THE IMPLICATIONS OF LEGAL REASONING FOR A SYSTEM OF ARGUMENTATION

by

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B.S., University of Houston, 1973
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Submitted to the Department of Speech and Drama and the Faculty of the Graduate School of the University of Kansas in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

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Dissertation defended: July, 1980

ACKNOWLEDGEMENTS

While the time spent working on any dissertation is rarely totally enjoyable, there are several people that did make this project a lot less painful than it could have been. I would like to express my gratitude to the graduate students at the University of Kansas, especially Mike Mayer, Charles Conrad, and Marj Keeshan, for providing a climate that made working on this project more bearable. To Chester Gibson, Mary Ferguson and Donna Haisty I express my appreciation for supporting my efforts during the final stages and insuring me that it would get done. I would like to thank Faye Gibson for deciphering my notes and typing the final copy of my dissertation. Wil Linkugel and Tom Beisecker provided many helpful suggestions and aided in focusing the study. Finally, I would like to thank Donn Parson for continued support far beyond the call of duty, not only while I was working on the dissertation, but throughout my stay at Kansas. It is an understatement to say that I would never have made it through graduate school without his encouragement and help.

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CHAPTER I

THE NATURE OF LEGAL ARGUMENT

Argumentation has always held a central place in the study of rhetoric.[1] Despite the importance of argumentation, however, no theory of argumentation has proven to be entirely satisfactory in explaining how decisions made in everyday conversations should be reached.[2] Initial explorations into the nature of argument drew heavily from classical logic. This is perhaps due to a tendency to equate logic with the syllogism, and to limit the types of arguments that can be considered sound with those that can be transposed into syllogistic form.[3] This position, while still advocated in some form by many, is unfortunately limited.[4] Toulmin, for example, notes that there are

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[1]See Karl Wallace, "The Substance of Rhetoric: Good Reasons," Q.J.S., XLIX (Oct., 1963), 239-249.

[2]See Steven B. Hunt, "The Genre of Rational Argument," (Unpublished Ph.D. dissertation, University of Kansas, 1974).

[3]See Julius Stone, Legal System and Lawyer's Reasonings (Stanford: University Press, 1968).

[4]See David W. Shepard, "Rhetoric and Formal Argument," Western Speech, XXX (Fall, 1966), 141-247; Lynn Anderson and C. David Mortensen, "Logic and Marketplace Argumentation," Q.J.S., LIII (April, 1967), 143-151; Glen E. Mills and Hugh G. Petrie, "The Role of Logic in Rhetoric," Q.J.S., LIV (Oct., 1968), 260-267, David W. Shepard, "The Role of Logic," Q.J S., LV (Oct., 1969), 310-312, Hugh G. Petrie, "Does Logic have any Relevance to Argumentation?" J.A.F.A., VI (Spring, 1969), 55-60, and C. David Mortensen and Ray Lynn Anderson, "The Limits of Logic," J.A.F.A., VII (Spring, 1970), 71-78.

several distinctions between analytical syllogistic arguments and those that take place in everyday discourse:

> (i) The distinction between necessary arguments and probable arguments. . .
> (ii) The distinction between arguments which are formally valid and those which cannot hope to be formally valid. . .
> (iii) The distinction between those arguments, including ordinary syllogisms, in which a warrant is relied on whose adequacy and applicability have previously been established, and those arguments which are themselves intended to establish the adequacy of a warrant.
> (iv) The distinction between arguments expressed in terms of 'logical connectives' or quantifiers and those not so expressed. . .
> (v) The fundamental distinction between analytic arguments and substantial ones. . .[5]

Anderson and Mortensen suggest that:

> Given the full powers of language, much rhetorical argument may be simply beyond logic. In the midst of renewed interest in the relationships between logic and rhetorical argumentation, a troublesome question must be approached afresh: namely, under what language conditions are available logical systems applicable for the assesment of the logical worth of rhetorical arguments.[6]

While there may be some use to the study of the traditional syllogism, it is of limited value. Much argument does not take the form of the syllogism, and formal logic is of little help in evaluating the premises of a syllogism, it merely helps us decide what inferences can be drawn, given the premises, a guideline that often provides no information that is new. Toulmin suggests that traditional syllogisms tend to be analytic; providing no new information in the conclusion that was not already known.[7]

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[5]Stephen Toulmin, The Uses of Argument (Cambridge: Cambridge University Press, 1958), pp. 148-149.

[6]Anderson and Mortensen, p. 143.

[7]Toulmin, p. 127.

There have been several attempts to create new theories of argumentation. One such theory was proposed by Toulmin. Hunt[8] suggested that some of the key contributions of Toulmin to argumentation theory was his development of the concept of field-dependency and his discussion of the implications of fields. Essentially, Toulmin posits the notion that there are fields (or disciplines)[9] of arguments, and that argumentation has both field-variant and field-invariant characteristics. The study of fields of arguments can aid in both understanding how argument functions in that field, and how argument functions in other fields:

> . . . our analysis allows us to compare the patterns of historical change in different kinds of collective enterprises. The central feature of our account was a model of historical development in 'compact disciplines', but we have seen that an understanding of the conditions required for the applicability of this model can throw light also on other fields of human activity, which are not fully disciplinable. If we contrast the compact disciplines . . . with the more diffuse disciplines . . . this can help us to understand better, not only those collective human enterprises which are in fact disciplinable, but also those which are not.[10]

Given the potential insights provided by the study of fields of arguments, further exploration would seem to be justified.

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[8]Hunt, pp. 14, 119.

[9]Toulmin uses both the terms field and discipline to cover the same concept. The term field appears more in The Uses of Argument, while the term discipline appears in Human Understanding: The Collective Use and Evolution of Concepts (Princeton: Princeton University Press, 1977).

[10]Toulmin, Human Understanding, p. 508.

The phrase, "field of argument", is first introduced by Toulmin in his book, The Uses of Argument. He argued that:

> Two arguments will be said to belong to the same field when the data and conclusions in each of the two arguments are, respectively, of the same logical type: they will be said to come from two different fields when the backing or the conclusions in each of the two arguments are not of the same logical type.[11]

Exactly what is meant by "the same logical type" is not made explicit in this work, although Toulmin does give several examples of what he considers fields, including science, law, ethics, and art-criticism. To confuse matters even more, in Human Understanding, Toulmin refers to fields as "disciplines" and subdivides disciplines into compact, diffuse, and would-be disciplines[12] which would suggest that Toulmin felt that fields were more complex than he originally hypothisized. He argues, however, that the more developed disciplines evolve into compact disciplines, which have several characteristics:

> (1) The activities involved are organized around and directed towards a specific and realistic set of agreed collective ideals. (2) These collective ideals impose corresponding demands on all who commit themselves to the professional pursuit of the activities concerned. (3) The resulting discussions provide disciplinary loci for the production of 'reasons', in the context of justificatory arguments whose function is to show how far procedural innovations measure up to these collective demands. (4) For this purpose, professional forums are developed, within which recognized 'reason-producing-procedures' are employed to justify the collective acceptance of novel procedures. (5) Finally, the same

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[11] Toulmin, Uses of Argument, p. 14.

[12] Toulmin, Human Understanding, p. 378.

> collective ideals determine the criteria of adequacy by appeal to which the arguments produced in support of those innovations are judged.[13]

Examples of these compact disciplines include "the better-established physical and biological sciences, in the more mature technologies and in the better-conducted judicial systems."[14] These disciplines can also have sub-disciplines.[15]

Toulmin also examines why disciplines come about. He suggests, for example, that disciplines come about because the divisions of knowledge seem to have some practible purpose:

> . . . the boundary between disciplinable and non-disciplinable activities runs where it does because, in the course of their practical experience, men have discovered that it is both functionally possible and humanly desirable to isolate certain classes of issues and make them the concern of specialized bodies of enquiries; while with issues of other kinds this turns out to be either impossible, or undesirable, or both at once.[16]

The original division of argument into fields is probably based on the types of problems that a field is concerned with:

> At the very beginning of our inquiry, we introduced the notion of a <u>field</u> of arguments, by referring to the different sorts of problem to which arguments can be addressed. If fields of argument are different, that is because they are addressed to different sorts of problems.[17]

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[13] <u>Ibid</u>., p. 379.

[14] <u>Ibid</u>., p. 380.

[15] <u>Ibid</u>., p. 365.

[16] <u>Ibid</u>., p. 405.

[17] Toulmin, <u>Uses of Argument</u>, p. 167.

Thus·

> The crucial element in a collective discipline . . . is the recognition of a sufficiently agreed goal or ideal, in terms of which common outstanding problems can be identified.[18]

A discipline does not remain static, and much of Human Understanding is devoted to how disciplines change over time. While the problems a discipline faces may remain the same over time, the approaches taken by the field will change. New theories will emerge from within the discipline. Both the new theory and the old theory will share certain common grounds; especially views as to how the arguments are to be evaluated·

> For the parties to such a debate - both those who cling to the older theory and those who put forward a newer one - would still share some common ground, not any common body of oretical notions, perhaps, but rather certain shared disciplinary conceptions, reflecting their collective intellectual ambitions and rational mathods, selection-procedures and criteria of adequacy.[19]

Over a period of time, the discipline may change dramatically. While the discipline tends to have an independent body of "concepts, methods, and fundamental aims" that remains constant, the content of a discipline can change drastically over time.[20] Thus disciplines are both continuous and changing:

> Such continuity and change consist in the generation of intellectual novelties, only a few of which win acceptance, thereby surviving and winning an ongoing place in the

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[18]Toulmin, Human Understanding, p. 364.

[19]Ibid., p. 79.

[20]Ibid., p. 139.

> conceptual pool associated with a discipline. The mechanisms whereby such conceptual variants succeed in winning widespread acceptance in the discipline or fail to are of two sorts: reasons and causes. The reasons constitute rational processes for the evaluation of intellectual novelties or conceptual variants, and the causes are those various social and other factors, such as the 'intellectual politics' of disciplines which sometimes override reason, and in any case are an important force in shaping the accepted intellectual content of a discipline.[21]

The importance of change to Toulmin cannot be underestimated. For Toulmin, the major shortfall of traditional logic is that it emphasized a static view of argument and did not give adequate attention to the manner in which new ideas and new concepts are developed. The key to argumentation is to discover the way ideas evolve, and the way new concepts replace old concepts.

> . . . in science and philosophy alike, an exclusive preoccupation with logical systematicity has been destructive of both historical understanding and rational criticism. Men demonstrate their rationality, not by ordering their concepts and beliefs in tidy formal structures, but by their preparedness to respond to novel situations with open minds - acknowledging the shortcomings of their former procedures and moving beyond them.[22]

Argumentation is not static; it involves a process of testing old ideas against new ideas. The study of argument includes not only the content of arguments, but also the structure of the discipline in which the argument takes place, including such things as the organization of the disciplines, the structure of the publications of the disciplines, and

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[21]Frederick Suppe, The Structure of Scientific Theories (Chicago: University of Illinois Press, 1977), pp. 674-5.

[22]Toulmin, Human Understanding, p. 278.

the nature of the authorities in a discipline that accept or reject new ideas.[23] Argument is not only rational, its acceptance in a discipline may depend on the internal political structure of a discipline.[24] Argument in a discipline thus has an element of the political, although there are limits to this element.[25]

Toulmin's theory of fields of argument suggests many possible insights into the nature of argument, especially if his conclusions in the philosophy of science apply to other fields. Unfortunately, much of Toulmin's discussion of fields leaves several critical questions unanswered. Hunt notes that Toulmin does not adequately define exactly what a field is, although Toulmin does give a few examples of fields.[26] The way arguments are evaluated within a field is also unclear:

> Toulmin's model has some potential as an explanatory tool; but its adequacy becomes marred by the fact that Toulmin has precious little to say about what constitutes "good reasoning" in the evaluation of intellectual novelties other than to say it involves "rational bets" as to which of the available competing intellectual novelties is the best way to proceed. But in the absence of some sort of account as to what constitutes a rational bet, we are left in the dark.[27]

In addition, since most of Toulmin's examples are drawn from science, it is not clear that his observations apply to other fields of argument.

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[23] Ibid., p. 278.

[24] Suppe, pp. 677-678.

[25] Toulmin, Human Understanding, 502.

[26] Hunt, p. 119.

[27] Suppe, pp. 679-680.

Thus, while the concept of fields offers some promise to scholars of argumentation, the potentials of this concept have yet to be explored in depth.

Method of Approach

Perhaps the best way to examine Toulmin's theory of fields of arguments is to explore one field of argument in depth, and to apply insights gained from that study both to Toulmin's theory of argumentation and to argumentation in general. Presumably, the contents of any single field of argument will contain both field variant characteristics, and field invariant characteristics that can apply to other fields of argumentation. The question becomes, which field should be examined?

As previously noted, Toulmin suggests that the most productive type of field to study would be a compact field. These include the physical and biological sciences, technologies, and sophisticated judicial systems. Toulmin devotes most of Human Understanding to the application of his concept of fields of argument to the sciences, but the application to legal argumentation is made only in passing.[28] This is unfortunate, since legal argumentation is the only discipline Toulmin lists as a compact discipline that is not a hard science. Unless the concept of fields can be shown to apply to legal reasoning, the value of Toulmin's theory as anything more than a philosophy of science is unclear. It would thus seem logical to study the field of legal argument in order to study the applicability of Toulmin's concepts of field to other disciplines in the social sciences.

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[28] See footnote 14.

There are other justifications for such a choice. Within the Speech Communication discipline there has been an increased interest in legal communication, as evidenced by the creation of a committee on Communication and Law in the Speech Communication Association. Indeed, the origins of law and rhetoric have much in common. Abbott notes:

> It is generally accepted that the study of rhetoric was born in response to the needs of the law courts of ancient Greece. The division of rhetoric and law which came later was, . . . the perpetuation of an almost accidental division.[29]

Given the historical connection between law and rhetoric, legal argumentation as it exists today would seem to be an appropriate field of study.

Legal reasoning also holds a special position in the hierarchy of argumentative fields. Legal reasoning is viewed as being helpful in understanding other types of reasoning:

> There are quite a number of other similarities between the kinds of reasoning that go on in Philosophy and in Law. A thorough training in the forms of legal reasoning ought to strengthen the intellectual repertory of any thinking man.[30]

Law has always been viewed as employing a type of argument that is more developed than other types of argument. Christie notes that "Ever since law became a specialized discipline, it has been assumed that legal reasoning exhibits a greater rigor than other types of

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[29]Don Abbott, "The Jurisprudential Analogy: Argumentation and the New Rhetoric," C.S.S.J., XXV (Spring, 1974), pp. 50-55.

[30]Fredric L. Bor, "The Nexus Between Philosophy and Law," Journal of Legal Education, XXVI (1974), p. 542.

non-formal argumentation."[31]

It is partly because of this position of legal argumentation in the field of argument that both of the major argumentative theorists of the twentieth century - Perelman and Toulmin - have drawn heavily from law in the development of their theories of argument. H.L.A. Hart, in his introduction to the English translation of The Idea of Justice and the Problem of Argument explains this characteristic of Perelman's writings:

> The connection between law and the study of argument - rhetoric in the old non-pejorative sense of that word - is no less clear. Legal reasoning characteristically depends on precedent and analogy, and makes an appeal less to universal logical principles than to certain basic assumptions peculiar to the lawyer; it therefore offers the clearest and perhaps most instructive example of modes of persuasion which are rational and yet not in the logical sense conclusive.[32]

Perelman draws heavily from law in the creation of his discussion of argument.[33]

Toulmin, while emphasizing the philosophy of science, also draws heavily from law, especially in The Uses of Argument. For Toulmin, the parallel between law and argument is quite close·

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[31]George C. Christie, Jurisprudence: Text and Readings on the Philosophy of Law (St. Paul, Minn.. West Publishing Co., 1973), p. 833.

[32]H.L.A. Hart, "Introduction," in Ch. Perelman, The Idea of Justice and the Problem of Argument (Atlantic Highlands, New Jersey· The Humanities Press, 1977), p. vii.

[33]Abbott, p. 51. See also Ch. Perelman, "What the Philosopher may Learn from the Study of Law," Natural Law Forum, XI (1966), pp. 1-12.

> We can get some hints [of the nature of field dependency] if we consider the parallel between the judicial process, by which the questions raised in a law court are settled, and the rational process, by which arguments are set out and produced in support of an initial assertion.[34]

For Toulmin, as with Perelman, legal reasoning is more sophisticated than other types of reasoning:

> Somehow, lawyers and judges have managed to work their way in practice through problems for which philosophers have not stated in any coherent or satisfactory theoretical solution.[35]

This sophistication even extends to the creation of sub-disciplines, which are properly placed in their appropriate place in the discipline.[36]

Legal reasoning also enables us to study how concepts evolve, and how inferences are drawn. As Toulmin observes.

> As Mr. Justice Holmes demonstrated so clearly, questions of judicial strategy take us - at the limit - beyond the reach of all merely formal reasoning, in which accepted rules, principles, and patterns of inference are applied to novel situations or sets of facts. Strategis reappraisals, in law as in science, have - necessarily - to be arrived at in the light of longer-term views about how, in a novel socio-historical situation, changes in the interpretation of the common law can fulfill most completely the basic responsibilities of any legal system.[37]

Like Perelman, Toulman draws heavily from law in his theory of argumentation.

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[34]Toulmin, Uses of Argument, pp. 15-16.

[35]Toulmin, Human Understanding, p. 87.

[36]Toulmin, Human Understanding, p. 88.

[37]Ibid., p. 489.

Given the importance of legal argumentation in any study of argument, it is surprising to note the lack of any serious study of legal argumentation by students of rhetoric. Perelman emphasizes the legal system of the continent, ignoring the developments that have taken place in England, the United States, and other common law states (although some legal scholars have attempted to apply Perelman's theories of rhetoric to law, most notably Christie[38] and Stone[39]).

To attempt to totally cover the entire field of legal reasoning, however, would be impossible for any one scholar. The fact that it is a compact discipline means that the concepts in the field have been discussed and debated for a long time, and many theories have been proposed. The result is that the quantity of material on legal reasoning is vast:

> The subject of legal reasoning is a vast one. It is one of the most important questions in any detailed study of the law from a philosophical point of view. . . . Indeed, anything like a "complete" view would take a lifetime and more of study.[40]

Choices must be made as to which theorists should be examined. For the purposes of this study, the works of three theorists will be examined in detail, with the works of other legal scholars drawn in as it seems necessary to explore the implications of these theorists. The selection of those legal theorists to be included is inevitably

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[38]Christie, 868-871.

[39]Stone, pp. 332-335.

[40]Christie, p. 837.

an arbitrary one, but there are certain guidelines that aid the selection. The theorists chosen should be both highly influential and insightful in their analysis. They should be among the leaders of the legal discipline. Their theories should be widely discussed and debated by legal scholars. Three authors seem to fit these criteria well: Edward H. Levi, Lon L. Fuller, and Herbert Wechsler.

The choice of Levi is logical, given the vast influence of his works. Toulmin cites Levi's classical work on An Introduction to Legal Reasoning[41] twice in Human Understanding,[42] both times suggesting it is an appropriate work to turn to to understand the nature of precedents in legal reasoning. Indeed, Levi has played an important role in outlining the nature of legal reasoning; Christie, in one of the few legal textbooks on Jurisprudence, argues

> Many, if not most, of the law teachers of the present day have taken Levi's model as the paradigm of legal reasoning. If there is an "official" model in the United States of what legal reasoning is all about, this is it.[43]

Loevinger calls Levi's book "one of the most extensive and elaborate inquiries into legal reasoning."[44] The book provides a basis for understanding the type of reasoning that many people feel is the mainstay of legal reasoning: Like Toulmin, Levi places importance

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[41]Edward H. Levi, An Introduction to Legal Reasoning (Chicago: University of Chicago Press, 1949).

[42]Toulmin, Human Understanding, pp. 89, 95.

[43]Christie, p. 962.

[44]Lee Loevinger, "An Introduction to Legal Logic," Indiana Law Journal, XXVII (Summer, 1952), p. 479.

on the process by which decisions are reached.[45] He argues that legal reasoning is not like that of format logic, but rather is a three step process:

> The steps are these: similarities are 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.[46]

Legal reasoning involves a type of imperfect reasoning. The judge attempts to develop concepts and phrases that cover past cases, and attempts to apply them to the case at hand.

From Levi we will move to Lon L. Fuller. Lon Fuller has had a great deal of influence on the legal profession. Robert S. Summer, in his review of American legal theory in the past ten years, concluded:

> A special note on Fuller's work is in order. He is by far the most fertile and prolific American contributor to jurisprudence on the scene. His efforts also generate substantial secondary literature. Among those who have reacted critically or appreciatively are philosophers, political theorists, and social scientists as well as law school professors.[47]

One of his major works is The Morality of Law.[48] While strictly not devoted to legal argumentations, it does provide a great deal of insight into how law is to be made and applied, and thus it has a great deal of potential implications for legal reasoning. This book

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[45]Levi, p. 5.

