only more or less compelling reasons in support of an argument, or when competing arguments can be reasonably entertained and no single conclusion imposes itself, then the role of authority and conceivably even the legitimate use of force becomes crucial to secure compliance with an existing order." 17

Even those who draw their legal postulates from a system of natural law must depend on authorities with competence to determine the interpretation or applicability of the identified norms; according to Perelman: "These fundamental norms must not be equated with mathematical premises that are self-evident and unequivocal, but rather with 'commonplaces', that is, vague but commonly accepted principles requiring a clarification of their mode of application, which may in some cases conflict with other principles." 18

The process of argumentation which is characterized as "the new rhetoric" is the mode of reasoning which is characteristic of legal reasoning. According to Perelman: "[W]hen deductive, purely analytical reasoning is insufficient, there is cause to refer to what Aristotle, who in his analyses is greatly inspired by law, has designated as dialectical reasoning and which I personally characterize as a recourse to argumentation." 19 Such argumentation is directed at an audience with the purpose to persuade, convince, gain adherence, move to commitment or action. 20 Such argumentation requires some means of communication, namely a common language which necessarily entails interpretation. 21 This process of argumentation aims not at truth but agreement. 22 This
is because argument does not lead to a determined solution, but rather acceptable or agreed upon conclusions.23

III. A CASE STUDY OF LEGAL REASONING

In order to examine the functioning of argumentation in the context of legal reasoning, I have chosen to consider a series of opinions of the United States Court of Appeals for the District of Columbia24 which deal with the question of whether an exhibitionist25 was properly regarded as a sexual psychopath and subject to indefinite involuntary commitment under the Sexual Psychopath Statute of the District of Columbia.26 The three majority opinions which are examined were all authored by Judge David Bazelon. A dissenting opinion in the third case, delivered by Judge Warren Burger, will also be examined.

Aristotle, the similarity between rhetoric and dialectic was all-important. According to him, they differ only in that dialectic provides us with techniques of discussion for a common search for truth, while rhetoric teaches how to conduct a debate in which various points of view are expressed and the decision is left up to the audience. This distinction shows why dialectic has been traditionally considered as a serious matter by philosophers, whereas rhetoric has been regarded with contempt. Truth, it was held, presides over a dialectical discussion, and the interlocutors had to reach agreement about it by themselves, whereas rhetoric taught only how to present a point of view—that is to say, a partial aspect of the question—and the decision of the issue was left up to a third person.

23. See Perelman, Law, Philosophy and Argumentation in JUSTICE, LAW AND ARGUMENT, supra note 8, at 155 where Perelman identifies the objective of argumentation:

Argumentation generally, and contrary to demonstration, even if guided by methodological principles, and in particular when guided by the principle of equal treatment for essentially similar situations, does not impose a determined solution. Most often, argumentation allows us to put aside solutions that don't conform to principles and yet does not impose a unique solution. The reason for this is that reasoning about values appeals to loci communes not because of their self-evidence but because of their ambiguity.

24. Three sets of opinions provide the basis for this discussion: Millard v. Cameron, 373 F.2d 468 (D.C. Cir. 1966), Millard v. Harris, 406 F.2d 964 (D. C. Cir. 1968), and Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969).

25. Exhibitionism is classified as a type of paraphila, alternatively as a sexual deviation or perversion, which is characterized by specialized sexual fantasies and masturbatory procedures. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) (302.40 Exhibitionism). See generally H. KAPLAN & B. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, at 1065-1077 (4th ed 1983). Exhibitionism involves acts of exposing the genitals to a stranger or an unsuspecting person. This activity produces sexual excitement in anticipation of the exposure, and often orgasm is brought about by masturbation during or after the event of exposure. In exhibitionism, the presence and significance of the phallus is established by the reaction of fright, surprise, awe, and disgust of the confronted victim. Id. at 1072.

A. The District of Columbia Sexual Psychopath Law

The District of Columbia Sexual Psychopath Statute, which is the focus of these opinions, defines a "sexual psychopath" as:

a person not insane, who by a course of repeated misconduct in sexual matters has evidenced such a lack of power to control his sexual impulses as to be dangerous to other persons because he is likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of his desire. 27

The District of Columbia Code provides authority for the United States Attorney, or the court, to file a statement setting forth facts tending to show that any criminal defendant or other person is a sexual psychopath. 28 The subject of such a petition is provided with a right to counsel and a due process hearing including notice and a right to examine psychiatric reports of two court appointed psychiatrists who are required to make a personal examination of the subject of the petition. 29 Upon receipt of reports of the two psychiatrists concluding that a subject is a sexual psychopath, the court must hold a hearing to make a judicial determination of whether the subject is a sexual psychopath and, if so, to commit the subject to the government's mental health facility. 30

B. Application of the Sexual Psychopath Law to the Case of the Exhibitionists

To apply this statute in the case of an exhibitionist, a court must determine: (a) the applicability of the statute to the particular subject; and (b) the sufficiency and compliance with the statutory procedures. The first issue presents the most serious issues of interpretation. A court must decide whether the subject lacks "power to control his sexual impulses" and whether he is "dangerous." This latter finding demands both interpretation of the concept of "dangerousness" as well as interpretation of the meaning of "injury, loss, pain or other evil" which the statute aims to protect against.

The indeterminancy of the applicability of this statute to exhibitionists stems in part from the differing reasons given for the adoption of sexual psychopath statutes. On the one hand, this

type of legislation was motivated by progressive concerns about the treatment of the mentally ill and about the restrictive nature of the insanity defense, which at the time of adoption of the Sexual Psychopath Statutes was limited to a narrow cognitive test, and the existent civil commitment law which provided treatment only for persons found insane. As one commentator noted: "[T]he introduction of this legislation was hailed by practically all scientists and many enlightened judges, law enforcement offices, and part of the community as a major step forward." 31 To the extent that such a humanitarian attitude motivated the interpretation of the statute the tendency was to focus on whether behavior such as exhibitionism is a treatable mental disorder and if so then to conclude that an exhibitionist is a sexual psychopath. If treatment is not effective or not available, or available under less restrictive conditions, it is less likely that the exhibitionist would be classified as a sexual psychopath.

There is a second concern, however, which motivated the adoption of the Sexual Psychopath Laws and that was fear of the sexual offender. It has been observed that:

[A]n even more important factor in the enactment of such legislation was the ever-growing preoccupation of powerful and vociferous parts of the population with sex crimes. The demands of the 'people's voice,' occasionally couched in rational argument but more often expressed with hysterical fervor, for more restrictive measures against sex criminals had to be met somehow by the various legislatures, since important groups seemed to feel that ordinary legislation was not sufficient to protect the community from the perpetration and repetition of heinous crimes by sex fiends. 32

Fear of sex offenders can motivate an interpretation of the statute which focuses on the potential dangerousness of the exhibitionist and the harm that his conduct is likely to produce. If the exhibitionist is judged not likely to produce physical or psychic harm in his victim or, if so, is not likely to engage in further exhibitionistic acts, then the exhibitionist is not likely to be classified as a sexual psychopath. However, if psychic distress is likely to be caused by the exhibitionist and he is likely to engage in future

32. Id. at 767.
33. THE NEW RHETORIC: ARGUMENTATION, supra note 12, at 19.
acts of exhibitionism, then the exhibitionist is likely to be classified as a sexual psychopath.

Any judicial opinion dealing with the question of whether an exhibitionist should be treated as a sexual psychopath, needs to be addressed to an audience composed of some individuals who primarily see the sexual psychopath statute as a means to provide humanitarian mental health treatment and of some others who view the statute primarily as a means to isolate dangerous sex offenders. Drawing on Perelman's discussion of the new rhetoric in the context of oratory, it is possible to identify the nature of the audience which is central to argumentation and the need to address the various groups which constitute it. An "audience" is defined by Perelman as "the ensemble of those whom the speaker wishes to influence by his argumentation." 33 In order to develop any argumentation, it is crucial that it be directed at an audience and that the audience by properly assessed. 34 For this reason, identification of the various motivations for adoption of the sexual psychopath statutes is crucial for effective argumentation to establish agreement on the meaning and application of the statute in the case of an exhibitionist. As Perelman observes: "It often happens that an orator must persuade a composite audience, embracing people differing in character, loyalties, and functions. To win over the different elements in his audience, the orator will have to use a multiplicity of arguments." 35

34. Id. at 18. Perelman makes clear the need to properly assess the character of the perspective audience: "In real argumentation, care must be taken to form a concept of the anticipated audience, as close as possible to reality. An inadequate picture of the audience, resulting from either ignorance or an unforeseen set of circumstances, can have very unfortunate results." Id. at 20. Such an unfortunate result can be observed in the abortion decisions of the United States Supreme Court where there was a failure to address the concerns of those who viewed the fetus as a person who deserves the protection of the law. While acknowledging that some hold the view that a fetus is a person with claims to the full protection, the Court did not expressly develop arguments aimed at those who held this position in order to persuade or convince them to the contrary, but merely asserted that there was no case law recognizing the fetus as a person under the fourteenth amendment. See Roe v. Wade, 410 U.S. 113 (1973) where the Court observed:

The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment. ... All this, together with our observation, supra,
C. Millard v. Cameron Convergence of the Sexual Psychopath Law with the Civil Commitment Law

The United States Court of Appeals for the District of Columbia began its consideration of whether an exhibitionist could be confined under the sexual psychopath law in Millard v. Cameron.\(^36\) The defendant, Millard, was committed as a sexual psychopath after pleading guilty and before sentencing on a charge of indecent exposure. The evidence showed that the defendant had exposed himself to several people, that one woman complained that she had seen the defendant expose himself on several occasions, that the defendant was masturbating; and several other females in the neighborhood reported having seen the defendant expose himself.\(^37\) The defendant sought his release on a habeas corpus petition on the grounds that his confinement was procedurally defective since it was made on the basis of written reports of two psychiatrists without a full hearing, that he was not dangerous within the meaning of its sexual psychopath statute and that he was being detained without provision of treatment.\(^38\)

(i) Procedural Requirement: Records Versus Oral Testimony

The first issue considered by the court in Millard v. Cameron was whether the determination that the defendant was a sexual psychopath was properly made on the basis of the court ordered report of two psychiatrists without any judicial adjudication beyond acceptance of the report.\(^39\) The trial court reasoned that the conclusory report of the psychiatrists was sufficient\(^40\) because the statute explicitly provided that the “court shall appoint two qualified psychiatrists” and that “[e]ach psychiatrist shall file a written report of the examination, which shall include a statement

\(^{35}\) THE NEW RHETORIC: ARGUMENTATION, supra note 12, at 21-22.
\(^{36}\) 373 F.2d 468 (D.C. Cir. 1966).
\(^{37}\) Id. at 469-70.
\(^{38}\) Id. at 469.
\(^{39}\) The two psychiatrists reported that they examined Millard and “as a result of the examination . . . arrived at the conclusion that [he] is a sexual psychopath as defined in the Sexual Psychopath Statute. It is recommended that . . . [he] be committed to a mental institution for proper care and treatment for his condition.” Millard, 373 F.2d at 470.
\(^{40}\) Id. at 470.
of his conclusion as to whether the patient is a sexual psychopath." This interpretation of the statute in effect renders the determination of whether a person is a sexual psychopath a medical judgment with the consequences that the required judicial hearing is limited to procedural issues or challenges based on failure of the reports to meet the statutory requirements. The statute clearly provides for a judicial hearing in the case that the reports of the psychiatrists indicate that the subject is a sexual psychopath. The question which was presented to the court of appeals was whether the psychiatrists must personally testify and be subjected to cross examination or whether their reports could stand as evidence without the personal appearance of the psychiatrists.

The statute is silent on the issue of whether there must be psychiatric testimony. The statute merely provides that: "Upon the evidence introduced at a hearing held for that purpose, the court shall determine whether or not the patient is a sexual psychopath." The court of appeals interpreted this provision to mean that the determination of whether a person is a sexual psychopath is a legal determination rather than a medical determination. Consequently, such a legal determination was held to require a hearing in which the reporting psychiatrists testify and are subject to cross-examination.44

(a) Dissassociation

At this point one can observe two equally plausible interpretations of the statute: one dispensing with actual psychiatric testimony and the other requiring it. Each have plausible justifications. The former based on a view that the determination of whether a person is a sexual psychopath is a medical judgment satisfactorily established by medical reports and the other based on the view that the determination is a legal one requiring oral

42. See D.C. CODE ANN. § 22-3507 (1967) which provides in part: "If, in their reports filed pursuant to section 22-3506, both psychiatrists state that the patient is a sexual psychopath, or if both state that they are unable to reach any conclusion by reason of the partial or complete refusal of the patient to submit to thorough examination, of if one states that the patient is a sexual psychopath and the other states that he is unable to reach any conclusion by reason of the partial or complete refusal of the patient to submit to thorough examination. . . ."
44. Millard, 373 F.2d at 470.
testimony and presenting an opportunity for cross examination. The court of appeals did not discuss the relative merits of the medical and legal models which are implicit in the two interpretations. Instead it emphasized all the legal rights which a person has at a hearing under the Sexual Psychopath Statute including a right to a jury, a right to counsel, and a right to inspect the reports of the examining psychiatrists. One can observe here what Perelman has called the dissociation of ideas and the manner in which this argumentative technique operates.\(^{45}\) According to Perelman:

While the original status of what is presented as the starting point of the dissociation is unclear and undertermined, the dissociation into terms I and II will attach value to the aspects that correspond to term II and will lower the value of the aspects that are in opposition to it.\(^{46}\)

In this case, term I refers to a proceeding based on the reports alone which implies the medical model which is not elaborated. In contrast, term II refers to the requirement of oral testimony premised on the legal moral which is elaborated by reference to procedural rights.

(b) Value Judgments

The statute, however, only states: "The counsel for the patient shall have the right to inspect the reports of the examination of the patient."\(^{47}\) The statute lacks any reference to a right to cross-examine the reporting psychiatrists. Rather, it provides that "[u]pon the evidence introduced" the court shall determine whether the patient is a sexual psychopath.\(^{48}\) Thus, the designation of the determination of whether a person is a sexual psychopath as a legal one is not determinative of whether the reports are sufficient evidence for a legal judgment. The court was required to invoke the concept of an "informed legal judgment" for which it found the reports, standing alone, to be insufficient. The court of appeals argued that: "A judicial determination based on a psychiatric examina-

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46. Id. at 128.
47. D.C. CODE ANN. § 22-3506(b) (1967).
tion must be an informed one, particularly where as here, the result is indefinite confinement." 49 In support of this assertion the court quoted as authority an earlier opinion to the effect that "[i]t would be necessary for the trial judge to inquire of the examining doctors the basis for their conclusions." 50 Here the court can be seen as employing two important argumentative techniques. The first maintains that the court must make an "informed" judgment which requires oral testimony of the examining psychiatrists. Such is an assertion based on a value judgment. According to Perelman: "[T]he word 'value' applies wherever we deal with 'a break with indifference' or with the equality of things, wherever one thing must be put before or above another, wherever a theory is judged superior and its merit is to be preferred." 51 This is not a reference to a known or presumed reality since it is not shown that a judgment based on a written report is inferior to one based on oral testimony. Rather it expresses "a preference (values or hierarchies) which indicate what is preferable (the loci of the preferable)." 52 In fact, what the court has done is express a preference for oral testimony over evidence consisting solely of a written report. The court did this by holding that the receipt of oral testimony is necessary to make an informed legal judgment. This is consistent with the manner in which Perelman suggests that the argumentative technique of value judgment operates. According to Perelman: "Often, positive or negative values indicate a favorable or unfavorable attitude to what is esteemed or disparaged, without comparison to another object. What is described by the terms 'good,' 'just,' 'beautiful,' 'true,' or 'real,' is valued, and what is described as 'bad,' 'unjust,' 'ugly,' 'false,' or 'apparent' is devalued." 53 The court projects a positive value on oral testimony by associating it with an informed legal judgment.

(c) Argument from Authority

Nevertheless, the court of appeals was not content to limit its argument to an assertion of positive value; instead, it attempted to support its view by citation to authority in the form of the opinion delivered in a previous case. The court relied on the authority

49. Millard, 373 F.2d at 470-471 (emphasis added).
50. Id. citing Holloway v. United States, 343 F.2d 265, 268 (D.C. Cir. 1965).
52. Id.
53. Id.
of a precedent which provided that the term "report" had to be construed as requiring a judicial determination involving the examination of the reporting psychiatrists. The persuasiveness of this authority is, however, somewhat reduced when one notes that the cited authority consists of dicta in an opinion of the very same court from the previous year.

Perelman points out that the use and acceptance of the argument from authority reflects the fact that a particular area of inquiry is not susceptible to demonstration of the type used in scientific inquiry but rather must utilize argumentation of the type associated with rhetoric. The argument from authority has been criticized as a pseudo-argument, intended to disguise the irrationality of an assertion and aims merely to win unthinking assent. It has been suggested that the argument from authority is "an instrument for logicalizing nonlogical actions and the sentiments in which they originate." Perelman, on the contrary, suggests the importance of the argument from authority where asserted matters are not susceptible to a true or false determination such as questions in law which cannot be reduced to scientific problems subject to demonstration. Perelman maintains that judges are concerned not only with truth but also with justice and social order. Perelman observes:

The quest for justice and the maintenance of an equitable order, of social trust, cannot neglect considerations based on the existence of a legal tradition, which appears first as clearly in legal doctrine as in the actual holdings of courts. Recourse to argument is inescapable if the existence of such a tradition is to be attested.

(ii) Classification

The second matter considered by the court of appeals in Millard v. Cameron was whether the defendant exhibitionist was properly classified as a sexual psychopath who is "a person, not insane, who

55. REALM OF RHETORIC, supra note 45, at 95 where it is noted that: "The argument from authority is of interest only in the absence of demonstrable proof. It comes to the support of other arguments, and the person who uses it will not fail to accord value to the authority which agrees with his thesis. . . ."
57. THE NEW RHETORIC: ARGUMENTATION, supra note 12, at 306.
58. Id.
59. Millard, 373 F.2d at 471-72.
by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his sexual impulses as to be dangerous to other persons because he is likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his desire." In construing the statute, the court was faced with two possible areas of emphasis. The court could emphasize the fact of "repeated misconduct in sexual matters" and the lack of power to control "his sexual impulses". Alternatively, the court could emphasize the danger to other persons requiring that the "injury, loss, pain or other evil" be serious and thereby de-emphasizing the significance of sexual misconduct in and of itself. The court of appeals chose the latter approach.

To support its emphasis of a required showing of serious injury as a requisite to establish the element of dangerousness as specified in the statute, the court referred approvingly to a decision rendered by the Minnesota Supreme Court construing that state's sexual psychopath laws. The construction of the Minnesota court of its sexual psychopath statute was later upheld by the United States Supreme Court; the statute withstood an attack that it was "too vague and indefinite to constitute valid legislation." The Minnesota court construed the statute in the following manner:

[The Act] is intended to include those persons who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desires. It would not be reasonable to apply the provisions of the statute to every person guilty of sexual misconduct nor even to persons having strong sexual propensities. Such a definition would not only make the act impracticable of enforcement and, perhaps, unconstitutional in its application, but would also be an unwarranted departure from the accepted meaning of the words defined.

The Court of Appeals for the District of Columbia concluded that the effect of the sexual misconduct must be serious, reasoning that: "Though the 'likely . . . injury, loss, pain or other evil' may be either physical or psychological, we think it must involve conduct

60. Id. at 471 citing D.C. Code Ann. § 22-3503 (1961).
that is not merely repulsive or repugnant, but that has a serious effect on the viewer." The court argued that without this requirement the definition of sexual psychopath would be too vague and indefinite to withstand constitutional attack.

(a) Confused Notions

The court in construing the notion of dangerousness utilized a type of concept Perelman has characterized as a "confused notion." These "confused notions" are not only inevitable but useful, according to Perelman, when one moves from scientific inquiry which requires terms of unequivocal meaning involving an ideal language "giving rise to" no misunderstanding, no disagreement, [and which] must conform to certain laws for the construction of a formed language." However, "when it is a question of expressions formulated in a natural language, the necessity for unequivocalness can disappear before necessities considered to have priority." Recourse to such confused notions is most appropriate in law where there is no possibility of specifying all possible cases which might come under a rule or be included in a class but which instead require a case by case determination of the applicability of a concept. According to Perelman: "[O]utside a pure formalism, notions remain clear and unequivocal only in relation to a field of application that is known and determined." Perelman suggests that sometimes such confused notions can be clarified by further classification so that "[a] highly ambiguous notion, like that of freedom, has some of its uses clarified in a judicial system where the status of free men is defined as opposed to that of slaves."

(b) Clarification

However, such clarification most often has both contextual and particular aspects. The court of appeals in Millard v. Cameron clarified the concept of dangerous conduct in a context of indefinite

63. Millard, 373 F.2d at 471 (emphasis added).
64. Id. at 471-472. See generally Rose, A Criticism of the Current Use of the Term "Sexual Psychopath," 109 AM. J. OF PSYCHIATRY 177 (1952).
65. See generally Perelman, The Use and Abuse of Confused Notions in JUSTICE, LAW AND ARGUMENT, supra note 8, at 95-106.
66. Id. at 96.
67. Id. at 97.
68. THE NEW RHETORIC: ARGUMENTATION, supra note 12, at 133.
69. Id.
commitment of an individual which requires not only a mental disorder evidenced by lack of control of sexual impulses but also a showing of dangerousness to self or others.\textsuperscript{70} Furthermore, the court of appeals maintained that there is a need to assess the particular circumstances of the individual case. According to Perelman: "Ambiguous notions present the person who uses them with difficulties whose solution calls for handling of concepts, for a decision as to how they are to be understood in a given case."\textsuperscript{71} In an effort to provide the trial court a means by which it could evaluate the threat of danger by an exhibitionist defendant's sexual misconduct, the court identified specific criteria which it offered for clarification of the concept of danger in the specific case. The court suggested consideration of: "Whether conduct is 'likely' to have a serious effect on potential viewers may depend for example, in their age and condition, the proximity and extent of the patient's exposures, and his accompanying gestures."\textsuperscript{72}

(iii) Confinement Versus Treatment

The court of appeals in \textit{Millard v. Cameron} considered whether the appellant could challenge his confinement on the ground that he was receiving no treatment.\textsuperscript{73} Two possible responses to this challenge were available to the court. The first, the approach taken

\begin{itemize}
  \item \textsuperscript{70} See \textit{Lessard v. Schmidt}, 349 F. Supp. 1078 (E.D. Wis. 1972) construing the Wisconsin Civil Commitment Statute. The court held an implicit requirement of a finding of dangerousness to be constitutionally required for the statute to withstand constitutional scrutiny. The court stated:

\begin{quote}
Wisconsin defines "mental illness" as "mental disease to such an extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community." \textsuperscript{*} \textsuperscript{*} \textsuperscript{*} \textsuperscript{*} [The United States] Supreme Court noted (in dicta) that implicit in this definition is the requirement that a person's "potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty." In other words, the statute itself requires a finding of "dangerousness" to self or others in order to deprive an individual of his or her freedom. The Court did not directly address itself to the degree of dangerousness that is constitutionally required before a person may be involuntarily deprived of liberty. However, its approval of a requirement that the potential for doing harm be "great enough to justify such a \textit{massive curtailment} of liberty" implies a balancing test in which the state must bear the burden of proving that there is an extreme likelihood that if a person is not confined he will do immediate harm to himself or others. (emphasis in original) (citation omitted).
\end{quote}

\begin{itemize}
  \item \textsuperscript{71} \textit{The New Rhetoric: Argumentation}, \textit{supra} note 12, at 135.
  \item \textsuperscript{72} \textit{Millard}, 373 F.2d at 472.
  \item \textsuperscript{73} \textit{Id}. \textit{at} 1093.
\end{itemize}
by the trial court, was that confinement was justified on a finding
that the appellant continued to meet the criteria of sexual
psychopath.\textsuperscript{74} Implicit in this view is the premise that the statute
was aimed at providing social protection by isolating a person who
was dangerous to the public. A second possible response was that
confinement was justified only upon a showing that the defendant
was receiving treatment. This latter position was the view of the
court of appeals.\textsuperscript{75} The court of appeals justified its view first by
an analogy to civil commitment. The court referred to an earlier
opinion that it had rendered requiring treatment of a person in-
voluntarily committed following an insanity acquittal.\textsuperscript{76} In that case,
the court considered that the statutory purpose of commitment
was detention for treatment and that absent treatment constitu-
tional issues were presented. Since the mental health statute pro-
vided a right to treatment,\textsuperscript{77} the court concluded that "[t]he same
principles apply to a person involuntarily committed to a public
hospital as a sexual psychopath."\textsuperscript{78}

(a) Analogy Versus Assimilation

Several reasons were given to justify the analogy of sexual
psychopath proceedings to civil commitment proceedings. The first
relied on the semantics of the statute and the legislative history.
The court observed: "Persons against whom proceedings under the
statute are instituted are called 'patients' because the title essen-
tially provides treatment rather than punishment."\textsuperscript{79} The second
reason involved an implicit constitutional argument based on equal
protection. The court observed: "The statute requires that the
criminal sentence for sexual misconduct be withheld until after
the patient's release. Lack of treatment destroys any otherwise
valid reason for differential consideration of the sexual
psychopath."\textsuperscript{80} Finally, the court found that the statute contemplated
treatment by its terms since a requirement for a person's commit-

\textsuperscript{74} Id. where it was reported that: "The [trial] judge responded that he considered the
purpose of the hearing to be only to determine whether appellant was still a sexual
psychopath. He made no findings on the fact of the alleged lack of treatment."
\textsuperscript{75} Millard, 373 F.2d at 472-73.
\textsuperscript{76} Id. at 472, citing Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).
\textsuperscript{77} Millard, 373 F.2d at 472-73.
\textsuperscript{78} Id.
\textsuperscript{79} Millard, 373 F.2d at 473, citing H.R. Rep. No. 1787, 80th Cong., 2d Sess. 5 (1948).
\textsuperscript{80} Millard, 373 F.2d at 473.
ment was a "[l]ack of power to control his sexual impulses" and that the purpose of commitment was "treatment," and that a requirement for release was "recovery." 81

Perelman's discussion of analogy reveals that while the court appears to be analogizing the sexual psychopath confinement to mental health commitment, in fact it is encompassing the sexual psychopath statute within the law of mental commitment. According to Perelman: "When the two relations encountered belong to the same sphere, and can be subsumed under a common structure, we have no analogy but argument by example or illustration...." 82 Thus the traditional view of legal reasoning as analogical reasoning is undercut. It is apparent by a close reading of the opinion in Millard v. Cameron that the court did not identify features of civil commitment and features of the sexual psychopath detention, which would otherwise provide grounds for concluding that the dispositional treatment should be similar under the two statutes. This in fact was not possible for the court since mental health commitment in the District of Columbia was based on a finding that the subject was "insane" and the sexual psychopath detention was conditioned on a finding that the defendant "was not insane." Thus the only way that the court could conclude that the same disposition was required was to find that both types of detentions were to be made within a general category of law which provided treatment of the mentally ill. Perelman makes clear the limited role of true analogy in law:

In the field of law, reasoning by true analogy appears to be restricted to comparison as to particular points of systems of positive law separated by time, place, or context. On the other hand, whenever resemblances between entire systems are sought, the systems are regarded as examples of a universal system of law. Similarly, whenever someone argues in favor of the application of a given rule to new cases, he is thereby affirming that the matter is confined to a single domain. 83

One may properly conclude that the court of appeals merely assimilated the Sexual Psychopath Statute within the structures of the Mental Health Code providing for civil commitment. This being the case, the question necessarily arises concerning how the

82. THE NEW RHETORIC: ARGUMENTATION, supra note 12, at 373.
83. Id. at 374.
two separate statutes can be maintained and whether the Sexual Psychopath Statute continues to have any independent significance. Thus, the fact that the court reasoned not by analogy but by example and assimilated the Sexual Psychopath Statute to the Mental Health Code would seem to render the Sexual Psychopath Statute a nullity. Nevertheless, the court of appeals was apparently reluctant to so rule even though the consequence of the court's reasoning seems to be incoherent to the extent that it would permit similar treatment of persons classified as "insane" and "not insane." This apparent incoherence renders the opinion in *Millard v. Cameron* and its reasoning instable and unconvincing. This evaluation is confirmed by the court of appeal's subsequent opinion in *Millard v. Harris*. 84

(b) *Argument by Convergence*

Perelman designates the type of argument developed by the court of appeals in which the Sexual Psychopath Statute was assimilated into the Mental Health Code as an argument by convergence. 85 As used by the court of appeals, the argument for convergence is based on the premise that the reasons for confinement of both the sexual psychopath and the mentally ill defined as "the insane," including the need to provide treatment for those with mental disorders and the need to protect society, are the same. The result is a necessary convergence of the two statutory schemes with a further result that the proper disposition in both types of cases and the required treatment for both should be the same. This analysis of what at first appears as two distinct situations leads to the conclusion that there is one overriding principle which governs both situations. However, as Perelman points out: "The convergence between arguments may cease to carry weight if the result arrived at by the reasoning shows up elsewhere some incompatibility which makes it unacceptable." 86 Several difficulties are inherent in maintaining the stability of conclusions based on arguments based on convergence. Distinctions between the two separate areas which are highlighted may seem more significant

84. See generally *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968). See also infra notes 90-156 and accompanying text.
85. See generally THE NEW RHETORIC: ARGUMENTATION, supra note 12, at 471-74.
86. *Id.* at 472.
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than the established convergence. Perelman suggests this when he notes that: "The problem of the significance of the convergence will arise every time there is an effort made to relate fields that are regarded as separate from one another, with barriers to be broken down before the convergence can be taken into account." The convergence achieved by the court in Millard v. Cameron was achieved by emphasizing the similar objective of mental health treatment in both the case of civil commitments as well as in the case of sexual psychopaths. Any special characteristics of the sexual psychopaths which distinguish them from those who constitute the class of mentally ill persons subject to civil commitment were ignored by the court. Similarly, no comparison was made between the sexually motivated criminal and those offenders who are not sexually motivated. To the extent that differences between sexually motivated offenders and the non-sexually motivated offender, and the special class of mentally ill persons subject to civil commitment are shown to be significant, the convergence argument of the court will be untenable.

