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LEGAL RULES: THEIR FUNCTION IN THE PROCESS OF DECISION *

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The part law plays in the process of adjudication has been obscured by Montesquieu's classic stereotype of the judicial function.¹ For orthodox believers in the separation of powers the judge who does his duty is an automaton; what decides the case must be the law itself in the sense of known public rules which the judge applies with machine-like precision.² At the same time it has been customary to assume that these rules are all somehow so related into a rational system that any rule which is needed can be deduced from others by a process of logic; with the result that the decision of cases turns out not to require from beginning to end the intervention of human choice, but on the contrary to be dictated throughout by sheer legal necessity.

Lawyers are seldom philosophers enough to formulate or even be fully aware of such deeply basic presuppositions of their

*The substance of this article was presented at the Round-Table on Jurisprudence and Public Law at the annual meeting of the American Political Science Association at Cleveland, Ohio, December, 1930.

¹ MONTESQUIEU, *DE L'ESPRIT DES LOIS*, bk. II, c. 6.

² For an exposition of this view see Alexander Hamilton in *THE FEDERALIST* (1789) No. 78, "The judiciary," he says, "can take no active resolution whatever." For other illustrations see Dickinson, *The Law Behind Law* (1929) 29 *COL. L. REV.* 113, 115, especially notes 7-10 inclusive.

thought. The ideal of a complete and perfectly logical system of legal rules has survived because for the most part it has remained implicit in conventional habits of legal analysis instead of projecting itself into conscious belief. So far as it did emerge, it long found congenial company, and confirmation by analogy, in the contemporary assumption of Newtonian science that the physical universe was governed by a body of natural laws whose interactions dictated with rigorous determinism the occurrence of each least event in space and time.³

The most spectacular crisis in intellectual history since Darwin's *Origin of Species* has come with the challenge which Einstein and the modern physicists have flung down to the Newtonian conception of nature. Like its Darwinian predecessor this more recent crisis has sent waves of repercussion into other fields of thought; and arriving within the domain of jurisprudence, the impact has struck amidships not merely the idea of law as a system of logically connected rules, but even the more fundamental idea of rules as controlling factors in the process of decision.⁴ It may be suspected that this particular direction of the impact has not been altogether due to unguided operation of the analogy from Einstein.

The revolt against the idea of law as a complete and coherent system has come significantly from teachers in American law-schools, whose daily ritual is to demonstrate by the "case-system" a coherence sometimes more suppositional than real; the rigor of the task has turned some of the hierophants into unbelievers. The further fact that teachers under the case-system are concerned exclusively with decisions of appellate courts, and almost always

³ DEWEY, *THE QUEST FOR CERTAINTY* (1929) 201. The notion that nature in its entirety is governed by absolute laws and that every phenomenon is capable of explanation by such laws was first definitely formulated and strongly insisted upon by the Stoics. See quotation from Alexander of Aphrodisias in E. MEYERSON, *L'EXPLICATION DANS LES SCIENCES*, v. I, 112, quoted from NOURRISSON, *DE LA LIBERTÉ ET DU HAZARD, ESSAI SUR ALEXANDRE D'APHRODISIAS* (1870) 260. It is significant that it was also the Stoics who developed the conception of a body of absolute natural laws governing men's jural and social relations.

⁴ For a recent exposition of this view which has attracted much attention see FRANK, *LAW AND THE MODERN MIND* (1930), and the Book Review by Professor Francis H. Bohlen (1931) 79 U. OF PA. L. REV. 822, to which I am indebted throughout this article.

on dubious and mooted points, has invoked the still deeper scepticism which presumes to doubt even the existence of rules of law as ordinarily understood.⁵

The effect of this sceptical movement in recent jurisprudence has been altogether beneficial insofar as it helps dispel the Montesquieu phantasy that rules of law dictate completely the outcome of the decisional process. The actual decision of any litigated controversy results almost always from the determination of numerous issues, on many of which there is not, and on some of which there cannot ever be, a controlling rule of law. Judicial discretion thus inevitably plays its part, and a large and important one, in the administration of what we call justice according to law.⁶ This has been too much overlooked by traditional theory, with the result that insufficient attention has been paid to the discretionary aspect of the judicial process. Insofar as this discretionary element is duly recognized, the result is to emphasize the inexorably authoritarian character of government, even in the performance of its most purely legalistic function.

The fact that legal rules do not always dictate the decisions of cases does not, however, mean that they may not have influence, and sometimes a controlling one, in the process of decision. Sceptics who minimize the influence of such rules often seem only disappointed absolutists, who expected the traditional theory of legal determinism to work out to the bitter limit of its clock-work logic, and on finding it play them false, react into an opposite extreme of naïve unwillingness to recognize the less absolute, but none the less relatively effective, way in which legal rules do their

⁵ Bingham, *What is the Law?* (1912) 11 MICH. L. REV. 109; Bingham, *Legal Philosophy and the Law* (1914) 9 ILL. L. REV. 96.

⁶ This is obscured by conceiving of the gross result of governmental action taken with respect to an individual in a particular case as "law" in the way in which Professor Llewellyn, for example, seems to conceive it in the following statement: "More often than not administrative action is, to the layman affected, the last expression of the law on the case. In such a situation I think it highly useful to regard it as the law of the case." Llewellyn, *A Realistic Jurisprudence* (1930) 30 COL. L. REV. 431, 455. The administrative, or even judicial, action taken with respect to a given individual always represents the component of a number of factors of which "law" is only one if the term "law" is to be preserved so as to have any distinction from the activity of government in general.

work, holding an impossibly exalted view of certainty, they insist on all or none.

The form which the sceptical doctrine currently takes is that legal rules are a device for producing certainty, and as such are open to censure on two grounds: *first*, because they are ineffective, in that they do not eliminate discretion; *second*, because the proposed end itself is an illusory fetish. The attack on the ability of rules to produce certainty is not ordinarily based on actual analysis of the manner in which they function in the process of decision, but is usually content to parallel the line of attack of the new physics on the supposed certainty of scientific "laws of nature". The latter attack seems to have shattered the notion of a body of eternal and immutable rules dictating the happening of every occurrence in space and time;⁷ but it has by no means caused scientists of the new school to believe that they can carry forward the work of science without continuing as before to formulate and employ scientific "laws".⁸ Rather the new theory emphasizes the importance of such laws as tools of scientific procedure, even though cosmic validity has to be denied to them as patterns of absolute truth.

It is difficult to see what other bearing this development can have in the field of jurisprudence than to confirm by analogy the abandonment of the now discredited theory of absolute self-existent "natural laws";⁹ certainly a rule of positive law devised by authority to meet a current need, and subject constantly to the possibility of revision or repeal, would seem precisely such a tentative "pragmatic" formulation as the new theory supposes scientific laws to be. To employ such rules in the process of decision carries no implication of belief in the attainment of an absolute metaphysical certainty.¹⁰

The analogy of the new conception of scientific laws has not, however, been developed by the progressive jurists toward the outcome just suggested. Instead, their imagination has been caught

⁷ DEWEY, *op. cit. supra* note 3, at 205-9.

⁸ Blumer, *Science without Concepts* (1931) 36 AM. J. OF SOCIOLOGY 515.

⁹ DEWEY, *op. cit. supra* note 3, at 211; Dickinson, *op. cit. supra* note 1, at 120-5.

¹⁰ See *infra* note 12.

by the resemblance between the new conception of a law of nature as "a formula for the prediction of the probability of an observable occurrence",¹¹ and Mr. Justice Holmes' fruitful suggestion that from a certain point of view jural law also is only a prediction of how future cases will be decided.¹² This analogy has fathered a far-flung demand for revision of the concept of jural law. Law, it is urged, consists of whatever will lead to better prophecy of how cases will be decided. We have noted, however, that decisions often depend largely on discretionary elements; henceforward whatever will aid in predicting how such discretion will be exercised is to be brought under the rubric of "law". Thus, if it can be anticipated on the basis of past knowledge that a police magistrate will exercise his discretion in accordance with the wishes of a particular politician, this fact, or knowledge of it, it is not quite clear which, becomes apparently a part of the "law" applicable to a case coming before that magistrate;¹³ similarly "law" must include such a fact as that in jurisdictions where justices of the peace rely for their fees on amounts collected from defendants, there is likelihood that such officials will give judgments for plaintiffs. In short anything of which knowledge is useful to an attorney in deciding how to act in his client's interest is to be labelled "law".¹⁴ The comprehensiveness of the result is startling to per-

¹¹ DEWEY, *op. cit. supra* note 3, at 206.

¹² "The prophecies of what the courts will do in fact and nothing more pretentious, are what I mean by law." HOLMES, COLLECTED LEGAL PAPERS (1921) 173.