[46]Levi, p. 2.

[47]Robert S. Summers, "Present State of Legal Theory in the United States," Rechtstheorie, VI (1975), p. 78.

[48]Lon L. Fuller, The Morality of Law, Revised Edition (New Haven: Yale University Press, 1969).

has also invoked a great deal of controversy. In the five years between the first and second edition of the book, more than forty-seven reviews of the book have been published, including a review by Perelman.[49] His second edition includes a response to his critics. Briefly, Fuller argues that there is an internal morality of law, a morality of duty and a morality of aspiration. The morality of duty is the minimum requirement of any legal system, and the morality of aspiration is the morality legal systems should strive to attain, even though it may be impossible. He next argues that there are eight ways a legal system can fail as a legal system.

> The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe, (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change, (4) a failure to make rules understandable, (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them, and finally, (8) a failure of congruence between the rules as announced and their actual administration.[50]

Thus, while Levi emphasizes the past in the use of legal reasoning, Fuller emphasizes the present, the proper process that a lawyer should use in determining the appropriateness of legal rules. Fuller attempts to create the standards by which the legal community can evaluate laws.

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[49] Ch. Perelman, "Review of Morality of Law" Natural Law Forum, X (1965), pp. 242-245.

[50] Fuller, p. 38.

Wechsler, on the other hand, emphasizes the future implications of a legal decision in his classic article, "Toward Neutral Principles of Constitutional Law."[51] Based upon a lecture given at Harvard, this paper has provoked a significant controversy. Golding observed:

> This lecture has already occasioned a minor literature, in past focusing on matters of interest to constitutional lawyers, and in part focusing on matters of a more theoretical nature. Although its main thrust may be of a more practical scope, no one can deny that Professor Wechsler's lecture raises important issues of jurisprudence and legal philosophy.[52]

Snortland and Stanga call the paper "a classic in modern legal thought."[53] Clark suggests.

> Even to those of us who must remain not fully persuaded by the argument, the lecture has provided a road to more careful thinking about these great issues, indeed, no higher tribute can be paid a scholar than the veritable tempest of discussion it has called forth.[54]

Indeed, Shepard's Citations shows that Wechsler's article has been cited over four hundred times by court and law review articles since it was published in 1959.[55]

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[51]Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," Harvard Law Review, LXXIII (November, 1959), pp. 1-35.

[52]M. P. Golding, "Principled Decision-Making and the Supreme Court," Columbia Law Review, LXIII (1963), pp. 35-38.

[53]Neil E. Snortland and John E. Stanga, "Neutral Principles and Decision-Making Theory: An Alternative to Incrementalism," George Washington Law Review, XLI (July, 1973), p. 1006.

[54]Charles E. Clark, "The Limits of Judicial Objectivity," American University Law Review, XLI (July, 1963), p. 6.

[55]Shepard's Law Review Citations (Colorado Springs: Shepard's Citations, Inc.), 73 (1975), p. 293, 74 (1976), p. 183.

Wechsler's thesis is simple: court decisions should be made on neutral principles

> I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgement on analysis and reasons quite transcending the immediate result that is achieved.[56]

While there have been many criticisms leveled against this position, it is worth study, both for the insights it provides and for the reactions the critics of this position have had to it.

Resources and Limitations

As already suggested in the discussion of the various legal scholars covered by this study, there is a vast amount of literature that has been generated by the three authors covered. Selecting the resources will be a difficult task. That does not mean the task is impossible. The major works cited will act as a starting point for analysis. From these works, the study will spiral outward, drawing both from the various reviews and criticisms of these works, and related works both by the authors and others with similar arguments. Past dissertations have tended to strive for in depth knowledge of one narrow subject, this analysis will attempt to synthesize a broader area of knowledge in order to form the basis for additional study.[57]

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[56]Wechsler, p. 15.

[57]See Hunt, pp. 1-30.

Levi's book is based on an earlier article in the University of Chicago Law Review,[58] and he further developed his views on legal argument in a paper presented fifteen years after his book.[59] While there have not been a large number of critical reviews of his articles, there have been several books and papers on the nature of precedent that have been published, ranging from Holmes[60] to Douglas.[61] These works will be drawn in where appropriate.

Fuller's works have been the subject of much discussion. A portion of the controversy has centered on his conflict with H.L.A. Hart's The Concept of Law, and Hart's critical review of Fuller's book.[62] These works, as well as the considerable number of reviews of his book will be reviewed.

Wechsler expanded his views on Neutral Principles in his book Principles, Politics and Fundamental Law.[63] The Federal Judicial Center held a conference in 1975 that afforded Wechsler to further

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[58]Edward H. Levi, "An Introduction to Legal Reasoning," University of Chicago Law Review, XV (1948), p. 501.

[59]Edward H. Levi, "The Nature of Judicial Reasoning," in Law and Philosophy: A Symposium, edited by Sidney Hook (New York: New York University Press, 1964), pp. 263-281.

[60]Oliver Wendell Holmes, The Common Law (Boston: Little, Brown, and Company, 1963).

[61]William O. Douglas, "Stare Decisis," Columbia Law Review, IL (June, 1949), pp. 736-755.

[62]H.L.A. Hart, The Concept of Law (New York: Oxford University Press, 1961), and H.L.A. Hart, "Review of Morality of Law," Harvard Law Review, LXXVIII, (1965), pp. 1281-1296.

[63]Herbert Wechsler, Principles, Politics and Fundamental Law (Cambridge: Harvard University Press, 1961).

explain his position.[64] Wasserstrom[65] in developing his two tier system of decision making advocated a similar position to Wechsler, and thus will also be considered. The critics of Wechsler are numerous. Among the more influential critics are Miller and Howell,[66] Clark,[67] and Mueller and Schwartz,[68] although all of the major articles written in response to the paper will be explored.

Several limitations of the study have been implied in previous sections of this paper. Levi, Fuller, and Wechsler are only highlighted as possible illustrations of major legal argumentation theories. One cannot survey the entire legal field in a study of this scope, rather it is hoped that some of the major legal theories that have been advanced can be explored in the hopes that the nature of the field of argumentation in general, and legal argumentation in specific can be illuminated. This analysis should aid in discovering more about the field of argumentation than past efforts have revealed.

Organizational Schemata

I will attempt to examine the field of argument in law by describing and synthesizing the various theories of legal argument

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[64]Federal Judicial Center, "Procedures to Reach Decisions," Panel discussion, May 15, 1975.

[65]Richard A. Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification (Stanford: Stanford University Press, 1961).

[66]Arthur S. Miller and Ronald F. Howell, "The Myth of Neutrality in Constitutional Adjudication," University of Chicago Law Review, XXVII (1960), pp. 661-691.

[67]Clark, "The Limits of Judicial Objectivity," pp. 1-13.

[68]Addison Mueller and Murray L. Schwartz, "The Principle of Neutral Principles," U.C.L.A. Law Review, VII (1960), pp. 571-585.

proposed by Levi, Fuller, and Wechsler. This analysis will be done in five chapters.

Chapter I, "The Nature of Legal Argument" states the problem of analysis, covers the nature of fields of argument, explains the importance of legal argument, discusses the approach of the study, briefly reviews the available literature, notes the limitations of this study, and previews the organizational structure of this paper. Its purpose is to explain the importance of this study, set forth the main arguments, and indicate the content of the dissertation.

Chapter II, "The Influence of the Past· Edward Levi and the Nature of Precedents," explores the importance of precedents in legal reasoning. Levi's theory of legal argumentation will be emphasized as a method of using past decisions to guide current legal decisions. The nature of precedents, the reasons for reliance of precedents by a legal system, the criticism of the use of precedents, and the method of overturning precedents will all be examined. Where necessary, Levi's discussion of these issues will be supplemented with the positions of other legal theorists. Finally, Levi's moving classification system will be explored. The system will be defined, and it will be contrasted to the traditional view of precedents. The role of ambiguity in Levi's system will be discussed, as well as his views of the adversary system. Finally, some initial implications of Levi's positions for a view of argument will be suggested.

Chapter III, "The Influence of the Present Lon Fuller and the Morality of Law," examines the responsibilities of the lawmaker in creating the rules by which men are governed and those that govern a

legal system. The contrast between the morality of aspiration and the morality of duty will be explored. Fuller's inner morality of law will also be examined, both to provide possible guidelines for argument in other fields and to determine the nature of the arguer in the field of law.

Chapter IV, "The Influence of the Future: Herbert Wechsler and Neutral Principles," examines the importance of neutral principles in legal decisionmaking. The discussion of Wechsler's position will include the exploration of six topics. First, the reasons for Wechsler's plea for neutral principles will be examined. Second, the nature of neutral principles will be explored, including the various ways the terms have been defined. Third, the application of neutral principles to specific Supreme Court decisions will be attempted. Fourth, Hart's attack on result-oriented jurisprudence and his tacit support for Wechsler will be noted. Fifth, the attacks on Wechsler's position will be described and evaluated. Finally, some tentative implications for a theory of argument will be suggested.

Chapter V, "The Implications of Legal Argument," will attempt to expand some of the issues in the first four chapters. The nature of fields will be analyzed, and the nature of the legal field will be probed, with possible implications for other fields of argument discussed. The nature of the advancement of argument and the altering of decisions will be explored, as well as situational constraints on legal argumentation. The goal of this chapter is to answer two questions: First, what are the nature of fields of argument?, and second, what are the implications of legal argument for other fields

of argument? To that end, the chapter will suggest that certain characteristics distinguish legal argument from other fields, including the conditions of relevance for problems, the goal of its field, the forum in which argument takes place, and the members of the field. Specific implications of legal argument for argument in general will be discussed within each of these four topics.

CHAPTER II

THE INFLUENCE OF THE PAST

EDWARD LEVI AND THE NATURE OF PRECEDENTS

> In law as elsewhere, we can know and yet not understand. Shadows often obscure our knowledge which not only vary in intensity but are cast by different obstacles to light. These cannot all be removed by the same methods and till the precise character of our perplexity is determined we cannot tell what tools we shall need.[1]
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> I told him it was law logic - an artificial system of reasoning, exclusively used in courts of justice, but good for nothing anywhere else.[2]

Although all judges must decide hundreds or thousands of cases every year, it is often difficult for them to articulate the exact method used in deciding law cases. Over half a century ago, Supreme Court Justice Benjamin Cardozo argued:

> The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain: he will not go very far before taking refuge in the excuse that the language of the craftsmen is unintelligible to those untutored in the craft. Such an excuse may cover with a semblance of respectability an otherwise ignominous retreat. It will hardly serve to still the pricks of curiosity and conscience.[3]

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[1]H.L.A. Hart, quoted in Edward Allen Kent, Law and Philosophy: Readings in Legal Philosophy (New York: Appleton-Century Crofts, 1970), p. 1.

[2]Jeffrie G. Murphy, "Law Logic," Ethics, 77 (1967), 193.

[3]Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1921), p. 9.

Despite the difficulty in articulating principles of adjudication, there have been several attempts to describe how legal decisions are reached. One of the more respected views on the nature of legal reasoning was developed by Edward H. Levi, a former Attorney General of the United States and former dean of the University of Chicago Law School. Levi argues that legal reasoning is based on a moving classification system. This view of legal argument was developed in his book, An Introduction to Legal Reasoning,[4] and was expanded in a paper presented at the New York University Institute of Philosophy in 1963.[5] These treatises have had a great deal of influence on the legal profession. Christie argues that "in America, the most generally accepted theory of the nature of legal reasoning is that of Edward Levi."[6] Loevinger calls Levi's model of reasoning "one of the most extensive and elaborate inquiries into legal reasoning."[7]

To understand fully Levi's position on legal argument, it is necessary to examine briefly three alternative views of legal argument. The first two views of argument, law as deductive argument and legal

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[4]Edward H. Levi, An Introduction to Legal Reasoning (Chicago: University of Chicago Press, 1949). An earlier version of this essay appeared as "An Introduction to Legal Reasoning," University of Chicago Law Review, 15 (1948), 501-574.

[5]Edward H. Levi, "The Nature of Judicial Reasoning," in Law and Philosophy: A Symposium, edited by Sidney Hook (New York: New York University Press, 1964), pp. 263-281.

[6]George Christie, "Objectivity in the Law," Yale Law Journal, 78 (1969), 1318.

[7]Lee Loevinger, "An Introduction to Legal Logic," Indiana Law Journal, 27 (1952), 479.

realism, while influential at various periods of legal history are rejected by Levi as being inadequate explanations of legal reasoning. The third view of legal reasoning, reasoning from precedent, overlaps Levi's position in many ways, but has several points of divergence from Levi's model that will help clarify his position. To that end, the nature of precedents, the reasons for reliance on precedents, the criticisms of reliance on precedents by a legal system, and the method of overturning precedents will all be explored. Where necessary, Levi's discussion of these issues will be supplemented with the positions of other legal theorists. Finally, Levi's moving classification system will be explored. The system will be defined, and it will be contrasted to the traditional view of precedents. The role of ambiguity in Levi's system will be discussed, as well as his views of the adversary system. Finally, some initial implications of Levi's positions for a view of argument will be suggested.

Law as Deduction

It is often thought that legal reasoning, especially the interpretation of statutes, is a form of deductive reasoning.[8] This view has a number of advocates,[9] and it would tend to promote a simple view of legal reasoning.

> A superficial view of the law may lead one to believe that decisions are arrived at purely on the basis of logical

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[8]Levi, Introduction, p. 27.

[9]See, for example, Jerzy Wroblewski, "Legal Syllogism and Rationality of Judicial Decision," Rechtstheorie, 5 (1974), 33-46.

> reasoning. In explaining how the law operates, it would be easy to say that all it amounts to is the application of principles, or rules, to factual situations, leading to an automatic conclusion.[10]

The view of legal argument as deduction may be accurate in a large number of cases. Cardozo suggested that "a majority [of the cases a court hears] could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain."[11] This view of legal reasoning tends to emphasize the certainty in reasoning,[12] the courts merely have to follow syllogistical reasoning to decide a case, and thus have very little leeway. This view has its benefits, in that it can insulate courts from outside criticism:

> . . . as long as the judicial function was believed, however erroneously, to be simply one of mechanical application of rules, it was only right that judges should be immune from criticism. For, assuming the belief to be true, it could only be the law, and not they, which is responsible for harsh decisions. But as soon as it is realized that some descretion is inherent in the judicial process, then the judges have to share at least some of the responsibility along with the law for the character of the decisions they give, which brings them and their methods under public scrutiny.[13]

While this view has some attraction, it does not help much in evaluating legal reasoning. Any deductive argument must start with premises

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[10]William Zelermyer, Legal Reasoning. The Evolutionary Process of Law (Englewood Cliffs· Prentice-Hall, Inc., 1960), p. 4.

[11]Cardozo, p. 164.

[12]Levi, Introduction, pp. v-vi. Levi argues. "The pretense is that the law is a system of known rules applied by a judge; the pretense has long been under attack. In an important sense legal rules are never clear. . . ." (p. 1).

[13]R.W.M. Dias, "The Present State of British Legal Theory," Rechtstheorie, 2 (1971), 208.

that have been agreed upon.[14] In law, much of the dispute is over the nature of the law; how to apply the law is a relatively minor problem in legal reasoning. The key to legal reasoning (and perhaps any type of reasoning) is how the premises for argument are created:

> As a matter of fact, men do not begin thinking with premises. They begin with some complicated and confused case, apparently admitting of alternative modes of treatment and solution. Premises only gradually emerge from analysis of the total situation. The problem is not to draw a conclusion from given premises, that can best be done by a piece of inanimate machinery by fingering a keyboard. The problem is to find statements, of general principle and of particular fact, which are worthy to serve as premises. As matter of actual fact, we generally begin with some vague anticipation of a conclusion (or at least of alternative conclusions), and then we look around for principles and data which will substantiate it or which will enable us to choose intelligently between rival conclusions.[15]

It would be impossible to develop a degal code that covered all possible situations,[16] thus there will always be some room for courts to create premises, or redefine premises. Deductive reasoning can take over once the premises have been created, but the formation of these premises does not follow a "logical" (in the traditional sense) pattern: "our principles and rules are neither complete nor always

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[14]George Christie, Jurisprudence· Text and Readings in the Philosophy of Law (St. Paul· West Publishing Cpmpany, 1973), pp. 835-6; Julius Stone, Legal System and Lawyers' Reasonings (Stanford· Stanford University Press, 1968), pp. 292-300.

[15]John Dewey, "Logical Method and Law," Cornell Law Quarterly, 10 (1924), 23. Holmes suggested "General propositions do not decide concrete cases," (Lochner v. N.Y., 198 U.S. 45, 76 [1905]).

[16]Roscoe Pound, An Introduction to the Philosophy of Law (New Haven: Yale University Press, 1922), pp. 48-50.

logically determined. . . ."[17] Levi's analysis emphasizes this often neglected aspect of legal reasoning: how the premises of legal argument are formulated, and how individual cases are used to create legal rules.

Legal Realism

While those that view law as deductive reasoning emphasize the constraints that law places on legal reasoning, the legal realists emphasize the latitude open to judges.[18] While for the first group there are very few decisions open to a judge in any case, legal realists argue that almost any decision could be reached by a judge, the actual decision reached is based on the biases of a judge, rather than any legal logic:

> The realists emphasized the importance of human choice - not legal principles - as the causal force with the greatest decisional power. In fact, they denied that precedents have controlling influence (the most radical of the realists claimed that precedents have no impact whatever), and argued that judges' psychologies are the key in predicting case outcomes. All law, they held, is judge-made law, because statutes, precedents and customs must survive the bench's molding before taking effect on disputants.[19]

While legal decisions may be cloaked in logical terms, there are a large number of choices open to the judge. The emphasis of legal

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[17] Zelermyer, p. 5.

[18] Levi, Introduction, pp. v-vi.

[19] Dale Hample, "Motives in Law An Adaptation of Legal Realism," Journal of the American Forensic Association, 15 (1979), 156.

realists is on exposing the choices made by the judges and the concious or unconcious basis for these decisions.[20]

Jerome Frank, probably the most vocal of the legal realists, responded to Levi's book by arguing that Levi tends to overlook the discretion open to the judge, especially in the fact finding stage,[21] Levi's response to this charge is fairly brief:

> . . . I hope the process described in this essay is recognizable as dealing just as much with fact determination or categorization as with rule-making. One can accept the persuasiveness of the legal concept as a rule of thumb, and particularly so at the trial or at an earlier stage, and yet marvel at the numerous possibilities, more open at the trial than at the appellate level, to shape the case by an interpretation of the facts in light of a re-examination of the law.[22]

Levi's response does not support his assertion that his theory also applies at the fact finding stage of the legal process. It would seem, however, that the criticism of the legal realists should not make the study of legal reasoning irrelevant. First, despite the latitudes open to a judge, law is predictable. The legal system does not produce decisions at random, rather a person familiar with legal reasoning can predict the decisions with a great deal of

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[20]Christie, Jurisprudence, p. 642. See also Joseph C. Hutcheson, "The Judgement Intuitive· The Function of the 'Hunch' in Judicial Decision," Cornell Law Quarterly, 14, (1929), 274-288, and Joseph C. Hutcheson, "Epilogue" Yale Law Journal, 71 (1961), 277-278.

[21]Jerome Frank, Courts on Trial (Princeton: Princeton University Press, 1949, p. 321.

[22]Levi, Introduction, p. vi.

accuracy.[23] This would suggest that there are some limits to a judge's decision making discretion.

In addition, the requirement that judges articulate a reason for a decision also acts as a check on legal discretion:

> The obligation to articulate the reasoning entering into a decision is itself a safeguard. Not infrequently, we are told, a judge changes his vote because the opinion he is preparing 'won't write.'[24]

While there may be some discretion, there are also some limits to what a judge can do. Stydying these limitations, as well as the way decisions are justified can aid in understanding the nature of legal reasoning.

Stare Decisis

If there is a view of legal argumentation as a distinct type of argument, it is probably a view that emphasizes the role of precedent in legal argumentation. Judges are viewed as following stare decisis, or, perhaps more accurately, stare decisis, et non quieta movere· adhere to decisions and do not unsettle things which are established. This view argues that courts are restricted in cases where a prior decision has been made by that court or a higher court.[25] While this

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[23]Charles E. Clark and David M. Trubek, "The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition," Yale Law Journal, 71 (1961), 259.

[24]Paul A. Freund, "An Analysis of Judicial Reasoning," in Hook, p. 288. See also Dias, p. 209.

[25]Levi, Introduction, p. vi. For an alternative view of judicial decision-making, see Martin Shapiro, "Stability and Change in Judicial Decision-making: Incrementalism or Stare Decisis?" Law in Transition Quarterly, 2 (1965), 134-147.

view is a popular one, it is not followed in all cases in all jurisdictions: "It has long been recognized that stare decisis was primarily useful as a principle where rules of property and rules of commercial transactions were involved."[26] In other areas of law, stare decisis, while frequently employed, is not viewed as being binding. Indeed, one of the major developments in jurisprudence in the past fifteen years was the 1966 decision of the House of Lords that "too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the proper development of the law."[27] This marked the first time the House of Lords ignored stare decisis in making a decision (or at least it was the first time it admitted ignoring stare decisis), thus destroying the last bastion of stare decisis. Despite the fact that stare decisis, in its pure form, is not used in any legal system, it is important to understand its nature in order to understand Levi's position fully. This is true both because Levi's theory of argument is similar in many ways to stare decisis, and because by contrasting the two positions Levi's position can be made clearer.