(c) Avoidance of Incompatible Positions

The effort of the court in Millard v. Cameron to subordinate the Sexual Psychopath Statute to the Mental Health Code while at the same time maintaining that the Sexual Psychopath Statute continued to have significance and was not a nullity must ultimately be seen as an instance of incompatible arguments. Perelman suggests that the attainment of resolution of such incompatible positions is a major objective of legal reasoning. According to Perelman:

[The same idea is expressed by the great American jurist Cardozo: "The reconciliation of the irreconcilable, the merger of antithesis, the synthesis of opposites, these are the problems of law." This effort to resolve incompatibilities is carried on at every level of legal activity. It is pursued by the legislator, the legal theorist, and the judge. When a judge encounters a juridicial antinomy in a case he is hearing, he cannot entirely neglect one of the two rules at the expense of the other. He must justify his course of action by delimitating the sphere of application of each rule through interpretations that restore coherence to the juridical system. He will introduce distinc-

87. Id.
tions for the purpose of reconciling what without them, would be
irreconcilable.\footnote{88} The avoidance of incompatible arguments and the achievement of consistency and coherence are driving forces in legal reasoning. This compulsion toward consistency can be seen in the subsequent opinions of the Court of Appeals for the District of Columbia as it further considered whether an exhibitionist could be properly classified as a sexual psychopath. Perelman, however, points out that the drive to avoid incompatibility and the means to achieve that goal is characteristic of persuasive argumentation generally. Perelman notes:

As a rule, a speaker who wishes to avoid the harm that comes from the use of incompatible arguments will have to introduce a complimentary line of argument which will underscore the apparent inconsistencies between his various arguments, or between his arguments and the beliefs of the audience, and seek to forestall their harmful effects. He will explain the changes of viewpoint, present hypotheses as alternative, and define the field of application of norms so that they are not mutually exclusive.\footnote{89}

\textbf{D. Millard v. Harris—Divergence of the Sexual Psychopath Law from the Civil Commitment Law}

The Court of Appeals for the District of Columbia was faced with the incompatible positions to which its argument in \textit{Millard v. Cameron} led, namely that all the requirements of the civil commitment law must be met in the case of the confinement of a sexual psychopath and that, nonetheless, the Sexual Psychopath Law had an independent significance. The court felt compelled in subsequent opinions to recast its interpretation of the purpose and application of the scope of the Sexual Psychopath Law. As will be seen in the following discussion, the court proceeded to argue the distinctions between the two statutes which it had previously ignored and it was ultimately compelled to reject the congruence argument on which it had previously relied.

In \textit{Millard v. Harris},\footnote{90} the Court of Appeals for the District of Columbia considered an appeal from the denial of \textit{habeas corpus}

\begin{footnotes}
\item[88] \textit{Id.} at 414-15.
\item[89] \textit{Id.} at 486.
\item[90] \textit{Harris}, 406 F.2d 964 (D.C. Cir. 1968).
\end{footnotes}
resulting from the hearing on remand which followed its decision in *Millard v. Cameron*. The court began its analysis by noting two facts which obviated much of the reasoning of its previous opinion. First, contrary to his prior testimony, the appellant testified at the remand hearing, that the two psychiatrists had testified at his original commitment hearing. Consequently, there was no basis for the procedural attack on the statute. Secondly, the appellant admitted that he was receiving treatment. Nevertheless, the appellant maintained that: (1) the statute was inappropriately applied to him and that he was improperly classified as a sexual psychopath; and (2) that the District of Columbia Hospitalization Act superseded the Sexual Psychopath Statute and that the latter was constitutionally invalid.

The court began its analysis by noting that the Sexual Psychopath Statute was enacted as "a humane and practical approach to the problem of persons unable to control their sexual emotions." The purpose of the statute, according to the court's reading of the legislative history, was "to provide for the commitment and treatment of sexual psychopaths in a manner similar to the treatment afforded insane persons." On the other hand, the terms of the statute made it clear that Congress intended to exclude insane persons from the operation of the statute. The significance of this legislative history, according to the court, turned on the meaning of the word "insane" at the time the statute was enacted. In a criminal case, if a defendant was "insane," the insanity defense which was available to a defendant in the District of Columbia would have provided an excuse and preclude conviction. If a person was found to be "insane," he was subject to civil commitment and the commitment statute itself used the term "insane" to designate those who were in need of treatment and subject to

91. *Id.* at 966.
92. *Id.*
94. *Harris*, 406 F.2d at 966.
95. *Id.* citing SENATE COMM. ON THE DISTRICT OF COLUMBIA, PROVIDING FOR THE TREATMENT OF SEXUAL PSYCHOPATH IN THE DISTRICT OF COLUMBIA, S. REP. No. 1377, 80th Cong., 2d Sess. 5 (1948).
96. *Harris*, 406 F.2d at 967.
involuntary hospitalization. Moreover, at the time of adoption of the Sexual Psychopath Statute the term "insane" was equated with a psychotic condition which entailed a clear break with reality. Thus it was reasonable to utilize the medical model and to provide treatment to persons suffering from mental disorders but who were not insane; and this was the apparent purpose of the Sexual Psychopath Law.

(i) The Current Law and the Significance of the Concept of "Mental Disorder"

The court of appeals went on to observe that significant change both in use of language and in the operation of both the criminal law and mental health law had taken place since adoption of the Sexual Psychopath Statute. The insanity test had been reformulated so that in place of the McNaughten Rule, the law of the District of Columbia provided that "an accused is not criminally responsible if his act was the product of mental disease or defect." Subsequently, the court had defined "mental disease or defect" to include "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." As a result, a defendant "need not be a hallucinating psychotic to pass through the eye of the insanity defense." Significantly, the civil commitment law was changed to reflect a broader conception of mental disorder. The 1939 statute entitled "An Act to Provide for Insanity Proceedings in the District of Columbia" was replaced by the 1964 Act entitled "The Hospitalization of the Mentally Ill Act." The court of appeals pointed out that the term "insane" was replaced by the term "mental illness" in the new statute. The statute, moreover, adopted a definition of mental illness which extended beyond psychosis to include any

100. Harris, 406 F.2d at 967.
101. Id.
103. McDonald v. United States, 312 F.2d 847, 51 (D.C. Cir. 1962).
104. Harris, 406 F.2d at 968.
107. Harris, 406 F.2d at 968.
“other disease substantially which impairs the mental health of a person.”

(ii) The Convergence Alternative

The next step in the court's analysis was to determine the consequence of these changes in language and legal practice for the Sexual Psychopath Statute. One possibility considered by the court was to maintain its earlier convergence analysis and to avoid the incompatibility problem either by maintaining that the Sexual Psychopath Statute was a nullity or to require full compliance with the procedures of the Mental Health Code in any action brought under the Sexual Psychopath Statute. The court observed: “[O]ne might well conclude that the more flexible standards now applied in the areas of the insanity defense and civil commitments leaves scant need for the separate statutory scheme for sexual offenders.” Procedurally, the court could have held that the Sexual Psychopath Statute was repealed by implication. However, the court found that Congress had expressly held that the new mental health law extended to those previously "declared insane or of unsound mind pursuant to a court order." A strict reading of the statutory language rendered it impossible to construe a statute which was to be applied to those “declared insane” as applicable to sexual psychopaths who were defined as “not insane.” Moreover, there was no evidence in the legislative history to suggest an implied repeal.

(iii) The Divergence Alternative

The second possibility was to reject the convergence argument and to identify a separate function for the Sexual Psychopath Statute and the Mental Health Code. Previously the “insane” were eligible for civil commitment and those “not insane” were subject to the Sexual Psychopath Statute. With the new statute, those found to be “mentally ill” and dangerous were subject to commitment and those “not insane” and dangerous because of inability to control their sexual impulses were subject to the Sexual

109. Harris, 406 F.2d at 969.
110. Id. citing 21 D.C. Code § 589(a) (1967).
111. Harris, 406 F.2d at 969.
Psychopath Statute. However, according to the court the term mentally ill includes some persons "not insane" under the earlier mental health code. Moreover, some persons who are unable to control their sexual impulse are in that condition because they are mentally ill. Since there are greater procedural protections under the Mental Health Code than under the Sexual Psychopath Statute, there would be serious constitutional problems of an equal protection type, if all those persons who were mentally ill were not afforded the same legal protection. The court reasoned:

It would indeed be strange logic to argue that the fact that a person is "mentally ill" but not so mentally ill as to be "insane" as that word was understood in 1948 justifies withholding from him the protections of the civil commitment law. Nor can we conceive of any rational reason for shading the procedural rights incident to commitment and release simply because the person's dangerous proclivities manifest themselves in the form of sexual misconduct.

(iv) Plasticity of Notions and the Avoidance of Incompatibility

Reasoning that as a court it was without authority to rewrite the Sexual Psychopath Statute to include all the procedural requirements of the civil commitment law, the court concluded that it could avoid the identified constitutional problems only by construing the words "not insane" in the Sexual Psychopath Statute to mean "not mentally ill." Thus the court avoided the incompatibility problem implicit in its earlier decision only by explicitly rejecting the convergence argument it had previously adopted. To achieve this result the court was compelled to maintain that the meaning of the words "not insane" had changed over time as a result of semantic developments and as a result of legal practice. A driving force of the court's reasoning was an argument for coherence avoiding both inconsistency or the need to declare an enacted law to be a nullity.

The argumentative usage which the court developed in Millard v. Harris employs the device which Perelman calls the "plasticity of notions." The notion of "insane" was shown to be rich and

112. Id. at 970.
113. Id.
114. Id. at 971.
flexible and subject to evolution as it was said to shift in meaning from "psychotic" to "mentally ill." By asserting the flexibility of the notion of "insane" at the onset of its argument, the court was able to avoid the incompatibility problem of its earlier opinion which led to constitutional difficulties identified in the instant case. This argumentative device permits the court to claim that it is not acting beyond its competence as it would if it had merely held the Sexual Psychopath Statute was repealed by implication, or if it characterized itself as redrafting the statute by substituting the term "mentally ill" for the term "insane." Perelman's reasoning suggests that the court's argumentation involves a standard rhetorical device: "The flexibility of the notion, postulated at the outset and claimed as inherent in it, makes it possible to minimize, and the same time underline, the changes that the new experience would impose, that objections would demand this basic adaptability to new circumstances will enable the speaker to maintain that he is keeping the same notion alive." It is important to observe that the court itself made the notion of "insane" flexible and provided the characterization of the notion as flexible. As Perelman describes the process, the technique operates at two levels: "On the one hand, we actually make the notions flexible, thus enabling them to be used in circumstances far removed from their original usage: on the other hand, we qualify the notions as flexible." The entire argument of the court depends both on the ability to postulate meaning and to maintain that there is semantic evolution. According to Perelman: "[I]f the meaning is viewed dynamically, in terms of the uses of the notion in argumentation, it will be seen that the field of application of the notion varies according to these uses and that the plasticity of notions is related to them." One can appreciate the significance of the court's argument when one considers an alternative reading. The Sexual Psychopath Statute could be read as merely providing for special treatment of a group of criminal offenders. The insanity defense would be available for those who meet the standard for insanity. Then among those who were convicted, those who met the definition of sexual psychopath would be dealt with as a special class for purposes of detention or possible alteration of their behavior.

116. Id. at 138.
117. Id. at 139.
118. Id. at 140.
Avoidance and the Technique of Restraint

Having read the word “insane” to mean “mentally ill,” the court was confronted with whether such a reading rendered the Sexual Psychopath Statute meaningless or self-contradictory. According to the court: “[T]he problem is whether a person who by a pattern of repeated sexual misconduct has demonstrated himself sufficiently dangerous to meet that part of the statutory definition is not, as a definitional matter, mentally ill and therefore outside the statutory definition.”119 To reach the conclusion that the statute was a nullity or meaningless, the court properly reasoned that “we would need to find that the intersection of the class of dangerous sexual recidivists and the class of not mentally ill persons is the null set—i.e., that there is no person who is a dangerous sexual recidivist but who is not mentally ill.”120 The court noted that both medical and legal literature reveals that a large number of sex offenders are mentally ill in the sense that their behavior is affected by their personality problems and that they are in need of psychiatric treatment.121 Nevertheless, the court reasoned that a determination of mental illness cannot be done by a broad classification such as “sexual offenders” but requires a case-by-case examination of personality and behavior.122 The court concluded that to establish a sweeping rule that all dangerous sexual exhibitionists are ipso facto mentally ill would stand in direct contradiction to the principle of case-by-case analysis.123 Moreover, the court expressed sensitivity to the legal implications of declaring as a matter of law that all individuals guilty of repeated sexual misconduct are mentally ill.124 While the court refused to rule that all sexual offenders were mentally ill, it also avoided the need to rule that they were not. Indeed, the court avoided the need to determine whether Millard himself was mentally ill. Instead it concluded that the statute required that it be established that the sexual offender be dangerous as a requisite of his commitment. Thus the

119. *Harris*, 406 F.2d at 972.
120. *Id.*
122. *Harris*, 406 F.2d at 972.
123. *Id.*
124. *Id.*
court reasoned: "Regardless of whether Millard is mentally ill or not, the statute is not applicable to him unless his past sexual conduct enables us to conclude that his likely dangerousness places him within the statutory definition."

One should recall that the issue before the court in Millard v. Harris was whether the particular exhibitionist before it was properly confined as a sexual psychopath. The litigants before the court framed the issue in terms of whether the defendant was to be viewed as mentally ill and properly subject to civil commitment to the exclusion of the proceedings under the Sexual Psychopath Statute. "[The appellant] attacks the constitutional validity of the Sexual Psychopath Act and argues that the 1964 Hospitalization of the Mentally Ill Act partially or wholly supersedes the statute." The appellee maintained that the Sexual Psychopath Statute applied to persons not mentally ill so that the statute had a significance independent of the Mental Health Code. "[That the] words 'not insane' in the Sexual Psychopath Statute [should be construed] to mean 'not mentally ill,' as indeed the government conceded we should."

(vi) Reformulation of the Issue and the Technique of Restraint

The court first used an argument of restraint in its consideration of whether the statute had any possible application. The court refused to rule whether there were or were not any "not mentally ill" sex offenders. The court portrayed itself as careful and restrained in its analysis implicitly suggesting modesty in its judgment. Perelman maintains that such "[t]echniques of restraint give a favorable impression of sincerity and judgment and help to dispel the idea that argumentation is a device, a trick." Secondly, the court recast the questions before it. Rather than having the case turn on whether the appellant is mentally ill or whether the Sexual Psychopath Statute is directed at a person in the appellant's position based on whether he is mentally ill, the court cast the question as being whether the appellant is dangerous or not. In a sense, the court ultimately avoids a conclusion based on the formulation of the parties to the litigation, pursuing a separate line of inquiry.

125. Id.
126. Id. at 966.
127. Id. at 971.
128. THE NEW RHETORIC: ARGUMENTATION, supra note 12, at 466.
to justify its conclusion that the statute does not provide a basis for the institutionalization of Millard. Perelman suggests that this interaction of arguments and reformulation of the issue are common techniques used in legal reasoning:

It may happen that the thesis under discussion is not conceived in the same way by the opposing sides: what for one side is the end of the debate for the other merely a step toward a later conclusion. Since the reality the argument is dealing with is split up differently, an opinion or decision in one direction is not the exact counterpart of the opinion or decision in the opposite direction. Accordingly, one of the basic considerations in a legal controversy is the determination of the point to be discussed. This involves an attempt to isolate the issue and to insert it into a framework set up by law or convention.129

By focusing the analysis on the issue of dangerousness rather than on the issue of mental illness, the court shifts the argument to one of values rather than empirical proof. Rather than being confined by the lack of factual basis for resolving the question of whether there are any “not mentally ill” sexual offenders and by casting the issue as a question of the dangerousness, the court is able to present the critical issue as one of the likelihood of significant psychological harm posed by the exhibitionist before the court. This type of argument which recasts and restricts the discussion is one which Perelman regards as powerful: “[A] technique, which is very effective, is to restrict the scope of the debate and to advance a conclusion that falls short of what might be anticipated from the writer or speaker.”130

(vii) Recasting the Issue as a Matter of Classification Rather than Treatment

The court recasts the question to be decided in these terms: “In scrutinizing the question, we begin with the premise that when “not insane” is read to mean “not mentally ill” the sole justification for commitment under the sexual psychopath statute is his dangerousness to others.”131 To decide the question posed, the court was required to identify the basis for a prediction of dangerousness which it identified a “the type of conduct in which the individual

129. Id. at 461.
130. Id. at 466.
131. Harris, 406 F.2d at 973.
may engage; the likelihood or probability that he will in fact indulge in that conduct; and the effect of such conduct if engaged in will have on others.'" The court also suggested that the dangerousness of certain forms of behavior can vary with the frequency with which it is likely to occur. Further; the effect on others might depend on the identity of the victim thus requiring an estimate of the type of person likely to become a victim. 

a. Likelihood of Future Misconduct

The court applied these criteria to the evidence presented at the habeas corpus hearing. The expert psychiatric testimony showed that the appellant was not psychotic, but suffered from a personality disorder diagnosed as "passive-aggressive personality, passive-dependent type, exhibitionism." The exhibitionist conduct was caused by the fact that he was unable to enter into a mature relationship with women and experienced marital difficulties. The record included a report by Millard's wife that he had walked around naked in his home exposing himself to his small children. The hospital records revealed no reports of acts of exhibitionism at the hospital. There was testimony from psychiatrists that since Millard continued to suffer from his personality disorder, it was likely that he would exhibit himself in public when under stress if he were released. However, there were no allegations in the record that Millard had ever committed a violent sexual offense. In fact, the psychiatrists who testified agreed that as a result of "the lack of aggressiveness, inferiority, timidity and heterosexual immaturity of the [typical] exhibitionist," such individuals are markedly less likely to commit violent sexual crimes than other types of sexual offenders. Nevertheless, the hospital records did contain reports of violent conduct on the part of Millard which was not sex related.

132. Id.
133. Id.
134. Id. at 974.
135. Id.
136. Id.
137. Id.
138. Id.
139. Id.
140. Id.
141. Id. at 975.
b. An Argumentation Appraisal of Determining Criteria: The Likelihood of Future Harm

The court then considered the likely effect of the appellant's exhibitionism on potential victims. The psychiatric testimony suggested that the effect would vary among particular viewers: some would find the act repulsive and suffer brief distress; some women might find it amusing; highly sensitive women would be shocked; and very seclusive, withdrawn, shy women would be quite upset for a few days.\textsuperscript{142} One psychiatrist testified that Millard's son, who was six at the time of Millard's exhibitionist act at his home, had suffered serious psychological harm.\textsuperscript{143} The court of appeals in evaluating this evidence concluded that there was not sufficient evidence of likely serious harm to establish that Millard's potential future conduct presented a threat of danger. The court reasoned that the mere fact that some women viewers would be psychologically affected as would small children, and that such women and children would be among the "potential viewers" of Millard's exhibitionism if released, was not enough to justify a conclusion of "likely" dangerousness.\textsuperscript{144} According to the court, the requirement of commitment for dangerousness is not the mere possibility of serious harm, but its likelihood.\textsuperscript{145} The court concluded the appellant was unlikely to engage in sexual misconduct other than exhibitionism.\textsuperscript{146} On the basis of the expert psychiatric testimony the court found that "the appellant's self control and insight into his personality shortcomings have improved sufficiently to permit the conclusion that such misconduct is likely to occur infrequently and only at times of stress."\textsuperscript{147}

\textsuperscript{142} Id. at 976.
\textsuperscript{143} Id. at 976. The court dismissed this testimony on the ground that there was a general breakdown of the parent-child relationship beyond the father's sexual misconduct:

The [Sexual Psychopath] legislation provides for the institutionalization of individuals who are dangerous to others because of their sexual misconduct, nor for the hospitalization of fathers who traumatize their children by a general pattern of rejection and abuse. If the effect of alleged sexual misconduct cannot be separated out, the solution in applying the statute is not to heap together all the unhappy effects of an unhealthy parent-child relationship as evidence of harm produced by "sexual misconduct."

\textsuperscript{Id.}

\textsuperscript{144} Id. at 977.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 977-78. The court noted that Millard had not exposed himself to others who
To further establish its conclusion that the appellant did not pose a threat of likely serious harm, the court considered the likely consequence of future misconduct on the part of Millard. The court reasoned that although the expert testimony showed that serious psychological harm would result from Millard exhibiting himself to unusually sensitive adult women and small children, any future sexual misconduct of Millard was not sufficiently “likely” to cause the sort of harm required to justify continued commitment. The court found the evidence showed Millard was “unlikely” to commit acts of exhibitionism with any great frequency. Although admitting some people who would have a significant psychological reaction to an exhibitionist act might observe Millard in a future act of exhibitionism, the harm would be produced in only a small proportion of the population and the susceptible viewers were merely “potential” viewers not “likely” viewers.

c. Anticipating Counterargument

The court anticipated criticism that it was not giving sufficient consideration to the interests of supersensitive women and small children. First, the court postulated that very seclusive, withdrawn, shy, sensitive women are a minority. Second, although it acknowledged a need to provide this class legal protection, the court reasoned that there are limits to which the law can go to eliminate all possible sources of occasional distress to this class of persons. Acknowledging a need to provide greater protection for children, the court referred to expert testimony that the typical child would not be injured by an isolated act of exhibitionism. Thus the court was able to conclude that the likelihood of serious harm being suffered by a child as a result of any act of exhibitionism by Millard was too remote to justify commitment. As a result of this analysis, the court concluded that Millard did not qualify as a sexual

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148. *Id.* at 978.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
psychopath because he was not shown likely to be dangerous to other persons.

d. **Evaluation of Millard v. Harris as a Case of Legal Argumentation**

The opinion of the court of appeals in *Millard v. Harris* provides a paradigmatic example of the use of argumentation in the context of legal reasoning. It is clear that the opinion does not utilize syllogistic reasoning or formal logic. Rather, the opinion consists of an argument in which adduced reasons are elaborated to persuade and to justify a conclusion. Nor did the court consider it sufficient merely to declare without reasons that an exhibitionist is or is not a sexual psychopath subject to commitment. The process of argumentation which is evident in *Millard v. Harris* is central to the reasoned judgment which is characteristic of law. Perelman correctly identifies this critical feature of legal reasoning:

> What is specific in the way matters are resolved in law is that decision is obtained by recourse to a judge . . . [who] cannot be satisfied only with a decision which settles the conflict, but most in addition justify it and show that it is in conformity to the law that is in force. The pronounced judgment is not given as a collection of premises from which a conclusion is deduced, but as a decision justified by adduced reasons. In a formal deduction the conclusions flow in a constrained and impersonal way from the premises. But when the judge makes a decision, his responsibility and his integrity are at stake, the reasons he gives to justify his decision and to refute the real or eventual objections which could be made against him furnish a sample of practical reasoning, showing that his decision is just and conforms to the law, i.e., that the decision takes account of all the directives which the legal system has given, and that he is responsible to apply—a system from which he draws his authority and competence. . . .

Legal reasoning then is an instance of practical reasoning which employs argumentation rather than justification. Argumentation employs reasons rather than logical proof. This is clear in the *Millard v. Harris* opinion in which the court assesses the nature of injury likely to be inflicted by conduct, determines the likelihood of the conduct occurring, and the psychological condition of the individual who is the subject of the proceeding. Perelman identifies

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the range of reasons, which are exemplified in Millard v. Harris, and which are generally employed in argumentation: "The reasons given in practical argumentation, the 'good' reasons, can be moral, political, social, economic or religious according to the field from which the decision is drawn. For the judge, they will be essentially legal, for his reasoning must show the conformity of the decision to the law which he is responsible for applying." In Millard v. Harris the reasons given employ practical judgment drawing on the insights of psychiatry, criminology and common experience, as well as law. It is clear from a close reading that there is no determinate solution available in a case like Millard v. Harris. The court could have ruled otherwise by making different evaluations of the data which it considered. As Perelman observes:

What characterizes an argumentation is its non-constraining character. If we admit certain propositions and methodological rules, we can show the inadequate character of certain solutions, but, even there, the accepted solution rarely can impose itself in all its details. It is rare when the judge does not have to exercise a power of appraisal, which his authority will have to impose on the issues before him as the expression of the law, although his practical reasoning is so closely rule bound.  

It should be clear that Judge Bazelon exercised a continuing power of appraisal on the various data that he offered as a basis for his decision as well as a continuing judgment on the identified harms that were posed by Millard. Also considered was the significance of the restraint posed by continued commitment. Legal reasoning employs argumentation to justify a conclusion, rather than operating by deduction as in formal logic or using demonstration to establish the existence of fact. Argumentation aims to convince, not to establish truth. Thus any argument is subject to counter argument. Reasons given in any argument are open to challenge. Moreover a counter argument may be based on reasons ignored or denied in the argument that presents the opposing view. These features of argumentation that are characteristic of legal reasoning are evident in the majority and dissenting opinions rendered in Cross v. Harris. The majority opinion, authored by Judge Bazelon, defended the argument developed in Millard v. Harris

155. Id. at 129.
156. Id.
while the dissenting opinion provided a challenge to the reasons and conclusions of the majority.

E. Cross v. Harris: A Clash of Arguments in the Application of Classification Criteria

Cross v. Harris involved an appeal from a denial of habeas corpus relief to the appellant who had been hospitalized for fifteen years on account of his tendency to engage in acts of public indecent exposure. The appellant had been released but within several months was hospitalized again following an arrest for indecent exposure and a determination that he was a sexual psychopath.\(^{158}\) At the commitment hearing, the examining psychiatrists recommended outpatient care rather than hospitalization. The court, however, concluded that the Sexual Psychopath Act precluded provision of less drastic alternatives in place of indefinite commitment.\(^{159}\) The appellant argued that proceedings under the Sexual Psychopath Act were equivalent to civil commitments so that the statutory mandate of least restrictive disposition under the Mental Health Code should be read into the Sexual Psychopath Act.\(^{160}\) The majority remanded the case for a determination of whether the appellant was a sexual psychopath under the statute as construed in Millard v. Harris.\(^{161}\) The majority’s opinion reiterates its argumentation in Millard v. Harris and extensively responds to the argument developed by the dissenting opinion. An examination of the majority opinion will be taken up following a discussion of the dissenting opinion.