¹³ "The peculiar traits, disposition, biases and habits of the particular judge will then often determine what he decides to be the law. . . . If the personality of the judge is the pivotal factor in law administration, then law may vary with the personality of the judge who happens to pass on any given case." FRANK, *op. cit. supra* note 4, at III.

¹⁴ Speaking of the action of a tax official Professor Llewellyn says: "If the official's decision is adverse and erroneous, I should include as a subtraction from my effective legal rights, if I proceeded to get a reversal, the ill will and subsequent trouble I might incur at the hands of that official; as a part of the law, if I won; and its predictability as a determining part of the law if I decided not to fight." Llewellyn, *op. cit. supra* note 6, at 456. In other words law is accountable for the entire gross result of what happens in any given case, and since it is a prediction, it includes all that may go into that result. Turned about, a right does not exist at law except insofar as it is absolutely certain to be realized in fact. Here surely "law" and absolute certainty are identified more closely than by traditional theory, which admits that law does not always work out into fact.

sons accustomed to more conservative terminology, and there has consequently arisen a war about words in which for the moment the progressive dialectic is largely consuming itself.¹⁵

There seems no reason why the term "law" should not be expanded to include any and every kind of knowledge which is admittedly useful to lawyers and judges and law-teachers and law-students, unless it should seem desirable to preserve the word for a narrower use,—*i. e.*, unless there is possible advantage in maintaining a certain precision in the use of the term, thus making verbal distinctions more convenient between thought-units which sooner or later it may be desirable to contrast. For example, it may become desirable to keep distinct for purposes of discussion the fact of Judge *A's* known animosity to Lawyer *X*, and the fact that there is a rule of law which in a given instance the judge's animosity led him to disregard. If both the animosity and the rule are equally "law", it becomes difficult to state the situation in appropriate terms, or to find any proper standard for criticising the behavior of the judge.¹⁶

I

Whether the term "law" is expanded to include all that may shed light on future decisions, or is limited to mean rules of decision in distinction from discretionary elements which may enter into the making of decisions, the important thing from a practical point of view is to understand the way in which the rule-element and the discretion-element interact and coalesce in the

¹⁵ Professor Llewellyn apparently suggests at one point, *ibid.* 431, that the term "law" should perhaps be abandoned as covering too many different kinds of things. This is an argument which has already been brought against the use of the term "sovereignty" and many other central concepts of legal and political thinking. To adopt the suggestion would mean the abandonment of some of our most familiar and focal, and therefore most useful, tools of thought.

¹⁶ The problem of what actual consequences result from the application or attempted application of a rule of law includes as one of its aspects the question of the degree and kind of resistance which such application meets and the resulting question of how far such resistance deflects the actual results of the rule from its intended result. If the law is taken according to Professor Llewellyn's terminology (*op. cit. supra* note 6, at 459) as the actual results of the rule in action, if as he says: "Rules in the realm of action are what they do," it is difficult to see how the foregoing problems can be clearly faced. If the perverted result is taken as the "law", how can there ever be a perversion of law?

decisional process. This question is central even on the view that law is only an apparatus for predicting the outcome of future cases. The way in which we can predict how a judge will decide an issue on which a rule of law exists is after all different from the way in which we can anticipate from observed past uniformities how a muscle will react when brought into contact with an electric current. In the case of the muscle, prediction does not have to assume that the muscle will react with conscious intent to conform to a rule formulating its proper behavior under the circumstances. That is, however, precisely what a judge can and must in most cases be expected to do. Hence in predicting how a case will be decided, it is not merely pertinent to know the social, economic, political, psychological, physiological and other pressures operating unconsciously on the person of the deciding magistrate,¹⁷ but also to know the rule of decision, if any, which exists for a case of the kind in question; for, if this be known, a fairly safe prediction may often be hazarded as to the judge's decisional behavior without knowledge at all of the more esoteric factors above enumerated. A rule of law is thus not a descriptive generalization of all the factors which influence the outcome of a case, but rather a formulation of a special and active kind of influence which operates on the mind of the judge and through that medium affects the outcome.

A rule of law, insofar as it is a prediction, is accordingly a prediction in a different sense from that in which a scientific law is a prediction of what will happen if two chemical elements are combined, or if a body with a certain mass and speed meets another body with a certain other mass and speed. Failure to give weight to this distinction is observable in much of the insistence of the newer jurisprudence that "law is what judges do, not what they say".¹⁸ Understood in its proper technical meaning the statement

¹⁷ Schroeder, *The Psychologic Study of Judicial Opinions* (1918) 6 CALIF. L. REV. 89. Haines, *General Observations on the Effect of Personal, Political and Economic Influences in the Decisions of Judges* (1922) 17 ILL. L. REV. 96.

¹⁸ This point, recently re-emphasized by Judge Cuthbert W. Pound (N. Y. Bar Ass'n Bull., Sept., 1929, 279, 282-83), has been insisted on by many of the more recent writers: Oliphant, *A Return to Stare Decisis* (1928) 6 AM. L. SCHOOL REV. 215 *et seq.*; Yntema, *The Hornbook Method and the Conflict of Laws* (1928) 37 YALE L. J. 468, 480; FRANK, *op. cit. supra* note 4, at 148 *et seq.*

is unexceptionable; but often it seems to carry the suggestion that by studying how past judges have acted we can predict the behavior of future judges in precisely the same scientific way in which a study of the past behavior of chemical reagents enables us to forecast their future reactions.¹⁹ While it is true that a study of the decisional behavior of past judges can be expected to shed light on what their successors will do, this is for the most part dependably so only to the extent that judges follow rules and precedents, or in other words make a deliberate effort to imitate their predecessors. Resemblance based upon such deliberate and conscious imitation is fundamentally unlike the automatic repetition of like reactions in the behavior of physical bodies under like circumstances; for it operates indirectly through the mental understanding which the later judge has of what the earlier judge has done. It is therefore not simply a case of an act of an earlier judge repeating itself inevitably in the act of a successor, as one chemical reaction repeats another.²⁰ If the repetition were in this sense automatic,

¹⁹ "An answer to these questions must . . . lead us to the opinion that the personality of the judge is the pivotal factor. Where then is the hope for complete uniformity, certainty, continuity of law? It is gone except to the extent that judges will all have substantially identical mental and emotional habits." FRANK, *op. cit. supra* note 4, at 133. So Professor W. W. Cook: "We as lawyers, like the physical scientists, are engaged in the study of objective physical phenomena. Instead of the behavior of electrons, atoms or planets we are dealing with the behavior of human beings. As lawyers we are interested in knowing how certain officials of society—judges, legislators, and others—have behaved in the past, in order that we may make a prediction of their probable behavior in the future." Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457, 475, quoted in FRANK, *op. cit. supra* note 4, at 129.

²⁰ "To call a decision the behavior of the judge is to confuse physically organic with social-teleologic categories. We usually mean by the behavior of the judge those physical acts which are connected with his organism. Doubtless the judge's organism functions when he speaks or writes; and we believe that it conditions his individual thinking, though precisely how, we do not know. But the legal effect of a judicial decision is altogether different from the physical effects of what is properly the judge's behavior. The latter is something in a physical *continuum* and it operates from point to point in time and space. But a legal decision relates situations remote in time and space through a purely logical connection. The logical relation involved in the question whether a given state of affairs can be subsumed under a rule laid down in a given decision, is a non-temporal one. As a social event, also, a legal decision does not operate on the pattern of physical causation. Whether, for instance, one on whom a decision is legally binding will actually obey it or not depends on an independent judgment and will. The decision orders me to pay, but I may decide not to, and it is not at all certain that the order of the court will be physically enforced." Cohen, *Justice Holmes and the Nature of Law* (1931) 31 COL. L. REV. 352, 365.

it would not be misleading to say that all we need to know for prediction is what past judges have done, for the connection between the past and future acts would lie in a set of common determining causes observable only through the resulting acts, and would not run through the medium and influence of words on the mind of the later actor. However it is precisely through the medium of words that the influence of past decisions does operate as a determining cause of future ones. The likeness of the future decision to the past decision is not involuntary repetition, but a deliberate imitated likeness resulting from the influence of the earlier decision on the thought processes of the later judge; and that influence operates almost altogether through the medium of verbal communication.²¹ In this sense the form of words through which earlier decisions are transmitted to the minds of later judges becomes a factor of the highest importance.

Even, therefore, if we take our stand on the common law doctrine, addressed to a wholly different problem, that a case is "authority" only for what it actually decides,²² and not for the words used in the opinion, it seems clear that a legal rule based purely on what judges have done and not on what they have said must itself be reduced to, and take the form of, language before it can enter as a factor into the decision of later cases. The forces which operate to produce a given chemical reaction under certain circumstances will produce the same reaction if the circumstances are repeated, irrespective of whether or not they have meanwhile been translated into a scientific formula. A legal rule however is not this sort of shorthand expression for relentless forces which thus operate irrespective of it, but is itself an independent active

²¹ Professor Llewellyn notes that the effectuation of the purpose of "legal rules in the accepted sense of the term," or what he calls "official rules", "must be sought by means of verbal formulation. . . . Our officials move to a great extent on the stimulus, and in the light, of verbally formulated rules. In part, moreover verbal formulations . . . are an inherently essential tool of communication in a complex society; they are peculiarly important in a society which depends upon written records to maintain continuity of practice." Llewellyn, *op. cit. supra* note 6, at 451.