Kocourek and Koven suggest that "it is difficult to formulate any definition of the American rule of stare decisis which might

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[26]Roscoe Pound, Law Finding Through Experience and Reason (Athens, Georgia: University of Georgia Press, 1960), pp. 39-40.

[27]Quoted in Ruggero J. Aldesert, The Judicial Process Readings, Materials and Cases (St. Paul: West Publishing Co., (1976), pp. 861-862.

embrace all the exceptions or departures."[28] Wasserstrom, though arguing "there is no distinctive meaning that can be attached to the doctrine of stare decisis,"[29] suggests that there are three possible types of stare decisis imposed rules.

> (1) The rule of stare decisis requires only that the judge in some fashion relate his decision in the instant case to decisions that were made in the past.
> (2) The rule of stare decisis requires that the judge decide cases in the same way in which similar cases were decided in the past unless a sufficient reason exists for not applying the rule of the earlier case.
> (3) The rule of stare decisis requires that cases which are similar to earlier cases be decided in the same way in which those earlier cases were adjudicated.[30]

In the United States, the second form of stare decisis is probably the most widespread. The third type was used in England until 1966. Levi's system would fall under the first type.

In order to understand the mechanics of stare decisis, it is necessary to understand a little about the mechanics of the case system. Strictly speaking, a court's decision affects only the immediate case before it, no other individuals are bound by that case. Llewellyn argues that there are four guidelines governing any decision.

> (1) The court must decide the dispute that is before it.
> (2) The court can decide only the particular dispute which is before it.

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[28]Albert Kocourek and Harold Koven, "Renovation of the Common Law Through Stare Decisis," Illinois Law Review, 29 (1935), 979.

[29]Richard A. Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification (Stanford: Standord University Press, 1961), p. 53.

[30]Ibid., pp. 53-4.

> (3) The court can decide the particular dispute only according to a general rule which covers a whole class of like disputes.
> (4) Everything, everything, everything, big or small, a judge may say in an opinion, is to be read with primary reference to the particular dispute, the particular question before him.[31]

These canons provide some difficulty in developing a concept of what constitutes the law, or how the courts will decide future cases. While prior cases are held to be binding, at least to a degree, on future cases, at the same time they apply only to the immediate dispute. The third guideline provides some help to the observer, since the case was decided on a general principle, presumably if that principle could be discovered it would aid in predicting future decisions.

To aid in the discovery of the general principles underlying a decision, legal theorists have argued that all decisions have two components, the ratio decidendi and obitur dictum (or dictum). The ratio decidendi consists of the reasons for the decision, the principles that govern the case. Obitur dictum are comments made by the court that are not relevant to the reason for decision. The ratio decidendi is binding on future courts, while the dictum can be ignored.

One of the major problems facing a legal theorist, then, is determining what sections of a case are ratio decidendi, and what

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[31]Karl N. Llewellyn, The Bramble Bush (Donns Ferry, N. Y.· Oceana Publications, Inc., 1930), pp. 42-43.

sections can be ignored as dictum. This requires a lawyer to discover what facts in a case have some legal importance:

> The process is one, from a lawyer's statement of a case, eliminating as it does all the dramatic elements with which his client's story has clothed it, and retaining only the facts of legal import, up to the final analyses and abstract universals of theoretic jurisprudence. The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel glit goblet and the sea-coal fire, is that he forsees that the public force will act in the same way whatever his client had upon his head.[32]

Determining what the ratio dicidendi of a case is can be difficult. Some suggest that it should include only the narrowest rule required to justify the decision of the courts, given the facts of the case. This is not helpful, since there is no "narrowest" rule,[33] except perhaps a rule governing only the individual case. Goodhart suggested ten guidelines for determining whether any material should be considered as ratio:

> (1) All facts of person, time, place, kind and amount are immaterial unless stated to be material.
> (2) If there is no opinion, or the opinion gives no facts, then all other facts in the record must be treated as material.
> (3) If there is an opinion, then the facts as stated in the opinion are conclusive and cannot be contradicted from the record.
> (4) If the opinion omits a fact which appears in the record this may be due either to (a) oversight, or (b) an implied finding that the fact is immaterial. The second is assumed to be the case in the absence of other evidence.

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[32]Oliver Wendell Holmes, "The Path of the Law," Harvard Law Review, 10 (1897), 458.

[33]Conrad D. Johnson, "On Deciding and Setting Precedent for the Reasonable Man," Archiv fur Rechts - und Social-Philosophie 62 (1976), 173.

> (5) All facts which the judge specifically states are immaterial must be considered immaterial.
> (6) All facts which the judge impliedly treats as immaterial must be considered immaterial.
> (7) All facts which the judge specifically states to be material must be considered material.
> (8) If the opinion does not distinguish between material and immaterial facts then all the facts set forth must be considered material.
> (9) If in a case there are several opinions which agree as to the result but differ as to the material facts, then the principle of the case is limited so as to fit the sum of all the facts held material by the various judges.
> (10) A conclusion based on a hypothetical fact is a dictum. By hypothetical fact is meant any fact the existence of which has not been determined or accepted by the judge.[34]

There guidelines provide some assistance, but they cannot be comprehensive, and in some cases offer little guidance.[35] Part of this confusion may arise from a belief that the initial judge is presumed to have the authority to determine what segments of the initial decisions are binding. While this may not be spelled out in detail by the initial judge, it is assumed that be reading the initial opinion(s) the second judge can discover the rule the first judge decided should govern other cases that follow it. The initial judge, in this view, decides what is <u>ratio</u> and what is <u>dicta</u>.[36] Levi argues that this approach is undesirable. Rather, he suggests, the second judge should determine the <u>ratio</u> based on her/his view of how the earlier decisions should relate to the immediate case:

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[34]A. L. Goodhart, "Determining the <u>Ratio Decidendi</u> of a Case," <u>Yale Law Journal</u>, 49 (1930), 182-183.

[35]Murphy, pp. 352-354.

[36]<u>Ibid</u>.

> I think the answer in Anglo-American law . . . is that the second judge, where only case law is involved, is free to make his own determination of decisive similarity or difference. This, of course, gives the law a great deal of flexibility and capacity for growth.[37]

The rule of law is thus determined by the last judge to hear a case on an issue, earlier judges may suggest rules of law, but as long as the rule imposed by the last judge covers the earlier decisions it is an adequate decision rule.

The use of precedents has developed over a long period of time. There have been several justifications for the use of stare decisis as a decision rule.[38] First, it is argued that stare decisis aids in promoting certainty and stability. Spaeth suggests that "a major by-product of the judicial system is to provide a measure of fixity, a semblance of stability, in the midst of life's changes."[39] Frank notes "Only if rules are certain and stable, it is said, can men conduct their affairs with safety."[40] Wasserstrom, noting that certainty is the most popular reason for stare decisis, suggests that "one of the first arguments for a decision procedure that guarantees the predictability of judicial decision is the desirability of a more

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[37] Ibid.

[38] These justifications are based on Wasserstrom, who concluded that the use of precedents was unjustified. Frank also comes to a similar conclusion.

[39] Harold J. Spaeth, An Introduction to Supreme Court Decision Making, Revised edition (New York Chandler Publishing Company, 1972), p. 56.

[40] Frank, p. 268.

generalized ability to anticipate the future." Since the nature of stare decisis is that future decisions must be based on past decisions, individuals can be confident about the future dictates of the law.

Second, precedent is justified based on reliance. Once a decision is handed down, individuals may act based upon what the court decided. If an individual acts in a manner dectated by a court, only to find that the court changed its mind later, the nature of justice would be undermined·

> . . . the failure to give effect to those activities and commitments which were undertaken in justified reliance upon the pronouncements of that system could serve, arguably, only to make the legal system ill-conceived irresponsible, and vicious.[41]

Third, use of precedent is justified based on equality. One of the premises of our legal system is that all individuals should have the equal protection of the laws. "Justice . . . requires equality of treatment."[42] In order for individuals to feel that they are treated fairly, this position argues, if a court holds one way in one case, it should hold the same way in a similar case involving different parties.

Fourth, use of precedent aids judicial efficiency. Many individuals, especially judges, argue that courts have a hard time paying adequate attention to all cases. If each case had to be considered tabula rasa, the courts could break down:

> . . . the labor of judges would be increased almost to the breaking point if every past decision could be

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[41]Wasserstrom, p. 61.

[42]Frank, p. 267.

> reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.[43]

Murphy suggests that stare decisis "provides harried judges who face difficult choices with a welcome decision-making crutch."[44] To remove past decisions from their place in stare decisis, according to this view, would greatly strain the judge:

> If a judge is not to be bound by precedent, then not only must he elucidate, ponder, and evaluate all possible rules of law which might be formulated for every case, but he must also examine all the reasons that might be advanced for instituting any one of these rules rather than any other. In short, the task of the judge would become interminable.[45]

Fifth, the use of precedent restrains judges. If a judge must follow precedent, the judge's power is limited.[46] This helps insure an unbiased decision:

> It is undeniable that if judges are absolutely bound by previous decisions, the personalities of the litigants will not influence the judge in his decisions. It is generally said that stare decisis brings about an ideal 'government of laws and not men.'[47]

Precedent thus guards against errors both of a legal nature, and those based on personal bias.[48]

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[43]Cardozo, p. 149.

[44]Walter F. Murphy, Elements of Judicial Strategy (Chicago: University of Chicago Press, 1964), pp. 22-23.

[45]Wasserstrom, p. 72. Pound cites Mr. Dooley as illustrative of this argument: "Hinnissy, I've the judicial timpermint. I hate worruk." (Law Finding, p. 65.)

[46]The lack of discretion may, however, increase the power of the courts. See Thomas C. Shelling, The Strategy of Conflict (New York· Oxford University Press, 1971), esp. Chapter I.

[47]Kocourek and Koven, pp. 980-981.

[48]Wasserstrom, pp. 75-79.

Sixth, precedent helps terminate litigation. Since both parties realize that a future decision will be the same as a past decision, the losing party has no reason to continue to litigate, in hopes of getting a more favorable decision.[49]

Finally, precedent is justified, ironically, because of precedent. Frank suggests that, at least in part, stare decisis is maintained because of habit,[50] courts have always relied on precedents, so there is no reason to change this tradition now. Wasserstrom cites the example of a House of Lords decision where the House refused to decide whether a precedent could be overturned because there was no precedent for doing so.[51]

This is not to imply that stare decisis is without its critics. Both Frank and Wasserstrom criticise the position, although Frank argues merely for its modification[52] and Wasserstrom argues for a legal system similar to the one discussed in Chapter IV. The main criticism of stare decisis is that it prevents change. Kocourek and Koven note that "stare decisis is a retarding factor in the progress of the law and results in the common law becoming stagnant."[53] Murphy notes that "no branch of government can govern a growing industrial society strictly by stare decisis. The Justices must frequently

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[49] Ibid., p. 79.

[50] Frank, p. 271.

[51] Wasserstrom, p. 80. This was pre-1966.

[52] Frank, p. 286.

[53] Kocourek and Koven, pp. 982-983.

extend or contract and even occasionally overrule precedents."[54] It is partly in response to this criticism that stare decisis has never been strictly followed by our courts, rather the courts feel free to modify or even overturn earlier precedents. The question becomes, under what circumstances can a court overturn precedents?

Any system of legal reasoning must respond to the inherent conflict between stability and change. Pound suggested:

> Law must be stable and yet it cannot stand still. Hence all the writing about law has struggled to reconcile the conflicting demands of the need of stability and the need of change. . . . the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the social life which it is to govern. If we seek principles, we must seek principles of change no less than principles of stability.[55]

As a clear implication of this conflict between stability and change, it is often desirable for a court to modify or alter a decision as social conditions change. As Frank argues, "The precedent system really bites viciously only when a court, regarding a precedent as undesirable, nevertheless refuses to deviate from it."[56] As conditions change, the courts may decide to change with the changing conditions to create a new decision rule

> Although a rule may bear the stamp of official authority - that is, most the 'pedigree test' of legal validity - it is held open to reassessment in the light of its consequences for the values at stake.[57]

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[54]Murphy, p. 31.

[55]Pound, Law Finding, p. 23.

[56]Frank, p. 275.

[57]Philippe Nonet and Philip Selznick, Law and Society in Transition: Toward Responsive Law (New York: Harper and Row, Publishers, 1978), p. 82.

The degree to which this option is open to the court will vary. In cases involving legislative interpretation, for example, the court will rarely deviate from prior decisions since, if its decisions have been in error, Congress could easily correct the decision of the Court. On Constitutional issues, however, overturning a precedent by a court is easier, since the process of amendment is very difficult. For similar reason stare decisis is more likely to be followed in property and commercial transaction cases, where individuals need certainty.[58]

The manner in which courts assess and respond to the changing conditions is not clear. That courts are required, on occasion, to respond to changes in society requires that they have some discretion in the outcome of the decision, since the court can always justify the overturn of prior decision by arguing that the conditions that justified the earlier decision are no longer present. There are a number of checks on the judge to prevent too much of this discretion from being exercised, including lower court checks on a higher court, as well as congressional and executive checks on the court.[59]

In addition, there may be other checks on the court. Murphy suggests that there are a number of constraints on a court. A court, for example, cannot create a case, it must wait for an appropriate

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[58]Levi, Introduction, pp. 56-57. See also, Pound, Law Finding, pp. 39-40.

[59]For a discussion of the checks on court decisions, see Thomas P. Jahnige and Sheldon Goldman, editors, The Federal Judicial System: Readings in Process and Behavior (Hinsdale, Illinois: Dryden Press, 1968), esp. pp. 305-357.

case to reach it. Additionally there are checks on a court both from other governmental entities and from lower and higher courts.[60]

The court may, however, decide to modify a decision. There are several ways this can be done. Frank, for example, argues courts can modify decisions by distinguishing a later decision from an earlier decision, by altering the meaning of the old rule while giving it vocal support, or by shifting the ratio decidendi of a case.[61] Kocourek and Koven suggested five ways a court could create exceptions to stare decisis

> (1) Thus, some courts admitting that the doctrine is to be applied generally, justify their departure from it when 'a change of conditions warrant a change of the rule.'
> (2) Many courts formulate a further exception on the basis of the expansibility of the common law.
> (3) Other courts, in order to escape the rule of stare decisis, announce that the law consists not of rules enforced by decisions of the courts, but only the principles from which these rules flow.
> (4) The most convenient device used to avoid constraint of the 'rule of precedent' is the practice of distinguishing cases which are frequently undistinguishable and which inevitably results in confusion and uncertainty in the law.
> (5) Still another convenient formula used to justify departing from stare decisis is to argue [when the reason for the rule ceases the rule itself ceases].[62]

There may be some other methods of individualizing decisions through such measures as parole, jury nullification, and other measures,[63] but the modification of rules of law are frequently made through the means

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[60] Murphy, pp. 123-176.

[61] Frank, 275-278.

[62] Kocourek and Koven, pp. 977-978.

[63] Pound, Philosophy of Law, p. 64.

suggested by Frank and Kocourek and Koven. It should be noted that all of these methods, while aiding in increasing the flexibility of law, also decrease its certainty and equality functions. It is against this background that Levi's position can be examined.

Levi's Moving Classification System

Essentially, Levi develops his theory of legal argument by exploring three issues. First, he attempts to outline the moving classification system which he suggests illustrates argument in law. Second, he stresses the importance of ambiguity in legal decision making. Third, he discusses the importance of the legal forum in the legal process.

Levi suggests that the nature of legal argument is a three step process: "similarity is seen between cases; next the rule of law inherent in the firstcase is announced, then the rule of law if made applicable to the second case."[64] This process is a dynamic and ongoing process and involves elements of both inductive and deductive argument. The determination of similarity is made by the individual judge. Unlike the traditional view of stare decisis, Levi argues that the statement of the rule of law in the controlling case is irrelevant.

> The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important. It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification.[65]

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[64]Levi, Introduction, p. 2.

[65]Ibid., pp. 2-3.

He notes that the American legal system is not precise about the nature of dictum; if nothing is dictum, then a judge could insert a code of law in a decision and make that binding on all future cases.[66] Levi argues that this power is unreasonable. There exists a large number of potential clusters of cases available to a judge. The judges are attempting to classify cases by category, and as new cases are added, it is likely that the rule will change its meaning. To give a judge the power to determine forever the distinctions that are binding would be unreasonable.[67] Levi rather suggests that the second judge should have the power to determine what factors should be used in classifying legal decisions. This position would allow for growth in the law, while at the same time requiring that a judge provide some reason for the new classification. There thus are checks on a judge· "the amount of change is limited by the judge's ability to encompass it within a logical structure that explains all prior cases, albeit the judges of the prior cases would have rejected the explanation."[68] The judge does not change decisions, rather the judge is detailing the system.[69] Levi does retreat slightly from this position by arguing that not all cases must be included in the new vision of case law;[70] "Particularly in those areas of the law where

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[66] Levi, "Nature", p. 268.

[67] Ibid., pp. 268-269.

[68] Ibid., p. 269.

[69] Ibid., p. 270.

[70] Ibid.

reported cases are so numerous, the present judge is not really compelled to organize them all,"[71] although most of the old cases must be included in the new vision. He also argues that the court is not obligated to suggest guidelines for future cases, lest the flexibility of law be limited,[72] rather the judge should just attempt to provide guidelines that cover both the immediate case and most of the old cases.

Levi attempts to develop the manner in which concepts are developed. Often, for example, there may not be a word that precisely expresses the similarities and differences that a judge wishes to emphasize in classifying cases. In other cases, a word may be used to cover a concept that may develop a dignity of its own and thus restrict the options open to the judge: "the word starts out to free thoughts and ends by enslaving it."[73] Once the word is accepted, however, it becomes "a legal concept."[74] This has implications beyond the immediate case:

> Its meaning continues to change. But the comparison is not only between the instances which have been included under it and the actual case at hand, but also if terms of hypothetical instances which the word itself suggests."[75]

To this extent, once a label becomes popular, reasoning may appear to be deductive. This is misleading, however, since the law is always in

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[71] Ibid.

[72] Ibid., p. 274.

[73] Levi, Introduction, p. 8.

[74] Ibid.

[75] Ibid.

search of new paradigms and terms to describe the legal concepts. Levi suggests that this is a circular process, with the legal system always searching for additional terms to describe the law.

> The first stage is the creation of the legal concept which is built up as cases are compared. The period is one in which the court fumbles for a phrase. Several phrases may be tried out; the misuse or misunderstanding of words itself may have an effect. The concept sounds like another, and the jump to the second is made. The second stage is the period when the concept is more or less fixed, although reasoning by example continues to classify items inside and out of the concept. The third stage is the breakdown of the concept, as reasoning by example has moved so far ahead as to make it clear that the suggestive influence of the word if no longer desired.[76]

In many ways, this process is similar to Kuhn's theory of paradigms in science.[77] The first step, where the judges search for new ideas and words can be viewed as the pre-paradigm of law.

> . . . in the early stages of the development of any science different men confronting the same range of phenomena, but not usually all the same particular phenomena, describe and interpret them in different ways.[78]

The courts are faced with several cases, and they emphasize different characteristics of the case in an attempt to develop a theory. This process may be more rapid in law than in science since the court must come up with <u>some</u> view of law and decide the case before it.

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[76] <u>Ibid.</u>, pp. 8-9.

[77] Thomas S. Kuhn, <u>The Structure of Scientific Revolutions</u>, Second Edition (Chicago: University of Chicago Press, 1970).

[78] <u>Ibid.</u>, p. 17.

The second step would approximate normal science, where the community agrees on a view of law and applies it almost deductively. By the end of the second stage, however, the judge is confronted with cases that do not "fit" in the classification scheme currently in use.[79] In the third stage an alternative view of the world is presented and substituted for the first. Like the scientific counterpart, law attempts to "hide" the revolution by reinterpreting history so that the old cases are consistent with the new vision.[80]

Preund extends the analogy to scientific reasoning further in his discussion of Levi's position:

> Science, too, may furnish an analogue to the overruling of precedents. As every experiment tests in principle, according to Duhem's theorem, not only the hypothesis under direct scrutiny but the whole antecedent pattern of which this is a part, so in law a reexamination of antecedent rules and principles is, in principle, open when a new set of facts is presented for decision, and it becomes a matter of judgement how radical the reexamination shall be.[81]

Legal reasoning thus involves an examination of a set of cases and the outcome of those cases. The cases are classified according to both their outcome and their facts. As new cases arise, new classifications may be needed as cases are shifted from one cluster to another, based on their facts (and occasionally their results). Words are then sought to lable these classifications. While the changes may be

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[79] Ibid., chapters VI and VII.