(i) Exhibitionists as a Dangerous Class

Judge Warren Burger concurred in the decision to remand the case but dissented from the reasoning of the majority in Millard v. Harris as well as in Cross v. Harris.\(^{162}\) Judge Burger objected to the argumentation developed by the majority which he maintained exceeded the proper bounds of judicial action and he argued that remand of the case precluded any need to state views about

\(^{158}\) Id. at 1096.
\(^{159}\) Id.
\(^{160}\) Id. at 1097.
\(^{161}\) Id.
\(^{162}\) Cross, 418 F.2d 1095, 1107 (Burger, J., dissenting).
the constitutionality of the Sexual Psychopath Statute. The principal focus of Judge Burger’s opinion, however, is a dissent from the portion of the majority opinion relating to the issue of “dangerousness.” Judge Burger asserted that the analysis developed of “dangerousness” in Millard was dicta without legal force.

Judge Burger began his analysis of the scope of the Sexual Psychopath Statute with the premise that the same concern should be given to the “victim whose traumatic injury may be very grave” as is given to the sexual offender. On that basis he objected to the discounting in the Millard opinion of the effect of exhibitionism which “‘most women would find . . . repulsive’ even though depending upon their sensitivity, they might be ‘quite upset’ but for only ‘two or three days.’” He further objected to the discounting of “the possibility of serious psychological harm which might result to small children from witnessing Millard’s ‘expected exhibitionism.’”

According to Judge Burger, the majority in Millard, as in the instant case, over-emphasized Millard’s lack of a physically assaultive or violent nature and denegated the psychic trauma and injury which could be associated, according to the dissent, with Millard’s acts of exhibitionism. The error of the majority was “to equate ‘dangerousness’ with conduct involving only physical impact.” According to Judge Burger the legislature intended to protect people from psychological as well as purely physical harm. While admitting that there are problems in determining

163. Id. at 1107. Judge Burger set out a firm statement of his view on judicial restraint: Since the case is to be rewarded, however, I think its wholly unnecessary—if indeed not inappropriate—for this court to intimate by way of obiter dicta general views as to apparent Constitutional issues which may never arise in this case. The majority takes issue with my challenge to their excursion into what is essentially no more than legal literature expressing personal views of two judges. I risk their displeasure because of my strong view that judges should generally confine themselves to the case at hand.

Id.

164. Cross, 418 F.2d 1095, 1108 (Burger, J., dissenting).
165. Id. at 1108.
166. Id.
167. Id. at 1108 citing Millard v. Harris, 406 F.2d 964, 976 (D.C. Cir. 1968).
168. Id. at 1108.
169. Id. at 1108-09.
170. Id. at 1109.
psychological trauma to victims and balancing the gravity of the
harm with the necessity of involuntary commitment of the sexual
offender, this was said to be a legislative policy matter and not
primarily a judicial matter.\textsuperscript{171} Judge Burger maintained that Con-
gress provided a non-penal rehabilitative approach to the problem
of the sexual offender in the Sexual Psychopath Act.\textsuperscript{172} Consequently,
he argued that the court should defer to this legislative
judgment.

In support of his position, Judge Burger developed an analogy
to the obscenity cases. Judge Burger noted that the United States
Supreme Court had upheld a state statute forbidding the sale of
obscene literature to minors under seventeen years of age.\textsuperscript{173} The
Supreme Court stated that it was “required only” to find that it was
not irrational for the legislature to find exposure to material con-
demned by statute harmful to minors.\textsuperscript{174} The Supreme Court main-
tained that it was precluded from concluding that the statute had “no
rational relation to the objective of safeguarding . . . minors from
harm from the mere fact that a ‘causal link has not been disproved’
even through the Court found that it was ‘very doubtful’ that the
legislative findings ‘express[ed] an accepted scientific fact.’”\textsuperscript{175} Ac-
cording to Judge Burger there was no determination by the major-
ity that it was irrational for Congress to conclude that exposure
to acts of exhibitionism may cause harm.\textsuperscript{176} Similarly, he argued
that the Congressional finding that harm results from acts of ex-
hibitionism, whether this represents an “accepted scientific fact”
or not, should be binding on a court since a “causal link” has not
been disproved. Thus the Court should be precluded from concluding
the statute has “no rational relation to the objective of safeguard-
ing” the public.\textsuperscript{177}

Judge Burger also noted that the obscenity cases reflected the
fact that the state may legitimately shelter specific groups from
exposure to obscene materials. He noted the Supreme Court had
held that the state may properly guard against he “danger that
obscene material might fall into the hands of children . . . or that

\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 1109-1110 citing Ginsberg v. New York, 390 U.S. 629 (1968).
\textsuperscript{174} Cross, 418 F.2d 1095, 1110 (Burger, J., dissenting) citing Ginsberg, 390 U.S. at 641.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
it might intrude upon the sensibilities or privacy of the general public.\textsuperscript{178} Accordingly, Judge Burger argued that the majority in \textit{Millard} erroneously relied on the conclusion that "only a small proportion of the population" would be injured from acts of exhibitionism,\textsuperscript{179} and asserting that the overt public misconduct of exhibitionism has an even more devastating impact destructive of the "privacy and sensibilities of the general public" than the intrusive potential of obscene material.\textsuperscript{180}

(a) \textit{Particularized Assessment of the Dangerousness of Individual Exhibitionists}

The majority opinion in \textit{Cross v. Harris}, authored by Judge David Bazelon, attempts to counter the arguments developed by Judge Burger. First, the majority addressed the argument that its discussion of constitutional issues raised by the Sexual Psychopath Statute are improper. Judge Bazelon provides a broad view of the significance of legal opinions:

Opinions are written for explication and instruction. Neither function would be served if, having concluded that the statute must be construed to avoid constitutional doubts, we then made no mention of the doubts we sought to avoid. . . . [C]rucial factors affecting decisions are not to be kept as secrets known only to the court. Bench, bar, and litigants alike would be ill-served if we were to conceal the bases for judgment.\textsuperscript{181}

The majority opinion characterizes the dissenting opinion as misreading the holding and rationale of \textit{Millard v. Harris}.\textsuperscript{182} The majority makes six assertions which it maintains reveal erroneous premises or a mischaracterization adopted by Judge Burger in his dissent:

(1) that Congress has never indicated any intention to detain all exhibitionists indefinitely as "dangerous"; (2) that we did not question congressional power to punish acts of exhibitionism; (3) that we did not in any way restrict the kinds of ends and interests that Congress may be appropriate means seek to promote; (4) that we did not say that harm to only a small segment of the population

\textsuperscript{178} Id. at 1110 citing \textit{Stanley v. Georgia}, 394 U.S. 557, 567 (1969).
\textsuperscript{179} \textit{Cross}, 418 F.2d 1095, 1110 (Burger, J., dissenting).
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 1106.
\textsuperscript{182} Id. at 1104.
could not be sufficient to support a commitment to the Sexual Psychopath Act, so long as that harm was, in the language of the Act, *likely* to occur; (5) that we did not exclude any lasting harm of any sort to children, women, or anyone else from the category of 'substantial injury' which may justify commitment under that Act, provided there is evidence that such harm is *likely* to occur; and (6) that far from relying on any psychiatric theories of our own, we simply accepted in *Millard* the testimony of the psychiatrists concerning the likely consequences of Mr. Millard's exhibitionism, as in this case we must rely on the expert testimony concerning Mr. Cross.\(^183\)

The majority asserts that the dissent adopts a faulty premise in that the Sexual Psychopath Statute should be construed to read into it an unascertainable congressional intent to confine all exhibitionists as "dangerous."\(^184\) The majority asserts that the statute is not fairly susceptible to such as construction.

According to the majority, the dissent adopted the unfounded premise that exhibitionism is necessarily dangerous. The majority maintained that its decision in *Millard* was based on a record that showed no harm was likely to flow from the subject's future conduct.\(^185\) The dissent, on the other hand, is said to adopt the view that possible acts of exhibitionism will result in "traumatic injury" and "psychic trauma" to bystanders without any analysis of the likelihood that such trauma will in fact occur.\(^186\) Conceding that it may be true that in particular circumstances frequent exhibitionism is necessarily "dangerous" within the meaning of the Sexual Psychopath Act, the majority maintained that there was no evidence in the record in *Millard* to support such a conclusion.\(^187\) The majority concluded that Judge Burger's dissent is either "(1) relying upon unmentioned extra-record psychiatric theories in order to conclude that exhibitionism is dangerous *per se*, or else (2) giving no effect to the word 'likely' in the statute."\(^188\)

Similarly, the majority rejected the assertion that it failed to give sufficient weight to "the *possibility* of serious psychological harm which result to small children."\(^189\) The majority again noted

\(^{183}\) Id. at 1104 n.61.
\(^{184}\) Id. at 1105.
\(^{185}\) Id. at 1105 n.65.
\(^{186}\) Id.
\(^{187}\) Id.
\(^{188}\) Id.
\(^{189}\) Id. at 1106.
that the statute provides for commitment only if the subject is "likely to . . . inflict injury" on other persons. According to the majority the dissent ignored significant semantic distinctions since "[w]hatever may be the requisite standard of likelihood, there is surely no warrant for reading 'likely' as synonymous with 'might possibly'".\textsuperscript{190}

The central error of the dissent then, according to the majority, was the adoption of the core premise that Congress concluded "that exhibitionism is necessarily dangerous, no matter what the circumstances."\textsuperscript{191} The majority noted that the dissent provided no citation to any authority establishing that Congress decided that exhibitionism is dangerous.\textsuperscript{192} According to the majority, the House Report on the bill, the Senate Report and the Congressional Record are void of any mention or consideration of whether exhibitionism is dangerous.\textsuperscript{193} Thus, the majority concluded that the trial court must determine the character and size of the likely viewing audience and the harm it may suffer in order to determine whether any particular exhibitionist's potential misconduct can be deemed a sufficiently grave danger to warrant an indeterminate commitment.\textsuperscript{194}

\section*{IV. \textsc{Legal Reasoning as Authoritative Argumentation}}

The opinions rendered in \textit{Cross v. Harris} demonstrate that legal reasoning entails a practice of argumentation. The reasons given for the conclusions reached are to be measured by their persuasiveness, not by reference to some established true state of affairs. The fact that there are opposing views developed does not mean that one or both of the judges rendering their opinion have not been reasonable or honest or that one is right and the other is wrong. As Perelman notes:

In fact, we admit that two reasonable and honest men can disagree on a determined question and thus judge differently. The situation is even considered so normal, both in legislative assemblies and in tribunals that have several judges, that decisions made unanimously

\begin{footnotesize}
\textsuperscript{190.} Id. at 1106 citing 22 D.C. Code § 3505 (1) (1967).
\textsuperscript{191.} \textit{Cross}, 418 F.2d at 1106.
\textsuperscript{192.} Id.
\textsuperscript{193.} Id. at 1106-07 citing H.R. Rep. No. 1787, 80th Cong., 2d Sess. (1948); S. Rep No. 1377, 80th Cong., 2d Sess. (1948), and 94 Cong. Rec. 3884, 4802, 4885-4887, 4927, 6297, 6910, 6593, 6747, 6851, 7114, 7981 (1948).
\textsuperscript{194.} \textit{Cross}, 418 F.2d at 1107.
\end{footnotesize}
are esteemed exceptional; and it is normal, moreover, to provide procedures permitting the reaching of a decision even when opposing opinions persist.\textsuperscript{195}

It is in this sense that the majority's opinion provides the correct reading of the statute because it is the majority opinion that it is the correct judgment.

One may respond that to the extent there is a lack of a determinate answer to any question subject to legal reasoning it is not rational. It is exactly this position which Perelman was committed to rejecting. It stems from a mistaken belief that only formal logic or demonstrative proof provide valid conclusions or results. Perelman asks rhetorically:

Must one condemn the law and the jurists in the name of a conception of reason and justice inspired by mathematical or natural sciences, or should one not begin with the fact that the most eminent jurists are as reasonable and as honest as men of science, and accept once and for all that the divergences of all sorts stem from its own nature, from its specificity in comparison to the sciences? If the important decisions of the Supreme Court of the United States are rarely made unanimously must one accuse at least certain of these respected judges of being unreasonable or dishonest, or must one not conclude that in law discord is explained by specific reasons?\textsuperscript{196}

Perelman's answer is clear: "Two opposing interpretations can be equally respectable, and it is not necessary to condemn as unreasonable at least one of the interpreters."\textsuperscript{197}

The critic can assess the persuasiveness of opposing opinions of the type rendered in \textit{Cross v. Harris}. But as an institutional and social matter, in law there must be a determined or authoritative decision. There is a need to know which is the correct reading of the statute being interpreted. The provision of a means for making such a determination renders legal reasoning authoritative in a way that, for instance, argument in philosophy cannot be. In a litigated case it is the judge who determines which counsel has made the persuasive argument. In a multi-judge court it is the majority which determines the correct rule or interpretation. It is not that the truth is determined but that the authority

\textsuperscript{195} Perelman, \textit{What the Philosopher May Learn From the Study of Law}, in \textit{Justice, Law and Argument}, supra note 8, at 165.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
of a position is determined. Perelman correctly describes the means by which an authoritative conclusion is established:

We need a judge when these rules are equivocal, when reasoning does . . . not end in a conclusion, but justifies a decision. We can reach contrary decisions according to the importance we accord to this or that type of argument, and it is for this reason that we turn to a judge who will have the power to decide. When the judges do not agree, we need a criterium, e.g., the majority who will hand down the decision and which in the last instance pro veritae habetur, will be presumed in conformity with truth. There is no truth in fact, but only recourse to a power that makes the decision binding. From the perspective we understand the importance of this power and also the fact that this power is recognized and its authority admitted. 198

It is because legal reasoning is a form of argumentation which resists providing determinate conclusion and because legal decisions are not imposed as self-evident, that "recourse to power and recognized authority must supplement the absence of unanimity." 199 Nevertheless, the decision which is rendered authoritative necessarily entails argumentation which is to be evaluated by the persuasiveness of the reasons given for the decision.

While legal reasoning cannot be assimilated to formal logic nor utilize scientific demonstration, neither can it be dismissed as mere subjectivism and exercise of unrestrained power. The argumentation which is the ultimate method of legal reasoning necessarily employs reasons which are ultimately tested by their effect in persuading. It is well to recall Perelman's view that: "The aim of argumentation is not to deduce consequences from given premises; it is rather to elicit or increase the adherence of the members of an audience to thesis that are present for their consent." 200 The vitality of a legal opinion as precedent ultimately depends on the effectiveness of the argumentation which it employs.

**Conclusion**

Legal reasoning has been viewed as a corrupted form of formal logic by some. Others have viewed what passes as legal reasoning as mere rationalizations for exercises of unrestrained judicial power.

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199. Id.
Chaim Perelman has provided a convincing account of legal reasoning which avoids these two extremes. For Perelman, legal reasoning is a form of rhetoric which utilized argumentation. The objective of argumentation is to persuade rather than to establish truth. The effectiveness of argumentation turns upon the persuasiveness of the reasons given for a decision. The argumentation itself employs a number of techniques and devices and forms of argument to establish its effectiveness. Through close study of a series of opinions of the Court of Appeals for the District of Columbia dealing with the question of whether an exhibitionist is properly classified as a sexual psychopath, one can identify the forms of argumentation which constitute the rhetoric of legal reasoning. One can observe in these opinions not only the operation of argument, but can also identify special features of law which make possible authoritative legal decisions.
PROFESSOR PERELMAN AND AUTHORITY

William L. McBride*

In an article entitled “Authority, Ideology and Violence,” written at the height of worldwide student unrest in the late 1960's,¹ Professor Perelman lodges a mild protest, on the basis, in part, of historical evidence, against the equations of authority with power and of the authority of the law with the fear of sanction.² He concludes with a discussion, characteristic of his entire world-view and particularly of his sensitivity to the role of rhetoric in rational discourse, of the importance both of “a recognized ideology” to serve as the basis of “a legitimate Power,” and of the clash of ideologies in any civilized social life.

I would like respectfully to challenge aspects of the late Professor Perelman’s treatment of authority in this short essay, as a means of pointing up certain interesting but problematic features of his philosophy. “Respectfully” is an appropriate word here; as Perelman writes: “Within the Judeo-Christian tradition authority is a moral and not a legal notion; it is tied to respect.” He goes on to say that “[t]he model of authority is the father’s relationship to his children whom he educates and guides.”³ I question, not the historical elements of these claims—certainly authority has functioned as a moral notion within the Judeo-Christian tradition, and the role of the father has often been taken (in a blatantly sexist fashion, I might add) as a model of authority in this and other traditions—but some of the conceptual implications that he appears to draw from them. The tenor of my questioning is respectful, I would like to think, because of the quality of Professor Perelman’s reasoning and the value of his insights rather than because I personally regard him as a quasi-paternal role-model. Thus, although authority may indeed be “tied to respect” in the Judeo-Christian tradition, it would seem that respect is not necessarily linked to felt relationships of authority.

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2. Id. at 138-39.

3. Id. at 139-40.
In a recent issue of the Georgia Law Review devoted to the topic of "the duty to obey the law," I argue, against the spirit of the essay by Professor Perelman that I am scrutinizing here, that the notion of "authority" plays a role that is more mystificatory and malign than useful in our thought and culture; as I maintain:

"Respect for authority," including "respect for the authority of the law," can be treated as if it were a duty of equal or greater magnitude than that of respecting human beings, persons, and its absence can be regarded as a great crime, a blasphemy. This is what I mean by the "mystification of authority." 

Perelman does, it is true, concede in his essay that the notion of authority has its negative or at least dubious aspects. He begins by acknowledging that "rebellion against authority" is the general formula whereby the then-current manifestations of public unrest throughout the world could best be characterized. Authority, he admits, is often thought to run counter to individual liberties—by no less a figure than John Stuart Mill, among others. Perelman cites approvingly from a work by Bertrand de Jouvenel in which the latter points out the negative connotations, which to his mind constitute a corruption of the proper sense of "authority," of the expression, "authoritarian government," "one which has large recourse to violence." (It would have been interesting to query either of these two distinguished writers concerning his views of the current status of the alleged distinction between "authoritarian" and "totalitarian" regimes that has been promoted by members of the Reagan Administration!) Perelman also stresses, and of course endorses, the traditional Western opposition to "argument from authority" where matters of objective, scientific (in a broad sense) truth are concerned. But his fundamental contention, these concessions made, is that, since in matters of social conduct some decision-making individual or body is required, some basis other than mere force is desirable in order that the decision-maker's power may "enjoy an authority that brings about the consent of those who are subject to it." That basis, according to Perelman, is an ideology.

7. C. Perelman, supra note 1, at 143 (emphasis added).
I shall defer until later my consideration of Perelman's treatment of ideologies. For the moment, I wish to reflect on the use made by Perelman of the notion of authority in this passage, which I take to be more central than his numerous historical allusions in furnishing an argument for the importance of that notion. Simply put, what is it that underlies the radical disagreement between the two of us concerning the value of the notion of authority in social life? I can only, of course, offer my version of an answer to that question.

Like de Jouvenel and like A.P. d'Entreves, whom he mentions (and I think somewhat underestimates) in reference to a dispute over the meaning of "natural law" with his colleague, Norberto Bobbio, in another essay published in the same English language volume as the essay on authority under consideration here, Perelman was most concerned to distinguish what he termed "authority" or even "legitimate authority" from mere Macht, power, force, violence. During the lifetimes of all these outstanding political and legal philosophers, their Europe has been racked by some of history's most egregious instances of governments exercising naked power over their subjects and displaying utter contempt for all constitutional procedures that would ordinarily be called "democratic." It is understandable and laudable that these philosophers would have sought powerful conceptual tools to identify more clearly the bases of those historical institutional catastrophes and to formulate appropriate theoretical remedies against similar developments in the future. For my erstwhile teacher, d'Entreves, the solution seemed to lie in the tradition of natural law. For Bobbio, on the contrary, a version of legal positivism appeared more attractive. For the early Perelman, as he himself acknowledges, and as one can readily discern from reading his first major monograph on justice, a very stark
positivism or “logical empiricism” pervaded his entire outlook, but he found this to be most unsatisfactory and gradually came to a greater appreciation of the subtleties of language and of the implication of this for the philosophy of law through his study of rhetoric. For de Jouvenel, an analysis and in some instances a restoration of certain concepts, such as “authority,” central to the mainstream tradition of earlier Western political thought, from the classical writers to Tocqueville, was the chosen path. None of them, at least during a certain period, seriously put into question the authority-claims of the State and the Law in its liberal democratic versions.

Or perhaps one of them may be said to have done so: Bobbio, otherwise a great admirer of Perelman’s,14 whose writings over the years since the mid-1960’s seem to me to have become increasingly skeptical concerning common notions of authority and legitimacy.15 Again, the spirit of the times can be read into the legal philosopher’s motivation for questioning assumptions once commonly held, and this is as it should be: the Western democracies were generally supporting United States government policy, which involved the employment of an astounding quantity of force against portions of the native population in Vietnam, and were generally endeavoring to quell domestic protests, often with considerable applied and threatened force, as well. It was the same period that inspired Perelman’s essay on authority, but it is evident that his reaction constituted more of a rebuke, albeit a typically gentle, humane, and somewhat indirect one, to protesters than of a questioning of the force exerted in the name of their own “authority” by the liberal democratic states.

It should be evident that my sympathies lie more on the side of Professor Bobbio than on that of Professor Perelman at the historical juncture, now already somewhat faded from memory, that I have been describing. Of course, as both of them would, I think, have readily admitted, matters were by no means one-

14. He is reported, in an introduction to an Italian edition of Perelman, to have said that the latter’s analysis of justice had “valore di modello” within the discipline of legal philosophy. Gianformaggio, Due lettura di Perelman, 62 Rivista di Filosofia 267 (1971).
15. For example, he concludes a 1981 essay with a reference back to an article first published in 1967, in which it was said, with reference to Kelsen’s and other views of law as a systematic, normative hierarchy, “che, al vertice del sistema normativo, lex et potestas convertuntur.” Bobbio, Dal potere al diritto e viceversa, 72 (21 n.s.) Rivista di Filosofia 358 (1981).
sided in any case: for example, much protest of the time was excessive, unreasonable, ill-advised, itself sometimes brutal. But I am convinced that Perelman should have paid more attention than he did to both the logic and the historical reality of the state—even the liberal democratic state—as force, as violence. Moreover, although the earlier experience, so formative for the philosophers just mentioned, of Europe under Nazi occupation was not mine, I observe from a distance in time that the fascist state under Hitler put great stress on authority, that it claimed legal continuity with its Weimer predecessor by virtue of the invocation of a crisis “state of exception” that had been provided for in the latter’s constitution, and that there is evidence of its having at times enjoyed the apparent consent of a large segment of the German population.

I now return from historical excursus to the logic of the matter. When Perelman argues that modern societies require decision-making agencies, no one can reasonably dispute him. Similarly, when he upholds the superior value of consent to decisions taken, he is unlikely to encounter opposition. But the problem lies with his assertion that attaching a notion of legitimate “authority” to the effective decision-making agency in a given situation at a given time somehow enhances the value of that agency, and with his concomitant failure, in my opinion even more serious, to give much weight to the usefulness, for established political institutions and legal systems, of the mystique surrounding the notion of “legitimate authority” in coercing consent. Indeed, the causal language to which Perelman resorts in this passage is very revealing; in place of a situation in which “force is the sole cause of obedience,” he says, the power in question should “enjoy an authority that brings about the consent of those who are subject to it.” But a consent, on the part of “subjects” (this word, too, however conventional it may have become in our Western legal tradition, is highly revealing), that is caused or brought about “from above,” so to speak—in other words, a passive, perhaps even manipulated, consent—is hardly a robust, voluntary, democratic phenomenon. Indeed, it differs very little if at all from the relationship of force to which Pro-

17. C. Perelman, supra note 1, at 143 (emphasis added).
18. Three essays of mine, the first dealing with degrees of consent as “acceptance,” the other two with voluntary associations and coercion, bear directly on the present issue. See McBride, The Acceptance of a Legal System, in 49 Monist 377-96 (1965); W. McBride, Voluntary Association: The Basis of an Ideal Model, and “Democratic” Failure in Voluntary
Professor Perelman was attempting to contrast an authority relationship.

To Perelman, the underpinnings of authority lie in ideologies, and it is with remarks primarily on this topic that the essay upon which I have been focusing concludes. Perelman is a pluralist, of course: there are many ideologies, and a revolutionary situation may be said to obtain precisely when the hitherto dominant ideology, which supports the established authority, begins to be rejected by sizeable segments of a population. He also remains, in some respects, as much of a relativist with respect to alternative ideologies as he was with respect to conceptions of justice in earlier work; as he says, "Scientific methods, at the most, can serve to show how an ideology can dominate but they cannot criticize the reasons which it uses to justify its preferences. It is from another ideology, another ideal of man and society that the prevailing ideology can be criticized."\footnote{C. Perelman, \textit{supra} note 1, at 143.} He concludes with a forceful and appealing plea for tolerance (although without actually using that word) among proponents of competing ideologies.

The meaning that Perelman identifies with the term, "ideology," although based in a certain usage that has become commonplace, is problematic. Although invented by others, the word was publicized particularly by Marx and Engels, with whom, especially in earlier works and notably in \textit{The German Ideology}, it had a decidedly pejorative connotation. Within this tradition, to speak or write ideologically meant to provide a certain plausible but ultimately indefensible rationalization for one or another set of relations of dominance and subordination—exactly the function that I see defenses of "authority" as frequently serving. Although he was familiar with this history of the term, Professor Perelman chose to write about "ideologies" without attaching any of this critical and negative sense to it.

A recent influential writer about ideology within one of the now many traditions of Marxism has been Louis Althusser.\footnote{See generally L. Althusser, \textit{For Marx} (B. Brewster trans. 1970).} Some of his erstwhile students have generated a considerable recent literature on the topic, much of it not in strict conformity to

\begin{footnotes}
\item[19.] C. Perelman, \textit{supra} note 1, at 143.
\item[20.] See generally L. Althusser, \textit{For Marx} (B. Brewster trans. 1970).
\end{footnotes}
Althusser's own approach. The latter, at any rate, carefully distinguishes ideology from science and sees ideologies as being indispensable, at least for the foreseeable future, just as Perelman does, but, unlike Perelman, contends that there is a true science of society; in fact, Althusser regards Marx as having discovered it.

That this type of belief can generate a political dogmatism which Perelman would have found deplorable should be obvious; I share his concern about it. But I am also concerned that the nearly total lack of critical "bite" in Perelman's conception of an ideology as one or another "ideal of man and society" will inhibit, rather than promote, the ongoing and never-ending philosophical conversation about courses of political action that Professor Perelman favors. For I fear that he has failed to provide us with sufficient grounds for contending, not that any one set of philosophical ideas about society and law is perfectly true or absolutely superior to all others—a type of contention that I fully concur with him in rejecting—but even that one or another has weaknesses from some point of view other than that of a rival "ideology." And if I am correct about this implication, then I would expect those who accept it to be severely tempted to avoid even trying to undertake philosophical criticism.

Perelman has contributed greatly to understanding the conceptual logic of those grandiose abstract terms, such as "justice" and "rights," which dominate the Western tradition of social, political, and legal philosophy. He has shown—as, for example, in his analysis of how alleged "rights" thought by different signatories to have somewhat different contents were approved by a broad consensus when the United Nations' Universal Declaration of Human Rights was adopted—the positive use as well as the obvious potential for abuse inherent in such unavoidably "confused notions" ("notions confuses," which in the French suggests perhaps a slightly different, less negative nuance). But might we not, imitating recent practice of the United States Supreme Court in determining which legally-based classifications of individuals should be subjected to a strict or even rigid scrutiny, further identify at least some of Perelman's "notions confuses" as "notions confuses et suspectes," with

perhaps varying degrees of suspicion attached? "Justice" would surely then be found to be quite suspect, with the ideal of a perfect substantive justice (as distinguished from the realities of actual injustices\textsuperscript{23}) being just as incoherent as the young Professor Perelman found it to be. But "authority" might well be found even more suspect than "justice"—like justice, useful for ideologically reinforcing an established political order, but, unlike "injustice," incapable of generating valuable criticism of an established order through any meaningful corresponding negative form.\textsuperscript{24}

\textsuperscript{23} For a discussion of this distinction, whereby the notion of perfect justice is rejected but the idea of injustices is preserved as being intellectually useful, see McBride, \textit{Government and Social Justice}, 14 J. Soc. Phil. 539-49 (1983).