²² Mr. Frank and those who think like him are apparently led by the common law verbal formula that a case is "law" to the conclusion that the act of deciding a case is the same thing as "making a law", with the result that the law made is law for that case and for no other case. FRANK, *op. cit. supra* note 4, at 137.

force. Whether the rule is based on the mere facts and results of past decisions, or whether it also takes account of the reasons which judges have put in words for those decisions, it is equally under the necessity of depending for its operation on being translated into a verbal formula.

The attitude of the newer psychology toward the function and importance of words is an aspect of current science which juristic progressives neglect in this connection in favor of analogies drawn exclusively from the physical sciences. Their position seems to be that since words are often instruments of loose thinking, and have characteristics which prevent them from attaining the accuracy of scientific symbols, legal thinking must be emancipated from "verbalism" by escaping from words to "facts".²³ Recent psychological investigations, however, have only served to fortify the long familiar belief that thinking is almost wholly synonymous with the language process.²⁴ It is therefore no more a disparagement of the influence of legal rules to admit that they are "forms of words" than to say that their formation and application involve acts of thought. The extreme behaviorist himself admits the importance of words by promoting thought itself to the status of "laryngeal behavior".²⁵ Even, therefore, if we insist on conceiving the behavior of a judge under the influence of a verbal rule as on a par with the reaction of a muscle to the stimulus of an electric current,²⁶ it becomes all the more important

²³ For an attack on "verbalism", based on the theories of C. K. Ogden and others that primitive "word magic" persists insofar as modern thought is dependent on language, see FRANK, *op. cit. supra* note 4, at 57 *et seq.*, 84 *et seq.* Similarly Dean Leon Green has argued that the possibility of developing a true science of law is retarded because lawyers have not risen above the "word-level". *The Duty Problem in Negligence Cases* (1928) 28 COL. L. REV. 1014.

²⁴ See especially LORIMER, *THE GROWTH OF REASON* (1929) *passim*. In contrast with the writers cited in the preceding note the trend of thought represented by Lorimer regards verbal thinking as the necessary medium of the higher intellectual processes. "Verbal processes (spoken or silent) supply the dominant systems of all typically human intellectual life." (*Ibid.* 71.) "Once established as an important mode of social control and mental life, words become both the trellis and the tendrils of human culture; they are the support of civilization and undergo constant revision and refinement in every new field of experience." (*Ibid.* 78.) See also RIBOT, *THE EVOLUTION OF GENERAL IDEAS* (1899); DELACROIX, *LA LANGAGE ET LA PENSÉE* (1924).

²⁵ WATSON, *BEHAVIORISM* (1925) 190 *et seq.*

²⁶ WATSON, *PSYCHOLOGY FROM THE STANDPOINT OF A BEHAVIORIST* (1919) 331 *et seq.*

to understand the way in which the form of words called a "rule" causes him to react.

Here it is necessary to guard against an apparently widespread misunderstanding. In distinguishing between the influence of rules on the one hand and discretionary elements on the other in the processes of judicial thinking, we are, of course, not dealing with separate physical entities interacting on one another mechanically. The discretion-element and the rule-element, when both are operative, are but moments in a single decisional process. This does not, however, mean that for understanding the process it may not be convenient to distinguish the two elements in our thinking about them in the same way that even so satisfactorily modern a philosopher as Dewey finds it continually desirable to distinguish between the element of *datum* and the element of intellectual effort in the thought process, wherein neither functions without the other.²⁷ In the same way the legal rules with which a judge is familiar exert an influence on his progress toward the decision of a case which can be intellectually marked off for discussion from the operation of concurrent influences more purely private to himself, and therefore designated as discretionary.²⁸ These discretionary influences may in various ways affect and qualify the influence exerted by the rule, as we shall see later; but that only adds another reason for distinguishing the two.

II

The view that law is a prophecy of what will be decided has the weakness of emphasizing exclusively the outside spectator's

²⁷ DEWEY, *op. cit. supra* note 3, at 123-124, 147-149, 164-165, and *passim*.

²⁸ Speaking of the distinction between "law" and "discretion" Mr. Frank says: "Words have an emotive value, and to say that part of what a judge does is 'not-law' or 'non-legal' is to create the impression that part of the judge's conduct is tinged with impropriety." Therefore, apparently on the ground that it would be improper for anything done by a judge to be "not-law", Mr. Frank assigns that it is impossible to distinguish "what Pound calls law and what he calls not law" (*i. e.*, discretion). "They are so thoroughly intermingled that it is impossible to divide them; nothing but false attitudes can be engendered by labelling either of these components as if it were not a necessary, and therefore desirable, part of the processes of law." FRANK, *op. cit. supra* note 4, at 141. It would, however, appear that the possibility of distinguishing two objects of reflection is an altogether different question from the question whether one of the two is necessary or desirable.

point of view—the point of view of the advocate or client who is interested in reading the future,—and consequently of ignoring the point of view of the judge through whose active agency the future is to be transmuted into fact. It is submitted that the sound way to anticipate a future decision is to attempt to put oneself in the place of the judge or judges who will actually make the decision. The judge will find himself confronted with one or more legal rules applicable, or conceivably applicable, to the case before him. For him these rules cannot be conceived as mere rules of prediction. He is not interested in predicting what he himself is about to do. The standpoint of prediction is that of the observer; the judge's attitude towards the rule is that it is a guide or mandate for action,²⁹ bidding him consider certain aspects of a case and not others, and reach one decision or another according as certain factors are or are not present. Only by thus visualizing the judge as he stands in the presence of the rules which will help him to decide, can an outsider undertake to make accurate forecast of what decision will be reached. From this standpoint, what judges have done in the past becomes only indirectly of importance for purposes of prediction; because what they have done will influence the decision only insofar as formulated into a rule which the judge regards himself as bound to follow, and which therefore, to a greater or less extent, limits and focuses his discretion.³⁰

There seems a certain confusion about what is meant by saying that a judge in deciding a case "feels bound" to permit rules of law to influence his decision, or in other words, that he regards such rules as "authoritative". There is no reason for understanding this to mean that the judge takes a mystical view of the suprem-

²⁹ Professor Llewellyn says that "rules of law in the accepted sense" are not eliminated from his conception of the workings of the judicial process. They are "rules of authoritative *ought*, addressed to officials, telling officials what officials ought to do." Llewellyn, *op. cit. supra* note 6, at 449.

³⁰ Cook seems inferentially to recognize this where he says: "The case is by hypothesis new. This means there is no compelling reason of pure logic which forces the judge to apply one of the competing rules urged on him by opposing counsel." Cook, *Scientific Method and the Law* (1927) 13 A. B. A. J. 303, at 308. This must mean that if there are such things as "old" cases the judge in such a case may be forced by the compelling reason of logic to apply an existing rule.

acy of legal rules, or treats them with any superstitious reverence.³¹ All that it signifies is that he accepts the working assumption of every system of law that a certain amount of uniformity between decisions on similar points is socially desirable, since otherwise men would not attempt to have a legal system at all, but would be satisfied to entrust themselves to the purely discretionary authority of an oriental *cadi*.³² Assuming the desirability of aiming at some uniformity, the only practical way to secure it is for different judges to recognize and abide by an obligation to bring their decisions into unison by giving effect in those decisions to the same legal formula or rule. In all this one need see nothing superstitious or mystical, although mystery and superstition doubtless had their part in starting the process,³³ as they had in starting other processes during early stages of human history; under present conditions the objective is merely the practical one of getting decisions made in a way which will somewhat restrict the purely personal and incalculable reactions of individual judges by causing them to give controlling influence to considerations which have to a certain extent been standardized for all judges in the jurisdiction.

³¹ "The Law—a body of rules apparently devised for infallibly determining what is right and what is wrong and for deciding who should be punished for misdeeds—inevitably becomes a partial substitute for the Father-as-Infallible-Judge. That is, the desire persists in grown men to recapture, through a rediscovery of a father, a childish, completely controllable universe, and that desire seeks satisfaction in a partial, unconscious, anthropomorphizing of Law, in ascribing to the Law some of the characteristics of the child's Father-Judge. The childish longing is an important element in the explanation of the absurdly unrealistic notion that law is, or can be made, entirely certain and definitely predictable." FRANK, *op. cit. supra* note 4, at 18. See also *ibid.* 196-203, 267.