[80] Ibid., 136-141.

[81] Preund, p. 289.

radical, stability is preserved since the new term in most cases would have resulted in the same decision in earlier cases, though for different reasons.

Levi then shifts to discuss two other types of reasoning, legislative interpretation and constitutional law, which he suggests are related to common law cases.[82] At one level, he suggests, the application of statutes should be viewed as deductive, the only question is whether a specific instance falls within the law. Often, however, the case is more complex than this. It is often difficult to find the intent of the legislature,[83] especially given that laws are often phrased ambiguously.[84] The ambiguous nature of laws is due in part to reluctance by legislators to be specific until it is necessary, and partly because compromise is easier if a law is vague. The court is more limited in legislative interpretation than in case law, since the legislature has specified a term to be used. At the same time, the use of the word can also provide some flexibility to the court.

> There is a difference then from cases law in that the legislature has compelled the use of one word. The word will not change verbally. It could change in meaning, however, and if frequent appeals as to what the legislature really intended are permitted, it may shift radically from time to time. When this is done, a court in interpreting legislation has really more discretion than it has with case law. For it can escape from prior cases by saying that they have ignored the legislative intent.[85]

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[82]Levi, Introduction, p. 102.

[83]Ibid., pp. 28-29.

[84]Ibid., pp. 29-30.

[85]Ibid., p. 32.

He suggests that this flexibility is undesirable. The responsibility for legislation should rest with the legislature; if the courts are always revising opinions on legislation, the responsibility for the content of the legislation has shifted to the courts.[86] Thus, once the court has formulated a rule for interpretation of a statute, the court should continue to follow in the direction earlier decisions point:[87]

> Where legislative interpretation is concerned, therefore, it appears that legal reasoning does attempt to fix the meaning of the word. When this is done, subsequent cases must be decided upon the basis that the prior meaning remains. It must not be re-worked. Its meaning is made clear as examples are seen, but the reference is fixed.[88]

If the courts are in error, the legislature can modify the law. The failure of the legislature to modify the law following a decision would support the thesis that the court's decision was correct.

This contrasts with cases involving the Constitution. Levi argues that the Constitution is much more ambiguous than legislation, and it must be ambiguous in order to survive the testing of time. There can be no authoritative interpretation of the Constitution; rather the meaning of the Constitution is time bound:

> The words are ambiguous. Nor can it be the Court['s responsibility to interpret a definite meaning of the Constitution], for the Court cannot bind itself in this manner; an appeal can always be made back to the Constitution. Moreover, if it is said that the intent of the framers ought to control, there is no mechanism for any

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[86] Ibid.

[87] Levi, "Nature," p. 270.

[88] Levi, Introduction, p. 33.

> final determination of their intent. Added to the problem of ambiguity and the additional fact that the framers may have intended a growing instrument, there is the influence of constitution worship. This influence gives great freedom to a court.[89]

Some may argue that the Constitution should be permanent and, like legislation, any change in the meaning of the Constitution should be made by amendment, not by the courts. Levi argues this position is undesirable, not because it is difficult to amend the Constitution, but rather because the Constitution is ambiguous:

> . . . a written constitution must be enormously ambiguous in its general provisions. If there has been an incorrect interpretation of the words, an amendment would come close to repeating the same words. What is desired is a different emphasis, not different language. This is tantamount to saying that what is required is a different interpretation rather than an amendment.[90]

This requires that the courts allow the Constitution to "change" as conditions change. Thus the courts are much freer to alter the meaning of terms in the Constitution than they are with legislation.[91] The discretion of the court is thus expanded in Constitutional litigation.

It should be clear that Levi stresses the ambiguities involved in the law. All legislation, case law, and Constitutional law involves the creation and, to a degree, the maintenance of ambiguity. Christie suggests that vagueness is often desirable in the law, due

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[89] Ibid., pp. 58-59.

[90] Ibid., p. 59.

[91] Ibid., pp. 60-63.

to uncertainty on the part of lawmakers as to the components of a law,[92] to avoid mistakes,[93] to allow the law to adjust to changing conditions,[94] to provide flexibility,[95] and even to aid in precision:[96]

> Vagueness is an inescapable aspect of our language. It has been submitted . . . that vagueness is not always a hindrance to precise and effective communication. Indeed . . . vagueness is sometimes an indispensable tool for the achievement of accuracy and precision in language, particularly in legal language. Vagueness in legal language has also given our law a much needed flexibility. At the same time there are some jobs which our linguistic tools, partly even because of vagueness, cannot completely perform without the aid of other communication devices.[97]

For Levi, the legal system is kept ambiguous to allow the infusion of new ideas.[98] While the leeway will vary from one type of case to another, it will exist to a degree in all cases. This ambiguity is inevitable,[99] and desirable:

> The joint exploration through competing examples to fill the ambiguities of one or many propositions has the advantage of permitting the use in the system of propositions or concepts saved from being contradictory because they are ambiguous, and on this account more acceptable as ideals or commonplace truths; it has the advantage, also, of postponing difficult problems until

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[92] George Christie, "Vagueness and Legal Language," Minnesota Law Review, 48 (1964), 889-890.

[93] Ibid., p. 889.

[94] Ibid., pp. 893-894.

[95] Ibid., p. 890.

[96] Ibid., pp. 895-898.

[97] Ibid., p. 911.

[98] Levi, Introduction, p. 4.

[99] Levi, Introduction, p. 6.

> they arise and of providing an inner discipline for the system by forcing an analysis of general propositions in terms of concrete situations.[100]

Nor does the system preclude prediction of future cases:

> The system permits a foreshadowing of results and therefore has built into it the likelihood of a period of preparation so that future decisions appear as a belated finding and not a making of law.[101]

The final argument of Levi's concerns the nature of the legal forum. Levi suggests that a major component of legal argument is the forum in which legal argument takes place:

> The forum protects the parties and the community by making sure that the compelling analogies are before the court. The rule which will be created arises out of a process in which if different things are to be treated as similar, at least the differences have been urged.[102]

The forum in which legal disputes take place is critical in evaluating argument. It is necessary that all potential world views be presented in order for the judges to test various possible decision rules and decide which decision rule is the base. The availability of the court to hear divergent views aids in the impartiality of the decision. Echoing John Stuart Mill, Levi argues:

> The ideas have their day in court, and they will have their day again. This is what makes the hearing fair, rather than any idea that the judge is completely impartial, for of course he cannot be completely so.[103]

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[100] Levi, "Nature," pp. 272-273.

[101] Ibid., p. 272.

[102] Levi, Introduction, p. 5. See also Ibid., p. 267.

[103] Ibid., p. 5.

These views may change over time,[104] but all sides have the option of presenting their views. The availability of the court as an ear for all views also aids in the acceptance of the court's final decision. Since the participants were involved in the decision-making process, they are more likely to accept the conclusion of the court:

> Reasoning by example in the law is a key to many things. It indicates in part the hold which the law process has over the litigants. They have participated in the law-making. They are bound by something they helped to make.[105]

The drama of the courtroom aids in the legitimacy of the court and makes the decision more palatable.[106] Levi does not develop this position at length, devoting about a page to it in his initial essay. At the New York University symposium, however, he contrasted the advantages of the judicial forum to other places where public policy is discussed, and suggested that the judicial forum is superior.

> The fact is that in our society, although some may disapprove, the court has advantages as a forum for the discussion of political-moral issues. In a broadly based vocal and literate society, susceptible to the persuasion of many tongues and pens, and with inadequate structuring of relevant debate, the court has a useful function, not only in staying time for sobor second thought, but in focusing issues. It is sometimes the only forum in which issues can be sharply focused - or appear to be so. It has the drama of views that are more opposing and less scattered, because its procedures require a certain amount of relevance. It operates more within a structure of logical ideas, and yet a structure

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[104] Ibid., p. 6.

[105] Ibid., p. 5.

[106] See Milner S. Ball, "The Play's the Thing: An Unscientific Reflection on the Courts Under the Rubric of Theatre," Stanford Law Review, 28 (1975), pp. 81-115.

> into which current views may be infused through new words that must find a relationship to the old through new meanings. It has the drama of a limited number of personalities who are called upon to explain their views. It has the advantage of beginning with certain agreed-upon premises to which all participants profess loyalty, and thus it can force concentration upon the partial clarification of ambiguities.[107]

What is critical is that Levi suggests the norms of the legal community may aid in the use of the moving classification system, and thus in order to utilize the legal reasoning method to its fullest extent, we must examine both the logical form of an argument, and the forum in which argument takes place. Only a forum that promotes the comparison of competing analogies can produce the optimal decision rule.

Conclusion

Levi's analysis emphasizes the role that past argument plays in legal reasoning. The judge in a legal forum does not enter into a dispute (at least in most cases) with no past decisions to guide him/her; rather there are a number of prior decisions that provide the basis for argument in law. The only question is, how should these decisions be utilized?

Levi's first answer is that the decisions of other judges should play a part in legal decision-making. This has two implications for argument. First, Levi, by relying on precedents rather than on general rules rejects the view of law-as-deduction that had gained some popularity in law. His focus on how to develop premises, rather than what to do with premises once they have been established paves

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[107]Levi, "Nature," p. 280.

the way for similar inquiries in other fields. His alternative system of reasoning combines elements of both inductive and deductive reasoning, and attempts to build flexible premises based on past decisions in a field.

Second, Levi notes that there are some restrictions on a judge. Contrary to the views of the legal realists, who would argue that judges decide how they please, and thus precedents are of no use in the study of legal reasoning. Levi argues that there are indeed constraints placed on the judge by past decisions. While there may be some truth in the legal realist position that a part of law is discretionary, Levi views the past decisions as limited factors on the judge's discretion: the judge must be aware of past decisions when making decisions, and that can limit his/her lattitude for decision.

Levi's examination of precedents has other implications for argument. The emphasis on stare decisis emphasizes the importance of the past in decision-making. While theoretically, any argument is based on a single issue, the way that the argument is resolved is based on a principle that is generalizable to other arguments. One way to insure that the correct decision is arrived at is to examine past arguments that were similar to the immediate argument, and to examine what rules could apply to both the past and the current arguments. This emphasizes the interconnectiveness of all arguments.

The distinction between the ratio and dictum of a case has still other possibilities. In any field, relevant material must be separated from irrelevant material. In law, individuals have attempted

to develop guidelines for determining what material is relevant, but even in a compact and developed discipline like law this is not possible. Levi suggests, however, that the solution to this problem is not to create guidelines for relevance, but rather decide who should determine what is relevant, and to provide certain goals to help that individual separate the material. Similar procedures could be used in other fields. Included in setting up such a procedure should be a discussion of whether the guidelines should be retrospective (for flexibility), or prospective (for certainty).

In addition, the deviations from precedent suggest possible implications for argument. Argument does not take place in a vaccuum, and this is certainly the case for legal argument. The rules for legal argument are justified, not because they lead to the discovery of truth in some abstract sense, but rather because the doctrine of stare decisis promotes certain goals of the legal system; including stability, equality, efficienty, reliance, and justice. The legal rules, then, are not value free, they promote certain values, suggesting, at least in law, that argument is not value free. Indeed, Levi and others note that law much change with the times, and thus sometimes old decisions must be reversed, exceptions must be made, and other changes in the way cases are decided may be required. Sub-fields may be created within the legal discipline, such as Constitutional Law, statuatory interpretation, and so on, each with its own set of rules based on the goal of that sub-field.

The ambiguity of words creates other difficulties with legal argument. Ambiguity is needed for law to grow, and sometimes it is

purposefully encouraged in legislation. The legal system can help to develop methods like the moving classification system to minimize this ambiguity, but the court will always have some flexibility. This factor, combined with the need for the courts to overturn precedents on occasion, mean that legal reasoning will always leave some discretion to the judge, suggesting that even in law, a theoretically well-developed argumentative discipline, a part of the decision-making process is subjective. While there are some checks on this discretion, including other courts, the legislative and executive branch, and the necessity for a court case to be brought before a court, at least a part of legal decisions are discretionary.

Finally, Levi hints at, although he does not develop, one possibly important implication of legal reasoning: the nature of the legal forum. This implies that argument has both a logical form and a forum in which it takes place. The latter can insure that important arguments are not ignored, and that all involved in the argument feel that they have been treated fairly. It also insures that competing views have a chance to be heard and evaluated. An analysis of the legal forum can aid in the analysis of how other forums may want to be organized, expecially if, as Levi suggests, the legal forum is superior to other forums of argument.

CHAPTER III

THE INFLUENCE OF THE PRESENT

LON FULLER AND THE MORALITY OF LAW

> He who would trade axe for pen, particularly to write about legal philosophy, is condemned always to look back with whistful eye.[1]

> I believe that order, coherence, and clarity have an affinity with goodness and moral behavior. More than this I have never said, less than this I have no intention of saying.[2]

Toulmin's concept of a "field" of argument suggests that one of the determinants of a "field" or "discipline" is the agreed goals and procedures of a group of individuals:

> A collective human enterprise takes the form of a rationally developing 'discipline', in those cases where men's shared commitment to a sufficiently agreed set of ideals leads to the development of an isolable and self-defining repertory of procedures, and where those procedures are open to further modification, so as to deal with problems arising from the incomplete fulfilment of those disciplinary ideals.[3]

In his book, Human Understanding: The Collective Use and Evolution of Concepts, Toulmin devotes a chapter to the discussion of the organization of the intellectual professions[4] suggesting that one of the

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[1]Robert S. Summers, "Professor Fuller on Morality and Law," Journal of Legal Education, 18 (1965), 15.

[2]Lon L. Fuller, "A Reply to Professors Cohen and Dworking," Villanova Law Review, 10 (1965), 666.

[3]Stephen Toulmin, Human Understanding The Collective Use and Evolution of Concepts (Princeton: Princeton University Press, 1977), p. 359.

[4]Ibid., pp. 261-318.

characteristics of a 'field' is the norms of the members of the field:

> The intellectual content of any rational activity forms neither a single logical system, nor a temporal sequence of such systems. Rather, it is an intellectual enterprise whose 'rationality' lies in the procedures governing its historical development and evolution.[5]

A similar argument was made by another Philosopher of Science, Thomas Kuhn. He suggests that, if he were to rewrite his classic essay on The Structure of Scientific Revolutions he would "open with a discussion of community structure."[6] Such a community would have several characteristics:

> Bound together by common elements in their education and apprenticeship, they see themselves and are seen by others as the men responsible for the pursuit of a set of shared goals, including the training of their successors. Such communities are characterized by the relative fullness of communication within the group and by relative unanimity of the group's judgement in professional matters. To a remarkable extent the members of a given community will have absorbed the same literature and drawn similar lessons from it.[7]

A field, or community would thus share similar goals, values, and procedures. It would thus seem appropriate that a study of law as a field should also explore the nature of the legal community.

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[5] Ibid., p. 85.

[6] Thomas S. Kuhn, "Reflections on my Critics," in Criticism and the Growth of Knowledge, edited by Imre Lakatos and Alan Musgrave (New York: Cambridge University Press, 1976). See also Thomas S. Kuhn, The Structure of Scientific Revolutions, Second Edition, Enlarged (Chicago: University of Chicago Press, 1971), p. 176.

[7] Thomas S. Kuhn, "Second Thoughts on Paradigms," in The Structure of Scientific Theories, edited by Frederick Suppe, second edition (Chicago: University of Illinois Press, 1977), p. 461.

To argue that the legal profession has a certain set of standards that are agreed upon by all legal scholars would not be accurate. As in all fields, there is some disagreement among legal theorists as to the purpose of law, as well as its nature. One of the more significant theories of the nature of law was proposed by Lon Fuller, Professor of General Jurisprudence at the Harvard Law School in his book, The Morality of Law.[8] The book has provoked a great deal of thought about the nature of law. Since it was published in 1964, over 47 reviews of the book have appeared,[9] not to mention a symposium devoted entirely to the book,[10] and a wide variety of related works. Robert S. Summers suggested:

> The Morality of Law will find a place among important books in the history of American legal philosophy. It includes insights into the relations between morality and law, and advances a theory of law of great practical relevance.[11]

Nicholson suggests "whether one accepts or rejects Fuller's position, its importance is clear."[12]

While at first glance, the contents of the essays contained in the book are about morality and law, and not legal logic, the implications for argument are clear, indeed, Hosking, in his review of the

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[8]Lon L. Fuller, The Morality of Law, revised edition (New Haven: Yale University Press, 1969).

[9]Ibid., pp. 243-244.

[10]"The Morality of Law - A Sumposium," Villanova Law Review, 10 (1965), 631-678.

[11]Summers, p. 1.

[12]P. P. Nicholson, "The Internal Morality of Law: Fuller and his Critics," Ethics, 84 (1974), 326.

book argued "The doctrine of 'inner morality' seems to this writer to be a doctrine of the logic of law and not of the ethics of law."[13] Just as Toulmin suggests a field of argument is a type of enterprise,[14] Fuller defines law as "the enterprise of subjecting human conduct to the governance of rules."[15] While this definition has been attacked by some in the legal profession as being too broad,[16] and by others as being both too broad and too narrow: "too wide because it catches in its net also the rules that apply to private associations and moral rules [and] too narrow because not all laws are rules,"[17] it does define the legal field in a similar way to Toulmin's definition of a discipline. The emphasis of Fuller is on the activity of making laws:

> Law is viewed as an 'activity,' and a legal system is the result of a sustained purposive effort. As such, there are certain conditions that must be fulfilled for the successful making of laws, and degrees of success are possible.[18]

Fuller emphasizes that "the legal order is more than a set of principles

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[13]Richard Hosking, Review of Lon Fuller, The Morality of Law, California State Bar Journal, 40 (1965), 93.

[14]Toulmin, p. 359.

[15]Fuller, Morality, p. 122.

[16]H. L. A. Hart, Review of Lon L. Fuller, The Morality of Law, Harvard Law Review, 78 (1965), 1281. See also Marshal Cohen, "Law, Morality and Purpose," Villanova Law Review, 10 (1965), 651.

[17]M. P. Golding, Review of Lon Fuller, The Morality of Law, Ethics, 76 (1966), 226.

[18]Ibid., p. 225.

and norms. It is a kind of activity."[19] It would thus appear that Fuller's concept of the legal field would be quite similar to that of Toulmin. Three concepts developed in his book should prove particularly enlightening: his views of the morality of duty (as opposed to the morality of aspiration), the nature of the internal morality of law; and the relationship between the internal and the external morality of law.[20]

The Two Moralities

Fuller begins his discussion with the distinction between the morality of duty and the morality of aspiration. This distinction, as he admits, is not new, though his elaboration and application is worthwhile. H. L. A. Hart, Fuller's principle target, concedes:

> The book opens with a contribution to moral philosophy which certainly deserves to be assesed as such and not merely as a casual by-product of jurisprudential thought; for the first chapter is a protest against thinking of morality as a simple, unitary concept, and makes a detailed plea for discrimination within morality of different, though related, dimensions of assesment of human conduct.[21]

He describes what the morality of law should be, as opposed to how it is viewed by legal theorists.[22] Fuller suggests that the morality of

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[19]Philip Selznik, Review of Lon Fuller, The Morality of Law, American Sociological Review, 30 (1965), 947.

[20]This review of Fuller will omit sections of the book that are not relevant to a theory of argument, especially his section responding to H. L. A. Hart's The Concept of Law (New York: Oxford University Press, 1961), except where Hart touches on the morality of law.

[21]Hart, Review of Fuller, p. 1282.

[22]James B. Brady, Review of Lon Fuller, The Morality of Law, Texas Law Review, 43 (1964), 259.

aspiration is 'the morality of the Good Life, of excellence, of the fullest realization of human powers."[23] It is an ideal toward which we all seek but which illustrates human conduct at its best.

The morality of duty, on the other hand, is a minimum requirement for individuals in a society:

> Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark.[24]

The morality of duty is the morality of the Ten Commandments, phrased in terms of "thou shalt not," and occasionally, "thou shall."

Fuller suggests that this distinction is critical since only the morality of duty should be enforced with laws. There is no way that we can require a person to "live up to the excellences of which he is capable."[25] Rather, we should concentrate on the violations of duty.

While the distinction between the morality of duty and the morality of aspiration may seem clear in the abstract, he suggests that the distinction is not always clear. He instead pictures a continuum of moral issues, ranging from the "most obvious demands of social living" and extends to "the highest reaches of human aspiration."[26] These may be viewed as being divided by an imaginary divider, that

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[23]Fuller, Morality, p. 5.

[24]Ibid., pp. 5-6.

[25]Ibid., p. 9.