\textsuperscript{24} It might be objected that "authority" does have a corresponding negative form, after all: anarchy. But, first, it is my contention that abandoning the notion of "authority" does not entail abandoning orderly decision-making procedures, in which case "anarchy" in the sense of the lack of such procedures cannot be the privative of "authority," and, secondly, there have been many serious and reasoned defenses of anarchy as a desirable state, whereas I know of no such defenses of injustice.
I. INTRODUCTION: NATURAL LAW, LEGAL POSITIVISM AND LEGAL REALISM

The tradition of western thought in legal philosophy comprises three main currents: natural law theories, legal positivism and legal realism. According to natural law theories, valid law consists of objective rules of conduct inherent in human nature, rules that reason should be able to discover. According to legal positivism, valid law is positive law: law enacted by the legislator. According to legal realism, valid law is judge-made law. Two main forms of legal realism have been developed this century: American legal realism and Scandinavian legal realism.

"Legal reasoning," in a broad sense, denotes the interpretative activity of jurists and judges, the result of which, in the continental European tradition, is, insofar as jurists are concerned, so-called legal science, and, insofar as judges are concerned, case law. The meaning of the term "valid law" oscillates in that tradition between the concepts of "law in force" and "binding law." It is generally assumed that jurists study valid law and that judges enforce (apply) it.

According to natural law theories, it is up to jurists to discover—roughly speaking in the way that logical and mathematical truths are discovered—the rules of natural law. Natural law is valid law in the sense that it is (morally) binding. Jurists also have the task of studying positive law in relation to natural law. Positive law that is not in conformity with natural law does not constitute valid law in the sense that it is not binding and, in the opinion of some natural law scholars, that it is not law in force. Judges, according to natural law theories, have the task of enforcing (applying) valid law as defined above (natural law and positive law in conformity with natural law).

According to legal positivism, there is no such thing as natural law. Valid law is positive law: law enacted by the legislator. Jurists have the task of studying positive law, whereas judges enforce it (apply it).

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1. On natural law theories, see generally G. FASSO, LA LEGGE DELLA RAGIONE.
2. On legal positivism, see e.g., N. BOBBIO, IL POSITIVISMO GIURIDICO (2d ed. 1979).
4. See generally E. PATTARO, IL REALISMO GIURIDICO SCANDINAVO (2d ed. 1975).
law and it is up to jurists to study law as it is enacted by the legislator. Law enacted by the legislator is valid in both senses: it is (morally) binding and it is in force. It is up to the judges to enforce (apply) this law.

Legal realists do not accept the notion of morally binding law, for which they substitute that of psychologically binding law. They consider "valid law" and "law in force" to be equivalent and attribute to these terms a meaning oscillating between psychologically binding law and actually enforced (applied) law. From the viewpoint of legal realism, there is no such thing as natural law, and law enacted by the legislator, insofar as it is merely enacted, is neither "valid" nor "in force," in whatever sense these expressions are employed (neither in the realistic sense, the legal positivist sense, nor the natural law sense).

This paper considers the function, in legal realistic thought, of jurists and judges in relation to valid law, in the work of one exponent of this current. It shall discuss legal science and case law in relation to valid law in the thought of one of the foremost Scandinavian realists, Alf Ross (1899-1979), whose most important work, On Law and Justice, was at the centre of European debate in legal theory for about fifteen years an which today (with The Concept of Law by H.L.A. Hart) remains one of the main points of reference of European scholars of general jurisprudence.

II. ALF ROSS'S VIEW

According to Alf Ross, legal science consists of assertions that have to do with legal norms. If we call a statement of legal science "A" (assertion) and the norm to which the said statement refers "D" (directive), we can express the way in which legal science deals with a legal norm in the formula "A = D is valid law." Statements of legal science assert that a certain legal norm is valid.

According to the principles of modern empirical science Ross believes a proposition about reality has a meaning insofar as it implies that by following certain procedures, certain experiences are obtained. For example, the assertion "this is chalk" implies that if the object in question is put under a microscope, certain

structural features will appear; that if acid is poured onto it, certain chemical reactions will take place. This set of procedures is termed by Ross the "verification" of the statement under consideration. The set of results of the verification procedure represents the "real content" of the proposition. Ross argues that statements in legal science are assertions (of the type "D is valid law") and that therefore they ought to be considered in the same way as assertions in the empirical sciences, in terms of the verification principle.

In the opinion of Ross, a legal directive is valid providing it is felt to be binding by the judges and is for this reason put into practice. To a considerable extent, Ross construes legal validity in this way in order to be able to number legal science among the empirical sciences. A legal directive is valid if it is felt to be binding by the judges and therefore put into practice; the statements of legal science assert that a certain legal directive is valid; this assertion is then tested through the behavior of the courts, which either apply or fail to apply the legal directive the validity of which has been asserted.⁶

A. Some Consequences of the Verification Principle

The principle of verification invoked by Alf Ross for legal science has the effect of reducing every proposition to which it is applied to a prediction. Indeed, it conducts the meaning of any assertion about reality towards the moment of the verification procedure, which is always subsequent to the statement of the proposition to be verified. Ross says that the "real content" of a proposition is "the sum of its verifiable implications" in accordance with certain procedures.⁷ The principle of verification then refers the meaning of a statement describing a certain fact to the presentation of the proof of that fact. Even an assertion relating to a past event is in this way turned towards the future. For example, the statement "yesterday it rained" has to do with the future insofar as its verification will consist in consulting the meteorological office; to state that "yesterday it rained" is equivalent to saying "if we consult the meteorological office, they will tell us that yesterday it rained": it is a prediction.

⁷. Id. at 39. Cf. A. Ayer, Language, Truth and Logic at 5ff., 41,97ff (1952). This classic work by A.J. Ayer provides a useful point of comparison, both chronologically and in terms of its content, for a better understanding of Ross's epistemology.
Bearing in mind these peculiarities of the verification principle, one can outline the possible meanings of a statement in the following way:

a). A statement that cannot be at least in principle verified is devoid of logical meaning, as it is a prediction from which the logical possibility itself of proving to be true has been removed. Ross gives the following example: “the world is governed by an invisible demon.” This statement does not involve any verifiable implication and therefore, since it is metaphysical, is banned from the realm of science.8

b). A statement that is in principle verifiable but which, however, has still to be verified, has a logical meaning, but it is not possible to commit oneself as to its actual meaning other than indirectly, by means of the interpretation of other elements relating to it. Ross cites as an example: “the hidden side of the moon is covered with forests.” This assertion had a logical meaning even at the time when Ross was writing in 1953, when it was not possible to demonstrate its actual meaning, since no one had yet seen the other side of the moon. It was, however, proper to consider, indirectly, on the basis of other known data relating to the moon, that the aforesaid assertion had no actual meaning, i.e., that it was untrue.9

c). A verified statement reveals its actual meaning through the result of the verification procedure, which may be positive (the statement is true: it has an actual meaning) or negative (the statement is false: it has no actual meaning). It should be observed furthermore, that a verified statement either has or does not have an actual meaning, with reference to the moment of verification only. For example, the assertion “the sea is rough” may have an actual meaning (be true) if tested today, because it is windy, but lack an actual meaning (be false in the context of tomorrow’s verification), if the wind drops.10

9. Cf. Ross, supra note 5 at 41. Prior to Ross the same example was used by M. Schlick and C.I. Lewis to illustrate the same point. Cf. Ayer, supra note 7, at 36.
10. My example. Cf. Ross, supra note 5, at 42f. It may be noted that assertions relating to objects assumed to be constant may possess actual meaning beyond the moment of verification. For example, the assertion “the earth is flattened at the poles” might be assumed to be true (in possession of concrete meaning) indefinitely, once it has been verified. Logical-empiricist philosophers, however, argue that, even in this case, a correct scientific approach must consider that the assertion is true only at the moment of verification, assuming only that it is probable that it remains true subsequent to verification. Cf. Ayer, supra note 7, at 37f., 94f.
To recapitulate: an unverifiable statement is devoid of logical meaning; a verifiable statement has a logical meaning and it may be more or less likely that it has an actual meaning, depending on other known data that concern it indirectly; a verified statement either possesses or lacks actual meaning, but only at the moment of verification.

If this is the way the verification criterion operates, if, that is to say, it turns statements about reality into predictions as to the result of a test procedure, it is necessary to determine what kind of relation obtains between the statement that is tested in this way and its object: between the verifiability or truth of the statement (its logical or actual meaning, respectively determined by the verification principle and procedure) and the reality of the object that the statement describes. To this end let us reconsider the three cases mentioned above.

a'). If a statement is unverifiable, it lacks "logical meaning," it would therefore be unscientific to commit oneself either to the affirmation or to the negation of its object. For example, the assertion that "the world is governed by an invisible demon" is meaningless; but that does not enable us to state that "there is no invisible demon that governs the world," given that such an assertion would be equally unverifiable, that is, meaningless.

b'). If, on the other hand, a statement is verifiable but has not yet been verified, its degree of reliability as a scientific statement (or, in other words, its probability of being true) will depend on other secondary known data; yet this reliability or probability does not concern the object of the assertion itself, that is, the actual phenomenon to which it refers. For example, the statement "the hidden side of the moon is covered with forests," given the series of observations that have been carried out on the visible side of the moon, which is barren, is not very likely, but the object of the statement is neither unlikely nor likely: the hidden side of the moon either is or is not covered with forests, and, if by chance it is, it will not be any less thickly forested because the assertion relating to it is unlikely.

c'). Lastly, if a statement is tested, it will turn out to be true or false and its object, the actual fact referred to by the statement, will itself either be or not be. But this correspondence between the truth or falsehood of the statement and the existence or inexistence of the object of the statement only holds good at the time of the test. For example, if we verify that throughout today the sea is rough, then the assertion "the sea is rough" is
true and to the truth of the assertion corresponds the reality of its object; but, from the moment at which the verification procedure is suspended, the statement once again becomes more or less likely, while the object to which it refers resumes its independence from the statement: it either is or is not, irrespective of the degree of likelihood of the assertion relating to it.

To conclude, the judgment as to the scientific status of statement about reality, formulated on the basis of the verification principle, cannot also serve as a judgment regarding the existence of the object of the statement, that is of the actual phenomenon in question. In other words, even if it is reasonable to reduce the truth value of a statement to its proof (actual meaning) and to accept within the realm of science only those statements that are in principle open to verification (logical meaning), it would however represent an unjustified leap\(^\text{11}\) from the level of knowledge to that of being, to claim that the actual existence of an object always corresponds to the scientific status of the statement regarding it. For instance, it would be hard to argue that the real existence of an object might, like the knowledge that the real existence of an object might, like the knowledge that we have of it, be relative, endowed with a greater or lesser degree of certainty or likelihood, as may be the case of the truth value of the statement that refers to it.

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B. The Courts' Decisions as a Test for Jurists' Assertions on Valid Law

Let us now return to the relation that in the opinion of Ross exists between the validity of legal norms (legal reality) and the verifiability of the statements of legal science (legal knowledge) referring to legal validity.

The statements of legal science—as Ross argues—should be considered according to the yardstick of the verification principle. Since by means of these statements it is stated that a directive is valid law—meaning by validity of law a correspondence between legal norms and a social reality, such that “by applying the system

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of norms as a scheme of interpretation we are enabled to com-
prehend the actions of the courts as meaningful responses to given
conditions, and within certain limits to predict them”—the verifica-
tion procedure for the statements of legal science will consist of
the behavior of the courts that decide legal cases.12

If the courts apply a given rule in cases in which the statement
of legal science, assuming this to be valid, “predict” that it will
be put into practice, those statements will be shown to be true;
if the courts, in such cases, do not apply the said rule, the
statements of legal science will be shown to be false. “Statements
concerning valid law at the present time must be understood as
referring to hypothetical future decisions under certain
conditions.”13 From a scientific point of view, he says, “the real
content, for example, of the proposition that section sixty-two of the
Uniform Negotiable Instruments Act is valid Illinois law is the
assertion that under certain conditions the courts of this state will
act in accordance with the tenor of this section.”14

These assumptions made by Ross are perfectly comprehensible
in the light of what has been set forth in section B. Legal science
statements regarding the validity of a legal rule always concern
hypothetical future decisions, because the verification principle
turns every statement into a prediction, thus conducting its mean-
ing towards the moment of the verification procedure, which as
far as legal science is concerned, consists of the decisions of the
courts of law.

However, this does not mean that the validity of a legal rule
depends on the decisions of the courts; it only means that one cannot
take the assertion of the validity of a rule to be scientifically pro-
ven until such an assertion has been verified by the courts’ en-
forcement of the rule in question. The actual existence of an ob-
ject should not be confused with the scientific status of a state-
ment that describes it. The enforcement of a rule by the law courts
confirms and proves the statement that this rule is valid, but it
does not validate the rule, which is already valid and hence
enforced.

12. Ross, supra note 5, at 39.
13. Id. at 41.
14. Ross, supra note 5, at 40. Cf. H Hart’s criticism, Scandinavian Realism, in 17 CAMBRIDGE
L.J. 233, 237ff (1959) who, albeit correct in various observations, does not take into account
the influence of verification principle on Ross's thinking.
This interpretation of Ross's thinking finds support in a series of his assumptions, which would not stand up if one held the opinion that the decisions of the law courts, rather than being necessary to the verification of the statements (legal knowledge) asserting the validity of law, were a prerequisite of the validity itself of legal rules (legal reality). Thus Ross writes that "a rule may be considered valid law although it has as yet not been applied in the courts—for example, if it is a recently promulgated law. It is considered to be valid if . . . there is reason to assume that the rule will be applied in any future legal decision." 15

If he worked on the assumption that actual enforcement by the courts is a prerequisite of legal validity, Ross would not be able to consider a legal rule valid prior to its enforcement, even if he had reason to think that the rule would be enforced in the future, given that the validity of the rule would in any case run from the moment of its enforcement. Whereas, in fact, he can consider a rule as valid prior to that moment because he does not assume enforcement by the courts as a prerequisite of the validity of rules, but only as a means for the positive verification of the assertion that a rule is valid.

As things are, Ross's statement that a rule is to be considered valid if there is reason to believe that it will be enforced in each future decision, should be taken as meaning that the assertion as to the validity of the rule may be considered true if there is reason to think that the rule will be enforced in future decisions.

According to the model outlined in section B an assertion of this kind is in fact verifiable, although it has not yet been verified (decisions involving the rule to which it refers are lacking), and it is backed up by other elements relating to its content indirectly and lead one to suppose that a future verification will be positive.

Secondly, Ross writes that "a statutory provision which has been in force only a short time without having been applied has been valid law during the period in question." In this regard, he argues that the assertion of the validity of such a legal provision may be considered true—even though it has never been and can never be verified—"on the basis of a number of other well-verified assumptions regarding the mentality of the judges." 16

In this passage, Ross not only grants law validity prior to any

15. Ross, supra note 5, at 40f.
16. Id. at 41.
form of verification (prior to the actual behavior of the courts of law in conformity with the rule), but even goes so far as to recognize that there is legal validity independent of any possibility of verification, independent of the possibility that the law courts' behavior might comply with the rule, given that in the case in question, the legal rule, subsequent to a brief period in force, has been repealed. It is interesting to note that here Ross clearly considers the behavior of the law courts relevant to the verification of the statements of legal science, not to the validity of legal rules, and that he lays emphasis on the "mentality of the judges" regardless of the enactment of the judicial decisions in which such "mentality" is usually made manifest.

Thirdly and lastly, Ross goes so far as to recognize the validity of a legal rule not only prior to its enforcement, or regardless of the possibility of its enforcement, but even when it has been given a judicial decision that is at variance with the terms of the rule in question. To the objection that his theory would rule out the possibility of criticizing a court decision as wrong, Ross in fact replies that, according to his conception too, a judicial decision may be wrong: "A decision is wrong, that is, at variance with valid law, if—after everything is considered, including the decision itself and the criticism it might evoke—it appears most probable that in future the courts will not follow the decision."17

If he did not assume that validity precedes the enforcement of the rule, if he assumed that a rule becomes valid at the moment of its enforcement, Ross would not be able to assert that a rule-enforcing decision may be wrong, "that is, at variance with valid law." Faced with a series of contradictory decisions, issued as applications of the same rule, he would have to say that valid law has altered, that one rule made valid by a judicial decision has derogated another rule formerly made valid by a previous judicial decision. He would not be able to consider a judicial decision wrong if the decision did not depend on the validity of the law, but if instead it was itself a prerequisite for this validity.

If, on the contrary, the judges' decisions according to Ross do

17. Ross, supra note 5, at 50. Like other theses upheld by Ross, his solution of the problem of wrong judicial decisions may be understood better in the light of his probabilistic epistemology than in that of his theory of legal validity. A significant comparison of Ross's point illustrated above may be drawn with what Ayer, supra note 7, at 38ff., 94ff., has written regarding the problem of the negative verification of an assertion and the choice between repudiating the assertion and maintaining it despite the negative result.
not have the function of validating the norms, but that of verifying the statements of legal science which assert that validity, it may well be that the decision of a court of law is wrong: it will be wrong when "it appears most probable that in future the courts will not follow the decision." In fact, as it happens, a test procedure may turn out to have been mistaken; the statement that has been tested negatively may, then, in spite of the negative test, be considered true, in relation to a set of elements that indicate that the test has not functioned properly and that future tests will be positive.

Having clarified the position and importance of the verification principle in the thinking of Ross and having defined his concept of legal validity—as a psychological moment in relation to decisions reached by law courts—we are now in a position to understand Ross's attempt to place legal science among the empirical sciences, even in its extreme consequences: as, for example, the assertion that legal science has a probabilist character and that its assertions possess a relative cognitive value.

Ross argues that a statement of legal science "A", shown to be correct by a legal decision enforcing the rule which it asserts to be valid, remains nonetheless, an uncertain prediction regarding the future, even subsequent to verification: "The question of the truth of A is still in no way definitely settled. Let $A_t$ represent the assertion A put forward at the time $t$. A subsequent legal decision at the time $t$, certainly verifies $A_t$, but not $t$."

At the point which we have now reached, such uncertainty in legal science should not surprise us. Indeed, as observed in the foregoing pages, the verification of descriptive statements does serve to grant them a concrete meaning (if positive) or to rule out any concrete meaning (if negative), but only for as long as the verification procedure lasts. Once this moment is past, the assertion in question awaits new tests: although proved and shown to be true in the past, after the test, the statement once again awaits verification. "Notwithstanding all that has happened and that happens, the statement regarding law at the present time always has reference to the future."

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18. So I cannot agree with Hart, supra note 14, at 237, who attributes to Ross the assumption that "a valid law is a verifiable hypothesis about future judicial behaviour and its special motivating feeling." (Emphasis added).
19. Ross, supra note 5, at 42.
20. Id.
Ross states this because, according to his conception, the statements of legal science are descriptive (of the validity of legal rules) and therefore, just like any other descriptive statement, are tested according to the yardstick of the verification principle. They are reduced, as far as their "real content" is concerned, to a set of implications verifiable through the procedure that will on each occasion be adopted: at moment $t_1$ for the assertion made at moment $t$, at moment $t_2$ for the assertion made at moment $t_1$, and so on. Apart from these test moments, which fulfill their function of demonstrating the truth of propositions concerning validity solely as regards the past, the jurist who wishes to remain on strictly scientific ground cannot hazard other than judgments of probability in spite of the fact that the validity of law precedes and goes beyond single and episodic legal decisions.

The statements of legal science "can never claim absolute certainty, but can only be maintained with a greater or lesser degree of probability depending on the strength of the points on which the calculations about the future rest." "In fact the assertion that a rule is valid law is highly relative." It is relative because (according to Ross) it is scientific, and the whole of logical empiricist epistemology—born from the crisis affecting traditional sciences, formerly considered to be of an absolute value—claims this feature of relativity for sciences.

III. ANALYSIS

Issue may be taken with the theory of legal science developed by Ross from at least two standpoints: internally, as regards the consistency and balance of the theory itself, excepting its aims; and externally, as regards its usefulness, bearing in mind in particular what jurists actually do when they act as jurists.

From the first mentioned standpoint, issue will be taken with a conclusion that Ross reaches with regard to the validity of law (as he conceives it), that is, the conclusion that a legal rule may...

21. Ross, supra note 5, at 44f. In this regard, Kelsen, Eine 'Realistische' und die Reine Rechtslehre, 20 OSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT (1959-60), points out that it is only the effectiveness of norms that is probable, not their validity. In my opinion, it is more correct to say that, in Ross's view, it is the truth of assertions that is probable (whether they have to do with validity or effectiveness), since they are submitted to the principle of verification. As I have noticed above, this part of Ross's thought can only be correctly grasped in the light of his epistemology, and not in reference to his theory of legal validity (designed furthermore to reduce the so-called legal science to the realm of empirical sciences).
be, not only valid or invalid, but even relatively valid, more or less valid, just as an assertion of legal science may be relative, more or less probable. Ross in fact not only writes that “the assertion that a rule is valid law is highly relative,” but also that it can also be said that a rule can be valid law to a greater or lesser degree varying with the degree of probability with which it can be predicted that the rule will be applied. This degree of probability depends on the material of experience on which the prediction is built (sources of law). The probability is high, and the rule possesses a correspondingly high degree of validity, if the prediction is based on a well-established doctrine sustained by a continuous series of indisputed precedents; or if it is based on a statutory provision whose interpretation has been established in long and consistent practice. On the other hand, the probability is low, and the rule has a correspondingly low degree of validity, if the prediction is based on a single and dubious precedent or even on ‘principles’ or ‘reason.’ Between these two extremes lies a sliding scale of intermediate variations.22

As already observed, it is incorrect to transpose the limits that the verification principle imposes on the scientific reliability of descriptive statements, to the object to which the said statement refer. According to the principle of verification only verifiable statements are accepted into the realm of science, and, apart from at the moment of verification itself, no objective truth is attributed to them, but only a degree of probability that may be inferred from elements that relate indirectly to them. It is therefore necessary to bear in mind that there is no necessary correspondence between the scientific realibility of an assertion, which may vary in accordance with a graduated scale, and the existence of the object referred to by the assertion. In other words, if every descriptive statement, as a result of the verification principle, becomes a hypothesis that is supported to a lesser or greater extent by data that relate to it, and is therefore more or less likely to be correct, its object, on the other hand, either is or is not, and if, by chance, it is, it will not exist to any lesser extent, just because the hypothesis relating to it appears to be rather unlikely.

Given the concept of legal validity (as psychological fact) assumed by Ross, a norm, providing it is valid, does not become any less valid just because legal science is unsure as to its validity; and

22. Ross, supra note 5, at 45.
a norm that is not valid obviously does not become valid on the
strength or the range of data, on the basis of which legal science
asserts its validity. A judgment as to the scientific reliability of
an assertion cannot simply be adopted as a judgment of the
existence of the object of the assertion, without making an un-
justified leap from the level of knowledge to that of being nor
without violating the principle of contradiction. If, therefore, valid
law is (as Ross believes) an empirical fact, namely a psychological
attitude on the part of judges, then it either is or is not: it cannot
exist relatively and not exist relatively. Whereas, on the other
hand, an assertion of legal science that relates to valid law can
indeed be relatively reliable or unreliable.

Ross, however, effects a transposition from the level of legal
science to that of valid law, at any rate in the passage quoted,
and this is a mistaken operation. As regards this point Mario Jori
has observed that one may speak of relative validity, in the sense
that a rule may be felt to be more or less binding, or that it may
be felt to be binding by a greater or lesser number of public
servants, or binding with a greater or lesser degree of constancy.
It should be pointed out that, when (as in the case of Ross) it is
assumed that “to feel a rule as binding” constitutes its validity,
either the actual situation at a given moment and place is at issue,
or the issue is whether this actual situation satisfies the concept
of validity. In the first case, it is tautological that the actual situa-
tion is as it is (and neither more nor less than what it is). In the
second case, there may be uncertainty whether or not the actual
situation satisfies the concept of validity, but this uncertainty, once
again, cannot be a feature of the actual situation, but rather a
feature either of the definition of the concept of validity (too vague)
or of the knowledge possessed by the person investigating the ac-
tual situation (insufficient). Once the concept has been clarified and
the necessary knowledge acquired, a given prescription will either
be valid or invalid, and not valid to a greater or lesser extent.

Ross’s transposition from gnoseology to ontology, from legal
science to valid law, may however be explained, even if not justified,
in terms of his conceptual framework: it arises in the attempt that

23. This principle was rightly considered by Axel Hägerström, whose teaching on realism
strongly influenced Alf Ross, to be the reality principle. Cf. E. Pattaro, Il Realismo
Giuridico Scandinavo, supra note 4, at 40ff.
he makes to harmonize and reconcile the positions of psychological realism with those of behavioristic realism.

Ross observes that, according to psychological realism, "a norm is valid if it is accepted by popular legal consciousness. The fact that such a rule is also upheld by the courts is in this view derivative and secondary, a normal consequence of the popular legal consciousness which is determinant also for the reactions of the judges." But this approach—in the opinion of Ross—would reduce law to a matter of individual psychology, to the legal conception prevalent, whereas it is necessary that, within certain limits, law be defined as "an externally given, inter-subjective phenomenon, and not merely as a subjective opinion, which can be measured by means of a Gallup poll." On the other hand, behavioristic realism considers a norm valid "if there are sufficient grounds to assume that it will be accepted by the courts as a basis for their decisions. The fact that such norms are consistent with the prevailing legal consciousness is, according to this view, derivative and secondary, a normal but not essential presupposition for the acceptance by the courts." This last-mentioned approach—in Ross's view—would reduce law to a mere "familiar, habitual order," whereas "it is impossible to predict the behaviour of the judge by a purely external observation of customs."

According to psychological theory, law is enforced because it is valid; in the view of behavioristic theory, law is valid because it is enforced. Ross, on the other hand, argues that a "tenable" interpretation of the validity of law is only possible if a synthesis of the two viewpoints is made.

His own interpretation, as maintained by Ross, is behavioristic, insofar as "it is directed toward finding consistency and predictability in the externally observed verbal behaviour of the judge"; and it is psychological, insofar as it rests on the hypothesis that "in his spiritual life the judge is governed and motivated by a normative ideology of a known content," to which the consistency and predictability of the decisions is related.

Ross takes the first step towards the synthesis of the psychological and behavioristic viewpoints by reducing the
addressees of legal rules to the judges. In this way, he avoids the rift that might otherwise exist between prevalent opinion in popular legal consciousness and the actual work of judges: legal consciousness is that of the judges, it is the normative ideology that they feel to be binding.

However, at the moment at which he makes this correspondence between the behavioristic aspect and the psychological aspect of law, limiting in number and identifying precisely the people that are its bearers, Ross approaches psychological theory, insofar as it is the psychological aspect that acts as the essential element constituting the valid law. This consists of the existence in the minds of the judges of a normative ideology, which guides them in their actions, preceding and causing their decisions.

At this point, if the material aspect is only a consequence of the psychological aspect, if judges' decisions derive from their inner conviction that they must observe certain rules, there is a risk that the synthesis between psychologism and behaviorism will not be accomplished, since the behavior (the decision) of the judges assumes a secondary importance in comparison with their mental attitude. To speak in terms of synthesis, the function of the behavior of the courts first needs to be reassessed.

In Ross's theory, the reassessment of judges' decisions is effected by means of the conception of legal science as a set of empirically verifiable statements the truth of which needs to be attested by the decisions of the judges. Law courts' behavior does not determine the validity of law, but it is decisive in the long run to our ability to know whether or not the law is valid, to prove that it is valid, or rather, to prove that the assertion that it is valid is true. In this way, the behaviorist element, the actual decision taken by the judge, is flanked by the psychological element (the normative ideology in force in the judge's mind) and both elements contribute to the formulation of a "tenable" solution to the problem of validity: the psychological element provides the basis for validity, whereas the behaviorist element makes it possible to form a scientific judgment about it. Synthesis is thereby achieved.

But perhaps it is not achieved!

The psychological element and the behavioristic element, even if attributed equal importance, belong to two different fields, that

of legal validity and respectively that of legal science (which investigates that validity). Only the unification of these two fields appears to guarantee the synthesis between behavioristic and psychological viewpoints. The unification between the two fields and the inclusion of the behaviorist element in legal validity are effected by Ross by means of the conversion of the probabilist character of legal science into the relativity of legal norms. It is in this way that the psychic attitude and the practical behavior of the courts appear to blend in the achievement of legal validity.

For the sake of this (apparent) result, Ross sacrifices the internal consistency of his theory. Regardless of his intentions, however, he remains an exponent of the psychological current of realism, because the step from the gnoseological field to that of reality cannot be accepted. Ross is a psychological realist in his conception of valid law; he is a verificationist logical empiricist in his conception of legal science.