³² Mr. Frank's theory is in fact an argument for reversion to the *cadi*. He says: "The honest, well-trained judge with the completest possible knowledge of the character of his powers and of his own prejudices and weaknesses is the best guaranty of justice. Efforts to eliminate the personality of the judge are doomed to failure. The correct course is to recognize the necessary existence of this personal element and to act accordingly. Indeed, as Ehrlich puts it, this personal element 'should not be tolerated as something unavoidable but should be gladly welcomed. For the one important *desideratum* is that his (the judge's) personality must be great enough to be properly entrusted with such functions.' The central problem of adequate administration of justice is 'how to organize the judiciary so as to give plenty of scope to strong personalities.'" FRANK, *op. cit. supra* note 4, at 138.

³³ See Dickinson, *Social Order and Political Authority* (1929) 23 AM. POL. SCI. REV. 605-608.

One of the objections brought against legal rules is that actually they do not have this result; that in fact the judge reaches his decisions on the basis of his personal reaction towards a case as a whole in its individual uniqueness, and then simply casts about and finds one or another of the forms of words called legal rules which he can attach to his conclusion for the purpose of rationalizing it.³⁴ This argument against the effectiveness of legal rules is much in the mouth of law-school teachers. The reason why it appeals to them is not far to seek. It is approximately true when applied to decisions of appellate courts which establish creative precedents, and these are precisely the decisions which find their way into "case-books". Here a court in deciding a new case to which one or more rules seem applicable with equal plausibility purports to bring the case under one rule rather than another, and it is quite true in such instances that it is not a rule of law but some non-legal consideration which ultimately accounts for the decision. This type of case, however, by no means exhausts or even fairly represents the operation of legal rules, and even in cases of this type the influence of rules has often a somewhat larger part than at first sight appears.

There is, however, a large and important class of cases in which it is not too much to say that the outcome is in fact directly dictated by a legal rule without the intervention of judicial discre-

³⁴ It is no doubt true that frequently the mind of the judge may be made up as to what decision to reach before consciously searching for legal grounds upon which to base the decision. That this is uniformly the case, however, as suggested by Mr. Frank and other recent writers (FRANK, *op. cit. supra* note 4, at 100 *et seq.*), can hardly be accepted. Even where the judge thus comes to a conclusion in gross before consciously seeking reasons, it is highly likely that his conclusion has been reached in part upon the basis of legal rules whose influence upon his mental process has become automatic. It would not seem sound to assume as so many anti-rationalistic modern writers do, that a conclusion must be reached for no reasons at all and that reasons are merely tacked on to it afterwards. It is quite true that in balancing the applicability of various possible grounds of decision a judge may ultimately be determined by a flash of insight, "a hunch" (Hutcheson, *The Judgment Intuitive: The Function of "the Hunch" in Judicial Decisions* (1929) 14 CORN. L. Q. 274); but this process is not unknown to practitioners of mathematical reasoning (POINCARÉ, *SCIENCE ET MÉTHODE* (1912) 50 *et seq.*) and by no means implies that previous generalizations have not been at work in striking the balance which is registered by the intuition. Mr. Frank recognizes this when he says that "rules and principles of law are one class of stimuli which make a judge feel that he should try to justify one conclusion rather than another." FRANK, *op. cit. supra* note 4, at 104.

tion in the smallest degree. Suppose for example that a purported will is offered for probate which bears the signature of but one witness in a jurisdiction where two are required by the statute. The rule of law which requires that the witnesses shall be two operates with the deadly inevitability of a guillotine to decide the question of probate. Similarly where land is claimed under a deed from a married woman not signed by her husband, in a jurisdiction where the law requires the husband to join in the deed. The automatic operation of direct specific rules of law of this character is seldom sufficiently brought home to professional teachers of law and students in law-schools. It does not always appear from a study of litigation, because cases where the rule thus leaves absolutely no doubt are seldom litigated. But this does not mean that the automatic operation of legal rules in situations of this kind is not of the utmost importance from the standpoint of the value of law as an agency of social order. It is one of the great preventives of litigation. It enables counsel to advise their clients with an assurance which does not need to be tested by resort to the courts in every instance. It operates with equal value in another way. Clean-cut and specific rules make it possible for men to accomplish in their business dealings the legal results they intend without the necessity of constant recourse to the courts to resolve doubts. Thus it is well established that a deed expressed in certain words and executed, acknowledged and recorded in a certain way will have the legal effect of transferring land from one person to another without having to be adjudicated. Similarly a check will serve to transfer a right to money in such a way that no doubt will arise about the validity of the transfer. These results are made possible by the practically automatic operation of legal rules which are so simple and specific that legal scholars do not ordinarily find them interesting.

Where the bar is reasonably well educated, cases which reach the stage of litigation are all cases presenting a substantial element of doubt. This doubt is not necessarily, however, as to the legal rule or rules applicable; often the rule is clear, but doubt exists as to the facts of the situation to which it is sought to be applied. This is true of perhaps the largest number of

controversies litigated in *nisi prius* courts which are not carried forward into courts of appeal. Thus the rule is clear that if an individual requests another to supply him with specific goods at a certain price and the other agrees to do so, and in accordance with the agreement does supply the goods, the former is legally bound to pay the agreed price. There may, however, be doubt as to the facts of a given case,—doubt, that is, whether the defendant did actually request the plaintiff to supply the goods, or whether the plaintiff did actually supply them. The decision of the case will turn on the conclusion reached as to what happened between the parties. The case is accordingly one which may well be taken into court, but it comes there not because of any uncertainty in the applicable rule, but solely because of uncertainty about the facts. Such a case will almost never get beyond a lower court except on a point of evidence or procedure; and therefore the vast mass of litigation of this character is seldom impressed on the attention of teachers who teach from case-books. The conditions of their work invite them, unless consciously vigilant, to overlook the obvious.

In a third variety of cases, which includes most of those decided by appellate courts, the issues are relatively more complex. They involve the application not of a single rule, but of a number of rules. In these cases the part played by any particular rule in determining the decision is less mechanical than in those hitherto considered. Any one rule may dictate or aid in determining the decision of a particular issue which will affect the ultimate decision of the case as a whole without necessarily determining it. Thus a legal rule applicable to one issue frequently operates merely to determine whether or not there are other issues in the case which are entitled to determination. For example there is a New Jersey rule that whether or not certain kinds of fraud afford ground for dissolving a marriage depends on whether or not the marriage was consummated.³⁵ Here the rule requires that the fact of non-

³⁵ *Ysern v. Horter*, 91 N. J. Eq. 189, 110 Atl. 31 (1920); *Dooley v. Dooley*, 93 N. J. Eq. 22, 115 Atl. 268 (1921).

consummation must be established before it becomes important to determine whether or not fraud of the character in question has been committed. Only if the marriage has been consummated is the fraud material. Similarly in actions against carriers, where the plaintiff has taken a bill of lading with a clause exempting the carrier from liability, the legal rule allowing or denying effect to such an exemption stands guard at the outset of the case to determine whether or not the issues relating to the cause and nature of the damage are entitled to influence the decision.

In cases of any complexity it may thus be said that legal rules, even if of a highly specific character, operate on the decision mainly by determining whether or not any issues, and if so which ones, remain to be decided in order to reach an ultimate decision of the case,—operate, that is by guiding the attention of the adjudicating official to certain particular issues rather than others, and by making his ultimate decision of the case as a whole meet the test of consistency with the decisions which are determined or influenced by the pertinent rules as to these particular issues. In the absence of rules, the attention of the official would be free to wander at large over the manifold elements of the case so that the ultimate decision might be reached on the basis of any factor or factors which for the time being loomed largest to the judge's mind. The operation of rules is to make certain factors the primary elements before the judge's attention, and to push other considerations into the background until he has reached conclusions on those which the rules single out as primary.³⁶ It thus helps him to decide without making the ultimate decision for him; it supplies a structure for his thought to follow, it draws a sketch map for him of the way into and through a case.

³⁶ Mr. Frank, *op. cit. supra* note 4, at 127n., 135n., and writers who have the same point of view seem to think it impossible that the mind in reaching a conclusion can be influenced by general propositions, but only by specific facts which appeal to them as relevant. There would seem to be no proper ground for this assumption. It might be significant to ask why an individual regards a specific fact as relevant? If he thinks reflectively, *i. e.*, if he thinks at all, does he not regard a fact as relevant precisely for reasons which bring the specific fact under a generalization? This is aptly and amply pointed out by Morris Cohen in his recent article, *op. cit. supra* note 20, at 361.

III

The degree in which the ultimate decision of a case will be controlled by legal rules depends in part on this matter of the relative complexity of the case, *i. e.*, the number and mutual relation of the various applicable rules, and in part on the character of the rules themselves, *i. e.*, on their relative definiteness or vagueness, and their closeness or remoteness of application to the fact-situations to which they are sought to be applied.