[26]Ibid., pp. 9-10.

distinguishes between the morality of aspiration and the morality of duty. The bulk of moral argument has been between those who "struggle to push it [the divider] upward" and those who "work to pull it down."[27] This problem exists not only for laws and morals, but for economics, aesthetics, and science.[28]

The distinction between the morality of duty and the morality of aspiration is never defined clearly, though he does suggest several guidelines. He initially draws an analogy between the morality of duty and the rules of grammar, and the morality of aspiration and the rules of composition.[29] He further suggests, in passing:

> . . . the morality of duty finds its closest cousin in the law, while the morality of aspiration stands in intimate kinship with aesthetics.[30]

The most extensive explanation is developed through an analogy to economics. The morality of aspiration, he argues, is related to the economics of marginal utility, while the morality of duty is related to the economics of exchange.[31] The morality of the marginal utility deals with our efforts to make the most of scarce resources, while the morality of aspiration guides us in "the best use of our short lives."[32]

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[27] Ibid., p. 10.

[28] Ibid., p. 29.

[29] Ibid., p. 6.

[30] Ibid., p. 15.

[31] Ibid., p. 17.

[32] Ibid., p. 20.

While the exact standard to be used to separate the two moralities is unclear, an effort is made to balance competing goals.

The morality of duty, on the other hand, is similar to the economics of exchange. This is guided by a form of the golden rule. "So soon as I have received from you assurance that you will treat me as you yourself would wish to be treated, then I shall be ready in turn to accord a like treatment to you."[33] The morality is based on reciprocity, which has three characteristics:

> First, the relationship of reciprocity out of which the duty arises must result from a voluntary agreement between the parties immediately affected, they themselves 'create' the duty. Second, the reciprocal performances of the parties must in some sense be equal in value. . . . Third, the relationships within the society must be sufficiently fluid so that the same duty you owe me today, I may owe you tomorrow.[34]

There are few other distinctions between the morality of duty and the morality of aspiration. The failure to fulfil a duty is reason for punishment, while the meeting of the morality of aspiration is reason for praise.[35] The morality of duty must be attainable.[36] The morality of duty cannot be qualified; it is usually an absolute obligation of an individual.[37] Nevertheless, the main distinction is the economic analogy.

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[33] Ibid., p. 20.

[34] Ibid., p. 23.

[35] Ibid., p. 30.

[36] Richard Wasserstrom, Review of Lon Fuller, The Morality of Law, Rutger's Law Review, 19 (1965), 582.

[37] Fuller, Morality, p. 29.

Fuller's distinction between the morality of duty and the morality of aspiration has been attacked as being vague,[38] as ignoring conflicts between duties and aspirations,[39] and as having little relevance to law,[40] but it does appear to be a useful distinction for argument. Given that argument is a human activity involved with probabilities, it is possible that the dual moralities could provide a structure of the study of argument. The morality of duty consists of the minimum components of an argument, that prevents the argument from being just opinion. The morality of aspiration would be the structure of a perfect argumentative situation, impossible in the real world, but which should be aimed at by an arguer.[41]

The Internal Morality of Law

One perenial conflict in legal theory has been between the legal positivists and the adherents in natural law. One of the major points of disagreement has been over the relationship between morality and law:

> Positivists assert whatever has the valid form of law is law, regardless of the morality or immorality of its content, natural law writers deny that form alone is enough, there must also be morally good or at least not morally bad content.[42]

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[38]Summers, p. 3.

[39]Ibid., p. 8.

[40]Wasserstrom, p. 582.

[41]Ibid.

[42]Nicholson, p. 311.

Thus a natural law proponent would argue that, when a law violates a natural (or moral) law, it is not really a law. A positivist, on the other hand, suggests that the existence of a law and its morality are two distinct concepts.[43] This conflict was emphasized with the trials of Nazi criminals after World War II who were obeying laws that were legally enacted, but which were thought to violate natural law.[44] While most posivists made some attempt to respond to this problem,[45] Fuller attempted to develop the natural law perspective. He does this by introducing a concept of the "internal morality of law," also known as "the morality that makes law possible," "the special morality of law," "procedural natural law," "the principles of legality," and "kinds of legal excellence." He uses these terms to distinguish between the internal morality of law from its external morality:

> The 'internal morality of law' is essentially concerned with the procedure of making law. It is the technique used by the lawmaker in deciding which rule of substantive law should be applied to the particular case which he has been called upon to decide. The 'external morality of law' refers to the content of the substantive rules of law which are actually applied by the arbiter in arriving at his decision.[46]

The inner morality provides procedural guidelines of interest to a lawmaker.

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[43]Golding, p. 225.

[44]Chiam Perelman, Review of Lon Fuller, The Morality of Law, Natural Law Forum, 10 (1965), 242.

[45]Ibid., p. 242.

[46]Edwin W. Tucker, Review of Lon Fuller, The Morality of Law, Indiana Law Journal, 40 (1965), 271-272.

Fuller devotes a chapter to outlining some of the specific rules that constitute the internal morality of law. He begins with the story of a King named Rex who attempts to reform the legal system. Fuller describes his futile efforts at legislation, and concludes that there are eight ways to develop a poor system of legal rules:

> The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe, (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change, (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them, and, finally, (8) a failure of congruence between the rules as announced and their actual administration.[47]

He thus suggests that a good legal system should have rules that are (1) general; (2) publicized; (3) prospective; (4) clear; (5) consistent; (6) possible to follow; (7) stable, and (8) congruent with official action.

Fuller postulates that:

> A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.[48]

He suggests that no citizen can be expected to have any moral obligation to obey a legal rule that violates the ten characteristics of the inner

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[47] Fuller, Morality, p. 39.

[48] Ibid., p. 39.

morality of law. Such was the case in Germany under Hitler, when the government attempted to institute rules not to aid a citizen in shaping his conduct, but "to frighten him into impotence."[49]

Fuller suggests that the internal morality of law is primarily the morality of aspiration, though the reasons for this position are not clear. He argues:

> The demands of the inner morality of the law, however, though they concern a relationship with persons generally, demand more than forbearances; they are, as we loosely say, affirmative in nature: make the law known, make it coherent and clear, see that your decisions as an official are guided by it, etc. To meet these demands human energies must be directed toward specific kinds of achievement and not merely warned away from harmful acts.[50]

While, if true, this may justify his claim that the internal morality is one of aspiration, his initial premise is of questionable validity. There is no reason why the morality of law must be expressed in an affirmative manner. The rules could be labeled, "do not keep the law secret," "do not pass retroactive laws," and so on. His second argument is:

> In the morality of law, in any event, good intentions are of little avail, as King Rex amply demonstrated. All of this adds up to the conclusion that the inner morality of law is condemned to remain largely a morality of aspiration and not of duty. Its primary appeal must be to a sense of trusteeship and to the pride of the craftsman.[51]

This again is unsatisfactory, since the good intentions of Rex occured in the absence of the knowledge of the internal morality of the law.

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[49] Ibid., p. 40.

[50] Ibid., p. 42.

[51] Ibid., p. 43.

Intentions alone may not be adequate, but intentions plus knowledge of the internal morality of law should have prevented Rex's failure.

Fuller then qualifies the nature of the morality of law as being a morality of aspiration when he suggests that the requirement of publicity may be an exception to the rule, since it would appear to be "a legal requirement for the making of law."[52] He suggests that:

> A formalized standard of promulgation not only tells the lawmaker where to publish his law; it also lets the subject - or a lawyer representing his interests - know where to go to learn what the law is.[53]

Why other rules are not also exceptions is not clear, though he does argue that, since the internal morality is a law of aspiration, there can be conflict between laws, and thus the principle of marginal utility will come into play.

Fuller then discusses each of the standards for the internal morality of law and explains how they come into conflict with each other (at least to a degree), and presents his strongest case for the impossibility of any of these standards to be a duty. The idea of laws being general, for example, is often thought to be desirable in that it insures fairness, since equals would be treated as equals. This type of rule does create problems in interpretation and in applying the law to an individual.[54]

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[52] Ibid., p. 43.

[53] Ibid., p. 43.

[54] Ibid., pp. 43-44.

The requirement of promulgation is critical to Fuller. While at times the law cannot or is not completely articulated (as in case law, or when the internal deliberations are kept secret)[55] this requirement is vital:

> The laws should be given adequate publication so that they may be subject to public criticism, including the criticism that they are the kind of laws that ought not to be enacted unless their content can be effectively conveyed to those subject to them.[56]

This does not mean that every citizen must read all the laws, merely that they be available to him/her.

Retroactive laws present a more difficult situation. In some cases, for example, it may be necessary to pass retroactive laws to correct past injustices, as in the case where some external force prevents individuals from complying with a law. In addition, much tort law is decided on a case by case basis, and the rule that the court uses to determine the outcome of a case is based on a rule that did not exist before the court gave its decision.[57] An even more ambiguous case is the example of a tax law taxing income received before the law was passed. The law may not be retroactive, though it may be thought to be unfair.[58] Fuller would suggest that since an individual's decisions on economic matters are decided on the current

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[55] Ibid., p. 50.

[56] Ibid., p. 51.

[57] Ibid., pp. 56-57.

[58] Ibid., p. 59.

tax structure, the law may have a retroactive effect.[59] The point is not that either position is correct, but that there are serious difficulties surrounding retroactive law.[60]

Similar problems exist, to some degree or another, for all the other principles. Sometimes it is difficult to express rules clearly.[61] Contradictions in law often arise when a new law fails to replace an old one.[62] The concept of strict liability sometimes requires individuals to perform acts they cannot do (or punishes them for acts they did not do).[63] Changes in law are often required for the same reasons as retroactive law,[64] and there often is a failure for the law as applied to resemble the law on the books:

> This congruance may be destroyed or impaired in a great variety of ways: mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive toward personal power.[65]

In other cases, the lack of congruence can be based upon a degree of uncertainty about what is meant by the law.[66] While in some cases it

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[59] Ibid., p. 60.

[60] Ibid., p. 61.

[61] Ibid., p. 63.

[62] Ibid., p. 68.

[63] Ibid., p. 77.

[64] Ibid., p. 80.

[65] Ibid., p. 81.

[66] Ibid., p. 85.

is not clear that the examples he chooses could not have been avoided (or, in the case of strict liability, that there may be alternate purposes of law), he does illustrate some of the problems of the moralities.

He does make a few observations about these standards:

> [First], infringements of legal morality tend to become cumulative. [Second], to the extent that the law merely brings to explicit expression conceptions of right and wrong widely shared in the community, the need that enacted law be publicized and clearly stated diminishes in importance. [Third], the stringency with which the eight desiderata as a whole should be applied, as well as their priority of ranking among themselves, will be affected by the branch of law in question, as well as by the kinds of legal rules that are under consideration. [Fourth], it should be recalled that in our detailed analysis of each of the demands of legal morality we have generally taken the viewpoint of a conscientious legislator, eager to understand the nature of his responsibility and willing to face its difficulties. The emphasis on nuances and difficult problems should not make us forget that not all cases are hard.[67]

This would suggest that these internal moralities may vary in importance depending upon the specific situation.

While Fuller's distinction between the morality of duty and the morality of aspiration has been favorably received by most of his critics, his section on the inner morality of law has been frequently attacked. While some of the attacks are based on some of his implications of these canons on the issue of a citizen's ability to disobey the law,[68] there are three main criticisms of Fuller's position that are relevant to the study of legal argument.

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[67] Ibid., pp. 92-93.

[68] Wasserstrom, p. 584.

First, some suggest that what Fuller has outlined is not an inner morality of law, but merely a description of standards for efficiency in a legal system. Fuller's nemisis, H. L. A. Hart aruges:

> Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ('Avoid poisons however lethal if they cause the victim to vomit,' or 'Avoid poisons however lethal if their shape, color, or size is likely to attract notice.') But to call these principles of the poisoner's art 'the morality of poisoning' would simply blur the distinction between the notion of efficiency for a purpose and those final judgements about activities and purposes with which morality in its various forms is concerned.[69]

The guidelines Fuller offers, so the argument goes, suggest efficient ways to carry out the law, though they may have little to do with morality per se.[70]

Second, while many critics would go along with the eight guidelines Fuller suggests, they appear to be arbitrary. Thus Summers argues that "[T]here are other ways to fail to make laws that are equally if not more fundamental than any of the ways the author identifies."[71] He goes on to list eight other ways to fail to make laws:

> First, his eight ways do not allow for the failure of a society to establish authoratative law making procedures at the outset.
> Second, the author cannot . . . satisfactorily accomodate failures to comply with authoratative law-making procedures after they have been set up.
> . . . a third and no less important way to 'fail to make law' is to fail to provide institutions for the authoratative interpretation of law.

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[69]Wasserstrom, p. 584.

[70]For Fuller's defense of this position, see Fuller, Morality, pp. 200-205.

[71]Summers, p. 19.

> . . . a fourth significant way to fail to make law - effective law - is to fail to provide for its execution by public official or private citizen.[72]

> To distinguish and identify a few others: (1) The failure to provide effective remedies for noncompliance, (2) the failure to maintain the minimal socio-economic conditions required for compliance, (3) a general failure to observe such essentials of 'natural justice' as judicial impartiality and a right to a hearing so that disrespect for law becomes common, (4) the use of law to control the uncontrolable, e.g., religious belief, love, and so on.[73]

While there may be some responses to these additional rules, such as that some of them may be incorporated in Fuller's inner morality, or that they emphasize a different aspect of law - its administration as opposed to the creation of the rules themselves, they do raise an important issue: what criteria should be used to evaluate the principles of the internal morality of law? While Fuller does not provide such a criterion, his rules do have a common feature:

> . . . the common feature of Professor Fuller's eight ways of failing to make law is that in each case compliance is impossible, because either there are no prospective rules or they are hopelessly contradictory or their content cannot be ascertained.[74]

Nevertheless, there is no reason to believe that his list is comprehensive, and the means of determining what new rules should be added to the list is uncertain at best.

The final criticism of Fuller's internal morality of law is that several principles are contradictory. He concedes that often the

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[72] Ibid., pp. 19-20.

[73] Ibid., p. 21.

[74] Graham Hughes, Review of Lon Fuller, Morality of Law, Stanford Law Review, 17 (1965), 552.

principles will be contradictory,[75] but his explanation as to the resolution of these contradictions is uncertain. He notes, for example, that Hitler's legal system did not resolve the issues adequately, but again there is no standard for examining at what point a legal system fails to achieve enough of the morality to be called a legal system:

> . . . aside from showing how difficult it may be to make this judgement - although Fuller has no doubts that some Nazi attempts at law-making were failures at law-making - I do not think that the author's remarks on the 'marginal utility principle' are sufficiently detailed to be of much help here.[76]

One possible explanation is that the author's definition of law as "the enterprise of subjecting human conduct to the governance of rules," and any conflict would be resolved correctly only if it would further aid an individual in her/his ability to abide by rules.

Internal vs. External Morality of Law

Perhaps the most controversial position Fuller defends is his position that if the internal morality of law is followed, the enacted laws will tend to be considered ethically moral. He argues, for example, that if Hitler or other leaders had followed the internal rules he outlines, they would not have passed the repressive legislation they did. This position has been frequently criticized. Hart suggests there is "no special incompatibility between clear laws and evil. Clear laws are therefore ethically neutral though they are not equally

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[75]A. H. Fuller, Review of Lon Fuller, The Morality of Law, Modern Law Review, 28 (1965), 371.

[76]Golding, p. 226.

compatible with vague and well-defined aims."[77] Summers argues:

> . . . there is no correlation whatsoever between clarity of formulation and goodness. Many good aims are as difficult to formulate in statutes as are some bad aims, and some bad aims are as easy to formulate in statutes as good ones.[78]

Even if there is a relationship, the relationship is merely asserted, and no support for the relationship is given.[79]

Some people point to examples of individuals following Fuller's guidelines and producing bad legislation. Dias gives the example of Herod's execution of all male children under the age of one.[80] Dworkin gives a hypothetical example:

> Tex, let us suppose, has an evil mind. He is set upon wholly immoral ambitions - he wants, for example, to subjugate and enslave one portion of his population. If Tex made the stupid mistakes that Rex made, he would fail in this endeavor. His black purposes would be thwarted. So Tex, who is not stupid, complies with Professor Fuller's canons, at least to the extent necessary to succeed in his design.[81]

There is no reason to believe that the internal morality would prevent this behavior.

Fuller does suggest that evil legislation may be more difficult to phrase, but most critics argue that "good" evil legislation need not be harder to frame than "good" moral legislation.

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[77]Hart, Review of Fuller, p. 1287.

[78]Summers, pp. 25-26.

[79]Hughes, p. 553.

[80]R. W. M. Dias, Review of Lon Fuller, The Morality of Law, Cambridge Law Journal, 1965 (1965), 158.

[81]Ronald Dworkin, "The Elusive Morality of Law," Villanova Law Review, 10 (1965), 632.

In response to this criticism, Fuller has attempted to ellaborate on his position. Dworkin, a leading critic of Fuller, summarized the potential positions Fuller could defend:

> (1) law is a precondition of good law, so one cannot have good law without observing internal morality; (2) internal morality requires publication, and this restraints a tyrant who fears publicity from pursuing evil by legislation; (3) internal morality demands some precision, and it is hard to be precise in legislating inequity; and (4) internal morality assumes a view of man as a 'responsible agent,' and a legislator holding this view will not seek to affront 'man's dignity as a responsible agent' with outrageous law.[82]

Fuller probably holds several of these views. He would suggest that individuals would be reluctant to express evil intentions openly,[83] He also suggests the principles he advocates have a greater afinity with good legislation than with evil legislation.[84] Finally, he suggests that:

> . . . the internal morality of the law requires a view as to the nature of man. To embark on the enterprise of subjecting human conduct to rules implies commitment to the view that man is or can become a responsible agent.[85]

While it may be true that some may comply with the procedures without being committed to them[86] presumably the concern for the internal morality of law will result in a greater interest in the external morality of law.

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[82]Ronald Dworkin, "Philosophy, Morality and Law - Observations Prompted by Professor Fuller's Novel Claim," University of Pennsylvania Law Review, 113, (1965), 671-672.

[83]Fuller, Morality, p. 159.

[84]Ibid.

[85]Nicholson, p. 315.

[86]Dworkin, "Philosophy, Morality and Law," p. 675.

Conclusion

Fuller's discussion of the morality of law emphasizes the nature of the legal discipline and how it affects the way the legal process works. Such a viewpoint has several implications for the study of legal argument.

First, the emphasis on legal argument as a discipline emphasizes certain aspects of law. Both Toulmin and Kuhn emphasize the nature of disciplines in science. The implication is that the conduct of inquiry is human activity. This means that the study of the values of those individuals may aid in the understanding of the nature of the argumentative activity. In law, according to Fuller, the emphasis of legal rule-makers on subjecting human conduct to the governance of rules has caused them to set up certain guidelines to govern lawmaking.

Second, the distinction between the morality of aspiration and the morality of duty has implications for the study of argument. Fuller argues that there can be no perfect legal system. Instead, each legal system sets up two types of rules, one type setting up minimum standards, and the other type creating ideal goals. In a similar manner, an argumentative system may realize that there can be no perfect argument, instead a system may generate two "moralities": one of basic rules required of all argument, and another of the ideal characteristics of argument in the field which, though perhaps not possible to achieve, acts as a model for argument.

Third, Fuller suggests several concrete guidelines for argument in law. These include admonitions that rules of law should be general, consistent, public, clear, stable, prospective, and so on. From this, there are several possible implications. First, some of the principles

of law may be field invarient. For example, it is arguable that the rules in any discipline should be general, and that the guidelines for argument should be determined before the argument, rather than during the argument (i.e., be prospective). At the same time, some of the guidelines may be field varient, in which case it may be worthwhile to determine the "inner morality" of other fields. In addition, since Fuller notes that the principles may come into conflict with each other, he emphasizes that, at least in law, these principles can only be part of a morality of aspiration, not of duty. Finally, since his critics note that a legal system can follow Fuller's morality and produce bad laws, Fuller may illustrate that even following logical rules of a field does not, by itself, guarantee moral results.

In addition, like Levi, Fuller notes that the nature of the rules of a field are based on the goal of a field. Fuller emphasizes that the goal of law is to subject human conduct to the governance of rules, and the rules he isolates are designed to further that goal. Finally, Fuller emphasizes that, in order to insure just laws, individuals in law must be concerned with the inner morality of law and its workings, suggesting that the ultimate measure of how well a field works may not be the logical rules it develops, but rather the intellectual and (in some cases) moral committment the members of that field have toward the goal of the field.

CHAPTER IV

THE INFLUENCE OF THE FUTURE

HERBERT WECHSLER AND NEUTRAL PRINCIPLES

> Continuing discussion concerning the concept of neutrality and frequent approving references to it nevertheless demonstrate the existence of a core of meaning offering useful insights into the judicial process. One feels, perhaps intuitively, that the standard introduced by Professor Wechsler has significance, the problem is to isolate and explicate those elements embedded in his analysis responsible for this significance.[1]

> It is difficult for the judge to be neutral because he has no relatively exact scale of measurement like grams or ounces with which to balance. Personal prejudices are likely to creep into inexact measurings. And in another sense it is impossible for the judge to be neutral; unless he has some preestablished hierarchy of values or social goals, some preestablished standards of relevance, how can he determine which characteristics of the interests before him to balance?[2]

> For the incompetent, it sometimes is true, as has been said, that an interest in general ideas means an absence of particular knowledge.[3]

One of the most influential, and certainly one of the most controversial, essays on legal reasoning is Herbert Wechsler's "Toward Neutral Principles

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[1] Robert L. Birmingham, "The Generality of Neutral Principles: A Game-Theoretic Perspective," California Law Review, 58 (1970), 873-874.