Roughly speaking this author agrees with both psychological legal realism and logical empiricism as far as the conception of valid law and epistemology respectively are concerned. It is a fact, however, that jurists do not operate in the way illustrated by Ross's theory of legal science and that their job and method cannot be replaced by an empirical legal science. For this reason issue must be taken with Ross's theory of legal science from an external standpoint, as regards its usefulness.

Assuming that the problems regarding the competence and the connection between the empirical legal science proposed by Ross and the other empirical social sciences are satisfactorily resolved (including the issue, raised by Mario Jori, for example, of a refinement of Ross's model, to take greater account of questions to do with scientific laws and theories, their confirmation, test, proof, etc.), a psychological and sociological science, such as that advanced by Ross, would probably be the best-suited to provide a scientific account of the valid law of any particular country.

Such a legal science, however, should not presume to replace the traditional one, based on interpretation and legal reasoning, and which plays a fundamental role, let us say, as source of law,

in the complex machinery of every legal system. Just as an empirical, psychological and sociological science of religion would be incorrect in claiming to substitute theology, and ought, instead, to provide an explanation of theology as an operative part of that social phenomenon which is named religion, similarly the empirical legal science proposed by Ross, and appropriately refined, ought to include the traditional, hermeneutic legal science as practiced by jurists (so-called legal dogmatics) among its own subjects of research, considering it just as it is, in the way it actually operates within legal systems.

THE WAY OF A JUDGE WITH A PRINCIPLE—A TRIBUTE TO PROFESSOR CHAIM PERELMAN

*Julius Stone*

It is a high privilege to join in the worldwide tributes recently paid to the legal and philosophical contributions of Chaim Perelman. From centres as far apart as the Australian National University, and the University of Sydney, in Australia, and from the Hebrew University of Jerusalem,** as well as the United States, the melancholy news of his untimely death in January 1984 brought shocked disbelief. The “universal audience” of “reasonable beings,” which Perelman had somehow conjured into twentieth century reality by a tireless intellect and inexhaustible human concern, felt a grief exceeded only by its gratitude for the philosophical legacy which Perelman had fashioned and bequeathed to all its members.

Readers of my own Legal System and Lawyers’ Reasonings (1964) and my Human Law and Human Justice (1965)*** will already know the great debts I there acknowledged to Chaim Perelman during more than three decades of friendship and intellectual exchange which followed his publication of De La Justice (1945). Chaim Perelman opened up critical crossroads in twentieth century legal and philosophical thought when he clarified the distinctions between “formal” justice, on the one hand, and “concrete” or “material” justice, on the other; when he confronted with courageous integrity the problematics of “concrete” justice; and when he explored with such imaginative persistence the possible roles of rhetorical or dialectic reasoning in this critical arena of justice in human societies.


* Perelman, as his thinking developed, saw judicial decision-making as a practical model of the value of rhetorical reasoning, where conclusions are characterized by persuasive probability rather than logical certainty. That insight certainly matches the theme which I have here elaborated in terms of leeways of choice which confront appellate judges where the law is disputed.

** See G. Haarscher & E. Kamenka, Professor Baron Chaim Perelman, 8 BULLETIN of the AUSTRALIAN SOCIETY OF LEGAL PHILOSOPHY, No. 30, June 1984, 48-51; Prott, The Thought of Chaim Perelman—An Appreciation, Id. at 52-58; and Ginossar, Chaim Perelman—In Memoriam and Gavison, A Tribute to Chaim Perelman, 19 ISRAEL L. REV. 1, 5 (1984) respectively.

*** See respectively, Ch. 8, esp. 325-37 and Ch. 11, esp. 326-30.
The loss of such a mind was felt the more deeply by his colleagues in Australia because he had so recently and graciously made a long visit to the University of Sydney in 1980. During that visit students and faculty alike in the major Universities were able to experience and converse with a rare intellect still at its zenith of power and understanding. For me personally the visit was part of a continuum of exchange which was already in its fourth decade. Indeed, as this present paper will manifest, both the theory and practice of law continue to benefit from that exchange.†

Not the least important source of choices faced by appellate courts dealing with disputed questions of law is the legal standard, or the “fact-value complex”, which is characteristically found embodied in “a principle.” I assume here, as Roscoe Pound long ago made clear, and the rather belated debates between Ronald Dworkin and others have not yet totally confused,¹ that “principles” must in important respects be distinguished from “rules.” Failure to respect this distinction has contributed recently to over-wide juristic attacks on “result-orientation” (in the United States),² and on “pragmatism” (in England).³ There is also much evidence, as this paper proposes to show, that related confusions by appellate courts dealing with disputed questions of law is the legal standard, or the “fact-value complex”, which is characteristically found embodied in “a principle.” I assume here, as Roscoe Pound long ago made clear, and the rather belated debates between Ronald Dworkin and others have not yet totally confused,¹ that “principles” must in important respects be distinguished from “rules.” Failure to respect this distinction has contributed recently to over-wide juristic attacks on “result-orientation” (in the United States),² and on “pragmatism” (in England).³ There is also much evidence, as this paper proposes to show, that related confusions by appellate courts dealing with disputed questions of law is the legal standard, or the “fact-value complex”, which is characteristically found embodied in “a principle.” I assume here, as Roscoe Pound long ago made clear, and the rather belated debates between Ronald Dworkin and others have not yet totally confused,¹ that “principles” must in important respects be distinguished from “rules.” Failure to respect this distinction has contributed recently to over-wide juristic attacks on “result-orientation” (in the United States),² and on “pragmatism” (in England).³ There is also much evidence, as this paper proposes to show, that related confusions by appellate courts dealing with disputed questions of law is the legal standard, or the “fact-value complex”, which is characteristically found embodied in “a principle.” I assume here, as Roscoe Pound long ago made clear, and the rather belated debates between Ronald Dworkin and others have not yet totally confused,¹ that “principles” must in important respects be distinguished from “rules.” Failure to respect this distinction has contributed recently to over-wide juristic attacks on “result-orientation” (in the United States),² and on “pragmatism” (in England).³ There is also much evidence, as this paper proposes to show, that related confusions by appellate

† This paper includes parts of the concluding Chapter 13 of J. Stone, Precedent and Law: Dynamics of Common Law Growth, (1985). The Editors of the present Memorial Issue are deeply grateful to Butterworths, Sydney, Australia, for permission to reprint these parts.


judges themselves place unnecessary intellectual obstacles in the path of the development of precedent law.

I

I choose for this purpose a modern judicial doctrine, and its surrounding perplexities, shared to a considerable extent by American and British courts. This is the doctrine that the range of duty of care owed by the defendant, and necessary to base recovery from him in negligence, is coextensive with the range of damage he should, as a reasonable man, have foreseen at the moment of the relevant act or omission. I propose here to re-examine the relevant positions of the majority judges in the Dorset Yacht Case, in purporting to apply the above "proximity" principle framed by Lord Atkin in Donoghue v. Stevenson. I propose to show that they fell prey to a confusion closely related to that of Patrick Atiyah, which I exposed in my recent article, "From Principles to Principles." This confusion is between the operation of "a rule" which is a precept in which the details of predicated facts and their legal consequences are set out, and "a principle" in which the predication is stated in merely general terms, usually as a "fact-value complex" (for instance, "reasonable foreseeability" in the present context) involving, it is true, some predication of facts, but also requiring moral evaluation of these facts by the decision-maker.

On the face of it, the precept imposing a duty within the range of "reasonable foreseeability" is "a principle" par excellence. Its very heart is "reasonable foreseeability"—clearly a "fact-value complex" if ever there was one. By hypothesis, a court correctly applying such a precept is necessarily involved not only in a finding of facts, but in a preliminary evaluation of the facts, involving inter-alia the contexts and the socio-ethical merits of the parties' positions, before it can give legal judgment. It is consistent with this that Lord Russell's decision in McLoughlin's Case took a course which went clearly beyond that of the majority in the Dorset Yacht Case. There Lord Reid had stated that "the time has

7. Stone, supra note 3.
come” when Lord Atkin’s principle “ought to apply unless there is some justification for its exclusion.” What Lord Reid seemed to imply was that after Lord Atkin’s principle was found to cover the case, a question of policy would then arise for the court as to whether the case ought indeed to be governed by it. But for Lord Russell the fact that all members of the Court of Appeal found that what happened to Mrs. McLoughlin was reasonably foreseeable by the defendant, and that he agreed with them, in itself settled the issue as to duty of care. No further evaluation, be it in terms of “justification” or “policy” or for that matter “justice,” arose; for, once the negligently caused damage is considered to have been reasonably foreseeable, “I do not see the justification for not finding the defendants liable” in damages therefor.  

Lord Russell followed Lord Reid in treating the proximity (or “reasonable foreseeability”) test of duty as established and as no longer merely competing with the “duty situation test.”  

Lord Russell’s position also respects the important distinction, central to this paper, between “principles” and “rules,” as elaborated by Roscoe Pound, Ronald Dworkin and the present writer.  

No less unequivocal from the present standpoint was the position of Lord Bridge. He, too, obeyed Lord Reid’s call in *Dorset Yacht* for acceptance of “the current criterion of a defendant’s duty of care, which, however expressed in earlier judgments, we should now describe as that of reasonable foreseeability.” He dismissed attempts to “draw the line” within this criterion of duty:  

To attempt to draw a line at the furthest point which any of the decided cases happen to have reached, and to say that it is for the legislature, not the courts, to extend the limits of liability any further, would be, to my mind, an unwarranted abdication of the court’s function of developing and adapting principles of the common law to changing conditions in a particular corner of the common law which exemplifies, par excellence, the important and indeed necessary part which that function has to play.  

It is respectfully suggested that such an approach manifests a

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13. *Id.* at 441.
rather clear understanding of the appellate judge’s role in applying principles, that is (as already seen) precepts predicated on fact-value complexes. It was consistent with this that Lord Bridge concluded that the reasonable foreseeability criterion “must necessarily be adjudicated only upon a case-by-case basis. We cannot now predetermine defendant’s obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future.”

Thus Lord Bridge, if asked where liability is to stop in the vexed area of nervous shock, would answer that it should stop “where in the particular case the good sense of the judge, enlightened by progressive awareness of mental illness, decides.” This is an apt, even if incomplete, way to describe the judicial task of evaluation called for if applying a precept predicated on a fact-value complex such as “reasonable foreseeability” (that is, applying “a principle” as distinct from “a rule”).

This basic position, indeed, had seemed to be taken at one point by the majority in the *Dorset Yacht Case*, but then unnecessarily obfuscated. Lord Reid there observed, at the outset of his speech, that “there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority, but whether recognized principles apply to it.” The obfuscation was related, interestingly enough, to a confusion like that I have elsewhere exposed in Patrick Atiyah’s inaugural lecture at Oxford. This is between principles involving predicated fact-value complexes like “reasonable foreseeability,” and rules which involve predication merely of detailed fact-elements. When Lord Reid went on to say that Lord Atkin’s “statement of principle,” since it was not “a statutory definition,” would “require qualification in new circumstances,” he ignored his own critical insight. This is that principles tend, by their above-described nature, to have a range of built-in flexibility and (by this very feature) to be applicable to new circumstances. To say, as he did, that the principle requires

14. Id. at 443.
16. For a longer treatment of this point see J. Stone, PRECEDENT AND LAW: DYNAMICS OF COMMON LAW GROWTH, (1985), ch. 4 § IV and ch. 13 passim.
18. Stone, supra note 3, at 224 passim.
qualification confuses precepts that are "principles" with those that are simply rules. The error became patent and gross when Lord Reid went on to say that the principle "ought to apply unless there is some justification or valid explanation for its exclusion."\(^{19}\)

The error here, shared with Professor Atiyah, is finally the use of the term "principle" to mean "rule," that is, as if the term referred to a precept detailed enough to be applied in each particular case without resort to normative evaluations such as "justice" or "reasonableness."\(^{20}\) This error ignores the obvious truth that when a criterion like "reasonable foreseeability" is found in a precept, the precept requires evaluative activity by the court, and that such a precept has the qualities of "a principle" and not a rule. Such evaluative activities in applying a principle are what the principle prescribes, (whether we describe the norm for these evaluative activities in terms of "justice," "policy," "fairness," or even "reasonableness."\(^{21}\)) It is thus erroneous to see such activities as only operating \textit{after} the legal principle had been applied, to "temper" as it were the harshness of a legal precept which is a principle confusedly mistaken for one which is a \textit{rule}.

I say "confusedly," since the effect of the error is that the judges concerned may remain unaware that the finding of "reasonable foreseeability" (or the contrary) entails value- (or "policy-" or "justice-") judgments. They have then not only joined in Professor Atiyah's error but have also slipped into his trap. For he can then plausibly accuse them "of involving some residuary system of discretionary justice . . . in particular cases to temper the harshness of the law. . . ."\(^{21}\) They will have lost sight of their true defence. This is that the invocation of which they are accused is really demanded of them by and within the law itself, because of the fact-value complex which is at the heart of the principle they are required to apply.

All of the majority judges in the \textit{Dorset Yacht Case} hovered on this matter close to this same margin of error. While they accepted Lord Atkin's principle as "applicable," they held its applicability to be not decisive, but subject to a separate and later policy determination as to whether a duty should arise. At times the language

\(^{19}\) 1970 A.C. 1005, per Lord Russell, at 1026-27.
\(^{20}\) See Stone, \textit{supra} note 3, for a fuller treatment of this point.
\(^{21}\) \textit{Id.}
verges on correct analysis; but in the end the error remains. For example, Lord Morris observed that it has "been suggested that, in situations where reasonable foresight can be in operation, the decision of a court as to whether a duty exists is in reality a policy decision." Unfortunately, he had already, only a few sentences before, asserted that where the instant facts had not previously been adjudicated, the judges would have to decide whether or not to use Lord Atkin's principle as a decisive criterion of duty of care. Indeed, at still another point, Lord Morris explicitly asserted that where A at the relevant time could reasonably foresee damage to B resulting from his act or omission, there may sometimes be and sometimes not be a legal duty of A to B. In this seemingly endless zigzag, he then observed one page later, by way of justifying his rejection of the competing "duty situation" criterion for duty of care: "precedents do not fix the limits of what may be called duty situations; they illustrate them."23

That last stated truth ought surely to have led him to recognize that the policy elements relevant to finding a duty (or no duty) ought correctly to be taken into account in applying the legal criterion of what A ought reasonably to have foreseen. And in his concluding statement Lord Morris did move directly from the Atkin criterion of "reasonable foreseeability" of damage to the plaintiff, to the holding within that framework that it was "fair and reasonable" that a duty of care should there exist, and that it "would be contrary to the fitness of things" were it not so. He admitted that these two last phrases had some reference to "policy." Yet he thought the test was better stated in terms of "whether it is fair and reasonable" that a duty "should arise."

Despite the coyness of this literary preference, Lord Morris still acknowledged the policy-component as inseparable from the test of what is "reasonably foreseeable." For he enjoined courts not to "shrink from being the arbiter," for they are "the spokesman of the fair and reasonable man."24 If this policy-fixing role is, as he thus states, to be filled by judges, it is difficult to see why it should not be performed as part of the very application of the

22. 1970 A.C. 1005, 1034, 1037H.
23. 1970 A.C. 1005, 1034H.
criterion of reasonable foreseeability. (Certainly this would have been the view of Lord Wright, as seen in the very passage from Bourhill v. Young which Lord Morris thought fit to quote by way of peroration.))

II

This issue maintains central importance in the American as well as the British common law. The still controversial decision of the Supreme Court of California in Dillon v. Legg held that recovery for nervous shock was not limited to shock arising from fear of danger to oneself. The court allowed recovery by a plaintiff mother, who was not within the zone of danger, and whose shock was caused by seeing her infant daughter killed by a car negligently driven by the defendant. (As this paper is being written, the same court is deliberating its decision in the case of Ochoa v. Superior Court of Santa Clara County, argument on which was heard in February 1984 though at this writing in January 1985, opinions have still to be handed down). A number of central issues raised in Dillon v. Legg resembled those on which the House of Lords divided in McLoughlin v. O'Brian. The majority judgment in Dillon v. Legg, like that of Lord Bridge in McLoughlin v. O'Brian, positioned itself finally along lines conforming to the present analysis.

In stating that majority position Justice Tobriner used rather interchangeably the notions of "foreseeability" and "reasonable foreseeability" of risk to refer to the standard (the fact-value complex, as we have here described it) serving as a criterion of the range of duty of care. His exposition, however, placed beyond doubt that it is the reasonableness of the foreseeability that is the anchorage of the criterion. It also placed beyond doubt that it is by reference to this fact-value complex that the variable facts of

27. 143 Cal. App. 3d 635, 191 Cal. Rptr. 907 (Cal. Ct. App. 1983). This was an action against the county and (among others) its medical officer, for "emotional distress" by a mother whose juvenile child detained by the defendants died of double pneumonia at a county juvenile hall. Plaintiff alleged negligent disregard by the medical officer of grave symptoms, which he diagnosed merely as a "bug" or "flu," 24 hours before death; and also his and the hall's disregard for her pleas for urgent medical attention. A demurrer was sustained by Justice Smith on the ground that she was merely in a position of "bystander" (and not a "direct victim") and the negligent conduct did not amount to an "accident" impacting on her sensory perceptions. The outcome of the appeal to the Supreme Court of California is still pending as of July, 1984.
the future are to be "adjudicated upon a case by case basis," any pertinent policy elements being "factors" to be given weight within this consideration. Such "factors" included, for example: where the plaintiff was located in relation to the negligent conduct; whether the shock received from the accident was through the plaintiff's own sensory perceptions, rather than by communication from others; whether the fear producing the shock was for his own safety or that of a near relative or of a stranger. They would also include, in the present view, whether the plaintiff's injury was sustained in the course of his voluntary involvement (for instance as "a Good Samaritan") in the zone of risk from which the damage emerged, the gravity of the emergency which triggered the involvement, and the degree of risk entailed in it. All such factors would present themselves in particular cases as matters of degree—degree of physical proximity, degree of immediacy of sensory perception, degree of concern and affection for the victim threatened by the defendant's conduct. They would include in the Good Samaritan case the degree of gravity of the emergency inspiring the Good Samaritan impulse and the risks apparently involved in yielding to it. In the light of such factors, the late Justice Tobriner seemed to be saying, "the court will examine whether the accident was reasonably foreseeable." And in case

29. 68 Cal. 2d at 728, 441 P.2d at 920-21, 69 Cal. Rptr. at 81.
30. Id. at 739-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
31. I have mentioned factors relevant to "reasonable foreseeability" in Good Samaritan situations in this enumeration, despite the general common law assumption that this basis of finding duty does not bind the Good Samaritan. No doubt this exception does present a historically based limitation on duty, independent of the test of reasonable foreseeability, for the Good Samaritan rule preceded the settlement of that test. Yet that historically given (and to some degree arbitrary) limit on the Good Samaritan's duty, does not exclude that reasonable foreseeability may still be apt in most situations for setting limits, via the duty notion, to a feared flood of recoveries. Nor should it exclude legislative review of the Good Samaritan rule itself, for instance, as to the duty and liability of a medical Good Samaritan in particular conditions of emergency.
32. 68 Cal. 2d at 728, 441 P.2d at 921, 69 Cal. Rptr. at 81. There is a useful bibliography of the United States literature in Diamond, Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries, 35 Hastings L.J. 477 (1984) n.3. Diamond thinks that only one of the three guidelines or factors listed in Dillon, namely the close relation of the "bystander" plaintiff to the victim, is "consistent with the foreseeability analysis." His supporting argument, however, is not convincing. Thus, as to the geographical "nearness" factor, he thinks this not "essential" to foreseeability. He also thinks that the factor of "direct emotional impact" from an observed "accident" is not a prerequisite" to foreseeability. Consistency with the foreseeability analysis, however, requires only that the factor in question be relevant to "reasonable foreseeability," not
his italicisation of the adverb “reasonably” might not be noticed, the learned judge added that “such reasonable foreseeability” did not turn on whether the particular party “as an individual would have in actuality foreseen the exact accident and loss.” Rather “it contemplates that courts, on a case to case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen.” (The normative import of the word “should” is unambiguous). In the light of these factors, the majority held that the plaintiff mother in Dillon v. Legg had established a prima facie case, and refused a motion to dismiss.

It is submitted that Lord Bridge was correct when, in McLoughlin v. O’Brian, he treated the majority ruling in Dillon v. Legg as supporting his own rejection of the use of supposedly “arbitrary” factors (such as a danger of opening floodgates of litigation, or that to allow recovery may prolong psychiatric illness) to defeat a plaintiff after his loss has been found to have been “reasonably foreseeable” by the defendant. Lord Bridge stated this, significantly enough, in terms equally applicable to the criterion for duty to take care and to that for remoteness of damage. Moreover, he found to be “arbitrary” any attempt to use any particular factor among those enumerated by Justice Tobriner as itself setting a policy limiting liability, additional to the criterion of reasonable foreseeability. He accepted that such factors as those enumerated, and the degree

that it be either “essential” or “prerequisite.” Relevance of a particular factor does not, by the same token, make it decisive in a particular case.

34. Id. at 441-42.
35. A number of cases between Dillon and Ochoa treated as mechanically decisive each of the three factors mentioned by Justice Tobriner, namely, (1) plaintiff's geographic proximity; (2) exposure to a sudden occurrence (“accident”) causing the damage; and (3) a victim of the occurrence closely related to plaintiff. Thus, in Jansen v. Children's Hospital, 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883 (1973), the plaintiff mother watching her five-year old child dying painfully as a result of the defendant hospital’s medical malpractice could not recover under Dillon. There was no sudden occurrence amounting to an “accident”.

On the other hand, in Molien v. Kaiser Foundation, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980), a plaintiff husband was allowed to recover for mental suffering and loss of consortium arising from negligent (and erroneous) diagnosis of his wife’s condition as syphilitic, leading to the defendant’s request that the plaintiff be tested as a possible source of her infection. The court in Molien held that the plaintiff was here “a direct victim” of the wrong (as distinct from the mere “bystander” case to which they limited Dillon), so that the above “accident” factor was not essential.

Some later courts have treated Molien as thus taking “direct victims” out of the literalistic view of Dillon. But others have taken Molien as reasserting reasonable foreseeability as the decisive test under Dillon. Thus, in Kelley v. Kokna, 56 Hawaii 204, 532 P.2d 673 (1975), a plaintiff grandfather living in California had a heart attack on hearing of the defendant’s negligent killing of his daughter and granddaughter in Hawaii. The defendant in Hawaii,
to which they were present, properly bore on the question of reasonable foreseeability. Their operation was by way of relevance to reasonable foreseeability, not as arbitrary additional limits once reasonable foreseeability had been found.

Lord Bridge, indeed, expressed himself in complete agreement with Justice Tobriner's view that the defendant's duty must depend on reasonable foreseeability. He also agreed (in that judge's words) that the question whether there is a duty must necessarily be adjudicated only upon a case-by-case basis. "We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future." Lord Bridge could have reinforced this view still further by pointing out that, in Justice Tobriner's own formulation, variations in the presence or degree of particular factors would affect the existence of a duty of care only insofar as they affected the "reasonable foreseeability" of injury to the plaintiff. The solidarity of Lord Bridge with the Tobriner thesis that policy elements are to be considered as part of the determination of reasonable foreseeability, also illuminates other aspects of the opinions in McLoughlin v. O'Brian. It explains, for instance, why Lord Bridge found it necessary to challenge Lord Edmund-Davies' strange summary of his own position as being that "public policy has no relevance to liability at law." 38

III

One central issue in the Bridge-Edmund-Davies altercation was as to whether policy issues should be judicially determined as a part of the evaluative judgment of what is "reasonably foreseeable," or by way of exceptional defeasance of a finding of "reasonable foreseeability," against the defendant. Most of the other judges in McLoughlin v. O'Brian were, however, solidly with Lord Bridge on another no less important question.

the court said, could not reasonably have foreseen the consequences to the plaintiff in California. To treat such cases (as some writers do) as applying a mechanical geographical test, is misleading. See Ochoa, 143 Cal. App. 3d 64, 703 P.2d 1 at 191 Cal. Rptr. at 916, for a list of cases following Dillon. See also Nolan & Ursin, Negligent Infliction of Emotional Distress, 33 Hastings L.J. 482 (1982); and Diamond, supra note 32, at 483, nn.38-39 and accompanying text.

36. 68 Cal. 2d 728 at 739-41, 441 P.2d 912 at 920, 69 Cal. Rptr. 72 at 81.

37. 1983 A.C. at 443 (Lord Bridge quoting 69 Cal. Rptr. at 81, Tobriner, J.).


Lord Scarman agreed with Lord Bridge in “his approach to the law and the conclusion he reaches.” He recognized with approval “judicial development and formation of principle” from “a baseline of existing principle,” and seeking a solution “consistent with or analogous to a principle or principles already recognized.” And he thought that “the real risk to the common law is not its movement to cover new situations and new knowledge, but lest it should stand still, halted by a conservative judicial approach.” In a ponderous counterpoise to this ostensibly flexible stream of thought, Lord Scarman then announced that if the effect of treating such factors of space, time, physical injuries, and the plaintiff’s relations to the immediate victim, was to make damages for “nervous shock” widely available, he foresaw “social and financial problems.” The “policy issue” raised by these “problems” he concluded, rather inconsequentially, is “not justiciable.”

I say “rather inconsequentially,” not only in the light of his preceding reasoning quoted above, but because all this is preceded on the page before by the bland assertion that “the function of the court is to decide the case before it, even though the decision may require the extension or adoption of a principle, or in some cases the creation of new law to meet the justice of the case.” The effect of his assertion cited and quoted above from page 431 is to frustrate the eloquently described judicial function which I also quoted from page 430. To this extraordinary conversion of the very “function” of a court into an issue that is “not justiciable,” Lord Bridge, with whose substantive holding Lord Scarman associated himself, did not expressly respond. And Lord Edmund-Davies responded only by declaring that the assertion of non-justiciability of the policy issue was “as novel as it was startling.” And the reason why it was startling was that “it runs counter to well-established and wholly acceptable law.”

It may, indeed, be that Lord Scarman’s position on this matter was so strangely inconsequential as to merit the scorn of neglect. Yet it surely does deserve some attention as an example of the ill effects of inadvertence to the leeways within which appellate judges must perforce exercise choices in cases of disputed law. In Lord Scarman’s own terms, he seems to believe that it is part

40. Id. at 431.
41. Id. at 427.
42. Id. at 430.
of the function of courts to "formulate" "principles," to "extend" "principles" and even create "new law" in order "to meet the justice of the case." In these processes, as he himself admits, "policy considerations will have to be weighed." The limits he is attempting to impose on "justiciability" arise from his assumption that once a principle is formulated by the judges, judges are incompetent to limit its operation. So that "if principle inexorably requires" a decision entailing a "policy risk," the court must "adjudicate according to principle, leaving policy curtailment to the parliament." Since, by his own statement, it is part of the functions of the courts to make "new law" to meet "the justice of the case," what he appears to wish to delegitimate may seem to be merely the repeal or perhaps the amendment or curtailment of the ambit of a judicially created "law." Yet it is difficult to see how what Lord Scarman declares to be a permissible making of "new law" can usually proceed except on the basis of repealing or amending or curtailing some existing "law" or "laws."

We owe it to Lord Scarman's common sense, as well as our own, to seek a less incoherent interpretation. This we may perhaps find by assuming that Lord Scarman is here identifying Lord Atkin's principle focused on "reasonable foreseeability," with a "rule" of law in the strict sense of a precept predicated on a detailed set of facts. By this identification he would ex hypothesi be ignoring the "fact-value" complex central to what is predicated in a "principle." If, indeed, Lord Scarman were making this false identification, he would be grossly misunderstanding the basic position of Lord Bridge, with which he purported to concur. Yet it would also be a splendid example of the lamentable effect of appellate judicial inadvertence to the leeways—including those built through the fact-value complex into a "principle"—among which appellate judges must choose when the issue before them is one of disputed law.

At any rate, Lord Scarman was apparently ready to affirm as a central judicial function the task of development of "new law" to meet "the justice of the case," and yet also to affirm simultaneously that a "policy issue" is "not justiciable" and must be left to the legislature. The sheer drama of this contradiction

43. This certainly is part of the explanation of Viscount Dilhorne's related position in Dorset Yacht Co. Ltd. v. Home Office, 1970 A.C. 1005, 1043A, B and E.
44. 1983 A.C. per Lord Bridge at 441H.
shows how fundamental errors concerning law and its development generally, as well as in particular areas, can arise from failure really to understand the difference between precepts which are "principles" and those which are "rules," or (which is a parallel but different point) to recognize the choices often presented even in the appellate application of rules.