Where a case is complex enough to involve a considerable number of rules, the relation between these may be such that once the fact-situation is settled, they will practically dictate the decision. Take, for example, the case of a person who has been injured while riding on a railroad train. He holds a ticket to a station at which the train is scheduled to stop. The ticket contains a clause exempting the carrier from liability for negligence. The injury occurs through the breaking of an axle which the carrier cannot prove to have ever been tested. However, the plaintiff at the time of the injury was riding on an outside platform of the car. The legal rules applicable to these facts are so related and connected in their operation that once the facts are established the rules up to a certain point practically dictate the result. The exemption from liability is ineffective. Therefore if the plaintiff has grounds for action he can recover. Failure by a carrier to cause equipment to be tested constitutes want of care for which it is liable to a passenger. However, a person riding in a part of the train where he had no right to be without authorization from the carrier is not entitled to the duty of care which the carrier owes to passengers. The decision will therefore turn on the question of whether or not any train official permitted the plaintiff to ride on the platform. If no one employed by the company saw the plaintiff on the platform, so that there is no question of such authorization, the case is decided; if the plaintiff was so observed, the question arises as to whether the employee was authorized by the carrier to give such permission and whether his conduct amounted to giving permission. The legal "rules" as to what will amount to such

authority, and what conduct by an authorized agent will confer such permission, are of broader and looser scope than the other rules involved, and their "application" to the facts therefore leaves larger leeway for discretion in the manner which remains to be discussed below.

There is another class of cases where the rules involved do not thus fit into a sequence guiding the conclusions of fact toward a decision, but where one rule which seems applicable to certain facts in the case is capable of sustaining a result at variance with another rule which may conceivably apply to the same or other facts. Thus the earlier Married Women's Property Acts did not expressly confer on a married woman the right to sue her husband. However, they provided that a married woman should enjoy her separate property free from interference or control by her husband. Suppose that under such a statute a husband collected rents which had accrued on property belonging to his wife. Clearly this would amount to a violation of a legal right of the wife under the statute. Did this provision of the statute, in order that it might be given effect, operate to confer on the wife a power to sue the husband, although the statute did not expressly amend the common law rule in this respect? Whenever a fact-situation thus creates possibility of conflict between two rules of law, the opportunity arises for a *creative precedent*,—for a decision, that is, which will make a new rule of law to cover a doubtful case. The creation of such a new rule involves something more than is usually involved in the application of existing rules; it involves choice and balance between the rules themselves by an exercise of legislative discretion.

Choice and balance, however, are frequently involved even in the application of existing rules. This is what was meant above by saying that the extent to which a rule governs a decision depends not merely on the nature of the case and the number of rules involved, but also on the nature of the rule itself and particularly on its relative definiteness or vagueness. Thus in the case already considered of the rule requiring two witnesses to a will, no choice or balance between opposing considerations is involved in applying the rule to an instrument bearing only one signature besides that of the testator. Not merely is the rule specific, but the case to

which it is to be applied is such as to fall squarely within it. There are cases, however, where doubt may arise as to the application of even such a highly specific rule. For example a will may on its face bear the signature of two witnesses, thus apparently satisfying the rule, but doubt may be raised as to the genuineness of one of the signatures, or as to whether or not it was duly affixed in the presence of the testator as required by law. Such cases illustrate that issues may have to be decided by conclusions as to both facts and law before it can be determined whether even a highly specific rule has been complied with, though in the great majority of cases the application of the rule is practically automatic and no such questions arise.

Many legal rules, however, are not thus specific; on the contrary they are expressed in forms of words which on examination permit considerable latitude as to what may or may not be included within them. The most familiar example is the basic rule of negligence law that liability results from failure to employ "due care under the circumstances". Obviously "due care under the circumstances" is a concept which leaves wide leeway to the agency applying it to a specific case. In "applying" a rule of this character composed of terms so broad that they have been referred to as "India rubber concepts", the decision of the adjudicating agency is substantially a discretionary act, determined, inside the limits of the broadest possible meaning of the rule, by the interplay of a mass of subjective influences, prejudices, pre-conceptions, of which the adjudicating officer himself can be expected to give no complete or adequate account, and of which he is probably in the normal case not even aware.³⁷ But the decision is not determined completely by such imponderables. The imponderables themselves are at least confined to those which can be suggested, however remotely, by the idea of "due care"; and in the midst of their protoplasmic incertitude emerge firmer structures of crystallized social opinion, as, for example, that a person crossing a crowded street must look about him, and certainly ought not to read a book

³⁷ For the character of decisions on points of this kind and the nature of the elements entering into them, see Bohlen, *Mixed Questions of Law and Fact* (1924) 72 U. OF PA. L. REV. 111.

as he goes. Such crystallized judgments, when present, are not subjective; what is subjective, however, is the degree of influence which any such consideration will have on the adjudicating officer in any particular case. They are the material for a possible rule of law, and may actually be on the way to becoming such a rule, as has happened, for example in the case of the so-called "stop, look, and listen rule" which in some jurisdictions precludes recovery by one who has failed to stop, look, and listen before crossing a railroad track. Here a consideration which might otherwise merely influence the mind of the tribunal if it chose to be influenced, has become a rule of law because the tribunal has come to feel authoritatively bound not merely to give weight to it, but to allow it determining effect on the decision.

The degree to which legal rules are elastic depends on the elasticity of the words in which they are formulated, and hence on the extent to which the meaning of given terms has become particularized in legal usage. There is a rule, for example, that a person must be "accepted" as a guest at a hotel before the hotel-keeper incurs the special liability which the law imposes in favor of guests. What acts or acquiescences by a hotel-keeper will amount to "acceptance"? The contour of the concept is shadowy. This indefiniteness of contour characterizes even concepts which at first sight appear to be delimited with a fair measure of precision. Take the familiar rule of negotiable instruments law that a promissory note must be expressed to be payable in "money". It would seem that the term "money" is sufficiently specific to indicate its content with precision; but the number of cases which have been litigated discloses the room for doubt which remains as to whether or not certain media of payment fall within the legal meaning of "money".³⁸

In all these instances the determination of whether or not to treat a given state of facts as included within the terms of a rule, where the meaning of those terms is not sufficiently narrowed

³⁸ *Burton v. Brooks*, 25 Ark. 215 (1868); *Chambers v. George*, 5 Litt. (Ky. 1824) 335; *Lampton v. Haggard*, 3 T. B. Mon. (Ky. 1826) 149; *Farwell v. Kennett*, 7 Mo. 595 (1842); *Cockrill v. Kirkpatrick*, 9 Mo. 688 (1846); *Thompson v. Sloan*, 23 Wend. (N. Y. 1840) 71; *Chrysler v. Renois*, 43 N. Y. 209 (1870); *Taylor v. Neblett*, 4 Heisk. 491 (Tenn. 1871).

to indicate the case as specifically included, involves that kind of choice between possible considerations uncontrolled by any authoritative determining factor which we have called discretion. Once the decision has been made, however, as to whether or not a given state of facts falls within a rule, it will, so far as treated as a precedent, establish what amounts to a subordinate rule that for the future a state of facts of that kind is to be included under the rule. This is what happened, for example, in the case of the "stop, look, and listen rule" above referred to, and this is the way in which the structure of the law is gradually built up from precedent to precedent, so that each more general rule ramifies with the multiplication of decided cases into an ever larger number of more specific rules of inclusion and exclusion.³⁹ Of course, where a rule is expressed in extremely broad terms, like the rule of "due care", so that the fact-situations presented for possible inclusion vary infinitely from case to case, it follows that for the larger number of possible situations no subordinate rules develop because of the infrequency of the recurrence of any particular situation. Where this is true, we say that each situation is left to be decided on its own "facts", which means that it must be decided, within the rationally possible outside limits of the rule, by discretion uncontrolled by any factor recognized as authoritatively decisive.