[2] Martin Shapiro, "The Supreme Court and Constitutional Adjudication Of Politics and Neutral Principles," George Washington Law Review, 31 (1963), 595.

[3] Oliver Wendell Holmes, "The Path of the Law," Harvard Law Review, 10 (1897), 477-478.

of Constitutional Law."[4] This essay was originally a speech delivered at the Oliver Wendell Holmes Lecture at Harvard Law School on April 7, 1959 and subsequently published both in the Harvard Law Review and in a book of collected articles by Wechsler.[5] The response to the paper has been overwhelming. Snortland and Stanga call the essay "a classic in modern legal thought."[6] Clark referred to it as an "already classic discussion,"[7] and Pollak referred to it as "a 'state paper' of consequence."[8] Rostow suggested that the lecture was "the most important recent attack on the Court."[9] Warren E. Burger, Chief Justice of the United States, in an issue of the Columbia Law Review devoted entirely to the contributions of Herbert Wechsler observed:

> In advancing and giving content to the notion of 'neutral principles,' he has set a standard for 'judging the judges' as we strive to work within the limits of these two systems - the judicial and the constitutional.[10]

This does not mean that Wechsler's concept of neutral principles has

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[4]Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," Harvard Law Review, 73 (1959), 1-35.

[5]Herbert Wechsler, Principles, Politics and Fundamental Law (Cambridge: Harvard University Press, 1961).

[6]Neil E. Snortland and John E. Stanga, "Neutral Principles and Decision-Making Theory: An Alternative to Incrementalism," George Washington Law Review, 41 (1973), 1006.

[7]Charles E. Clark, "A Plea for the Unprincipled Decision," Virginia Law Review, 49 (1963), 661.

[8]Louis H. Pollak, "Constitutional Adjudication: Relative or Absolute Neutrality," Journal of Public Law, 11 (1962), 48.

[9]Eugene V. Rostow, "American Legal Realism and the Sense of the Profession," Rocky Mountain Law Review, 34 (1962), 136.

[10]Warren E. Burger, "Herbert Wechsler," Columbia Law Review, 78 (1978), 951.

always been greeted with open arms, indeed, his article has been met with voluminous criticism. Writing less than four years after the essay appeared, Benjamin Wright commented:

> Few essays dealing with the theory and practice of constitutional interpretation by the Supreme Court of the United States have resulted in so many and such immediate comments as Professor Herbert Wechsler's 'Toward Neutral Principles of Constitutional Law.' . . . . at least five articles have appeared dealing directly with some aspect of its thesis, and other writings have touched on it more briefly. An essay which results in such diverse replies or explanations must be concerned with issues of more than limited application, and merits more than passing attention.[11]

Indeed, Bickel argued "[t]he volume of responsible criticism that Mr. Wechsler's paper on "Neutral Principles" has produced is nothing short of the most genuine kind of tribute to him."[12] Clark concurred:

> Even to those of us who must remain not fully persuaded by the argument, the lecture has provided a road to more careful thinking about these great issues; indeed no higher tribute can be paid a scholar than the veritable tempest of discussion it has called forth.[13]

Though some may disagree with the solution he poses, the issues he raises are important for all scholars of argument in general, and legal argument in particular. The issues he raises "reach to the very core of the process of judicial decision and will retain importance as long as judges sit in this country."[14]

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[11]Benjamin F. Wright, "The Supreme Court Cannot be Neutral," Texas Law Review, 40 (1962), 599.

[12]Alexander M. Bickel, "Forward to the Supreme Court, 1960 Term," Harvard Law Review, 75 (1961), 47-48.

[13]Charles E. Clark, "The Limits of Judicial Objectivity," American University Law Review, 12 (1963), 6.

[14]Kent Greenawalt, "Enduring Significance of Neutral Principles," Columbia Law Review, 78 (1978), 984.

While the responses to Wechsler's speech have been numerous, Wechsler's position is articulated in very few places (which, as we shall see, creates several problems). Besides the initial lecture, Wechsler spent little time clarifying his position. He did respond to his critics in the introduction to his book Principles, Politics and Fundamental Law,[15] but the defense was very brief and not very enlightening. He did appear at the New York University Institute of Philosophy symposium on "Judicial Reasoning" with Levi, Freund, Henklin, and others,[16] and the paper he presented at that sumposium provides some clarification of his views as well as his response to Levi's position. More recently he was asked to appear on a panel at the Conference for Federal Appellate Judges at the Federal Judicial Center in Washington, D. C. in May, 1975 on "Procedures to Reach Decisions," which allowed him to respond (again briefly) to his critics.[17] The issues he raises are also illuminated by a series of articles by Henry Hart,[18] Thurman

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[15]Wechsler, Principles, Politics and Fundamental Law, pp. xi-xv.

[16]Sidney Hook, ed., Law and Philosophy: A Symposium (New York: New York University Press, 1964), pp. 263-335.

[17]"Procedures to Reach Decisions," Conference for Federal Appellate Judges, Federal Judicial Center, Washington, D. C., May 15, 1975. Wechsler's comments have been reprinted in excerpts as "Toward Neutral Principles: Revisited," in The Judicial Process: Readings, Materials and Cases, edited by Ruggero J. Aldisert (St. Paul: West Publishing Co., 1976), pp. 543-545.

[18]Henry M. Hart, "Foward: The Time Chart of the Justices, The Supreme Court, 1958 Term," Harvard Law Review, 73 (1959), 84-125.

Arnold,[19] and Erwin N. Griswold.[20] These articles are often discussed in the same articles that address Wechsler's thesis.

The discussion of Wechsler's position will cover six topics. First, the rationale behind Wechsler's position will be examined, including his reasons for judicial review and the perceived need for standards for criticism of court cases. Second, the nature of neutral principles will be explored, including the many ways that the terms have been defined. Third, the application of neutral principles to Supreme Court decisions will be attempted, using the cases Wechsler emphasized. Fourth, Hart's attack on result-oriented jurisprudence and his tacit support for Wechsler will be noted. Fifth, the attacks on Wechsler's position will be described and evaluated. Finally, some tentative conclusions about legal argument will be suggested.

The Rationale for Neutral Principles

Wechsler begins his essay by discussing the basis for judicial review. He does this by responding to the position defended by Learned Hand, who gave the Holmes lecture at Harvard the previous year.[21] Both Hand and Wechsler agree that the Supreme Court has the authority to review the legitimacy of legislation. Wechsler devotes the first third of his lecture explaining why Hand's reasoning is incorrect. This is

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[19]Thurman Arnold, "Professor Hart's Theology," Harvard Law Review, 73 (1959), 1298-1317.

[20]Erwin N. Griswold, "Of Times and Attitudes - Professor Hart and Judge Arnold," Harvard Law Review, 74 (1960), 81-94.

[21]Learned Hand, The Bill of Rights (Cambridge: Harvard University Press, 1958).

not an idle dispute, the reasons why the Supreme Court can review the Constitutionality of an act will shape in some way the way the Court goes about its task:

> Here as elsewhere a position cannot be divorced from its supporting reasons; the reasons are, indeed, a part and most important part of the position.[22]

Hand argued that judicial review was not an integral part of the Constitution, that is, judicial review cannot be inferred directly from the Constitution. Rather, judicial review is justified because it is needed to preserve the union:

> . . . it was probable, if indeed it was not certain, that without some arbiter whose decision should be final the whole system would have collapsed, for it was extremely unlikely that the Executive or the Legislature, having once decided, would yield to the contrary holding of another 'Department,' even of the courts.[23]

This view would greatly restrict the power of the Court in reviewing Congress:

> [S]ince this power is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution. It is always a preliminary question how importunately the occasion demands an answer. It may be better to leave the issue to be worked out without authoratative solution; or perhaps the only solution available is one that the court has no adequate means to enforce.[24]

Wechsler argues that, judicial review is justified based upon a close reading of the Constitution, not on its pragmatic value.

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[22]Wechsler, "Toward Neutral Principles," p. 5.

[23]Hand, in Ibid., p. 2.

[24]Hand, Bill of Rights, p. 15.

Judicial Review is "grounded in the language of the Constitution and is not a mere interpolation."[25] Drawing from the supremacy clause,[26] as well as Article III, section I, and section 2, he notes that 1) a state court can rule on a constitutional issue; 2) the state court's judgement would be reviewable by the Supreme Court, and 3) lower federal courts are also bound by the Constitution.[27] From these positions, he argues that the Supreme Court, which must rule on constitutional issues in state cases, can rule on those issues in other cases.[28] He further argues that, as argued in Marbury v. Madison: "a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument."[29]

This view of judicial power has several implications. First, rather than being optional, judicial intervention is required. The Supreme Court cannot stand back and wait for an action threatening the country before it intervenes in the political conflict, rather the court must be prepared to decide on cases involving the Constitution:

> It is the duty to decide the litigated case and to decide it in accordance with the law, with all that that implies as to a rigorous insistence on the satisfaction of procedural and jurisdictional requirements.[30]

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[25]Wechsler, "Toward Neutral Principles," p. 3.

[26]U.S. Constitution, Article VI, section 3.

[27]Wechsler, "Toward Neutral Principles," p. 4.

[28]Ibid.

[29]5 U.S. (1 Cranch) 137, 180 (1803).

[30]Wechsler, "Toward Neutral Principles," p. 6.

This does not mean that the Supreme Court should act as a third chamber of Congress; there will be some standards for limiting court decisions. The question becomes, what should those standards be?

Whatever standards are to be used in evaluating decisions, "the question is the same one for the Court and for its critics."[32] Nor can history be relied upon to evaluate the decisions of the Supreme Court:

> . . . history has little tolerance for any of those reasonable judgements that have turned out to be wrong. But history, in this sense, is inscrutable, concealing all its verdicts in the bosom of the future, it is never a contemporary critic.[33]

Wechsler argues for a standard that will please neither those who view judicial decision as fiat, nor those who see judicial decision as supporting the values they believe in; rather he attempts to present a decision rule that will introduce reason into the judicial process. He explains the concept in the following manner:

> I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgement on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only on the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply?[34]

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[31]Alexander M. Bickel, The Least Dangerous Branch (New York:

[32]Wechsler, "Toward Neutral Principles," p. 11.

[33]Ibid.

[34]Ibid., p. 15.

> A principled decision, in the sense I have in mind, is one that 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.[35]

Weschler suggests that judges should employ neutral principles in determining what rules to apply to a specific case. This is not meant to be a comprehensive explanation of what a judge should do,[36] rather it is but one guideline that a judge should follow.

The Meaning of Neutral Principles

The focus of much of the discussion of Wechsler's view of legal reasoning has been on his use of the phrase, "neutral principles." The fact that the debate has focused on this phrase would imply that the terms have a reasonably accepted meaning. Unfortunately, this is not the case. Snortland and Stanga suggest that "Wechsler employs the term 'neutral' to convey a variety of interrelated meanings," including "consistent, general, logical, broad, and unbiased."[37] Henklin[38] argues that much of the controversy over the article may be based on a misunderstanding of what neutral means. Friendly agrees, arguing:

> The adverse reaction to the lecture in some quarters may have come from use of the word 'neutral' in the title. This perhaps conveyed a wrong impression that the lecturer

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[35] Ibid., p. 19.

[36] Herbert Wechsler, "The Courts and the Constitution," Columbia Law Review, 65 (1965), 1014.

[37] Snortland and Stanga, p. 1009.

[38] Louis Hanklin, "Some Reflections on the Current Constitutional Controversy," University of Pennsylvania Law Review, 109 (1961), 652.

> was urging the Court to ignore the great social issues of the day. In the light of hindsight, 'Toward Principled Decisionmaking in Constitutional Law' might have been a more politic title, but Professor Wechsler can be forgiven for supposing that critics would read not merely the title but the text.[39]

Other critics are not as kind:

> . . . [Wechsler] does not stay with any known or possible meaning of the quality he apparently has in mind when he uses 'neutral' or neutrality.'[40]

> These views fail to justify the attempt to apply, without defining or even giveing examples of what is meant a conception Mr. Wechsler chooses to call 'neutral principles.' He neither defines, gives examples, nor reconciles.[41]

> There are some signs, in this Holmes Lecture itself, that the Author was by no means sure where this position took him . . .[42]

While Wechsler has attempted to respond to his critics on a few cases, these responses did not clarify much. In his 1961 introduction to the lectures, he explained his choice of the word, "neutral":

> As to the choice of adjective, my case is simply that I could discover none that better serves my purpose. Neither 'impartial,' nor 'disinterested,' nor 'impersonal,' the main alternatives that I considered, seems to me as adequate in its expression; and to rest on 'general,' though the idea is certainly included, is to give up overtones that I intend. That those overtones are somewhat enigmatic in their content is not, from my point of view, a real deficienty, this is an enigmatic subject.[43]

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[39]Henry J. Friendly, "In Praise of Herbert Wechsler," Columbia Law Review, 78 (1978), 978.

[40]Wright, p. 601.

[41]Ibid., p. 617.

[42]Julius Stone, "Result-Orientation and Appellate Judgement," in Perspectives of Law, edited by Roscoe Pound, Erwin N. Griswold, and Arthur E. Sutherland (Boston. Little, Brown & Co., 1964), p. 349.

[43]Wechsler, Principles, p. xiii.

The last statement hardly satisfied many of his critics. Nor did his response in 1975

> I do recognize that there are problems, as there are bound to be in any such delineation. How general must supporting reasons be to a decision to be adequately principled? What does 'neutral' add to 'general' or, indeed, 'general' to 'principle' as a designation of the governing criteria? The only answer I can honestly make is that I am not entirely sure. I used the words that I hoped would convey an attitude, a mood. I did not think that I was drafting an invention.[44]

While he goes on to modify his views of neutral, it is important to note that most of the responses to Wechsler come from individuals who may have differing views of what neutrality means. Thus, any evaluation of his thesis must develop a more explicit definition of neutrality, both to understand Wechsler's position and to evaluate the responses to Wechsler's position.

The term, "neutral" would appear to have at lease six possible meanings, based upon both Wechsler's article and the responses to it. First, it could be viewed as an attack on the Supreme Court's certioran policy. Second, it could require a court to present reasons for its decisions. Third, it could require the judge ignore the results of a decision. Fourth, it could require a judge to ignore values. Fifth, it could require a judge to give <u>acceptable</u> reasons. Finally, it could require that a judge develop a principle that goes beyond the immediate case.

<u>Neutral Principles and Certioran Policy</u>. One possible view of Wechsler's position on neutral principles would stress his view of the Supreme Court's certioran policy. Every year, there are thousands of

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[44]Wechsler, "Neutral Principles Revisited," p. 543.

potential Supreme Court cases. The Supreme Court does not have adequate time to hear and deliberate on all these cases.[45] The question becomes how the Court decides which cases it chooses to hear. At one level, the appeal to neutral principles presents a possible solution to this problem:

> [Wechsler] has tried to work out the legal principle by which the Supreme Court should decide whether it should adjudicate or should refrain from decision. His view is that the Court should act only in those cases where it would be applying principles of adequate neutrality and generality; cases which do not survive this test should not be heard by that Court.[46]

This policy could have vast implications. Certainly the decision about what cases to hear can be just as influential as a decision about what principles to apply in a case. It is in these areas that, according to Wechsler, the Court has adopted some type of neutral standards.

> . . . it is well worth noting that the Court by rule has defined standards for the exercise of its discretion, standards framed in neutral terms, like the importance of the question or a conflict of decisions. Only the maintenance and the improvement of such standards and, of course, their faithful application can, I say with deference, protect the Court against the danger of the imputation of a bias favoring claims of one kind or another in the granting or denial of review.[47]

At this level, the appeal for neutral standards is to continue to develop an objective standard for determining what cases to hear.

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[45] Hart, pp. 84-125.

[46] Charles E. Clark, "Federal Procedural Reform and States Rights. Toward a More Perfect Union," Texas Law Review, 49 (1961), 226-227. See also Addison Mueller and Murray L. Schwartz, "The Principle of Neutral Principles," U.C.L.A. Law Review, 7 (1960), 580-582.

[47] Wechsler, "Toward Neutral Principles," pp. 9-10.

Neutral Standards and the Reason for Decision. One objection to traditional Court procedure that Wechsler continually refers to is the failure of the Court, in many cases, to give any reasons at all. This practice may be acceptable in other fields

> No legislature or executive is obligated by the nature of its function to support its choice of values by the type of reasoned explanation that I have suggested is intrinsic to judicial action - however much we may admire such a reasoned exposition when we find it in those other realms.[48]

What Wechsler was objecting to was the tendency of the Court to give only brief opinions, or to give no opinions at all.

> There has been particular objection to handling important questions through per curiam decisions which simply state the Court's result with no explanation of how or why it arrived at that result except the Delphic citation of a precedent or two. Nor have the commentators been pleased with full opinions which fail to canvass all the relevant issues and rebut the objections of opponents.[49]

Wechsler emphasizes the cases that followed the school segregation cases that were dismissed by per curiam decisions, thus providing no guidance to future courts.[50] These decisions were objectef to for several reasons. First, they did not live up to what he thought a reasoned opinion should include. Edward White places Wechsler with a group of scholars he terms the Reasoned Elaborists, who emphasize the arguments presented in opinions. He observes:

> . . . the Reasoned Elaborists, reflecting their academic orientation, emphasized technical and professional expertise in opinionwirting. Their model of an enlightened

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[48] Ibid., pp. 15-16.

[49] Shapiro, p. 591.

[50] Wechsler, "Toward Neutral Principles," p. 22.

> opinion contained qualities associated with professional success among legal scholars thoroughness, soundness, clarity, and internal consistency. Their interest in craftsmanship reflected their own desire to participate actively in shaping the professional progress of the Court.[51]

Neutral principles are also desired to help the public predict future cases; "a principled decision informs potential litigants of likely subsequent decisions."[52]

While a case that had no "articulated theory to support it but seems right"[53] may have some function in our legal system, it has a place only "when there is a theory that becomes apparent on reflection, though it may not be articulated by the court."[54] He suggests

> If the point is that courts may reach correct decisions by accident or intuition, I should readily agree, while noting that correctness turns on someone else's statement of the reasons that the court has sensed but has not stated in its judgement. But if it is contended that there is a measure of correctness distinct from the existence of such reasons, I must say that I am forced to disagree.[55]

Thus, for Wechsler, one of the primary functions of a court is to articulate its reasons for decision, and it can be said to reach a legitimate decision only if either the court can give a satisfactory

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[51]G. Edward White, "The Evolution of Reasoned Ellaboration: Jurisprudential Criticism and Social Change," Virginia Law Review, 59 (1973), 290.

[52]Greenawalt, pp. 1000-1001.

[53]Edward H. Levi, "The Nature of Judicial Reasoning," in Hook, p. 276.

[54]Herbert Wechsler, "The Nature of Judicial Reasoning," in Hook, p. 297.

[55]Ibid.

explanation of the neutral principles behind its decision, or if someone else (presumably within a reasonable time period) provides such an explanation.[56]

Neutral Principles and Results-Orientation. One approach to the explanation of neutral principles has been to suggest that a judge applying neutral principles should decide a case without considering what the results of his/her decision will be. Stone argues that Wechsler places himself in this position when he argued for neutral principles.

> Prima facie, then, on this basis, we might understand a rule forbidding 'result-orientation' to mean (as seems indeed to be Professor Wechsler's meaning for the most part) that the judge should first fix upon the rule of law he intends to apply before he determines what are the precise facts of the case material to his decision. Unless he does so, the judge's procedure is bound to be 'result-orientated,' or at least 'result-conscious.'[57]

The emphasis this view would make is that the effects of a decision are irrelevant to the decision. Golding suggested: "it is 'results' that we expect from the courts, not mere results, however, but just results. We cannot understand this except in terms of 'principle.'"[58]

This view of neutrality is not what Wechsler intended. The long range results of a decision rule can be considered, as long as the results of the immediate case are not emphasized. Wechsler explained this in a letter to his critic, Louis H. Pollak:

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[56]Rostow, p. 139.

[57]Stone, p. 350.

[58]M. P. Golding, "Principled Decision-Making and the Supreme Court," Columbia Law Review, 63 (1963), 36.

> By no possible reading did I say that the Supreme Court 'should have cast out of its reckoning the likelihood that a decision one way rather than another would effect an enduring contribution to the quality of our society.' What I did say is that it is not enough that a decision makes such a contribution unless it also rests on neutral principles, i.e., was not merely an ad hoc disposition of its immediate problem unrationalized by a generalization susceptible of application across the board.[59]

This would suggest that the results of one principle compared to another principle could be examined by a judge, but deciding a case merely on the results to the immediate litigants is not allowed.