In these respects, indeed, Lord Scarman's speech 45 matches closely the central error in Patrick Atiyah's "From Principles to Pragmatism" thesis.46 At first sight, Lord Scarman appears impeccably conscious of the dynamism of the common law, acknowledging development and principle-formation by judges as proper "even though the decision may require the extension or adoption of a principle, or in some cases the creation of new law to meet the justice of the case." Yet this is followed almost immediately by the assertion that judges can "by concentrating on principle . . . keep the common law alive, flexible and consistent and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve." 47 The implications are that not only formation of principle, but also its extensions (including such as create "new law" for doing "justice"), can somehow be carried on as "policy-free" activities. The reality ignored by this error is also that new legal precepts, including both principles and rules, arise by virtue of policy choices by judges within the leeways presented for the time being by the materials of the common law. These leeways include those presented by the various illusory categories, among which the indeterminate category—with the fact-value complex at its heart—is here exemplified by the criterion of "reasonable foreseeability." How can judgment within such leeways be kept "clear of policy problems?"

It is now to be added that this error has its companion among other judges like Lords Wilberforce and Edmund-Davies who, while they joined in allowing the appeal, did so on the basis that the mere finding of "reasonable foreseeable" did not establish that the defendant had a duty of care. They purported thereafter to ask whether there was any reason of "policy" or justification for

45. 1983 A.C. at 429.
46. See Stone, supra note 7; and J. STONE, PRECEDENT AND LAW: DYNAMICS OF COMMON LAW GROWTH, supra note 11, ch. 13, §§ 1-IX.
47. 1983 A.C. at 429-430; italics supplied.
excluding such a duty, and held that there was none such. The implication that policy considerations are illicit in relation to determining whether damage was "reasonably foreseeable," but also both licit and necessary after this criterion has been satisfied, underlies the approach as well of Lord Edmund-Davies and of Lord Scarman, whose speech the former so severely criticized. Both of these appeared blind to the basic difference between their positions, on the one hand, and those of Lord Bridge and the late Justice Tobriner, on the other. The latter (as already seen) focus on the evaluative judgment required by the fact-value complex central to the "reasonable foreseeability" principle itself.

Why should a judicial policy determination, illicit as part of the "reasonable foreseeability" criterion, then become licit as an overriding consideration after that criterion has been satisfied? Neither Lord Wilberforce nor Lord Edmund-Davies offers any plausible reason why it should. This is particularly surprising in the case of Lord Wilberforce. For he, in the very present context, can be found to observe that when the criterion of reasonable foreseeability is held to result in a duty of care being owed to a person or class, the statement that there is a "duty of care" denotes a conclusion into the forming of which considerations of policy have entered. It may be added conversely that Lord Scarman, for his part, offered no plausible reason why a determination of "policy" he deemed licit for judges as entailed in the judgment of "reasonable foreseeability," should become illicit (as "non-justiciable") when it is separated from that fact-value complex.

The majority Lords in the Dorset Yacht Case implied that they were passing a watershed in declaring that Lord Atkin's reasonable foreseeability criterion of duty of care should be given its long overdue effect as a "principle" of law (even if not a "definition"). It is a strange irony that what they hailed as a watershed has yielded obfuscation, rather than clearer vistas. That declaration was indeed accompanied in Dorset Yacht by the majority caveat, which McLoughlin v. O'Brien has now complicated further. This was that, except when fact-situations have already been held to be within the criterion, mere satisfaction of the criterion does not

48. See, e.g., 1983 A.C. per Lord Wilberforce at 420-21 and per Lord Edmund-Davies at 426-27.
49. 1983 A.C. at 420.
in itself raise a duty of care. It is still for the court as a further extraneous matter of policy to decide whether a duty was raised. It is this supposed hiving off of an uncertain range of "policy issues" for overriding consideration, after the criterion of what the defendant "ought reasonably" to have foreseen has supposedly been satisfied, which has multiplied the false issues and cross-purposes (and therefore the confused uncertainties) of an area already rich in them.

Lord Wilberforce might conceivably have been right in *McLoughlin v. O'Brian*\(^5\) when he noted several policy concerns: the need to avoid difficulties of trial and proof; the need to avoid ease of fraud; and the need to avoid excessive burdens on free movement throughout the community, caused by the size and numbers of verdicts against defendants. Even, however, if he were right, this would not explain why such policies should not be given their full weight in the initial judicial determination of what the defendant ought reasonably to have foreseen. That determination has to be made (in British as well as other jurisdictions) as a basis for fixing both duty of care, and what damage is too remote. All relevant policy factors, including those mentioned above, can and should, in the present view, be dealt with in such determinations of reasonable foreseeability. The fact-value complex of "reasonable foreseeability" is sufficiently indeterminate to accommodate all these factors, even if the judges do not indulge further the equilibrating "implosion" of that notion ingeniously devised by Lord Reid in *Wagon Mound No. 2.*\(^5\)

That "implosion" occurred (be it recalled) when Lord Reid said that what a defendant ought reasonably to foresee depended on other elements besides statistical probability. He identified three of these: one, the degree of culpability inherent in the defendant's pertinent activity; two, the gravity of the damage which might result from it; three, the cost and difficulty of measures which if taken might have forestalled or reduced the risk. These were additional to four, the statistical probability of the risk that damage would occur. Thus, the more culpable the activity, the graver the

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possible damage, the less the cost and difficulty of forestalling or reducing the damage, and the higher the statistical probability of the damage, the more zealously foresighted (and farsighted) the defendant ought to be. The holding in a particular case is an outcome of the equilibration of the degrees of each of these diverse elements present in the instant case.

I am not here concerned with the substantive law either of duty of care or remoteness as such. What is important here is the relation of these matters to the "policy" debate in the present examination of *McLoughlin v. O'Brien* and related cases. In this context the central point is that, consistent with Lord Reid's view in *Wagon Mound No. 2*, the elements which must be taken into account to extend or contract the range of "reasonable foreseeability" beyond mere statistical probability and therefore the range of duty owed and of damage not too remote, are all considerations of policy par excellence. Lord Reid's insistence that they must be taken into account in deciding what is "reasonably foreseeable," makes the invocation of his authority in *McLoughlin v. O'Brien* in 1983 by both Lord Wilberforce and Lord Edmund-Davies more than passing strange. For they cited him there in a context seeking to support the view that "policy" considerations are not to be weighed in applying Lord Atkin's principle that duty proceeds from reasonable foreseeability, but are to be separately weighed, after Lord Atkin's principle has been held satisfied.  

IV.

In *Jaensch v. Coffey*, 5 decided August 20, 1984, as this article was being written, the High Court of Australia dismissed an appeal

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To overcome corresponding problems of alleged artificial limits on the reasonable foreseeability test of duty, Jon L. Diamond (See Diamond, supra note 32), has proposed a solution based on Richard Miller's article *The Scope of Liability for Negligent Infliction of Emotional Distress: Making the Punishment Fit the Crime*, 1 UNIV. OF HAWAII L. REV. 1 (1979). The proposal is that while maintaining the foreseeability test as decisive of duty, recovery should be restricted in all cases of "intangible harm" to economic loss (such as loss of wages, or medical expenses) resulting from the negligently inflicted emotional distress, etc. This kind of limit on recovery has been used by California courts as a compromise in relation to rather novel claims for "wrongful life," in *Turpin v. Sortini*, 31 Cal. 3d., 643 P.2d 954, 182 Cal. Rptr. 337 (1982). Whether it could win acceptance as a judicially imposed ceiling on recovery for more well-established causes of action seems dubious.

by the defendant against a judgment in respect of psychiatric illness of a wife suffered "because of what she saw and heard at the hospital to which her husband was admitted with serious injuries caused by the negligent driving" of the defendant. 56 None of the judges who decided the Jaensch case pointed to any relevant distinctions from McLoughlin v. O'Brien, and all held the defendant liable for the psychiatric illness arising not from the plaintiff's presence at the time and place of the accident, but from her going to see her husband at the hospital in "the aftermath." 57 I am concerned here only with certain aspects of the judgments, especially of Justice Deane, which seem at this late date to threaten a further proliferation of false issues and cross-purposes in this area of law.

The matter may be introduced through the shorter judgment of Chief Justice Gibbs, who admitted that there was "high authority" for the view that "foreseeability is the only test of the existence of the duty." He was concerned, however, to question this, and was inclined to agree with Lord Wilberforce's position in Anns v. Merton London Borough Council 58 which was that: a prima facie duty arises where as between defendant and plaintiff "there is a sufficient relationship of proximity or neighborhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter." 59 Lord Wilberforce went on to say that this prima facie duty may be defeated by "considerations which ought to negative or reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise." The Chief Justice stressed the above quote and concluded with Lord Wilberforce's words, that "foreseeability does not of itself, and automatically, lead to a duty of care". 60 On the instant facts, he held that the plaintiff was a "neighbor" of the defendant in Lord Atkin's sense: "It was foreseeable that a person in her position

56. Id. at 427.
57. Much of the detail in the judgments of Chief Justice Gibbs and Justices Brennan and Deane is devoted to the chequered history, not here relevant, of the action for nervous shock in Australia, since the inauspicious and now long discredited Privy Council decision of Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222 (1888).
58. 1978 A.C. 728.
59. Id. at 751-52.
60. 58 Austl. L.R. (1984) per Lord Wilberforce, at 428E.
would suffer nervous shock, and there is no reason of policy why her claim should not succeed."\textsuperscript{61}

On December 11, 1984, a majority of the High Court, led by Chief Justice Gibbs, made clear in \textit{Hackshaw v. Shaw}\textsuperscript{62} that their final position approximated to that of Lord Bridge in \textit{McLoughlin v. O’Brien} and of Mr. Justice Brennan in the \textit{Jaensch Case}. The competing issues in \textit{Hackshaw} were whether a suit by a trespasser against an occupier must necessarily be governed by the "special" common law duty of an occupier of land to trespassers, limited to not setting a trap or inflicting intentional harm; or whether the defendant-occupier in such a case might still be held liable, even to a trespasser, under the "general" duty of care based on what harm to the plaintiff the defendant ought reasonably to have foreseen, as laid down by Lord Atkin in \textit{Donoghue v. Stevenson}.\textsuperscript{63} The majority chose the latter position. Chief Justice Gibbs escaped from the mystifying language contained in the precedents about concurrence of the "special" occupier-trespasser duty with the "general" (Atkin-type) duty. He concluded that the "special" duty may be replaced by the "general" duty "if the relationship between the parties is not simply one of occupier and trespasser, and there are circumstances which give rise to a duty of care."\textsuperscript{64} This makes clear that the court was choosing, as between two competing

\textsuperscript{61} Id. at 429E.


\textsuperscript{63} For a survey of the conflicting lines of decisions see Hackshaw v. Shaw, 59 Austl. L.R. 156, 158-62 (1985) (Gibb, C.J.); 173FF (Deane, J.). On one side is a series of Privy Council and House of Lords cases from Addie v. Dumbreck, 1929 A.C. 358 (H.L.), through Commr. for Railways v. Quinlan, 1964 A.C. 1054, where the occupier-trespasser relation was held decisive. On the other side are the pre-Quinlan Australian authorities of Thompson v. Bankstown Corp. 87 C.L.R. 619 (1953); Rich v. Commr. for Railways (N.S.W.) 101 C.L.R. 135 (1959); Commr. for Railways (N.S.W.) v. Anderson, 105 C.L.R. 4 (1961) (followed later in Public Transport Commn. (N.S.W.) v. Perry, 137 C.L.R. 107 (1977). In these cases, under various formulations, the defendant-occupier was held, in the particular circumstances, to have a general duty towards the plaintiff-trespasser even though he would not have been liable under the traditional "special" occupier-trespasser rule. Rich, 101 C.L.R. at 159 (1959) (Windyer, J.) Voli v. Inglewood Shire Council, 110 C.L.R. 74, at 88-89 (1963), saw these latter cases as squarely subjecting occupier-trespasser, etc. relations to Lord Atkin’s general duty criterion. As to the above "special duty" and "general duty" as competing categories, see infra note 66. And see Justice Deane’s judgment in the \textit{Hackshaw} case, especially his interpretation of the bridging (or was it hedging?) effect of the Privy Council’s language in Southern Cement Ltd. v. Cooper, 1974 A.C. 623, 643-45, and in the \textit{Hackshaw} case, 59 Austl. L.R. at 174-76 (1985) esp. 175.

\textsuperscript{64} 59 Austl. L.R. 156 (1985).
categories of duty for the determination of negligence. Once this choice was made, in Chief Justice Gibbs' words, the fact of the trespass was not itself decisive. That fact and its circumstances, along with a multitude of other circumstances, became relevant to the central issue raised by the general Atkin-type duty. Thus, the central issue was "was the presence of the trespasser reasonably foreseeable?" in all these circumstances, including in this case "the series of lethal acts" committed by the defendant?\textsuperscript{65}

While, for example, differences in the circumstances of a trespass may be irrelevant to a rule predicated solely on the fact that the plaintiff was a trespasser, they are deeply relevant to a principle predicated on the fact-value complex of what the defendant ought reasonably to have foreseen.\textsuperscript{66} So, in terms of the Wagon Mound No. 2 "implosion" of this last notion, recalled at the end of the last Section, there are extreme differences in the activities out of which the harm arose—from defendants playing cricket at one extreme to lethal discharge of firearms at the other.\textsuperscript{67} There is, of course, a difference between the historical trespasser rule—before Lord Atkin's formulation in Donoghue v. Stevenson—and the considerations of "policy" which Lords Diplock, Wilberforce and others think may ex post facto negative the existence of the kind of general duty established by that case. The majority in Hackshaw v. Shaw unequivocally included the lethal nature of the defendant's acts, along with the circumstances of the plaintiff's trespass, as relevant to

\textsuperscript{65} 59 Austl. L.R. per Gibbs, C.J., at 161-62 (1985). As Justice Deane trenchantly observed—"a trespasser may be a burglar, a traveller in difficulty, a person on an errand of mercy, a person who walks on another's land believing it to be his own, a person who honestly follows a mistaken direction, or accepts an unauthorized person, a person who cannot see, or a child who cannot understand." Id. at 177D-E.

\textsuperscript{66} Cf. 59 Austl. L.R. per Wilson, J., at 166C-F (1985). The clearest way of seeing the outcome in Hackshaw of the above conflicting tendencies in the case law, is that the majority made a choice between two competing categories presented by the existing law. What they called the "special" duty arose from a rule attaching a severely constricted duty to detailed predicated facts of the plaintiff's trespass on the defendant-occupier's land. What they called the "general" duty arose from a principle predicated not on detailed facts, but rather on the normative "fact-value" complex of what, in all the circumstances, the defendant ought, as a reasonable man, to have foreseen. Justice Deane came near to recognizing these competing categories in the same case, at 167FF, especially at 169-171. He there adopted Justice Kitto's contrast in Thompson v. Bankstown Corporation, 87 C.L.R. 619, at 642-43 (1953), between "the mechanical and inflexible theory" of the special occupier-trespasser duty, with the Australian Court's trend "towards a consistent jurisprudence of negligence" 59 Austl. L.R., at 168F (1985).

what harm the defendant as a reasonable man ought to have foreseen and therefore relevant to the general duty falling on him. This seems, at any rate, to suggest that the Australian court will not lightly allow such a duty to be defeated *ex post facto* by reference to the Diplock-Wilberforce type of “considerations” of “policy.”

Thus far nothing in the *Jaensch* or *Hackshaw* cases would require any addition to my preceding analysis of *McLoughlin v. O’Brien*, nor change my support for Lord Bridge’s rejection there of Lord Wilberforce’s bifurcated approach to the duty problem. For even in the bifurcated view of Lord Wilberforce the “reasonable foreseeability,” test for duty was still seen as embracing within itself (if not synonymous with) “proximity.” For both are merely ways of referring only to Lord Wilberforce’s same “first stage” question of whether “a prima facie duty of care” arises. Only thereafter does his “second stage” inquiry arise about “considerations” of “policy” which may negate such a duty.

I argued in the preceding section against even the Wilberforce-type bifurcation as introducing unnecessary confusions into the law. Yet Mr. Justice Deane seemed to propose in *Jaensch* that even before Lord Wilberforce’s “second stage” of policy considerations is reached, a new kind of “second stage” test must be interposed, in addition to the test of “reasonable foreseeability”—namely, a requirement of sufficient “proximity” of relationships between plaintiff and defendant. I am now compelled to say, with the respectful and even affectionate regret of a former teacher, that this further new-fangled sub-bifurcation of law would submerge this whole area in an ocean of raging chaos.

It has been hitherto widely understood that the “proximity” notion, as used by Lord Atkin in 1932, was another way of referring to the range of persons to whom the defendant owes a duty because he could reasonably foresee that damage to them would be caused by his conduct, unless he proceeded with care. As we

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68. See, *e.g.*, 59 Austl. L.R. per Gibbs, C.J., at 161-62 (1985). It may be possible, of course, to restructure the older occupier-trespasser rule, as Justice Deane suggests to make it a part of “the general principles of the law of negligence.” 59 Austl. L.R., at 173-74 (1985). We cannot, however, *in anticipation of this*, treat the “special” rules as merely “explaining” and “exemplifying” the application of that general law. For this would overlook the peremptory effect of the occupier-trespasser rule as a *rule*. The reality rather, is that when the judicial choice is for the general *principle* of reasonable foreseeability, the peremptory effects of the special *rule* cease to be operative.
have seen, those who, like Lord Wilberforce, claimed a residual judicial veto on the enforcement of the *prima facie* duty, did so, not by subverting that understanding, but by superimposing a further "second stage" of "overriding" policy "considerations."

Mr. Justice Deane's long judgment in *Jaensch* tried to discredit this understanding. There had been (he said) "a common, although mistaken tendency to see the test of reasonable foreseeability as a panacea, and to refer to it as if it were, from the viewpoint of principle, the sole determinant of the existence of a duty of care." 69

In this view, when Lord Atkin in *Donoghue v. Stevenson* 70 said that we owe a duty to our "neighbor" and proceeded to describe "neighbors" as "persons who are so closely and directly affected [by my act] that I ought reasonably to have them in contemplation as being so affected by my act when I am directing my mind to the acts or omissions which are called into question," he was laying down not one test for the existence of a duty, but two separate and cumulative tests. One was "reasonable foreseeability"; the other, Mr. Justice Deane surprisingly thinks, was "the requirement of proximity in the relationship between plaintiff and defendant with respect to the relevant act and injury." 71

I say "surprisingly" for two reasons. First, because Lord Atkin obviously introduced the notion of "proximity" by way of a short secular explanation of his biblical metaphor of "neighbor." His further explanation quoted above which begins "so closely and directly affected by my act that I ought reasonably to have them in contemplation," is with no less certainty a longer explanation of this shorter notion of "proximity." Both are alternative ways of explaining the "neighbor" metaphor. A second reason for my surprise is that while Mr. Justice Deane courteously mentions various judges and scholars (including myself) as holding the view he declares "mistaken" and declares himself "unable to accept it," 72 he nevertheless gives no good reason *why* he is unable to accept it. Good reason is thus lacking both in terms of meanings of Lord Atkin's discourse and in terms of supporting authorities.

First, as to meanings. The learned judge needed to find some

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69. 58 Austl. L.R. 426, at 440F (1984). I interpose that the learned judge seems here to have misstated the issue which concerns him. That issue is not whether "reasonable foreseeability" is the "sole" determinant, but whether it is always a "sufficient" determinant.
70. 1932 A.C. 562, 580.
72. Id. at 441C-D.
reason why so many judges and scholars have treated the issue of “reasonable foreseeability” as settling the issue of “proximity.” Yet the reason he finally attributed to them seems to be that all have inferred from the meanings of Lord Atkin’s language that “reasonable foreseeability” and “proximity” refer to the same entity. Moreover, as I shall later illustrate, Mr. Justice Deane offered no meaning of the latter which is not already, in Lord Atkin’s terms, embraced in the former. He did assert, incongruously with the usage of the authorities, that these authorities always tacitly applied or took for granted the “proximity” requirement as different from and additional to the “reasonably foreseeable” requirement. This unproved and indeed unprovable argument of tacit assertion, is at odds with what is expressed and adds little strength to the position. So does his obvious difficulty in explaining or illustrating what is meant by “neighborhood” or “proximity” in terms which do not in substance already form part of Lord Atkin’s test of “reasonable foreseeability.”

Mr. Justice Deane found himself, indeed, bound to admit that Lord Atkin himself “did not seek to identify the precise content of the requirement of the relationship of ‘proximity’.” He added, however, that Lord Atkin had “identified” the “proximity” relation “as a limitation upon the test of reasonable foreseeability.” If by this second “identified” the judge meant to assert that Lord Atkin explicitly told his readers that, apart from finding “reasonable foreseeability,” the judge must apply as an additional test of duty the requirement of “proximity,” this (with respect) must be an error. Lord Atkin said nothing of the kind. One clear reason why he did not, was that his reference to the proximity relationship was

73. Id. at 439G.
74. Id. at 441C-D.
75. Justice Deane’s error may have arisen from Lord Atkin’s words “limited by the notion of proximity” at 581 of 1932 A.C. 562. These words, however, were not spoken by Lord Atkin as a limit upon his own criterion on the preceding page. He was referring rather to Lord Esher’s attempt to make more precise in Le Lièvre v. Gould [1893] 1 Q.B. 491, 497, 504, language which (as Brett, L.J.) he had used in Heaven v. Pender [1883] 11 Q.B. 503, 509. Moreover, when Lord Esher’s explanation quoted by Lord Atkin on page 581 is examined, it is obvious that “proximity” is an integral part of the structure of “reasonable foreseeability” as both Lord Atkin and Lord Esher expounded it. Indeed, this virtual identity of the requisite relationship (“proximity”) with the range of injury which should reasonably have been foreseen by the defendant, is clear from the very passage from Lord Esher in Heaven v. Pender, on which Justice Deane later relied in Hackshaw v. Shaw, 59 Austl. L.R. at 174A-D (1985).
but part of his explanation of the "neighborhood" and "reasonable foreseeability" notions.

When, indeed, in pursuit of his own surprising theme, Mr. Justice Deane sought to identify the precise content of the supposed additional test of "proximity" (which he recognized that Lord Atkin had not even attempted) the result is most revealing. "Proximity," he says, is a "broad and flexible touchstone," and is "directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act of one person and the resulting injury sustained by the other." Such relevancies were closeness between parties and their properties in space and time, relations such as those of master-servant, and closeness and directness of the relations between "the particular act or cause of action and the injury sustained." These are examples of elements relevant to his newly revealed "proximity" test which Mr. Justice Deane sees as distinct from and additional to "reasonable foreseeability." Yet it seems impossible to imagine a court determining the issue of "reasonable foreseeability" in which it would fail to take into account those very same elements, as relevant to "reasonable foreseeability." 78

Insofar as this is so, the effect of Mr. Justice Deane's insistence on "proximity" as an additional test is to introduce into the law a distinction where there is no difference. Such a distinction is


77. Id. at 441C-G.

78. In his opinion in Hackshaw v. Shaw, Justice Deane makes a brief and similarly circular reference to "the requisite relationship of proximity." 59 Austl. L.R., at 173B (1985). He later refers to "proximity" as "the prerequisite of duty," and "reasonable foreseeability" as "the touchstone" of duty. Id. at 177-78. The meaninglessness of the distinction is evident from the fact that if "proximity" and "reasonable foreseeability" were interchanged in these two phrases, the sense would not materially change. Justice Wilson's adoption sub silentio of this meaningless distinction evidences the regrettable danger that Justice Deane has introduced a quite unneeded source of further confusions into this important area of law.

These confusions are much more treacherous than those displayed in Hackshaw v. Shaw surrounding the competing categories for determining duty, with the "special" occupier-trespasser rule on the one hand, and the "general" (Atkin-type) principle on the other. Despite the drastic effect on substantive outcomes, the choice of the special occupier-trespasser duty to prevail against the competing general (Atkin-type) duty, or vice versa, faces no difficulty of theory or methodology. Justice Dawson's dissent illustrates the former part of this truth, and the majority ruling illustrates the latter. Id. at 154-55. When, however, it is proposed that policy considerations can only be applied ex post facto after the court has made the normative judgment predicated on the fact-value complex of what the defendant should as a reasonable man have foreseen, this ignores the very nature of the fact-value complex invoked. Justice Deane's supposed "prerequisite" of "proximity" would be open to similar objection, even if it did not (as I have shown it does) involve a meaningless category.
of course but an example of what I have elsewhere identified as a category of meaningless reference.\textsuperscript{79} The virtue of such a meaningless category for those operating with it, is that later judges can decide any set of instant facts in any manner that they think fit. This virtue has its corresponding vice. This is that as long as any judge concerned mistakenly believes that the distinction does represent a difference, he cannot explain the reason for his holding to anyone else—least of all to his judicial colleagues—except, that is, by persuading them that the non-existent difference does nevertheless exist. Lord Wilberforce-type assertions of second stage testing for “overriding policy” negating or limiting the prima facie duty arising from reasonable foreseeability, are less perilous than this to legal understanding. Although I have shown that they deserve criticism on related grounds, they are, at any rate, not blatantly meaningless.

The new-fangled “proximity” thesis also fails of support in terms of the authorities between 1932 and 1984. I have already shown that Mr. Justice Deane’s claimed anchorage of his additional “proximity” criterion in Lord Atkin’s original exposition of 1932 will not hold. I propose, however, to ask at this point what authorities can be marshalled as at 1984 for Mr. Justice Deane’s thesis, even if we now pretended for the limited purpose of testing the later authorities that the anchorage could hold. Even on this highly concessional basis, we face the extraordinary phenomenon (as the learned judge himself ruefully admitted) that for half a century his fellow-judges throughout the common law world had failed to discover in Lord Atkin the supposed additional requirement of “proximity.” Mr. Justice Deane’s dubious explanation, that in this half-century of cases, “the requirement of proximity [was] not a subject of dispute,”\textsuperscript{80} scarcely removed even his own obvious unease on this score.

At any rate, his argument finally moved on to a very different tack. He proceeded sub silentio to couple his second stage “proximity” test with Lord Wilberforce’s overriding policy “considerations” second stage test, quoted above from \textit{Anns v. Merton London Borough}.\textsuperscript{81} As already seen, there is some (but as yet inconclusive)

\begin{itemize}
  \item \textsuperscript{79} See, \textit{e.g.}, J. STONE, \textsc{Legal System and Lawyers’ Reasonings} 241-46, 339-41 (1984) and J. STONE, \textsc{Precedent and Law} ch. 4, § V (1985).
  \item \textsuperscript{80} Austl. L.R. at 440FF (1984).
  \item \textsuperscript{81} 1978 A.C. 728, 751-52.
\end{itemize}
support in the authorities for the Wilberforce-type position. It would require that even after a finding of reasonable foreseeability against a defendant, the \textit{prima facie} duty raised only becomes indeed a duty if the additional test is met that no considerations of policy exist which negative, or qualify, such duty. I have already shown from \textit{McLoughlin v. O'Brian}\textsuperscript{82} that there remained as late as 1983 a confused conflict between Law Lords. Some think that such matters of policy (like the danger of “opening floodgates”) must thus be used as an additional second stage test. Others (like Lord Scarman) seem to want to declare such policy matters, when they arise, to be “non-justiciable.” Still others like Lord Bridge think (as does the present writer) that any relevant policy considerations can and should in any case be taken into account in applying the test of reasonable foreseeability—so that no “second stage” testing at all is required.

What is here fatal to Mr. Justice Deane's efforts in terms of authority, is not merely the half a century absence (admitted as already seen by Mr. Justice Deane himself) of judicial holdings that “proximity” is a test additional to “reasonable foreseeability.” It is also that judges have referred to a second stage additional test, but not at all in terms of “proximity.” “Proximity,” Mr. Justice Deane insists, \textit{is concerned with relations between the litigants}. Such second stage additional tests as other authorities support, however, are \textit{rather in terms of supposedly overriding considerations of policy}. The learned judge, perhaps recognizing these difficulties, moves, at the critical point of this judgment, away from the thesis about “proximity” as a separate test (for which authority is lacking), to a coupling of “proximity” with “some other overriding limitation” (for which some—though inconclusive—authority does exist). He is at obvious pains finally not to let his thesis about “proximity” as a second stage test stand alone, but to couple it with other Wilberforce-type positions. Thus he speaks of a proximity-requirement or “some other overriding control”; of “the requirement of proximity . . . or other and special controlling rule based on policy considerations”; and of “the requirement of proximity or some other . . . control upon the . . . test of reasonable foreseeability.”\textsuperscript{83}

No doubt the coupling of two distinct second stage tests, for

\textsuperscript{82} 1983 A.C. 410.

only one of which there is authority, adds some semblance of strength to the weak case for "proximity" as an additional test. Equally clearly, it is a clouding of the issues. Any genuine arguments for and against a second stage test must surely be rather different for "proximity" than for "overriding policy." It is a striking fact that the very speech in the Anns Case asserting the second stage test of policy "considerations" (with which Mr. Justice Deane now wishes to couple his "proximity" thesis) is quite at odds with that thesis. For Lord Wilberforce there expressed clearly his own view (which most of his common law brethren, and I myself respectfully share) that "a sufficient relationship" of "proximity or neighborhood" is a part of what is to be considered in determining whether damage resulting from lack of care is "reasonably foreseeable."