In all these ways the opportunity for discretion to influence decisions is very great, as was emphasized at the outset of this paper, and the controlling influence of rules is correspondingly narrowed. A still further enlargement of the field of discretionary influence results from the necessary power of the adjudicating tribunal to determine the "facts" of a case, or in other words to reach a conclusion as to what happened between the parties, before going on to decide the legal consequences to be attached to those facts. Obviously if the parties acted in a certain way, the case may fall within the scope of one rule, while if they acted in a different way, a different rule will apply. For example, if the tribunal reaches the conclusion that as a matter of fact a steam-

³⁹ For the growth of law through the successive singling out of new facts as having legal pertinence see DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) 202-5.

ship company has not been in the habit of permitting deckhands on its steamboats to accept goods for shipment, the rights of a shipper leaving goods in the custody of a deckhand will not be covered by the legal rules prescribing the relations between shipper and carrier. Similarly in a case where it is claimed that a deed was given as a mortgage, if the court finds as a fact that the grantor's intention was to give a deed and not a mortgage, the case is excluded from the operation of rules applying to mortgages. This power of finding the facts confers on the adjudicating agency a wide area of discretion in many types of cases to determine whether legal rules of one tenor, or others of opposite tenor, shall apply to the determination of the case. There can be no doubt that occasionally courts employ this power of finding the facts to evade the necessity of applying a legal rule to a case to which it would otherwise be applicable, and to that extent the effectiveness of any rule in controlling the action of courts and in facilitating the prediction of decisions may be seriously impaired.⁴⁰

IV

The question of how far a rule, which is a general proposition, can control particular states of fact, and how far particulars inevitably escape such subsumption, is an aspect of the fundamental problem of the relation between "particular" and "general"⁴¹ in human thought. The result of what has so far been said is substantially that the operation of legal rules in determining decisions of particular cases is subject to the same limitations as the application to specific facts of any generalizations which are employed as a basis for reasoning towards conclusions from those facts. Jurists of the sceptical school are correct in pointing out

⁴⁰ This point is very heavily relied on by FRANK, *op. cit. supra* note 4, at 134-135, also 127n. and is noted by Llewellyn, *op. cit. supra* note 6, at 450.

⁴¹ I adhere to this mode of expression because it usefully points out an important distinction in the terms in which that distinction has customarily been expressed. It is desirable to note, however, that recent thinkers have pointed out that "general" and "particular" are relative terms with reference to one another and that any given item of experience includes both particular and general according as attention is concentrated on one or another aspect of it. HALDANE, *THE REIGN OF RELATIVITY* (1921) 47-48. Because of this fact Whitehead regards "universal" and "particular" as misleading in their suggestion. WHITEHEAD, *PROCESS AND REALITY* (1929) 76.

that legal rules enjoy no advantage in this respect over other rules. The essential difference between a rule of law and a non-legal rule is not, however, in this matter of its operation in the reasoning process, but rather in the peculiarity that it commands acceptance by the adjudicating agency as a basis for reasoning, while in other fields of thinking there is greater subjective freedom to pick and choose between possible variant rules. It is a presupposition of a system of law that a legal tribunal feels and must feel a sense of obligation to employ in the decision of litigated controversies those applicable rules which happen to be stamped as authoritatively legal, irrespective of whether the tribunal agrees with them, and whether or not it would employ them if they were not so authoritative.⁴² Only an appellate court will exercise its power to decide a case in disregard of a rule which it feels has once been accepted as authoritative, and in the rare cases where the power is exercised, it must be for reasons far stronger than would cause the disregard of commonly accepted general propositions in some other field of thought.⁴³

One primary source of confusion in the position of the sceptics is that they fail to distinguish between two separate problems,—between this problem of acceptance by the courts of particular rules as authoritative to the exclusion of other possible

⁴² "A rule, that is become settled law, is binding on the courts, and is to be followed. 1 W. Bl. 181; 1 Eden 250; 7 Bing. 279, 280; 3 Ves. 529; 7 Ves. 199; 1 Russ. 423; 3 Russ. 35; 1 Sch. and Lef. 5. And a rule, that is become settled law, is to be followed, although some possible inconvenience may grow from a strict observance from it, 4 M. & S. 352; or although it is not 'bottomed in reason,' 7 Durn. and E. 415; or a satisfactory reason for it is wanting, 8 Bing. 536, 537, 557; or although the principle of the rule appears to be doubtful, 14 Ves. 449; 16 Ves. 196, 197; or although both the principle and the policy of the rule may be questioned, 3 Russ. 435; or although in some cases it may be productive of hardship and oppression, 1 Durn. & E. 8; 7 Bing. 280; 2 Ves. Jun. 426; or although it has been objected to and lamented by great authority, 2 Younge and J. 623." RAM, *THE SCIENCE OF LEGAL JUDGMENT* (2d Am. ed. 1871) 83-84.

⁴³ An illustration of the duty of courts to apply an existing rule of law even though they may disagree with it, and even though the purpose for which the rule was adopted has disappeared, is given by Max Radin in the case of the statutes adopted in many Western states which granted a bounty for coyotes' scalps. "The ultimate purpose was unquestionably that of extirpating coyotes, or, at any rate, of reducing them in number. It turned out that coyote farms were established and coyotes bred in order to collect the bounty. Yet the statute was so nearly determinate that it took little color from this remoter result, and it would have been an unlawful violation of duty for a court to disregard the sharp limitations of the statutory extensibility." Radin, *Statutory Interpretation* (1930) 43 HARV. L. REV. 863, 879n.

rules, and the quite different problem of the extent to which rules, even if accepted as authoritative, can and do determine particular decisions. The adherence of courts to authoritative rules is for the obvious practical purpose of securing some degree of uniformity between decisions with certainty. The position of the sceptics seem to be that this effort is misdirected because rules do not actually dictate decisions.⁴⁴ Since in addition to the rule an element of discretion often turns out to be necessary, they conclude that rules are superfluous and that decisions should be committed to discretion entirely. This clearly amounts to more than an attack on the acceptance of legal rules as authoritative, since the argument for abandoning the authority of rules goes on a ground which in effect denies the value of all reasoning from rules. Any use of rules involves reasoning from supposed uniformities; and if uniformities are in fact fictitious, all reasoning which proceeds by resort to rules must be unsound.⁴⁵ If on the other hand rules in spite of their limitations supply a valid element in the reasoning

⁴⁴ "What, with unfortunately few exceptions, judges have failed to see is that in a sense all legal rules, precepts, concepts, standards—all generalized statements of law are fictions." FRANK, *op. cit. supra* note 4, at 167.

⁴⁵ It is a natural consequence of Mr. Frank's general position that he would not have a judge in deciding a particular case seek for a rule of decision which will be applicable to other cases (*op. cit. supra* note 4, at 153-154). He feels that any ground of decision which is applicable beyond the particular case will not afford a just ground for deciding that case since it will necessarily disregard some of the unique features of the case. Here once more we are thrown back upon the question whether an intelligent decision on any particular state of facts can be reached without reference to considerations which reach beyond that particular state of facts. One reason why the modern writers object to the application in a later case of the ground laid down in an earlier case as the ground of decision for that case is apparently because they take what seems an impossibly exalted view of precedent. Thus Frank writes, "The rules which a judge announces when publishing his decision are intelligible only if one can relive the judge's unique experience while he was trying that case,—which, of course, cannot be done. One cannot even approximate that experience as long as opinions take the form of abstract rules applied to facts formally described. . . . You are not really applying his decision as a precedent in another case unless you can say that, having relived his experience in the earlier case you believe that he would have thought his decision applicable to the facts of the latter case." *Ibid.* 150. These sentences in effect deny the possibility of reasoning from general propositions since they imply that no rule which governs one set of particulars can be employed as a precedent to govern another set of particulars unless both sets of particulars are absolutely identical in the minutest details. It is precisely the function of any generalization to be applicable to different sets of particulars which may differ from one another in many respects. Generalization is a rough medium of approximation, and therein consists its usefulness if its function is properly understood.

process, then there is at least no inherent objection to consciously accepting, as lawyers and judges do, certain rules to the exclusion of others as a basis for reasoning toward legal decisions.

The reason why the sceptical school so strongly object to the fact that courts in reaching their decisions employ rules which are stamped as authoritative appears to be primarily because this method is not followed by modern thought in other fields than the adjudication of legal controversies, and particularly because it is not followed in scientific thinking.⁴⁶ The modern scientist when called upon to solve a problem does not feel obliged to reason from any particular propositions because they bear the *imprimatur* of authority. Time was, in the history of science, when the contrary was true; when the scientist felt bound to reach conclusions, irrespective of what the facts might show, which were in accordance with settled and authoritative propositions⁴⁷ in the same way that a judge feels bound to reach his decision of a case in accordance with settled legal rules. It is clear that in the case of science the abandonment of this procedure was essential to progress, and that so long as it persisted it made any real science impossible. Under the influence of analogy progressive jurists assume that what has been good for science must be good also for law,⁴⁸ and that the abandonment of reasoning from legal rules will make possible a corresponding advance in the administration of justice. This conclusion involves failure to note the difference between the objectives of scientific thinking and the nature of the problems to which it addresses itself, as contrasted with the judicial thinking which is directed toward deciding litigated controversies in accordance with law. The distinction is fundamental. It needs to be

⁴⁶ FRANK, *op. cit. supra* note 4, at 82-83, 285-288.

⁴⁷ An interesting illustration of this attitude is the story recounted by Myerson (*L'EXPLICATION DANS LES SCIENCES*, v. I, 119) of Father Scheiner who reported his discovery of sun-spots to the provincial of his order and was told by the latter that such a thing could not be. "I have read," said the latter, "my entire Aristotle several times and I can assure you that I never found there anything of the sort. Go, my Son, calm yourself and be sure that it is defects in your lenses or in your eyes which you take for spots in the sun."