Neutral Principles and Values. Perhaps the greatest misunderstanding of Wechsler's concept of neutral principles has come from those who viewed neutral principles as those that did not reflect a value. Miller and Howell devoted an entire article to this position.[60] Robert Birmingham explained the reasons for this position:

> The standard of neutrality has been interpreted to deny the propriety of judicial decisions resulting from choice among competing values. At most this interpretation receives uncertain support from the pronouncements of the progenitor of the concept . . . . That doubt remains appears in large part a consequence of the absence of plausible alternative interpretations: the distinction between value judgements and other judgements, while not always clear, permits at least a modicum of classificatory precision, on the other hand, differentiation between acceptable and unacceptable value judgements appears necessarily to depend on individual preference or arbitrary rule.[61]

The result is that a large number of critics have viewed Wechsler as

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[59]Letter from Herbert Wechsler to Louis Pollak, April 8, 1962, quoted in Pollak, pp. 60-61.

[60]Arthur Miller and Ronald Howell, "The Myth of Neutrality in Constitutional Adjudication," University of Chicago Law Review, 27 (1960), 661-691.

[61]Robert L. Birmingham, "The Neutrality of Adherence to Precedent," Duke Law Journal, 1971 (1971), 542.

suggesting a value-less Court, phrasing its opinions in terms value-free, a position that we shall soon see has caused much adverse reaction.

As with the last definition of neutrality, this definition is not supported by Wechsler, who argues that neutral principles do not "exclude value judgements from interpretation, as some others have alleged."[62] Rather, the demand for neutrality provides a guideline for evaluating values:

> In calling for neutrality of principle, I certainly do not deny that constitutional provisions are directed to protecting certain special values or that the principled development of a particular provision is concerned with the value or the values involved. The demand of neutrality is that a value and its measure be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group, or person may assert the claim.[63]

Wechsler does not deny that values are involved in the choice of principles in a decision. Rather, he suggests that neutral principles should be used to resolve conflict of values.

> . . . the principle of resolution must be neutral in a comparable sense (both in the definition of the individual competing values and in the approach that it entails to value competition.)[64]

Although it is assumed that neutral principles are valueless, this is an inaccurate, though popular, reading of Wechsler. Wechsler would allow decisions to reflect values, but he would insist that the judge

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[62]Wechsler, "Courts and the Constitution," p. 1014.

[63]Wechsler, Principles, pp. xiii-xiv.

[64]Ibid., p. xiv.

be prepared to apply those values in all cases where they applied, rather than just apply the values where they fit the bias of the judge. The principles themselves can reflect values, as long as the values are neutrally applied to all cases where they apply. In addition, neutral principles can be used to decide conflict between values. For example, of one judge decides that one value is more important than another (or develops a system of weighing values), then the judge should apply that heiarchy in all cases.

Neutral Principles as "Correct" Reasons. One problem Wechsler encountered was his failure to give examples of a neutral principle; rather, he merely attacked prior court decisions. Combined with his ambiguous definition of neutral, this could lead some critics to suggest that a neutral principle is one that Wechsler agrees with, which would hardly be an enlightened view of legal argument. There is an undertone of the essay that suggests that the idea of neutral principles as being those that are acceptable is a possible reading of Wechsler's position. Thus he suggests that "The real test inhereas, as I have tried to argue, in the force of the analysis."[65] Wright suggested that one possible view of this meaning of neutral is that a decision be "well established, generally accepted, universally applicable."[66] To a degree, this position calls for opinions to be accepted by some unspecified audience, though Wechsler does not name the audience. One possible view is that the opinion should be acceptable to all the

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[65]Wechsler, "Toward Neutral Principles," p. 25.

[66]Wright, p. 607.

"leading" scholars in the field. This would not be a desirable position:

> We must accept the fact that under the best of circumstances honest judges, working within the boundaries of their power, and strictly according to the customs of their calling, will often write opinions which will fail to convince many, or all, or the best lawyers of their time, or of later times.[67]

Many of the decisions Wechsler implies may have been desirable were not popular at the time they were handed down. Besides, merely to suggest that an opinion should be acceptable to the public is too vague, since Wechsler does not attempt to develop any standards for determining what makes a decision acceptable:

> If the fundamental test of the neutrality of a principle lies in its public acceptability, on the other hand, the point of Professor Wechsler's criticism is lost, because Wechsler would require, in addition to acceptability itself, <u>criteria</u> of acceptability to which men of good-faith might subscribe despite differences in their personal values. For Wechsler, to say that a principle is publicly accountable cannot be to say only that the public accepts it.[68]

The question becomes, if audience acceptance <u>per se</u> could not be the measure of neutral principles, what guidelines are appropriate to determine whether or not a principle is neutral?

<u>Neutral Principles as General Principles</u>. Probably the most accurate description of what Wechsler meant by neutral principles is that the principle used should be applicable to other cases. This is to be contrasted with an <u>ad hoc</u> decision that is meant to apply only to the immediate case.[69] That the principle affects the immediate

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[67]Rostow, p. 144.

[68]George G. Christie, "Objectivity in the Law," <u>Yale Law Journal</u>, 78 (1969), p. 1312.

[69]Wechsler, "Toward Neutral Principles," pp. 12-13.

litigants is of minor importance; the emphasis should be on the results that transcend the immediate.

> To be sure, the courts decide, or should decide, only on the case they have before them. But must they not decide on the grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essance of judicial method to insist upon the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?[70]

The principle should be comprehensive; encompassing cases that transcend the immediate. The judge should be aware of the implications of extending the principle to other cases:

> The central thought is surely that the principle once formulated must be tested by the adequacy of its derivation from its sources and its implications with respect to other situations that the principle, if evenly applied, will comprehend. Unless those implications are acceptable the principle must be reformulated or withdrawn.[71]

Wechsler concedes that the issue of how general the principle should be, or how many other situations should be considered is an ambiguous one, though he suggests that the courts consider at least the cases that "we can now imagine or forsee, granting, of course, that all of us, including even the courts, wear blinkers of some kind."[72] The decision should be as comprehensive and reasoned as possible. The judge should draw from both the past and the future in rendering a decision:

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[70] Ibid., p. 15.

[71] Wechsler, "Neutral Principles Revisited," p. 543.

[72] Ibid., p. 544.

> History must be weighed, though we must grant that it can rarely be decisive, and history must not be re-written or fabricated for the purposes of the decision. The course of previous adjudication on the same or on related issues asserts the normal claims of continuity, which certainly demand consideration. So too do changes that have taken place in life and law and the new problems that have thus emerged. From sources such as this, judgement must distill a principle that determines the case at hand and that is viable in respect of those other situations, now forseeable, to which the logic of the principle demands that it apply.[73]

When Wechsler is read in this light, his charges become very serious. If a neutral principle is one that extends to other cases besides the immediate case, and if the courts have not been following neutral principles, then:

> . . . the Supreme Court is not behaving like a court at all, but is deciding similar cases differently, depending on whether favored or disfavored parties or interests are before the Court - parties or interests favored or disfavored, let us be clear, not because their positions should be considered different in fact and in law, but simply because the judges happen to be partisans of one, and not the other.[74]

The courts should develop neutral principles; principles that they "must be prepared to apply across the board, without compromise." Neutral principles must be of general application that must be "logically and consistently applied."[76] Thus, in a sense, the court is deciding not only the immediate case, but future cases as well.[77] One possible corolary of this, though not one advocated by Wechsler, is

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[73]Wechsler, "Courts and the Constitution," p. 543.

[74]Rostow, p. 138.

[75]Bickel, "Forward to the Supreme Court," p. 48.

[76]Henklin, p. 653.

[77]Ibid., p. 661.

that the broader the applicability of a principle, the greater its neutrality.[78]

Neutral Principles Applied

One way of clarifying Wechsler's concept of neutral principles, at least in the last sense in which they were defined, is to examine his illustrations of cases that do not live up to his standards of neutrality. Indeed, part of the notoreity of his essay is that he chose to attack the Supreme Court's segregation cases. He did this, not because he thought they were undesirable decisions in the sense that they were morally wrong, but rather because they were not based on neutral principles:

> . . . skeptical about predictions as I am, I still believe that the decisions I have mentioned - dealing with the primary, the covenant, and schools - have the best chance of making an enduring contribution to the quality of our society of any that I know in recent years. It is in this perspective that I ask how far they rest on neutral principles and are entitled to approval in the only terms that I acknowledge to be relevant to a decision of the courts.[79]

From this position, he examines the three relevant decisions. He begins with the white primary cases, ultimately resulting in Smith v. Allwright.[80] Briefly, this case held that, since primaries are part of the elction process, parties can no more prevent racial groups from participating in primaries than racial groups can be excluded from voting. While this may be a socially desirable decision, Wechsler argues it cannot

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[78]Birmingham, "Generality of Neutral Principles," p. 874.

[79]Wechsler, "Toward Neutral Principles," p. 37.

[80]321 U.S. 649 (1944).

be defended on neutral grounds. He suggests that, by the same principle, a religious party would be prohibited; an implication that he assumes would be unfortunate.[81] It should be observed that he does not deny that there could be a neutral position behind the decision, rather he is arguing that such a principle, if articulated, would probably not be accepted by the Court.

Wechsler next examines the restrictive covenant decision of Shelley v. Kraemer.[82] Essentially, this case held that, since the state cannot discriminate, and since a court is an agent of the state, the court cannot enforce a private covenant that discriminates against a race. While the reason expressed is clear, Wechsler argues that it does not contain a neutral principle:

> Again, one is obliged to ask: What is the principle involved? Is the state forbidden to effectuate a will that draws a racial line, a will that can accomplish any disposition only through the aid of the law, or is it a sufficient answer there that the discrimination was the testator's and not the state's? May not the state employ its law to vindicate the privacy of property against a trespasser, regardless of the grounds of his exclusion, or does it embrace the owner's reasons for excluding if it buttresses his power by the law.?[83]

Once again, Wechsler suggests that the decision was not based upon neutral principles transcending the immediate case.

Finally, Wechsler examines the school segregation case in Brown v. Topeka Board of Education. His discussion of this case is not clear.[84]

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[81]Wechsler, "Toward Neutral Principles," p. 29.

[82]334 U.S. 649 (1944).

[83]Wechsler, "Toward Neutral Principles," pp. 29-30.

[84]347 U.S. 483 (1954).

Even his critic Benjamin Wright interjects comments like "I have difficulty in following him"[85] and "I have difficulty, however, with Mr. Wechsler's reasoning when he says, ..."[86] He argues that the Court may have overlooked benefits to segregation in its opinion, and that the separate-but-equal doctrine may be better in some cases.[87] From this, he suggests that the decision could not be based on the facts, but rather must rest on "the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed."[88] This is undesirable, first because it "involve[s] an inquiry into the motive of the legislature, which is generally foreclosed to the courts,"[89] and second because it suggests that the issue is really one of freedom of association, and that this principle is not applied neutrally: "But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant."[90] Expanding this position later, perhaps anticipating a Baake-type case, he argued:

> Whether the fourteenth amendment should be read to outlaw race or color as determinants of all official action must be tested not alone by the effects of such a principle on state-required segregation, but also by its impact upon

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[85] Wright, p. 606.

[86] Ibid.

[87] Wechsler, "Toward Neutral Principles," p. 33.

[88] Ibid.

[89] Ibid.

[90] Ibid., p. 34.

> measures that take race into account to equalize job opportunity or to reduce de facto segregation, as in New York City schools.[91]

That these issues were not treated was only part of the problem. The Brown case dealt only with public education, yet was extended to other areas by per curiam decisions without examining whether the same factual conditions are met by parks, golf courses, bath houses, and beaches; just because school segregation may be harmful does not mean that the same loss of self-esteem, etc. is caused by other types of segregation.[92]

The application of neutral principles to these cases has been criticized. Bickel suggests that, even if the decisions were not neutral, for the Court not to have ruled the way it did would be morally undesirable.[93] Others have attempted to develop neutral principles that could justify these decisions.[94] These responses usually agree with the concept of neutrality, and merely attempt to provide alternative, possible opinions that would meet the standard of neutrality. Wechsler observed about some of his earlier critics:

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[91]Wechsler, "Courts and the Constitution," p. 1012.

[92]Wechsler, "Toward Neutral Principles," pp. 22-23.

[93]Bickel, pp. 64-65.

[94]See, for example, Louis H. Pollak, "Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler," University of Pennsylvania Law Review, 108 (1959), 1-34, Charles L. Black, Jr., "The Lawfulness of the Segregation Decisions," Yale Law Journal, 69 (1960), 421-430, and Richard A. Givens, "The Impartial Constitutional Principles Supporting Brown v. Board of Education, Howard Law Journal, 6 (1960), 179-185.

> It is significant for me that these defenses of the judgements advance reasons differing substantially from the opinions of the Court. They thus contribute to the inquiry I hoped to stimulate in areas where bland contentment with results has satisfied too many academic minds. I wish that I could add that I am able to accept these rationales as an answer to the difficulties I have raised. The reader is entitled to be told that I am not, but I invite him to pursue the question further and to reach an independent judgement.[95]

Unfortunately, he does not explain his objections to the reformulation of the decisions, but his objections to the actual decisions does help explain the meaning of neutrality as being close to the sixth meaning discussed earlier: neutrality as being general principles, transcending the immediate case.

Hart's Criticism of the Court

The same year that Wechsler published his critique of the Supreme Court - indeed, in the same issue of the Harvard Law Review as Wechsler's article - another critic was attacking the Court along similar lines. This attack, which is sometimes lumped together with Wechsler's position, was made by Henry Melvin Hart, the Charles Stebbins Fairchild Professor of Law at Harvard University Law School.[96] Hart initially examined the amount of time available to judges to hear and analyze cases, and he suggested that the justices have inadequate time to spend fully analyzing cases.[97] Partially due to this lack of time, and partly due to other factors, the quality of Supreme Court

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[95]Wechsler, Principles, p. xv.

[96]Hart, pp. 84-125.

[97]For a brief review of the dispute over the amount of time available to Supreme Court Justices, see Griswold, pp. 85-85.

decisions has been low:

> . . . few of the Court's opinions, far too few, genuinely illuminate the area of law with which they deal. Other opinions fail even by much more elementary standards. Issues are ducked which in good lawyership and good conscience ought not to be ducked. Technical mistakes are made which ought not to be made in decisions of the Supreme Court of the United States.[98]

He goes on to analyze one Court case (Irvin v. Dowd[99]) and uses it to illustrate how the Court can sidetrack important issues. He then isolates a few specific indictments of the judicial process. First, the Court did not adequately explain its position:

> It means in turn that they were content to leave the sufficiency of the reasons for the decision unexposed to any ready examination. Plainly, the failure at least to explain what the Court understood its decision to be was not due to any lack of time.[100]

Second, the opinion of the Court ignored other possible positions. In Irvin, there was a minority opinion that deviated from the majority opinion. The majority opinion did not even allude to the positions in the minority opinion:

> . . . it would seem to be psychologically difficult if not impossible for any judge to emerge from this kind of consideration of an able and subtle analysis and then to explain his own reasoning in arriving at a different decision without having some hint of the possibility of the alternative analysis creep into the explanation.[101]

Hart suggests that more time needs to be spent in deliberation, with justices exchanging ideas before the opinions are finalized. This

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[98]Hart, p. 100.

[99]359 U.S. 394 (1959).

[100]Hart, p. 122.

[101]Ibid., p. 123.

will allow the court to identify the main issues of the case and the major points of disagreement, with the result that the final decisions will improve:

> . . . the purpose of expression of individual views is not to make a paper record to preserve the personal position of a particular Justice on controversial questions. The purpose of preparing such views in the first place is to help the whole Court in coming to a decision, which implies that the whole Court should give them the most thoughtful consideration possible. The purpose of recording the views when they have failed of acceptance is to appeal to the riper wisdom of another day, which implies at least that the issues to which the views are addressed have been delineated as carefully and accurately as the Court as a whole is capable of delineating them.[102]

The Court needs to improve its procedures for airing views on the issues, current time constraints do not permit this.

Finally, Hart asks for greater criticism of Court decisions. Currently, there is inadequate evaluation of decisions:

> More serious still, neither at the bar nor among the faculties of the law school is there an adequate tradition of sustained, disinterested, and competent criticism of the professional quality of the Court's opinions.[103]

As a result, decisions are evaluated based upon whether the result is favorable or unfacorable for an individual. The evaluation of decisions should not be based on votes for your side, but on more objective criteria.

Like Wechsler's article, Hart's has been criticized on many grounds. Thurman Arnold called the article "a whole series of . . . pompous generalizations dropped on the Court from the heights of

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[102] Ibid.

[103] Ibid., p. 125.

Olympus."[104] He further argued that the Court requires compromise, that often requires an ambiguous decision of the type that Hart attacks.[105] As for the benefits of increased interaction between justices, he suggests that it is impractical and useless, since the justices already have firm beliefs that would only be hardened by any interaction,[106] a position that is disputed by Dean Griswold.[107]

Responses to Wechsler's Position

As indicated ealier, the responses to Wechsler's article have not been all favorable. Part of the responses have been based on a misreading of his thesis, while part of the responses concern more fundamental problems of legal reasoning. Essentially, the attacks of Wechsler's positions have concentrated on two issues. The first attack suggests that neutral principles are impossible; the second that neutral principles are undesirable.

The Possibility of Neutral Principles. The first attack on neutral principles simply argues that there is no such thing as a "neutral principle." A principle in law inherently involves choices. The specific form of this attack varies from author to author.

One attack on the possibility of neutral principles is based on the definition of neutral as not advocating a value. This position

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[104] Arnold, p. 1299. Ray D. Henson argues that "It is fairly clear, in the context of the article, that 'reason' is something the writer agrees with, and that is all it 'means.'" ("A Criticism of Criticism: In re. Meaning," Fordham Law Review, 29 [1960], 554).

[105] Ibid., p. 1312.

[106] Ibid., pp. 1312-1313.

[107] Griswold, p. 86.

argues that legal reasoning is value laden. Thus an appeal for neutral decisions is bankrupt. "Its philosophical underpinnings are doubtful; it springs from a belief that there can be objective knowledge, a belief which many would question."[108] One of the most extensive defenses of this view came in an article by Miller and Howell.[109] They argue:

> . . . neutrality, save on a superficial and elementary level, is a futile quest; that it should be recognized as such, and that it is more useful to search for the values that can be furthered by the judicial process than for allegedly neutral or impersonal principles which operate within that process.[110]

They then proceed to explain why neutrality is impossible. They begin with other disciplines, and note that neutrality is not possible in any other discipline:

> In this section we shall set out, in very brief form, the opinions of a classical philosopher (Plato), a natural scientist (P. W. Bridgman), a physical scientist who is also a social philosopher (Michael Polanyi), a sociologist (Karl Mannheim), a social scientist (Gunnar Myrdal), a political philosopher (Leo Strauss), a historian (Isaiah Berlin), and a theologian (Reinhold Neibuhr). The consistent teaching of these respected observers is that neutrality or objectivity is not attainable, either in the social sciences or in the natural sciences. (Needless to say, it is rarely pretended to be in the humanities.) Knowledge, therefore, is primarily <u>decisional</u> in nature.[111]

They then examine several judicial decisions, and argue that the judicial

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[108]Charles E. Clark and David M. Trubek, "The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition," <u>Yale Law Journal</u>, 71 (1961), p. 268.

[109]Miller and Howell, 661-691.

[110]<u>Ibid</u>., p. 661.

[111]<u>Ibid</u>., p. 665.

process cannot be "disinterested."[112] While this position is essentially an attack on a position Wechsler does not make, it is important to note that the implications of this position is that argument is inherently value-laden; it cannot be neutral in the sense of being objective or free from values due both to the premises it starts with and, to a degree, the framework it operates under:

> . . . it must be recognized that the articulation of value premises will not necessarily make them fully amenable to the processes of reason. In the final analysis, most or even all values are based on faith as much as reason.[113]

Wechsler does not deny the importance of values in legal decisions; rather he suggests that "the virtue of a decision depends on the extent to which it makes a reasoned choice of values."[114]

A second argument concerning the possibility of neutral principles is the human possibility of neutral principles. Similar to the Legal Realists' attack, this position argues that judges are human, and it may be impossible for them to discover neutral positions:

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[112] Ibid., p. 682.

[113] Lawrence R. Vevel, "Suggested Approaches to Constitutional Adjudication and Apportionment," U.C.L.A. Law Review, 11 (1965), p. 1383.

[114] Ibid., p. 1380. Mueller and Schwartz attempt to develop some guidelines for determining the neutrality of a principle: Another way of talking about the principle is to appraoch it from the standpoint of what a judicial opinion must contain to qualify as a 'principled' decision. At the very least, of course, it must contain some reason for the result. . . . Next, the reason given must be related to the facts in the case which presents the constitutional problem . . . . The reason given must not only be related to a fact in the controversy presented for decision, it must be related to the constitutional problem itself. . . . Finally, the reason given must not only be related to the constitutional problem involved, it must transcend the case at hand. (pp. 578-579)

> . . . it is far from easy for the human mind to avoid result-oriented decisions. Consider, for example, the extent to which counsel can usually persuade themself of the soundness of their cases.[115]

Contrary to other positions, this view would argue that there are many neutral principles: "Cannot any new principle, or any reversal of an old rule, be given a 'neutral- form?"[116] This would suggest that neutrality alone is not an adequate check; other guidelines are also needed.