It is also most significant that when Mr. Justice Deane himself reached the issue whether in the instant circumstances Mr. Jaensch owed a duty to Mrs. Coffey, his second stage test was not in terms of the supposed "proximity," but in terms of "public policy." One should perhaps also recall here the point already made, that it is difficult to see what fact-elements a competent judge might consider to be relevant to his supposed additional test for "proximity," which would not already have been taken into account in assessing "reasonable foreseeability."

Fears of further unnecessary obfuscation of this branch of the law by the novel thesis that "proximity" is a second additional test of duty, may be somewhat allayed by the other judgments in Jaensch v. Coffey. Justices Murphy and Dawson, though concurring in result, avoided endorsement (indeed even mention) of Mr. Justice Deane's thesis on "proximity." Mr. Justice Dawson appeared both to accept that reasonable foreseeability determined duty, and also (à 'la Wilberforce) that policy considerations may at a second stage negate that duty. Chief Justice Gibbs (as already indicated) clearly adopted Lord Wilberforce's type of position, allowing "policy" at a stage after "reasonable foreseeability" has been found, to override the prima facie duty.

84. Id. at 452B.
85. Id. at 428-29. His only references to the "proximity" point are ambiguous as to whether he accepted (or perhaps even understood) the thesis of Justice Deane; as is his introductory statement that he had read Justice Deane's judgment and "agree[d] with his conclusion and, in general, with his reasons." Id. at 427A.
86. Id. at 428G-H.
The remaining judgment of Mr. Justice Brennan, on the other hand, squarely challenges—as I myself have here felt bound to do—any second stage testing for duty by reference either to the Wilberforce-type overriding policy, or to Mr. Justice Deane's version of "proximity." Justice Brennan observed:

In each case where causation is established, the question of fact (sic) is whether it was reasonably foreseeable by the defendant that his conduct might bring about a phenomenon the sudden perception of which by the plaintiff or by a class of which the plaintiff is a member might induce a psychiatric illness. . . . Of course, the room for judgment is manifest as it always is in the evaluation of facts, but that provides no warrant for introducing new criteria to limit liability. 87

In terms which reinforce the criticisms which I have already made in preceding sections of some speeches in McLoughlin v. O'Brian, Mr. Justice Brennan also observed that "the limitations suggested by Lord Wilberforce" are appropriately taken into account by "the general principles of causation and reasonable foreseeability." 88 My own preceding account would perhaps add a major point supporting Mr. Justice Brennan's analysis. This is that in its nature the standard of "reasonable foreseeability" consists not merely of "fact" (as the learned judge implied in the above quotation) but rather of "facts-as-evaluated-by-the-normative-standard-of-reasonableness." This very nature of the notion of "reasonable foreseeability," of what I have called "a fact-value complex" is, indeed, central to my own position. For it permits (and indeed requires) the court to take account of a very wide, if not unlimited, range of policy considerations in determining what damage the defendant ought reasonably to have foreseen as likely to flow from his careless acts or omissions.

V

It is a main thesis of my latest work, Precedent and Law: Dynamics of Common Law Growth, that lawyers and the community generally must learn to recognize and use those processes and structural features of the common law which can assist in the law's central tasks of adjustment to social, economic, technological and

87. Id. at 436A-B.
88. Id. at 436A-B.
psychological change. The initial formulation of legal precepts, whether in the sense of "rules" or of "principles," involves essentially a process of classification of instances for similar treatment. So does the process of refinement which then sets limits to a precept, extends the precept, or subjects it to some clustering of sub-precepts. As already observed above, initial classification, reclassification or sub-classification of old classes, may all be operations in the search for just results. The characteristics delimiting the class are the predicates of the given precept; and the precept becomes complete by the attachment to the delimited class of certain legal consequences.

Those are basic truths for the wide range of appellate cases in which result-orientation is not only permissible but unavoidable within the leeways of choice offered by the presence, within the law, of indeterminate or other categories of illusory reference. The very process of choosing amounts to a reclassification of instances by reference to the facts predicated in the precept which is chosen. This very emergence of precepts or versions of precepts within the leeways of choice is usually also preceded by a phase which may be thought of as individualization in the sense of deciding cases "on their merits" by the making of judgments of justice rather than of law. Yet, even in this phase, it is the state of the law which requires this. It is these judgments of justice which feed the womb from which precepts of law may in their due time spring. Where values for judging new situations are still unsettled, the contest of precept with precept to cover them is inevitable. That contest cannot in its nature be forthwith settled by legal precepts, whether of the type of "rules," or even of the type more truly called "principles." It has to be settled by reference to successive judgments as to what is just in the new situations for which legal rules or principles are still to be found; and these legal rules or principles emerge from these judgments of justice.

For lawyers and judges of the approaching fin de siècle, the need to recognize these built-in structuring and processing resources of the common law for its own adaptation to changed conditions, has a grave urgency arising from both negative and positive considerations. On the negative side, blind appellate cleaving to the status quo as manifest in apparently "established" legal precepts, in disregard of the salutary leeways of choice which surround these precepts, compounds all problems of legal adjustment. On the affirmative side, the pace of such processes of contemporary change
as informational electronics, genetic engineering, and *in vitro* fertilization, demand that we use every available resource, judicial as well as legislative and administrative, to ensure that the common law may successfully adjust to such changes within a frame of living community values. The law and its judges should, on this basis, help rather than hinder an orderly and circumspect adjustment to change in social life. The leeways of choice available to appellate judges when the law is disputed, have been for centuries an insufficiently acknowledged arena for such adjustment. In an age of unprecedented pressures for change prudence demands that we understand the range and magnitude of these leeways as an *ongoing social resource*, and use them for the maintenance of justice in the contemporary legal order.

The Editors of this issue note with regret that Professor Julius Stone died September 3, 1985, before the final printing of this article. The world has lost yet another illustrious scholar in the field of Jurisprudence.
But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.¹

INTRODUCTION
This short essay explores one way in which attention to the philosophy of Chaim Perelman will aid understanding in American constitutional theory (there are doubtless others). Perelman's account of the necessary ambiguity, if not inconsistency, present in what he calls "confused notions"² illuminates the nature of and, hence, facilitates the interpretation of the United States Constitution, especially its "open-ended" clauses, such as the due process and equal protection clauses of the fourteenth amendment.

American constitutional theory has renounced, but not yet fully overcome, legal formalism. True, the mechanical jurisprudence against which Mr. Justice Holmes and others³ railed is no more. But unnecessary and avoidable formal limitations remain. They continue to hamper and frustrate constitutional theory even today.⁴

Ironically enough, the two main selling points of formalism are also its prime defects. Formalism promises simplicity and certainty.⁵ It offers simplicity in precise and univocal rules and concepts, i.e., rules and concepts which are neither vague nor ambiguous. And it sees certainty in a deductive decision procedure applied to those precise rules and concepts. But the real world is neither simple

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¹ Associate Professor of Law, Salmon P. Chase College of Law. B.A. 1972, J.D. 1975, Harvard University.
³ See, e.g., Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605 (1908).
⁴ See infra text accompanying notes 68-121.
⁵ See, e.g., M. WHITE, SOCIAL THOUGHT IN AMERICA 11-32, 59-75 (paperback ed. 1976) (discussing the various meanings of formalism and the revolt against it in law, history and the social sciences in turn of the century America). See also Pound, supra note 3.
nor certain. As a result, formalism necessarily distorts the reality with which it deals. Worse yet, by its very nature, it lacks adaptive devices to correct and remove these distortions and errors.

Post-formalist jurisprudence realizes that law can have neither the clarity nor the precision formalism thought possible, but it carries these realizations only so far. Legal and constitutional concepts are recognized to be necessarily vague. But, while accommodating a fringe of uncertainty in legal concepts, post-realistic jurisprudence holds that these concepts must have a core of settled meaning. They must be, in a phrase, open-textured. Legal and constitutional concepts may be ambiguous, supporting many different specific conceptions, but they must also yield a right answer in almost every case. It may be that, "In an important sense legal rules are never clear." Nevertheless, law "is a system of rules; the rules are discovered in the process of determining similarity or difference." 

Is post-formalist jurisprudence adequate to fully capture the range of legal and constitutional concepts and standards? Not if these concepts contain irreducible and irremovable aspects of equivocation and inconsistency. But the "open-ended" provisions of the Constitution, to the extent that they embody or incorporate moral requirements, do have just this sort of equivocal, inconsistent nature.

Professor Chaim Perelman's New Rhetoric provides a number of ways of integrating this logically pluralistic insight into contemporary legal and constitutional theory. As I shall set out below, for example, his account of "confused notions" provides one method of appreciating and expressing the moral dimension of important constitutional provisions. But this account carries with it a price in terms of the lost simplicity, certainty, stability, and consistency which always must accompany the equitable softening of formal rules. This is a price some will not be willing to pay.

I. VAGUE AND AMBIGUOUS CONCEPTS

Before we can usefully treat the subject of confused notions in constitutional law, it will be helpful to explain the nature of con-
fused notions. In order to do this we must introduce the more general topic of conceptual vagueness and ambiguity. Let us temporarily put the special problems and concerns of constitutional law to one side then, in order to first develop our expository apparatus.

Our formalist opponent, we have noted, finds in the world and the language he uses to describe the world a simplicity and a certainty which are just not there. Real concepts and natural languages are fuzzier and more complex than the formalist allows. But in what ways? One answer is that concepts may be both vague and ambiguous.

What does it mean to say that a concept or a proposition is vague? Charles Peirce, the American pragmatist philosopher, said this:

[A] proposition is vague when there are possible states of things concerning which it is intrinsically uncertain whether, had they been contemplated by the speaker, he would have regarded them as excluded or allowed by the proposition. By intrinsically uncertain we mean not uncertain in consequence of any ignorance of the interpreter, but because the speaker's habits of language were indeterminate.¹¹

The application or reference of a vague concept is, then, uncertain or indeterminate.

Philosophers who analyze vagueness typically see vague concepts as partially determinate and partially indeterminate rather than as completely indeterminate.¹² The line between determinate and indeterminate applications of a concept is not a bright line. Rather, it is a matter of shading and degree. Two visual representations of this relation may be given. Max Black presents the image of

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¹⁰ The difference between conceptual and propositional vagueness will not matter for purposes of this paper. See Black, Vagueness, 4 Phil. of Science 427, 431 (1937).


¹² This need not, in principle, always be the case. A concept whose applications, for example, are all equally indeterminate is a logically possible concept—it is just not a concept one is likely to encounter in the real world. However, one may find such statistical entities in the natural or social sciences.

In everyday life, our concepts are typically partially determinate and partially indeterminate. Partially determinate because "[general terms would be useless . . . as a medium of . . . communication unless there were . . . familiar, . . . unchallenged cases." H. Hart, supra note 6, at 123. Partially indeterminate because natural kinds have defective instances and other sources of variability.
a continuum, such as a color spectrum, where, because the change is gradual and continuous, it is difficult to say where one color ends and another begins. He says, “At the extremities of the series little or no uncertainty is felt, but the observer grows increasingly doubtful when the borderline cases in the center are approached.”

H.L.A. Hart gives us a three-dimensional image of vagueness as “a core of uncertainty and a penumbra of doubt.” In law, Hart gives two examples of this sort of vagueness—applying precedent and applying legal standards such as “reasonable” and “fair rate.” They have both clear and uncertain applications.

Vagueness is the downfall of formalism. Formalism requires a conceptual precision which vagueness defeats. Thus, as Bertrand Russell noted, “All traditional logic habitually assumes that precise symbols are being employed. It is therefore not applicable to this terrestrial life, but only to an imagined celestial existence.”

Vagueness is not the only cause of conceptual imprecision. Ambiguity can also cause indeterminacy of meaning, but in different ways. A vague concept has a fringe of uncertainty around a core of settled meaning; an ambiguous concept has more than one focus of meaning. The two properties of vagueness and ambiguity are independent—possession of one neither necessitates nor precludes possession of the other. Ambiguity is, however, more complex than vagueness. Concepts may be ambiguous in a number of different ways. I will note not one, but three varieties of ambiguity—elementary ambiguity, indecisive ambiguity, and multiple ambiguity.

Elementary ambiguity occurs between words which have the same spelling, but different meanings and references, i.e., between homonyms. This accidental sort of ambiguity will be of little importance for us here.

Indecisive ambiguity occurs in cases of words with alternative meanings. As W.V.O. Quine says, “[A]mbiguity is supposed to con-

14. H. Hart, supra note 6, at 119.
16. On the difference between vagueness and ambiguity, see Black, supra note 10, at 430. See also W. Quine, Word and Object 129 (1960).
17. The following account of the three types of ambiguity is adapted and simplified from that of I. Scheffler, Beyond the Letter 11-37 (1979). I assert neither that this list of types of ambiguity is exhaustive, nor that it is the best possible classification. Fortunately, I need make neither claim here.
sist of indecisiveness between meanings." Any word which has multiple dictionary meanings, however, can be ambiguous in this way. In individual cases, contextual location and other devices help specify meaning and eliminate the ambiguity of reference. So, for example, the word "light" may be ambiguous in meaning by itself, but this ambiguity is usually removed when the word "blinding" is prefixed or the phrase "as a feather" is suffixed to it.

Multiple ambiguity occurs with words or concepts which have simultaneously and irremovably different meanings. Unlike indecisive ambiguity, the uncertainty of meaning cannot be resolved by contextualization. Puns typically contain such multiple ambiguous terms. "Our mothers bore us," for example, is a pun only because "bore" has two different meanings at once. If a single reference or meaning can be specified, we are not dealing with multiple ambiguity.

With multiple ambiguity we see for the first time terms whose application appears to involve inconsistency. One word applied in a single instance has multiple, even inconsistent, meanings. This raises problems not merely for a formalistic system, but also for any system which aspires to logical consistency. Perelman's confused notions, we shall see, are multiple ambiguous concepts.

Given the drawbacks of vague and ambiguous terms, the reader may fairly ask the use of these sorts of terms. Should we not seek to eliminate vague and ambiguous terms from our language? We can get a better idea of the issues involved if we can compare our vague and ambiguity-laden everyday, natural language with artificial, ideal languages free of these elements.

A number of logicians, mathematicians, and philosophers have written about artificial or ideal languages. What properties would such a language and its words have? It would fully specify basic symbols or words. These symbols or words would, then, be fully

19. To use Quine's example. See id. at 129.
20. The account that follows is drawn from Perelman's discussion of the work of the logician Alonzo Church. See A. Church, 1 INTRODUCTION TO MATHEMATICAL LOGIC 50-52 (1956), cited in C. Perelman, Rhetorical Perspectives on Semantic Problems, in THE NEW RHETORIC AND THE HUMANITIES 82-83 (1979) and in C. Perelman, supra note 2, at 96. There are, of course, other accounts of ideal and formal languages, but Church's will suffice for our purposes because we will be relying on no distinctive or unique feature of his account in our discussion.
21. I mention both symbols and words here (as I shall refer to both formulas and sentences in a few sentences) because I intend to also include logical, mathematical and linguistic possibilities in this description of formal systems.
determinate in their meaning or application. They would be neither vague or ambiguous. Likewise, such a language would fully specify the rules for putting these symbols or words together into properly-formed formulas or sentences, i.e., what we might loosely call the grammar of the language. These, too, would be fully determinate in their meanings or applications and, hence, neither vague nor ambiguous.\footnote{An artificial, formal language would have various additional properties which will not concern us here.}

This sort of artificial language has certain advantages over natural language. It is free from confusions, gaps, and perhaps internal contradictions.\footnote{See C. Perelman, Law, Logic and Epistemology, supra note 2, at 137.} Perelman notes that, "a concept can be perfectly clear only if it is within a formal system."\footnote{C. Perelman & L. Olbrechts-Tyteca, The New Rhetoric 133 (J. Wilkinson & P. Weaver trans. 1969) [hereinafter cited as C. Perelman].} But these virtues are also the causes of the limitations of artificial languages. First, they can be realized only in very simple systems.\footnote{Even arithmetic, Kurt Gödel has shown, cannot be shown to be internally logically consistent. For a non-technical account of his celebrated proof see E. Nagel & J. Newman, Gödel's Proof (1985).} Second, we employ words and language for many purposes. But artificial language, with its clear, simple, and precise meanings, cannot provide for all these possibilities. As Perelman says, "[N]atural language has more than one use and . . . certain of these usages force us to depart from the conditions that logicians and mathematicians impose on an artificial language such as formal logic."\footnote{C. Perelman, supra note 2, at 96.}

We may even use the same word in several senses at the same time. But this sort of usage cannot be accommodated by artificial language which gives us no common ground or basis to contend over the meaning and application of words and principles. Where this type of disagreement exists, ideal, artificial language fails.\footnote{C. Perelman, supra note 20, at 83.} Ambiguous and vague terms are needed for these purposes. For this reason, Perelman says, "Confused notions constitute, in the theory and practice of action, especially public action, instruments of communication and persuasion which cannot be eliminated."\footnote{C. Perelman, supra note 2, at 105.}

Third, artificial languages, because of their closed nature, do not allow for unforeseen, unexpected future events and applications. Because the meaning of a term or rule in an ideal, artificial language
must be wholly determinate, it has no definitional or applicational "give" to it. This makes artificial language inflexible. Perelman notes, "But a rule of action defined as reasonable or even as self-evident at one moment or in a given situation can seem arbitrary or even ridiculous at another moment and in a different situation." These last two topics, ambiguity in meaning and ambiguity in application or reference, are related. Perelman notes that, "a notion can be considered univocal only if its field of application is wholly determined, which is possible only in a formal system from which every unforeseen element has been excluded. . . ." 

II. CONFUSED NOTIONS

Perelman's "confused notions" are a particular type of ambiguous term. We have already noted their formal nature—they are multiply ambiguous concepts. But what of their substantive nature? Confused notions include moral-legal ideas, such as justice, equality, and goodness. Let us pause to ask what warrant we have for making this claim.

Philosophers have been trying, without any notable success, to define moral-legal concepts such as "justice" for several millennia. In the twentieth century alone, there has been significant disagreement over the nature and meaning of these terms. Some philosophers, perhaps chastened by earlier failed attempts to define these concepts in terms of simple, natural properties, take a different approach. G.E. Moore, for example, describes goodness as a simple, unanalyzable, hence, undefinable quality. Charles Stevenson and other emotivists define goodness, not in terms of any property which good things or acts have, but rather in terms of approval.

29. C. PERELMAN, The Rational and the Reasonable, supra note 20, at 119. The example Perelman gives is a nineteenth century ruling by the Belgium Supreme Court upholding the prohibition of admission of women to the Bar despite a provision of the Belgian Constitution proclaiming the legal equality of all Belgians. The American analogue of this case is Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

30. C. PERELMAN, supra note 24, at 130.

31. Plato's Republic was among the earliest and most influential philosophical attempts to define justice.

32. See G. MOORE, PRINCIPIA ETHICA 10 (1903) (where goodness is compared to yellowness in this respect).

33. "'X is good' means most people would approve of X if they knew its nature and consequences." (emphasis in original). C. STEVENSON, The Emotive Meaning of Ethical Terms in FACTS AND VALUES 14 (1963).
Unfortunately, these two accounts of goodness are not very useful in helping us define or apply goodness or other moral-legal notions. Moore's account of goodness, which holds that it is a simple and unanalyzable quality, leaves us with no way of resolving the inevitable disagreements individuals will have concerning what is good. Under Moore's account, we either perceive or intuit goodness or we do not. No method of contending over the determination is offered.

Stevenson's emotivist account of goodness is little better in this respect. Although his account of goodness is not wholly negative, it is not useful in resolving disagreement over its application. Goodness is rendered in terms of subjective preferences. But what can we do when preferences differ? Stevenson explicitly distinguishes factual disagreement, which he calls "disagreement in belief," from value disagreement, which he calls "disagreement in attitude" or interest. Only disagreement in belief can be settled by scientific (i.e., rational) methods according to Stevenson. But value disagreements are disagreements in attitude or interest. As a result, for Stevenson value disagreement escapes rational argument and resolution. Perelman's account of confused moral notions, in some important ways, improves upon both the failed naturalistic definitions of moral-legal notions and the alternative accounts offered by Moore and Stevenson.

The problem with naturalistic definitions of moral notions is that they are too limited. They fail to capture all of what we mean by these ideas. One historically important formulation of this point was Moore's critique of the "naturalistic fallacy." Professor Prior concisely summed up the fallacy in this way:

What Professor Moore means by the 'naturalistic fallacy' is the assumption that because some quality or combination of qualities invariably and necessarily accompanies the quality of goodness, or is invariably and necessarily accompanied by it, or both, this quality or combination of qualities is identical with goodness.

34. See C. Stevenson, The Nature of Ethical Disagreement, id. at 1.
35. See id. at 5-7. See also C. Stevenson, Persuasive Definitions, id. at 50-51.
36. See G. Moore, supra note 32, at 6-17.
37. A. Prior, Logic and the Basis of Ethics 1 (1949). Discussion of the scope, nature and validity of Moore's naturalistic fallacy argument has itself been a cottage industry in philosophy. See, e.g., W. Frankena, The Naturalistic Fallacy in Perspectives on Morality 1-11 (K. Goodpaster ed. 1976); M. Warnock, Ethics Since 1900 11-38 (2d ed. 1966). It is only Moore's basic point in which concerns us here, however, not the validity of his entire argument.
We can illustrate the point in a comparison of goodness and pleasure (the example Moore himself uses in his critique of John Stuart Mill's utilitarianism). Suppose *arguendo* that good acts are invariably pleasant. Does that mean that the good is identical with the pleasant? If that were the case, the sentence, "The good is pleasant" would be a tautology, conveying no information at all. But the sentence does convey information. It is synthetic, not analytic. Therefore, the good and the pleasant cannot be identical, cannot have the same meaning, even though (pursuant to our assumption) they are always conjoined.

But, if naturalistic accounts of moral notions do not work, the alternative accounts of Moore and Stevenson, as we have already noted, do not aid us in dealing rationally with moral disagreement either. In fact, they tell us that we cannot rationally treat moral disagreement.

Perelman offers a promising middle path between these two approaches. Both the naturalistic and non-naturalistic accounts assume that moral notions, to be substantively definable and rationally manipulable, must be determinate and univocal. These accounts differ only in their assessment of whether or not this can be done. That is, they assume that moral notions must be like the concepts in an artificial, ideal language—neither vague nor ambiguous.

Perelman denies that moral-legal notions can or should be clear and precise. Instead he contends that they are and ought to be confused notions. His philosophy of the New Rhetoric covers the range of cases between the extremes of the self-evident and the arbitrary. He notes this saying,

On the one hand, where the admitted thesis is self-evident and imposes itself upon every attentive mind there is no cause for argumentation. When truth is manifestly clear, when self-evidence leaves no room for willful choice, all rhetoric is superfluous. On the other hand, when the thesis is shown to be arbitrary and there is no reason to favor it, the demand for submission to a constraining power can come about only through brutal force, without any concern for intellectual acceptance. These two extremes are indeed rare; the field of rhetoric is thus immense.

The meanings and applications of moral-legal notions are, accord-

38. See supra text accompanying notes 32-35.
39. C. PERELMAN, Law and Rhetoric, supra note 2, at 120 (footnote omitted).
According to Perelman, neither fully self-evident nor completely arbitrary. They are vague and ambiguous, but not irrationally so.

Let us not accept Perelman’s assertion that moral-legal notions are confused notions without further explanation. Perelman’s thesis is itself not self-evident. Moore and Stevenson, to name just two philosophers we have mentioned, have held contrary views. Perelman’s own principles would require support for his theory. Let us examine, then, the moral-legal concept which Perelman has treated at greatest length—the concept of justice.

In his first work on justice, Perelman calls justice the most hopelessly confused of evocative terms. By this he means that it is an emotion and value-laden term over which there is much contention and dispute. It is the task of philosophy, but not science, to study these terms.

Perelman finds that justice has not one, but six possible meanings:

1. To each the same thing.
2. To each according to his merits.
3. To each according to his works.
4. To each according to his needs.
5. To each according to his rank.
6. To each according to his legal entitlement.

All six proffered definitions of justice are plausible. None is arbitrary. All capture at least part of what we mean by justice. On the other hand, no one meaning clearly covers all applications of the term.

Can these six meanings be reduced to one more comprehensive account so that we are not left with an irreducibly plural concept? Perelman suggests that all six definitions have a certain formal or abstract element in common, which he describes as, “a principle of action in accordance with which beings of one and the same

41. See id. at 1-3. Perelman explicitly links his approach to that of Charles Stevenson. See also C. Stevenson, supra note 35. Both writers distinguish the factual aspect of meaning from the emotive, hence arbitrary, aspect of meaning.
42. “[T]he proper object of philosophy is the study of those value-laden ideas which are so strongly coloured from the emotive point of view that agreement on their conceptual meaning is almost unattainable.” C. Perelman, supra note 40, at 4.
43. Id. at 7.
essential category must be treated in the same way."44 Although
this approach limits, it does not remove the underlying problem
of multiple meaning because the limitation applies only to the for-
mal element of the definition of justice. The substantive element
remains variable or indeterminate. "Our definition tells us neither
when two beings participate in an essential category nor how they
ought to be treated."45

Worse yet from the formalist point of view, the notion of justice
Perelman advances is multiply ambiguous. That is, more than one
substantive variable may apply in any specific application of the
term, thus creating at least apparent inconsistency. So, for exam-
ple, in an affirmative action case like University of California Regents
v. Bakke,46 rival interpretations of justice based on merit and need
come into conflict.

Perelman's reply here is to admit the existence of conflicting
simultaneous applications of the concept of justice and say further
that this conflict mirrors reality. He remarks on the limits of for-
mal justice,"Unfortunately, reality is far more complicated than
that. What happens is, in fact, that our feeling for justice takes
account at one and the same time of several independent essential
characteristics, and these give rise to essential categories which
are by no means always consistent with one another."47

How is this inconsistency to be accommodated? According to
Perelman there is no a priori answer, but instead compromises
between judgments and principles must be made on a case by case
basis.48 But this process of compromise between conflicting prin-
ciples of justice in individual cases is not a scheme invented by
Perelman, but rather a more familiar sort of procedure both lawyers
and philosophers have seen before.

Lawyers know Perelman's compromise of judgments and prin-
ciples as the notion of equity. Equity is distinguished from and
softens, in the name of justice, the harshness of the strict applica-
tion of legal rules.49 Equity is needed because legal rules, like

44. Id. at 16.
45. Id.
47. C. Perelman, supra note 40, at 30.
48. Id. at 33.
49. One common legal reference source defines equity as, "Justice administered accord-
ing to fairness as contrasted with the strictly formulated rules of common law." Black's
artificial languages, oversimplify the reality they regulate or describe. Equity in law and justice, like vagueness and ambiguity in natural language, helps make up for the shortcomings of a formal approach—lack of versatility and inflexibility in the face of new or unforeseen cases. Equity is an embodiment of our unsystematic intuitions about justice and is set off from and not reducible to the rules of law.