⁴⁸ "There is danger in the assumption that legal science resembles physical science to such a degree that methods which have proved successful on the one hand necessarily will be valid when applied to the other." Goodhart, *Law and the State* (1931) 47 L. Q. REV. 118, 138.

elaborated in view of the fact that most of the attention which has recently been given to questions connected with human thought-processes has been in relation to scientific thinking, and that conclusions reached in connection with scientific thinking have been unreflectingly transferred and applied to judicial thinking.⁴⁹

Some of the confusion between scientific thinking and the judicial thinking which is directed towards deciding controversies has no doubt been promoted by the insistence of Dewey and his followers that the objective of scientific thought is action,—is to inform human beings what to do.⁵⁰ Clearly the objective of judicial thinking is also action, in the sense that it aims to inform the judge how to act with reference to the case before him. From this point of view the objectives of the two types of thought seem superficially the same. But on analysis there becomes apparent an essential difference which was set in clearer relief by the older conception of scientific thinking. According to the older form of statement, the object of scientific thinking is not to inform an actor how to act, but rather to describe what will happen if a given situation is left undisturbed, or is disturbed in a particular way. Dewey's conception does not affect the validity of this conception,—it merely adds to it by emphasizing why men may wish to know what will happen. Since it is true that men are dominantly interested in what will happen because they may wish to adapt their conduct to the future situation, it is to this extent true that men's ultimate interest in action stimulates and to a certain extent may be said to account for scientific thought. It remains true, however, that scientific thought itself is not directly concerned, and indeed, so far as it is scientific, is not concerned at all, with how men may choose to act in view of the situation disclosed by science; it stops with disclosing the situation.

The aim of science may therefore still be accurately described as discovery. The scientific procedure of discovery rests on the assumption that, given identical conditions, what has happened

⁴⁹ See, *e. g.*, RUEFF, *FROM THE PHYSICAL TO THE SOCIAL SCIENCES* (1929). In the introduction (xxviii) Professor Oliphant states "there is no difference in the nature of the subject matter of law or of any other social science, as contrasted with physics, for example, which precludes a like rigid scientific pursuit."

⁵⁰ DEWEY, *op. cit. supra* note 3, at 104-105, and *passim*.

once will happen invariably. Scientific thought, therefore, concerns itself with analyzing and classifying the elements of given fact-situations and determining their relations to one another for the purpose of acquiring ability to predict the relations between these elements if recurring in a future situation. This procedure involves the same basic thought-processes which are also involved in the procedure of judicial thinking,—the isolation of identities, their formulation in general propositions, and the application of these propositions to specific situations. Here, however, the resemblance ends.⁵¹ The aim of science being discovery, its concern with its general formulations is primarily to test them for their conformity to future situations. The interest of the scientist in a scientific “law” is to determine the degree of accuracy with which it turns out to describe a future case,⁵² and if possible to supersede it with a new generalization which will make possible a description having a higher degree of accuracy. In a sense therefore the generalization is created with the idea of being overthrown; it is created with specific understanding that its application to future cases shall be for the purpose of testing its validity. Each specific case thus controls the generalization; each future happening supplies a standard to which a scientific proposition must conform at the risk of being rejected for some other proposition which will state the observed facts more closely.

⁵¹ Of course in cases when there is doubt as to what the rule of law *is*, then under a system of law which adopts the doctrine of precedent it is necessary to “discover” the rule from past adjudications. The method of doing this seemed to Hammond and Bishop, and apparently still seems to Llewellyn and Cook, the same method as that whereby scientific laws are discovered. Legal rules seem to Llewellyn discoveries of what “is”. Thus he writes: “Real rules . . . are descriptive, not prescriptive, except insofar as there may be occasionally implied that the courts ought to continue in their practices. Real rules, if I had my way with words, would by legal scientists be called the practices of the courts, and not rules at all. . . . Factual terms. No more. . . . They are on the level of *isness* and not of *oughtness*. . . . Their intent and effort is to describe.” . . . Llewellyn, *op. cit. supra* note 6, at 448. It is important to note, however, that a legal rule, even though derived by generalization from what has been done, is not a rule of “isness” because it either may or may not be applied in the next case, *i. e.*, the case for which the rule is sought, depending on the volition of the judge. There is thus no possibility as in the case of a scientific rule of testing the “correctness” of the rule by seeing whether the instant case conforms to it. In other words the uniformity between cases is an imitated, not a scientific or physically necessitated, uniformity.

⁵² DEWEY, *op. cit. supra* note 3, at 205 *et seq.*

This whole procedure is radically different in intent and method from the kind of reasoning which is directed toward deciding controversies by the application of law. Once more the distinction can best be explained by recourse to older conceptions, in this instance the long-established distinction between scientific and so-called "normative" thinking.⁵³ The decision of controversies by recourse to authoritative rules is an instance of normative thinking. The goal of normative thinking is not discovery; the judge who is called on to decide whether or not to award damages to a plaintiff is not, like the scientist, engaged in the discovery of new truth, or in adding to the sum total of human knowledge. The judge does not employ the case before him as a means of testing the validity of the rules which he employs in reasoning towards his decision. The whole theory of decision according to law is that the rules are to govern the case, and not, like scientific laws, to be governed by it.⁵⁴ Normative thinking rests on the assumption that it is socially beneficial that action shall be taken which is in accordance with a rule primarily because it is in conformity to observed fact, and the reason for applying the rule raises a different issue which is not for the moment in question.

In the case of a scientific rule, the problem of applying the rule and the problem of testing its "correctness" are substantially one and the same problem, since "correctness" means only conformity to observed fact and the reason for applying the rule in scientific experiment is primarily to determine its conformity to fact. In the case of a normative rule, on the other hand, the problems are distinct. The reason for applying the rule is not directly or immediately concerned with determining its "correctness". This is not the task of ordinary judicial thinking, which is concerned with deciding in accordance with rules because they happen to be the established rules, but is the task of what, for the purpose of emphasizing the distinction, may be called "construc-

⁵³ Cohen, *op. cit. supra* note 20, at 358; see also Dickinson, *op. cit. supra* note 1, at 285, 289 *et seq.* I GÉNY, *SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF* (1914) 179-181.

⁵⁴ "There is a real danger for the stability of our law if it comes to be believed that the contingency of rules of law is of the same nature as the contingency of the laws of mechanics, physics or chemistry." A. KOCOURER, *AN INTRODUCTION TO THE SCIENCE OF LAW* (1930) 209.

tive juristic thought," which is concerned with the criticism and formulation of rules.⁵⁵ This constructive thought must at one time or another be performed by practically all judges in dealing with difficult or unprovided cases,—*i. e.*, cases not falling clearly under an existing rule; but it does not form the principal function of *nisi prius* judges, or even of appellate courts except in connection with new and difficult cases. It is, however, an essential factor in the judicial process, and as such can only be understood in connection and contrast with the more usual type of normative thinking which is concerned with the application of rules.

The term "correctness" has a different meaning when applied to a scientific and to a normative rule. Normative rules, which are statements that in certain kinds of fact-situations certain action is to be taken, are not statements that any fact-situations will occur, and therefore cannot be tested by conformity between actual and predicted occurrence. What we mean by saying that they are correct is that the action which they prescribe will produce a result which for one reason or another we regard as the result that ought to be produced in contrast with other results which are physically capable of being produced.⁵⁶ To determine the correctness of a rule in this sense, a double process is necessary. There must first be determined the fact-consequences which the application of the rule can be expected to produce; secondly there must be determined whether this result should be regarded as desirable.

The determination of the consequences which may be expected to follow from the fact of applying a normative rule involves, like

⁵⁵ See *ibid.* 43; but Kocourek apparently confines his attention to the criticism of rules enacted by legislatures. The same type of criticisms is of course applicable to judge-made rules.

⁵⁶ Llewellyn's interest in descriptive rules, which are generalized statements of the past action taken by courts and officials, as contrasted with rules which are verbal commands to officials, turns out in the last analysis to be only an interest in causing the verbal rule to be altered so as to produce the result desired by giving the right command to the officials. Thus he says: "Since the ultimate effectuation of a purpose is in terms of action, of behavior, the verbal formulation to be an efficient tool must be such as will produce the behavior desired. This turns on the relevant prevailing practices and attitudes of the relevant processes." Llewellyn, *op. cit. supra* note 6, at 452. Again he says that the draftsman of a statutory rule "must so shape it as to induce its application". *Ibid.*

other "scientific" determinations, simply the possibility of establishing connections between past observed and future observable facts. The difference between the establishment of such connections in the field where legal rules operate,—*i. e.*, the field of social relations,—on the one hand, and in the fields of physics and chemistry on the other hand, is a difference in the nature of the subject-matter and not in the basic character of the problem. It has frequently been pointed out that the subject-matter of social relations, because of the infinitely greater complexity of the facts which compose them, the greater number of interconnections between these facts, the vaguer and less determinate way in which identical facts or types of facts can be isolated, and above all because of the impossibility of controlled experiment, presents vastly greater difficulties for the formulation of generalized statements of relations between causes and consequences than is true in such sciences as physics and chemistry where the inquirer is solely concerned with relations between such relatively simple and controllable facts as weight, size, shape, and motion.⁵⁷ It has, therefore, seemed to many that the effort to establish scientific generalizations which shall formulate connections between relevant social facts with anything approximating the accuracy of generalizations in the field of the natural sciences is doomed from the outset to failure because of these differences, and that generalizations are only possible for the trivial and the obvious. However, modern social science is for the moment busy with the development of various statistical and other measuring devices which it is hoped may result in making possible generalizations which will have some degree of accuracy. The possibility of developing such generalizations is of the highest interest to legal thinkers insofar as it is desirable for purposes of constructive legal thought to estimate the fact-consequences of the application of rules of law, and, in this country especially, many progressive legal thinkers are for the moment directing their whole attention to it. This work deserves to be done, if for no other reason than to determine the limits beyond which it may ultimately be found impracticable to

⁵⁷ I GÉNÈX, *op. cit. supra* note 51, at 172-179.

estimate the results of law by other than old-fashioned rule-of-thumb methods. One unfortunate consequence, however, is that the concentration of many legal scholars on work of this character tends not merely to withdraw their attention from other essential aspects of legal thinking, but even leads them to deny the existence of these other aspects of what is after all a single problem. The result is that they tend to conceive legal thinking exclusively in terms of scientific thinking, with the consequence of confusing and obscuring the ways in which science can be of real service to law.

After the fact-consequences of applying a legal rule have been estimated by methods of observation, either scientific or rule-of-thumb, a further step still remains for the determination of the "correctness" of the rule. This involves the determination of whether or not the predictable fact-consequences are desired or desirable. Whether they are desired is a fact-question insofar as it concerns, for example, whether they are desired by the parties to the controversy, or by the opinion of particular groups in the community. The ultimate question, however, is whether they are desired by the judge or other agency responsible for making the decision, and this is in substance the question of whether in the eyes of that agency they are desirable. Here we are once more confronted with a question which calls for normative thinking by the judge or the legal scholar who undertakes to criticize the rule. Whether or not the consequences of a rule are desirable is not a question which can be ultimately decided by the mere scientific determination of connection between cause and consequence. To assume that it can be so decided is to assume, as Dewey and some other recent thinkers apparently do, that the desires of human beings are ultimately uniform and that disagreements are due simply to confusion or ignorance as to proper methods for attaining those desires. Only from this standpoint can it be taken for granted, as Dewey and others seem to take for granted, that science by disclosing the consequences of a rule of conduct affords a test of its desirability. Science may indicate the method of attaining the object of a desire, but if ultimate desires differ, mere predictions of fact, which is all that science

has to offer, cannot decide between them. A more sophisticated view, which recognizes that there can be other differences than differences as to fact-relations, must leave room for the solution of such differences by other methods than appeals to fact. The only resort in such cases is to norms of value, and it is by reference to such norms that the decision must ultimately be made as to whether or not a legal rule having certain predictable consequences is a desirable rule.⁵⁸ The normative thinking which is involved in making such a decision differs in one important respect from that which is involved in the simpler task of applying an established legal rule to the decision of a controversy. In the application of a rule of law, the rule itself supplies the norm; in testing a rule for desirability, after determining what its fact-consequences will be, the norm must be some generalization which is found outside of and above the law, and which therefore is not vested with the sanction of authority which is attached to legal rules.

In view of the present direction of interest of many legal scholars, it seems desirable to point out that the relative importance of predicting the probable factual consequences of a legal rule is not always as great as it is now generally assumed to be. There are, of course, certain rules whose social consequences are properly regarded as the most important factor in determining their validity so that the determination of these consequences becomes of the highest importance. This is true, for example, of the rules which govern the liability of employers for injuries to their employees,—the so-called fellow-servant rule, the rule of assumption of risk, and the like. The effect of these rules in imposing difficulties in the way of recovery by injured workmen produced a definite consequence on an entire social class which had a positive bearing of the most significant kind on the question of the

⁵⁸ "The idea of a normative science cannot be replaced by the idea of pure technique, of a practical art. For technique tells us that if we wish to achieve one or another result we must employ such or such means; but it does not tell us to aim at one objective rather than another. Normative science on the contrary has as its characteristic the fact that it is addressed to free will, that is to say to the human capacity to choose between different possible acts, in order to fix the determination of such choice by means of its rules." Norero, *La Philosophie de Wundt* (1908) 16 *REVUE DE MÉTAPHYSIQUE ET DE MORALE* 214-243, quoted in 1 GÉNY, *op. cit. supra* note 51, at 68n.

desirability of the rule. However, there are many legal rules to which such widespread social consequences cannot be traced, and of which it is hard to estimate the consequences to others than the parties immediately affected in the relatively infrequent cases to which the rules apply. Take for example the question of whether or not a finder of a lost article who has had repairs or improvements made to the article shall be entitled to recover the value of the improvements from the owner after the latter reclaims the article.⁵⁹ It is clear that the consequences of allowing such a recovery would be to throw a possible burden on the owner of lost property. Social consequences, however, there would seem to be none. In such a case the question of the correctness of the rule is accordingly limited to the immediate value judgment presented by the rule itself without the necessity of any elaborate intermediate observational process. The same thing is true in connection with the rule that a woman who has lived with a man under the belief that she is his wife is not entitled to recover the value of her services on learning that he has a wife living.⁶⁰ In cases of this character the rule itself raises at once the question of the comparative value of the opposing interests involved and that question has to be faced directly without the aid of data supplied by statistical procedure. Such procedure is of assistance only in the case of rules which have definite and widespread social implications.

It thus appears, in summary of what has been said, that legal rules at various times form elements in a number of different types of thought-processes. In the simplest and commonest case where they are employed by a lawyer in advising a client or by a court in deciding a litigated case, the process of reasoning is concerned simply with the question of whether a given fact-situation falls within the rule,—whether the rule is to be applied to the fact-situation in question for the purpose of determining, or aiding to determine, the decision of the case. In the second place, legal rules form elements in the process of constructive legal thinking, *i. e.*, of determining whether or not a rule which is admitted to apply authorita-

⁵⁹ Chase v. Corcoran, 106 Mass. 286 (1871); STORY, BAILMENTS (2d ed. 1840) 391; 2 KENT COMM. (Holmes's ed. 1873) 256.

⁶⁰ Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892 (1888).

tively to a given situation, is the rule which ought to apply in contrast with other conceivable rules. In this procedure of constructive legal thought the rule figures in two types of processes. On the one hand it figures in a process of scientific reasoning to determine what will be the fact-consequences of its application; on the other it figures in a process of comparison with some norm of value to determine whether or not these consequences are desirable, *i. e.*, whether they are consequences which ought to be brought about through the action of the state. If it should be determined that the application of a rule to a particular type of case will have consequences which for one reason or another are regarded as undesirable, this result, if reached by a private jurist, may lead to advocacy of the repeal or amendment of the rule; if reached by a court of last resort in the exercise of its judicial function, it may bring about an abandonment of the rule or a narrowing of it so as to exclude from its operation the particular case in question.

Usually all these different processes go on together and at one and the same time. This is particularly true in the unofficial thinking of legal scholars who are primarily interested not in advising clients but in discussion and criticism of the legal system. It is also true of the thinking of courts in dealing with cases which do not fall squarely under an established rule and in the thinking of courts of last resort when presented with the argument that an established rule should be abandoned or narrowed. Inevitably where the different processes thus go on at the same time they are not kept formally distinct. The natural tendency toward economy of effort leads to their combination in a single process. The part which each different process plays is taken for granted and in most instances is well understood and leads to no confusion. On the other hand the result is sometimes to generate confusion in the thought of speculative jurists through undue concentration of attention upon a single phase of the process.⁶¹ This is what seems to have occurred in the thinking of some recent progressive jurists with the result that a mass of confusing theory has originated which needs to be cleared away by a reiteration of the elementary

⁶¹ This has been noted by Llewellyn, *op. cit. supra* note 6, at 439.

and the obvious before sound progress can be made towards considering the technique of legal thinking in the application and elaboration of law. The whole argument of this paper has been concerned with this emphasis on the obvious for the purpose of brushing aside false issues and misleading lines of approach. Only after this has been done does it become possible to proceed to the consideration of the central question of the way in which the application and elaboration of rules are affected by considerations of logic on the one hand and by discretionary considerations of policy, taste, and value judgments on the other.