But equity does not displace or downgrade legal rules. Both law and equity are necessary components of justice. Neither has inherent priority or superiority over the other (the result depends on the facts of the individual case). For this reason, there is no preset general way of reconciling law and equity. 50

This point can be restated by saying, as Perelman does,

In morals, for example, reasoning is neither deductive nor inductive, but justificative. . . . [A]bsolute preeminence cannot be given either to principles—which would make morals a deductive discipline—or to the particular case—which would make it an inductive discipline. Instead, judgments regarding particulars are compared with principles, and preference is given to one or the other according to a decision that is reached by resorting to the techniques of justification and argumentation. 51

This explanation will also be familiar to students of recent Anglo-American political philosophy because of the similarity it bears to John Rawls' account of a reflective equilibrium of moral principles and moral judgments. 52

Like Perelman's justificatory moral theory, Rawls' model of a reflective equilibrium of moral principles and moral judgments is neither deductive nor inductive. It assigns no inherent priority to either moral principles or moral judgments. Depending on the situation, either may give way (i.e., require revision) in the face of the other. 53 Both theories, then, have provisions for avoiding the inflexibility of formalistic systems of morals by providing for feedback and critical reflection. There are, though, also some striking differences between Rawls and Perelman here, especially on issues

50. Perelman tells us that, "Social life offers the spectacle of a continual oscillation between justice and equity." C. PERELMAN, supra note 40, at 35.
53. See id. at 20.
of the methods of securing the assent of the parties to principles and judgments and of the consistency of principles.

Rawls secures agreement upon principles partly through the use of a veil of ignorance, a procedural device which deprives the parties to the social contract of particular information about themselves and their personal situations. Perelman, on the other hand, seeks to secure agreement in a state of full information for the parties.

Perelman also allows for greater pluralism, if not inconsistency, of principles than does Rawls. For although Rawls recognizes the permanent possibility of the revision of our moral principles, he assumes that at any one time it will typically be possible to accommodate our moral judgments to a consistent set of moral principles. Perelman does not assume this. On the contrary, his account of confused notions is an explicit recognition that moral and legal experience often requires the use and compromise of mutually inconsistent principles. This is so because Perelman seeks compromise or equilibrium not merely between moral judgments on the one hand and moral principles on the other, but also among moral principles themselves. Rawls concedes that one can be hopelessly torn between moral principles, but does not discuss or recommend simultaneously holding inconsistent principles.

Is Perelman's rhetorical method of reconciling ambiguities and conflicts between principles and judgments a rational method? Not if rationality is restricted to deductive and other formal methods. But it need not be understood in such a limited way. Initially, Perelman himself thought the meaning of value terms arbitrary. Later, however, he came to hold that argumentation could bring about reasonable compromise among conflicting principles.

Perelman came to realize that the ideal of reason can be interpreted in two sorts of ways. One is the notion of rationality, an ideal

54. See id. at 136-42.
55. I do not here examine the questions of which approach is more rational or more reasonable.
56. This is contained in the assumption that there is an equilibrium point.
57. See supra text accompanying note 47.
58. See J. Rawls, supra note 52, at 50.
59. In his first work he says, "There is no value which is not logically arbitrary." C. Perelman, supra note 40, at 57.
60. For the English edition of his work on justice, he added the following footnote to the quotation given in note 53, "Since these lines were written, the author has tried to present, through his theory of argumentation, a way of reasoning about values." Id. at 57 n.1.
61. The account which follows is taken from C. Perelman, The Rational and the Reasonable, supra note 20, at 117-23.
based on self-evident, immutable truths. This conception of reason is sufficient only within formal, theoretical systems, not in law or natural language. The other interpretation of reason is the conception of the reasonable, as embodied, for example, in notions such as common sense and the reasonable man.

Now, the reasonable certainly differs from the rational. The reasonable is the realm of persuasion; the rational is the realm of demonstration. Yet, both are opposed to brute coercion or manipulation. Both seek the voluntary acceptance of the audience. Disagreement is compatible with the reasonable, but not with the rational. This is because the rational demands unique right answers. The reasonable does not. The rational is monistic, while the reasonable is pluralistic. And as Perelman notes,

From a pluralistic perspective two different decisions, on the same subject, can both be reasonable and be expressions of a coherent and philosophically justified point of view. The thesis which holds that only one just point of view exists ... supposes the existence of a global and unique perspective which we can rightfully consider as the only true one. 63

So, although Perelman’s rhetorical or argumentative method is not rational in a formal sense, it is reasonable. And, in this, it may be no less rational than legal or scientific discourse. Law no longer claims to be a purely deductive enterprise. Likewise, even the philosophy of science has grown to favor less deductive models of scientific rationality. The accommodation of these changes in

62. In philosophy the classical statement of this position is that of Descartes:
Now whenever two such men are carried to opposite conclusions regarding one and the same matter, one at least must be in error; indeed, neither of them, it would seem, has the required knowledge. For if the reasoning of either of them were certain and evident, he would be in a position to propound it to the other in such wise as to convince him also of its truth.

In legal theory, a recent statement of this demand occurs in Ronald Dworkin’s “Right Answer” thesis. See R. DWORINKIN, supra note 7.

63. C. PERELMAN, Disagreement and Rationality, supra note 20, at 115.

64. As Morris Cohen wrote, “The law, of course, never succeeds in becoming a completely deductive system. It does not even succeed in becoming completely consistent.” M. COHEN, The Place of Logic in Law, in LAW AND THE SOCIAL ORDER 167 (1933).

65. Thomas Kuhn, in a widely influential work, has said that during periods of scientific revolutions there is “argument and counterargument in situations in which there can be no proof.” T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 152 (2d ed. 1970); see also id. at 199-200.
disciplines formerly claimed to be examples of formalistic rationality suggests that if useful discourse in a field of study does not accord with restricted canons of rationality, then we might be better off liberalizing our canons of rationality, rather than dismissing these forms of discourse as irrational.\textsuperscript{66}

Even if what I have claimed about confused notions so far\textsuperscript{67} is accepted, it still remains to be shown what role, if any, they have to play in constitutional theory.

\section*{III. CONSTITUTIONAL AMBIGUITY}

Are constitutional terms and provisions all clear and precise or do they have elements of vagueness and ambiguity? It is fairly well accepted that constitutional terms and provisions have a range of vagueness and ambiguity (although there is significant disagreement as to what this range is).\textsuperscript{68} Let us briefly survey some examples.

Some constitutional provisions are so clear as to defy the need for interpretation. Take, for example, the provision that the President “have attained to the Age of thirty five Years.”\textsuperscript{69} Little short of a change in the period of the orbit of the earth would make the meaning of this provision unclear. Some other provisions may require a historical supplement to the plain meaning of the words.\textsuperscript{70} But this need not make divination of meaning very difficult either. More general constitutional words and provisions affecting whole categories of activity present more difficult problems.

\textsuperscript{66.} Kuhn suggests that, “[I]f history or any other empirical discipline leads us to believe that the development of science depends essentially on behavior that we have previously thought to be irrational, then we should conclude not that science is irrational but that our notion of rationality needs adjustment here and there.” Kuhn, Notes on Lakatos, 8 Boston Studies in the Philosophy of Science 144 (R. Buck & R. Cohen eds. 1971).

\textsuperscript{67.} This includes, in proposition form, that—
\begin{itemize}
  \item a) Language contains words and statements which are vague and ambiguous.
  \item b) A word or statement may display at least three types of ambiguity—elementary ambiguity, indecisive ambiguity, and multiple ambiguity.
  \item c) Justice, goodness and other moral-legal concepts are multiply ambiguous, i.e., are confused notions.
  \item d) Judgments and principles relating to the confused moral-legal concepts may be inconsistent, requiring compromise among conflicting demands.
\end{itemize}

\textsuperscript{68.} See J. Ely, Democracy and Distrust 13-41 (1980); E. Levi, supra note 8, at 7-8. I refer to these sources in my survey below.

\textsuperscript{69.} U.S. Const. art. II, § 1, cl. 5. The example is Ely’s. See J. Ely, supra note 68, at 13.

\textsuperscript{70.} Ely gives the example of the requirement that the President be a “natural born Citizen,” U.S. Const. art. II, § 1, cl. 5. See J. Ely, supra note 68, at 13.
Some constitutional provisions are vaguer than the clear provisions we have just mentioned. Take, for example, the contracts clause71 or the commerce clause.72 These clauses do not on their faces clearly specify for all cases what constitutes contractual impairment or interstate commerce. In the terminology we have developed, we can say that although these clauses may have a core of clear cases, they also have a fringe of vagueness in application. Although this vagueness can give rise to significant dispute and litigation (as the history of the contracts and commerce clauses attests), the imprecision found in these vague provisions is something with which courts utilizing the common law method can deal.

The common law method of judicial decision is adapted to adjudication with vague concepts. Mr. Justice Cardozo describes the factors underlying the decision process in this way,

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired.73

This method utilizes both the core of settled meaning and fringe of uncertainty in application possessed by vague concepts.

Stability and certainty in meaning is found in those cases which clearly satisfy all five of Cardozo's criteria, that is, in cases where the received rule both clearly applies and strikes us as the right rule to apply to the case. Sometimes, however, there are uncertainties or conflicts concerning one or more of these criteria. Then the court must reverse or go beyond the scope of earlier decisions. But, it is important to note that the common law method assumes that this range of uncertainty is small—that it is interstitial, not global.74 The method involves the comparison of clear and unclear

71. "No State shall... pass any... Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1.
72. "The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.
74. Cardozo says, "We must keep within interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through the centuries of the common law have set to judge-made innovations." Id. at 103.
cases to the end that the latter may be brought under or related
to the former. Without the core of settled cases to work with, the
common law method cannot be applied.

Yet, in a small number of cases, even with these aforementioned
constitutional provisions, the common law method is overtaxed.
This happens in situations of diametric, severe, and irresolvable
conflict among Cardozo’s five criteria. One example of this sort
of conflict involving the contracts clause is found in *Home Building
and Loan Association v. Blaisdell.* Blaisdell involved a state mort-
gage moratorium enacted to provide relief for financially strapped
property owners during a time of extreme economic depression.
The Supreme Court upheld the scheme for general reasons of social
utility which inferentially underlay the contracts clause, despite
the difficulties presented for this result by both the literal text
and the specific intent of the framers of the provision.

This sort of construction of textual provisions which looks beyond
the specific meaning of a provision to more general, abstract, and
structural considerations, gives rise to a distinction between what
has been called the specific and interpretive intents of the framers.

75. 290 U.S. 398 (1934).
76. Chief Justice Hughes wrote for the Court,
It is manifest... that there has been a growing appreciation of public needs and
of the necessity of finding ground for a rational compromise between individual rights
and public welfare. The settlement and consequent contraction of the public domain,
the pressure of a constantly increasing density of population, the interrelation of
the activities of our people and the complexity of our economic interests, have in-
evitably led to an increased use of the organization of society in order to protect
the very bases of individual opportunity. . . . [T]he question is no longer merely
that of one party to a contract as against another, but of the use of reasonable means
to safeguard the economic structure upon which the good of all depends. *Id.* at 442
(Hughes, C.J.).

Justice Sutherland, in dissent, pointed out the difficulties with this approach saying,
"A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly
opposite interpretations. It does not mean one thing at one time and an entirely different
thing at another time." *Id.* at 448-49 (Sutherland, J., dissenting).

77. The intentions of the framers rather than the ratifiers are typically consulted in
constitutional construction, even though the ratifiers rather than the framers are the adopters
of a constitutional provision. As in statutory construction, the ratifiers are usually deemed
to have delegated this intent-determining power to the framers. *See* MacCallum, *Legislative Intent*, 75 Yale L. J. 754, 780-84 (1966). There are several reasons for this. The framers are
less numerous and less scattered than the ratifiers. They are also more likely to have con-
sidered and recorded their thoughts on the meaning of the constitutional provisions in
question. This fiction is not without its dangers, though. *See* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204, 209-17 (1980).
of a constitutional provision. The specific intent of the framers is manifested in their specific and concrete value judgments expressed in adopting the constitutional provision in question. Because these judgments are specific and concrete, adherence to the specific intent of the framers in the construction of constitutional provisions, where that intent is determinable and clear, tends to provide narrow, rule-like directives for interpreting courts (thus limiting their flexibility and discretion). In this sense, use of specific intent is a formalistic device.

Two main problems arise with the use of the specific intent. First, because of the number of people involved and the nature of the adopting process, the framers' specific intent is often neither determinable nor clear. Worse yet, even if that intent can be discovered, it may be undesirable to apply it with full force in situations neither contemplated nor foreseen by the framers. We have already discussed the need for the exercise of equity jurisdiction to temper the harshness of the strict and literal application of the rules of justice. So, too, we may need to utilize the interpretive intent of the framers and noninterpretive bases of constitutional decisionmaking to transcend the limitations of specific intent construction of constitutional provision.

Interpretive intent is not based on the specific beliefs and value judgments of the framers of a constitutional provision. Instead it is concerned with the interpretive principles and methods the framers would have future decisionmakers use in interpreting the

79. See Brest, supra note 77, at 216-17; J. Ely, supra note 68, at 13-41.
80. For example, Chief Justice Hughes wrote in Blaisdell that, "In the construction of the contract clause, the debates in the Constitutional Convention are of little aid." 290 U.S. at 427 (footnote omitted).
81. See supra text accompanying notes 49-51.
82. Even without these modern interpretive strategies in constitution construction, earlier courts sometimes in hard cases also departed from the literal textual meaning. For example, in a difficult contracts clause case dealing with bankruptcy laws and their retroactivity with respect to preexisting contracts, Justice Johnson wrote in 1827:

But to assign to contracts, universally, a literal purport, and to exact for them a rigid literal fulfillment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction, and fulfillment of contracts, as over the form and measure of the remedy to enforce them.

constitutional provision in question. Interpretive intent tends to take the form not of rule-like directives, but rather of principles to be considered and balanced by decisionmakers. In this sense, at least, interpretive intent is an equitable device.

Interpretive intent construction has its shortcomings, too. Like specific intent, it is often neither determinable nor clear. Not determinable because the framers did not make the modern distinction between specific and interpretive intent. Hence, the process of determining the framers' supposed interpretive intent is often inferential, depending as much on the interpreters' state of mind as the framers. Not clear because although the interpretive intent can be formulated at many different levels of generality, there is no commonly accepted method for determining which level of abstraction is best or proper.

An alternative to the quest for the framers' interpretive intent is the frank admission that there are and must be legitimate bases of constitutional decisionmaking other than the text and the value judgments constitutionalized by the framers. This type of constitutional theory is usually called noninterpretivism or nonoriginalism.

83. See Brest, supra note 77, at 212, 215-16; Dworkin, supra note 78, at 493-97.
84. Despite a difference in methodology, it is often similar in operation and result to noninterpretive constitutional theory. See infra text accompanying notes 87-88.
85. Brest mentions the hermeneutic assertion of the impossibility of separating the interpreter and the interpretation and of seeing the past other than from our own worldview. See infra note 77, at 221-22 n.65. See also H. GADAMER, TRUTH AND METHOD, (G. Barden & J. Cumming trans. 1975).
86. Ely refers to "the understandable temptation to vary the relevant tradition's level of abstraction to make it come out right." J. ELY, supra note 68, at 61 (footnote omitted). See also Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 YALE L.J. 1063, 1084-85 (1981).
87. Michael Perry describes interpretivism in this way:

The Supreme Court engages in interpretive review when it ascertains the constitutionality of a given policy choice by reference to one of the value judgments of which the Constitution consists—that is, by reference to a value judgment embodied, though not necessarily explicitly, either in some particular provision of the text of the Constitution or in the overall structure of government ordained by the Constitution. Such review is "interpretive" because the Court reaches decision by interpreting—deciphering—the textual provision (or the aspect of governmental structure) that is the embodiment of the determinative value judgment. (footnote omitted).


Non-interpretive review, then, he defines in this way:

The Court engages in noninterpretive review when it makes the determination of constitutionality by reference to a value judgment other than one constitutionalized by the framers. Such review is "noninterpretive" because the Court reaches deci-
The bases usually consulted are political, moral, and religious principles not explicitly stated in the constitutional text. As a practical matter, the results of applying the framers' interpretive intent and of applying noninterpretive bases of constitutional decisionmaking are often quite similar.88

Acceptance of a constitutional theory which focuses either on the framers' interpretive intent or on noninterpretive bases of decisionmaking has the potential, as we have seen in the case of the contracts clause, of making even relatively unambiguous constitutional provisions unclear and indeterminate in their application. For at least one new ambiguity is created. A provision otherwise having a univocal (although possibly vague) meaning is now made ambiguous between at least two meanings—one concrete meaning determined by the text itself or the specific intent of the framers and on other more abstract meaning deriving from the interpretive intent of the framers or from noninterpretive bases of decision. Worse yet, we seem to have no clear way of deciding between the two sets of meanings or of accommodating them to each other.

With the sorts of constitutional provisions we have surveyed so far, the problem we have examined is usually not severe. Literal meaning or the specific intent of framers serves us well and it is usually neither necessary nor reasonable to recur to abstract or noninterpretive meanings. The situation is different, however, with the "open-ended" clauses of the Constitution, such as the due process and equal protection clauses of the fourteenth amendment.89

88. See, e.g., M. PERRY, supra note 87, at 113-14.
89. The privileges or immunities clause of the fourteenth amendment and the ninth amendment are additional examples. See J. ELY, supra note 68, at 22-30, 34-41 respectively. Limiting
The “open-ended” clauses of the Constitution present interpretive problems not posed by the other clauses because they are not only vague, they are also ambiguous. The “open-ended” clauses are not concrete, but formal and abstract. They are not determinate, but seem to require external reference for specification of content. Discussion of their meaning raises not only political and legal questions, but moral questions, too. In this they are like the concept of justice discussed by Perelman. As a result, the problem of conflicts in their construal between literal meaning or the specific intent of the framers, on one hand, and interpretive intent or noninterpretive meaning, on the other hand, cannot be limited to exceptional, extreme cases. Instead these problems are global. In the remainder of this essay I will flesh out these statements and suggest how Perelman’s account of confused notions can help us to understand the difficulties we encounter in attempting to construe the “open-ended” clauses of the Constitution and to see what is at stake in the disputes over their meaning.

The contention that the due process and equal protection clauses of the fourteenth amendment afford substantive moral-political guarantees which are not in so many words set out in the literal meaning of the text or the specific intent of the framers is, of course, not new. It has a long history in substantive due process and fundamental rights adjudication. It is also the prime topic of debate in constitutional theory today. Moreover, all the assertions I have made about the ambiguous, indeterminate, and abstract character precedent and historical disfavor have tended to restrict their use. See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); B. Patterson, The Forgotten Ninth Amendment (1955).

90. Lochner v. New York, 198 U.S. 45 (1905), and Griswold v. Connecticut, 381 U.S. 479 (1965), are perhaps the two most notorious substantive due process holdings of the Supreme Court from its liberty of contract and fundamental rights period of adjudication. Perhaps ironically, Lochner is cited with disfavor in Griswold. Lochner symbolizes the excesses of substantive due process which its advocates must try to explain away. See Brest, supra note 86, at 1085-87.

91. Modern fundamental rights adjudication differs from substantive due process adjudication in two ways. First, it deals only with personal autonomy rights, whereas substantive due process adjudication also dealt with economic rights. Second, substantive due process involves, as the name indicates, only cases arising under the due process clause of the fourteenth amendment. In contrast, fundamental rights cases can also arise under the equal protection clause of the fourteenth amendment and the Bill of Rights.

of the “open-ended” clauses depend upon the claim I have made about their moral-political character. I will, therefore, focus on that issue.

The question of whether the “open-ended” clauses of the Constitution are moral-political in character is not one we can solve solely by reference to the dictionary or history. It is a question which calls for a practical or policy choice. The alternative answers which have been proposed are, at least in their general outlines, relatively clear. We can attempt to render the meaning of the provisions clear and precise by restricting the bases of interpretation to the literal meaning of the provision or, more likely, to the historical meaning at the time of the adoption and the specific intent of the framers. This approach, however, can have the same sort of harsh unfairness we found in the application of legal rules untempered by equity. Alternatively, we can try to take account of the moral-political resonances of these provisions. Historically, this approach has also been problematic. In precedent this approach is haunted by the ghost of Lochner. In scholarship this approach is marked by disagreement over both what values are to be referenced and how these values once chosen are to be determined.

Can confused notions help us in this dilemma? They will not dissolve the dilemma because it is a real, not merely illusory, problem. But the theory of confused notions can help us to see how and why these conflicts arise and, in this way, lead us to acceptable compromises and reformulations. Let us look first at the disagreement over the possibility of moral knowledge among constitutional theorists.

The problem of moral scepticism impacts constitutional theory in the following way. If moral scepticism is true (that is, if there is no moral knowledge), then the strategies of applying the interpretive intent of the framers or the noninterpretive meaning of the provision are radically defective. Defective because a prime

94. See M. Perry, supra note 87, at 91-93.
95. See, e.g., M. Perry, supra note 87; D. Richards, The Moral Criticisms of Law 39-56 (1977); Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975).
96. 198 U.S. 45 (1905). See also Brest, supra note 86, at 1085-87; J. Ely, supra note 68, at 14-15, 65-68.
97. See supra note 92.
postulated source of guidance—moral knowledge—does not exist. But, if moral scepticism is false, then moral knowledge may help these alternative strategies modulate the severe simplicity of literal meaning and the specific intent of the framers.

Not surprisingly, then, those who would construe the Constitution according to the specific intent of the framers, when they discuss the issue, are open to moral scepticism. 88 In contrast, the proponents of the interpretive intent of the framers or noninterpretive sources of Constitution meaning, those whose constitutional theory depends on the possibility of moral knowledge, reject moral scepticism. 89 The sceptic's best argument against the existence of moral knowledge is the lack of moral agreement or settled procedures for settling moral disputes. The anti-sceptic's best arguments are the necessity and utility of moral knowledge. We do act as if we have moral knowledge because we find it valuable and useful to do so. The battle between the two positions is a stand-off because neither position can fully overcome the other's criticisms.

But this impasse can be overcome through an analysis of the dubious, mutual presuppositions of both the sceptic and the anti-sceptic. The primary mutual presupposition I wish to attack is the notion that moral knowledge consists of unique right answers. 90 If this claim can be discredited, then the sceptic's arguments concerning moral disagreement lose their force.

Perelman's analysis of moral concepts as confused notions gives us just such an alternative argument. Recall that for Perelman moral concepts are not merely ambiguous, but multiply ambiguous. 101 Moral justification occurs not through a deduction or rule-bound procedure, but through an informal, rhetorical

98. Mr. Justice Rehnquist writes, for example:

Beyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments. There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa. Many of us necessarily feel strongly and deeply about our moral judgments, but they remain only personal moral judgments until in some way given the sanction of law.


99. See, e.g., M. Perry, supra note 87, at 107-112 (and sources cited therein).

100. See supra notes 7, 98, 99.

101. See supra notes 46-47 and accompanying text.
Moral answers are compromises between conflicting principles and facts. There is rarely a unique right answer in moral questions, but rather a variety of reasonable, acceptable answers (not all of which need be consistent).

If Perelman’s view of the nature of moral concepts is persuasive, then we will see that the conflict in constitutional theory between the sceptic and anti-sceptic is unresolvable but avoidable. For it assumes that constitutional concepts and provisions are no worse than vague or indecisively ambiguous (as we have defined these terms), that is, in one way or another the Constitution can be made to speak with a single voice on an issue. But, if moral concepts are confused notions and, further, if the “open-ended” clauses of the Constitution embody or refer to these moral concepts, then this assumption is simply wrong. As a result, both the interpretivist and noninterpretivist projects must fail (for different, but complementary, reasons).

This realization assuredly does not resolve all our problems relating to the construction of the “open-ended” clauses of the Constitution. It only shifts our attention to the true policy choices to be made (no mean feat in itself). For if constitutional interpretation requires utilization of multiply ambiguous confused notions, then it may not be possible to render uniform, principled decisions in these areas. This situation, some might say, would make it inappropriate for the Court to entertain these sorts of cases because its decisions could not be principled. One important argument of the interpretivists is that reliance on the specific intent of the framers in constitutional interpretation facilitates uniform, principled decisionmaking. Even noninterpretivists agree that constitutional justification must be principled.

What are the requirements of principled explanation? One influential statement says, “A principled decision . . . is one that

102. See supra notes 51-58 and accompanying text.
103. See supra notes 57-66 and accompanying text.
104. See supra notes 62-66 and accompanying text.
105. John Ely, for example, writes, “If a principled approach to judicial enforcement of the Constitution’s open-ended provisions cannot be developed, one that is no hopelessly inconsistent with our nation’s commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them.” J. ELY, supra note 68, at 41.
106. This is because specific intent methodology renders the meaning of constitutional provisions univocal.
rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. 108 Can Perelman’s account of moral justification, utilizing rhetoric and confused notions, meet the requirements of principled explanation or decisionmaking? Our reply here is like our response to the question of whether Perelman’s method is rational. 109 Here, too, we must admit that the method will not meet a strict interpretation of the test imposed. But, we will also then reply—so much the worse for a strict interpretation of the test imposed.

The principled explanation requirement, when analyzed, has two components—

1) A demand that reasons be given for a decision.

2) A demand that these reasons be general or neutral, i.e., that they transcend the particular case.

Perelman’s method of moral justification can meet 1), but may not meet 2). But, for Perelman, his method’s inability to meet 2) is a virtue, not a defect of the account.

How does Perelman’s method meet the demand for reasons? It does this by starting from commonly accepted propositions 110 and attempting through argument to convince rather than compel or coerce. 111 The result reached will not be arbitrary, but acceptable. 112

Because it attempts to reach a compromise among conflicting principles given the facts of particular situations rather than to apply uniform rules regardless of the harshness or unacceptability of the outcome, Perelman’s method may not satisfy the generality and neutrality demand. It is in this way like equity. It may be helpful to view the application of Perelman’s method of moral justification to the construction of the “open-ended” clauses of the Constitution as a theory of constitutional equity.

An apparent trilemma is generated by the conflict between the confused nature of moral concepts and the demand for generality and neutrality in constitutionality. Either—

109. See supra notes 59-60 and accompanying text.
110. See, e.g., C. PERELMAN, Philosophy, Rhetoric, Commonplaces, supra note 20, at 58-60; Classicism and Romanticism in Argumentation, id. at 159-63.
111. See supra text accompanying note 39.
112. See id.
a) all constitutional provisions, including the "open-ended" clauses, shall be construed to avoid multiple ambiguity, e.g. by applying the specific intent of the framers, or
b) constitutional meaning will be permitted to include multiple ambiguity, but the courts will be allowed to entertain cases only where they can make principled decisions. Courts must forbear, then, from making noninterpretive decisions, especially in cases involving the "open-ended" clauses of the Constitution, or,
c) the courts will be permitted to render decisions even in situations where the meaning of the relevant constitutional provisions is multiply ambiguous. The generality and neutrality demand must then be dropped.

None of these alternatives is wholly appealing. Much modern human rights precedent would be illegitimate under a) or b). (a) and b) will be in practical operation, although not in theory, quite similar). But c) seems to violate the requirements of democracy and to threaten judicial tyranny. If a) and b) are to be avoided, the defects of c) must be lessened in some way. Perelman suggests how this might be accomplished. His pluralistic method is democratic in that it both takes account of opposing views and attempts to reach a result acceptable to all. The compromise reached in a particular situation can then be rationalized and extended. In the end, Perelman calls not for an abandonment of method or procedure, but rather for a more complex, more sensitive method or procedure.

Perelman's procedure resembles the method Alexander Bickel accused the Warren Court of employing—predicting progress. But Perelman's approach is free of the suggested defects of that enterprise. Critics have doubted that courts are any more competent at clairvoyance than are the other branches of government.

113. See supra note 94.
114. See J. Ely, supra note 68, at 4-7 and the sources cited therein.
115. The classic statement of this fear is that of Judge Hand: For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. L. Hand, The Bill of Rights 73 (1958).
116. See supra notes 47-63 and accompanying text.
117. Cf. supra note 66.
True enough; however, it is not clairvoyance, but detachment and analysis, which are called for here. And courts are arguably superior to coordinate branches in these abilities. It is also claimed that predicting progress is anti-democratic, leaving us in thrall to the supposed principles of future generations. But this is not so with Perelman's method, which looks not to hypothetical future consensus, but rather at current (although perhaps latent) agreement. What if the Court is wrong and a given decision is not acceptable? It can be changed in future cases. No theory of constitutional decisionmaking can reasonably require judicial infallibility.

IV. CONCLUSION

Doubtless Perelman's analysis will not end dispute over the meaning of the "open-ended" clauses of the Constitution, for it implies that this unclarity is real and unavoidable. His approach, however, can help us understand why we have the problems with constitutional meaning and construction we do. It will make us wary of simple, formalistic solutions. It will make us more comfortable with the complexities and conflicts of the situation as it is and provide for us methods less ambitious but more useful for our task of constitutional construction and interpretation.

120. Id. at 70.