Third, it is argued that it is difficult to articulate neutral principles. This attack is strengthened by Wechsler's refusal to give an example of a neutral principle. Golding outlines this problem:

> It is, in fact, impossible to tell by inspection of a given legal rule or principle, in isolation from the context of its application, whether it is 'neutral' or 'general' in any significant sense. Trivially, almost every legal rule is 'general' and there are also levels of generality.[117]

The question becomes, when is a principle general, and when is is not? How general must a principle be? Wechsler suggests, for example, that a rule should not be based on individual characteristics of a litigant, yet in some cases that is required:

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[115] Griswold, p. 91. Jan G. Deutsch notes that the principle that "all Negro claims are to be upheld" is a neutral principle, yet not one many would find to be legitimate as a decision rule. See "Neutrality, Legitimacy, and the Supreme Court· Some Intersections between Law and Political Science," Stanford Law Review, 20 (1968), 192-3.

[116] Wright, p. 617.

[117] Golding, p. 37.

> Yet it is impossible to say that it can never be proper that even such facts should be taken into account in judgement. Issues in bankruptsy law, or income tax law, or maintenance or alimony law, may well turn precisely on how well endowed a party is.[118]

There is also the question of exceptions to the principle. Wasserstrom, while defending a position similar to Wechsler's, suggests that the Court should not just adopt a useful neutral principle, but rather the neutral principle with the greatest utility. This could include rules like "One should keep promises except when they would hurt another person."[119] If this is a general principle, however, then Wechsler's criticism is moot, since any undesirable implication could be written off as an exception to the principle.

The final objection to the possibility of neutral principles is that a court cannot predict all the relevant exceptions to a rule; that is, it cannot predict what principle would be the best in future cases. Rostow suggests:

> Any lawyer who has worked through a line of cases about easements or trusts or bills and notes or any other legal subject knows that no court has ever achieved perfection in its first, or indeed in its twentieth opinion on the same subject.[120]

Conditions may change; better opinions may be formulated. Judges are not scientists, on the first hearing they cannot be expected to find the optimal decision:

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[118] Stone, p. 350.

[119] Richard A. Wasserstrom, The Judicial Decision: Toward a Theory of Justification (Stanford Stanford University Press, 1961). See esp. Chapter 6, "Extreme and Restricted Utilitarianism."

[120] Rostow, p. 141.

> We still want to know what the judge thought was relevant in deciding the case, but the thought that he might do some research on his own in matters economic or social fills us, no doubt correctly, with dread.[121]

This attack is not extremely accurate, since it assumes (as will be discussed later) that the initial decision cannot be reversed. This is not the case, as long as the future cases are also based on neutral principles:

> Later cases may require qualification, but the principle as then qualified is also a principle of general applicability. As modified, the principle still governs the earlier case.[122]

Many of these reactions assume that the requirement that a decision be guided by neutral principles is the only requirement Wechsler places on a judge. This is not the case; there are additional, though perhaps unstated requirements; Wechsler is merely suggesting one possible guideline:

> A court, in my submission, acts by fiat not by law unless its judgements meet this minimal criterion. But it is a minimal criterion . . . . If a judgement meets this minimal criterion, then one must face the harder question of its wisdom and its justice. A decision may, in short, be wholly principled and wrong. All I was saying is that it cannot be unprincipled and right.[123]

The second major criticism of Wechsler's position is that, even if neutral principles were possible, they would be undersirable. Essentially, this position suggests that neutral principles would hamper

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[121]Levi, p. 278.

[122]Louis Henkin, "'Neutral Principles' and Future Cases," in Hook, p. 304.

[123]Wechsler, "Neutral Principles Revisited," p. 545.

a judge by preventing the reversal of decisions. Clark predicted:

> There is no way that decision can be avoided; there is a kind of pressure - even presumption - to choose what seems the side closest to precedent and past action. And that means a conservative vote for inaction and the status quo. It is a sad, but little noticed, fact that neutral principles eventually push to re-enforce the dead hand of the law and the rule of the past.[124]

Many desirable cases would have been precluded if the Court had insisted on neutral principles. This is largely due to the difficulty in predicting all the nuances of the law in an early decision.[125] Thus Bickel suggests that:

> . . . no society, certainly not a large and heterogeneous one, can fail in time to exploed if it is deprived of the arts of compromise, if it knows no ways to muddle through. No good society can be unprincipled, and no viable society can be principle-ridden.[126]

Our society needs flexibility that neutral principles cannot provide: "Mechanical use of rules, if possible, is suited only to a society which is relatively homogeneous and unchanging."[127] This criticism must be modified, though, since Wechsler clearly would permit a case to be overturned (perhaps even more easily than under Levi's system) as long as a neutral principle is used to overturn the earlier cases.[128]

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[124]Clark, "Plea for the Unprincipled Decision," p. 545.

[125]Rostow, p. 142. Ronald Dworkin, in Taking Rights Seriously (Cambridge: Harvard University Press, 1977) takes the position that there is only one correct decision in any case, developing his own set of principles. For a criticism of this position, see Kent Greenawalt, "Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges," Columbia Law Review, 75 (1975), 359-399.

[126]Bickel, "Foward to the Supreme Court," p. 49.

[127]David Dittfurth, "Judicial Reasoning and Social Change," Indiana Law Journal, 50 (1975), p. 259.

[128]Vevel, p. 1387.

The final criticism of neutral principles is that it requires too much from the courts. It is too much to expect the courts to decide all future cases. Rather, the court should keep open options for future courts.[129] Judicial reasoning, according to Levi, should be retrospective, filling in the gaps of past cases.[130] Wechsler argues, however, that the court should at least be aware of possible future cases. Perhaps all future cases cannot be anticipated, but at least some thought should be directed in that direction. There may be some cases where the principle cannot be articulated, but at least an attempt at articulation should be made.[131]

Implications for Argumentation

Wechsler's plea for neutral principles has been the subject of a wide range of controversy. Many implications for argumentation theory can be discerned from both Wechsler's paper and the response to it. The focus of his paper, as well as his critics, has been on warrant establishing arguments. In law, as in argument in general, the creation of the premises from which argument proceeds is a critical step.

Wechsler notes the importance of the goal of a field in determining the legal rules to be applied. His discussion of the origin of judicial review is vital to his argument, since his emphasis on neutral principles

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[129]Christie, p. 1320.

[130]Levi, p. 276.

[131]Wechsler, "Nature of Judicial Reasoning," pp. 297-300.

is based on the goal of the court system. In addition, his critics, by noting how vital values are to a legal system, also emphasize that law should reflect societal values. Indeed, contrary to Wechsler's wishes, most of his critics note that argument in law (and other fields) cannot be value free, and thus argument must be value laden.

Second, Wechsler emphasizes the importance of transcending the immediate decision in making a decision. Unlike Levi, who emphasized the use of past precedents in legal decisions, Wechsler admonishes the judges to look to the future effect of a decision; at least to the forseeable cases that could be covered by the rule used to decide the immediate case. The decision must transcend the immediate result of the case, and the judge must consider the other cases a decision would cover. While Wechsler may have difficulty articulating the exact nature of his neutral principles, they may act as, to use Fuller's terms, a "morality of aspiration," a goal for individual judges to strive for, even if they be fully achieved. For other disciplines, the strive for "neutral" principles may also be desirable. Individuals may predict what other phenomena may be covered by a rule that applies to an immediate investigation, and to discover if the prediction is, in fact, accurate.

Wechsler and Hart also note that argument takes time. The judge in a Supreme Court, or in any other field, can only hear a finite number of arguments if (s)he plans to have enough time to deliberate and make a rational decision. This has two implications. First, it increases the need for neutral principles since, once the principle has been decided, the judge can determine future cases by deductive

reasoning (presumably saving time), rather than going through all the effort required to weigh all the advantages and disadvantages of individual cases. Second, the limits on the amount of arguments a judge can hear places increased emphasis on the certiorari policy of a court: determining what case to hear can become almost as important to the legal system as determining the decision in a case that is heard.

Fourth, Hart again raises the issue of the forum of legal argument. Supreme Court decisions arenot made by vote, but rather require a great deal of deliberation. More time and increased interest in exchange of opinions between justices, according to Hart, will produce better decisions, even though the form of argument remains the same. Thus a study of the forum of legal argument may aid in better argument in law, and perhaps in other fields.

Finally, Wechsler emphasizes the importance of articulating reasons for decisions. The judge may be in a different position from other members of the legal profession, in that (s)he is expected to settle arguments, rather than make arguments. To that end, the writing of an opinion can assist in the workings of the legal system. The judge has the obligation to respond to the arguments of the party (s)he decides against, both to insure there is a reason for rejecting that position, and to insure that the losing party feels that (s)he has been treated fairly. The articulation of reasons also acts as a check on the justice, and provides guidelines for future litigants.

CHAPTER V

THE IMPLICATIONS OF LEGAL ARGUMENT

> Many years ago, at the conclusion of a particularly difficult case both in point of law and of fact, tried to a court without a jury, the judge, a man of great learning and ability, announced from the Bench that since the narrow and prejudiced modern view of the obligations of a judge in the decision of causes prevented his resort to the judgment aleatory by the use of his 'little, small dice' he would take the case under advisement, and, brooding over it, wait for his lunch.[1]

> In the end, the justification for the adversary system lies in the fact that it is a means by which the capacities of the individual may be lifted to the point where he gains the power to view reality through eyes other than his own, where he is able to become as impartial, and as free from prejudice, as 'the lot of humanity will admit.'[2]

> There is the old story of the layman who was appointed to a position in India where he would have to pass in his official capacity on various matters in controversy between natives. Upon consulting a legal friend, he was told to use his common-sense and announce his decisions firmly; in the majority of cases his natural decision as to what was fair and reasonable would suffice. But, his friend added: 'Never try to give reasons, for they will usually be wrong.'[3]

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[1]Joseph C. Hutcheson, Jr., "The Judgement Intuitive: The Function of the 'Hunuch' in Judicial Decision," Cornell Law Quarterly, 14 (1929), 274.

[2]Lon L. Fuller, "The Adversary System," in Talks on American Law, Second edition, edited by Harold J. Berman (New York: Vintage Books, 1971), p. 47.

[3]John Dewey, "Logical Method and Law," Cornell Law Quarterly, 10 (1924), 17.

When in doubt, do the right thing.[4]

When we began this discussion of legal argumentation, we outlined two issues concerning argument in general: 1. What is the nature of a field of argument; and 2. What are the implications of legal argumentation for argumentation theory in other fields? Having explored the theories of three legal scholars, it is now possible to propose a tentative answer to these questions. Such a response is best made by indicating what guidelines are suggested by this study for use in distinguishing fields of study from each other, and by explaining how the characteristics that distinguish legal argument from other fields of argument can aid in the understanding of argument in general. Thus, this chapter will suggest that fields of argument differ from each other in four basic areas: the goals of the field; the conditions of relevance for problems; the forum in which argument takes place; and the members of the field.[5] Specific implications of legal argumentation will be discussed within each of these four topics.

Goals of a Field

Every field is unified by a goal that both provides guidance for argument within a field, and also distinguishes that field from other fields. Toulmin notes:

The crucial element in a collective discipline (we

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[4]Paul Porter Doctrine, cited in Walter F. Murphy, Elements of Judicial Strategy (Chicago: University of Chicago Press, 1964), p. 36.

[5]For an alternative view of fields, see Stephen Toulmin, Richard Ricke and Allan Janik, An Introduction to Reasoning (New York: Macmillan Publishing Co., Inc., 1979), pp. 195-202.

> have argued) is the recognition of a sufficiently agreed goal or ideal, in terms of which common outstanding problems can be identified.[6]

Members of a field are unified by some purpose. Their argument has some overall direction or goal:

> . . . in other enterprises and fields of argumentation, the modes of practical reasoning we expect to find in any particular field - in natural science or art criticism, in ethical discussion or elsewhere - will once again reflect the general purposes and practical demands of the enterprise under consideration.[7]

The field has some purpose for existing, and the rules of argument in that field will reflect the goal of the field. The goal of the field will also shape the way the members of the field approach the study of the phenomena they are interested in: "The activities involved are organized around and directed towards a specific and realistic set of agreed collective ideals."[8]

The importance of the goal of a field is illustrated by the legal field. Dworkin notes:

> The emphasis on tactics had a more lasting effect within the law schools. Scholars like Myres McDougal and Harold Lasswell at Yale, and Lon Fuller, Henry Hart, and Albert Sachs at Harvard, though different from one another, all insisted on the importance of regarding the law as an instrument for moving society toward certain large goals, and they tried to settle questions about the legal process instrumentally, by asking which solutions best advanced these goals.[9]

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[6]Stephen Toulmin, Human Understanding: The Collective Use and Evolution of Concepts (Princeton: Princeton University Press, 1972), p. 364.

[7]Toulmin, Rieke and Janik, p. 200.

[8]Toulmin, p. 379.

[9]Ronald Dworkin, Taking Rights Seriously (Cambridge: Harvard University Press, 1977), p. 4.

Those legal scholars discussed in the first four chapters support this conclusion. Levi thus views the goal of law to be providing the best balance between stability and change, and his description of legal reasoning is designed to promote this balance. The proponents of stare decisis justify that decision rule by an appeal to the goals that they feel a legal system should have: stability, justice, efficiency, reliance, and certainty. Wechsler begins his discussion of neutral principles by examining the reasons for (or goal of) judicial review. Fuller offers his guidelines for an internal morality of law by arguing that the goal of a legal system is to "subject human conduct to the governance of rules."[10] In all these cases, the guidelines for legal reasoning are justified based on the goal of the field.

The emphasis on the goal of the field has some interesting implications. Since each field has its own set of goals, and the warrants for argument are selected in order to further that goal, it is possible that some fields may develop rules for argument that may not be "rational" in the traditional sense. For example, Lord Herschell suggested "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it."[11] This would suggest

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[10]Lon L. Fuller, The Morality of Law (New Haven: Yale University Press, 1969), p. 122.

[11]Lord Herschell, quoted in Roscoe Pound, "Mechanical Jurisprudence," Columbia Law Review, 8 (1908), 606.

that he would argue for decision rules that may not be logically sound, but that those affected feel are just. In some cases this may require the judge to be inconsistent or illogical, if by so doing those affected think justice is done. The implication is that, in some cases, the goal of a field may not be truth, but may be efficiency, the satisfaction of those involved, or other ends.

One example of a "non-rational" field, for example, might be argument that takes place between friends. The goal (or one goal) of this field may not be to discover the truth, but to argue in such a way as to enable the relationship to continue. In this case, normally fallacious arguments like hasty generalizations and post hoc arguments may be legitimate (or at least not incorrect) if their use does not hinder the goal of the field. Similarly, a "sound" argument, if it causes one member to get angry, would run against the goal of the field, and thus would be rejected as inappropriate by members of that field.[12] The appropriateness of any argument, thus, is a function of the goal that members of a field share. The goal will vary from field to field, and thus is one way to differentiate between fields.

Once the goal of a field has been determined, this goal is utilized by members of a field to help screen out potential information and to determine what types of arguments should be heard. This screening process suggests a second way that fields differ from each other: the condition of relevance.

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[12]For an example of the type of rules that may govern such a field, see George R. Bach and Peter Wyden, The Intimate Enemy (New York: Avon Books, 1968).

Conditions of Relevance

Fields of argument often differ from one another based on the conditions each field places on data before that data can be said to be relevant to the field. This is not to say the actual data will vary from field to field; rather, due to the perspective a field has, certain features of the data will be highlighted.

The data in one field will often be the same as the data in another field. This is certainly the case in law. Legal decisions on segregation have used data on the effects of segregation on education; decisions on abortion draw from data associated with biology; and decisions reviewing environmental impact statements draw from other scientific fields. Dworkin argues:

> The philosophy of law studies philosophical problems raised by the existence and practice of law. It therefore has no central core of philosophical problems distinct to itself, as other branches of philosophy do, but overlaps most of these other branches. Since the ideas of guilt, fault, intention, and responsibility are central to law, legal philosophy is parasitic upon the philosophy of ethics, mind, and action. Since lawyers worry about what law should be, and how it should be made and administered, legal philosophy is also parasitic on political philosophy. Even the debate about the nature of the law, which has dominated legal philosophy for some decades, is, at bottom, a debate within the philosophy of language and metaphysics.[13]

The data thus may be the same for law and other fields. It is not the data per se that divides fields of argument from each other, rather, the criteria used to determine what data is relevant,

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[13]R. M. Dworkin, The Philosophy of Law (Oxford: Oxford University Press, 1977), p. 1.

what portions of the data should be abstracted out, and what data is irrelevant helps distinguish one field from another. Toulmin, Rieke and Janik phrase the question: "What makes one particular set of grounds or facts acceptable and relevant for the purposes of this or that specific claim?[14] Even though two fields may find that the same data is relevant for both fields, the process used to reach that conclusion will vary from one field to another, and the criteria of relevance will vary:

> Accordingly, relevance is a subjective matter, to be discussed in science by scientists, in law by lawyers, and so on. There are very few 'conditions of relevance' of an entirely general kind that hold good in all fields and forums and apply to all types of arguments.[15]

The criteria of relevance involves two concepts. At the first level, it involves abstracting out of the universe of potential inputs the relevant information needed to make a decision; in legal terms this involves the separation of the ratio from the dicta. This means that two observers from different fields will look at the same event and view different data:

> The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the seal-coal fire, is that he forsees that the public force will act in the same way whatever his client had upon his head.[16]

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[14]Toulmin, Rieke and Janik, p. 34.

[15]Ibid.

[16]Oliver Wendell Holmes, "The Path of the Law," Harvard Law Review, 10 (1897), 458.

Each field must set up some criteria for evaluating what part of the data is worth mentioning in an argument.

The second, and largely neglected, concept implied by the criteria of relevance is what issues should the field address? Any field is faced with a vast array of potential data and claims to examine and must make decisions concerning what areas of study should be pursued. The legal counterpart to this process is the certiorari process, discussed by both Hart and Wechsler. The court system cannot decide all cases that arise, so it must choose which cases it will hear. Woodward and Armstrong observe:

> The decision to take the case requires that the Court note its jurisdiction or formally grant cert. Under the Court's proceedures, the Justices have discretion in selecting which cases they will consider. Each year, they decide to hear fewer than two hundred of the five thousand cases that are filed.[17]

This means that the standards for evaluating whether or not a case will be heard are built into the system of legal argument.

The certiorari policy involves two assumptions. First, it assumes that argument takes time. Second, as a result of the first assumption, the certiorari process assumes the legal system must make choices about which arguments to hear. The judicial system must be selective, hearing and deliberating on some arguments, while ignoring other arguments. Although "the romantic notion that the Supreme Court sits 'to do justice' in

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[17] Bob Woodward and Scott Armstrong, The Bretheren (New York: Simon and Schuster, 1979), p. 2.

every case potentially within its jurisdiction dies hard",[18] the Supreme Court must make choices on what cases it will hear. Prettyman argues:

> Obviously, the Court must deny hearings in all but the most exceptional cases, or it will not be able properly to exercise its judgement on the merits in those cases in which review is granted.[19]

The Report of the Study Group on the Caseload of the Supreme Court concurred:

> The indispensable condition for the discharge of the Court's responsibility is adequate time and ease of mind for research, reflection, and consultation in reaching a judgement, for critical review by colleagues when a draft opinion is prepared, and for clarification and revision in light of all that has gone before.[20]

While there is clear agreement on the importance of the certiorari decision, the guidelines for certiorari are, as Wechsler suggested, unclear. The only codification of the certiorari policy is in the U.S. Supreme Court Rule 19. Emphasizing that a writ of certiorari is a matter of judicial discretion, the rule lists a few of the conditions that will be considered in granting certiorari:

> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

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[18]Felix Frankfurter and Henry M. Hart Jr., "The Business of the Supreme Court at October Term, 1933," Harvard Law Review, 48 (1934), 264.

[19]E. Barrett Prettyman, Jr., "Opposing Certiorari in the United States Supreme Court," Virginia Law Review, 61 (1975), 200.

[20]Report of the Study Group on the Caseload of the Supreme Court," Federal Rules Decisions, 57 (1973), 578.

> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in which has not been, but should be, settled by this court. . . .[21]

The list of conditions in rule 19 is not comprehensive, nor is it meant to be. Tanenhaus, Schick, Muraskin and Rosen suggest that the Supreme Court is influenced by the parties involved, the existence of dissention among lower court judges, and the nature of the issues raised.[22] Earp summarized some of the reasons for denial of certiorari as follows:

> (1) the unimportance of the issue;
> (2) the absence of a conflict between the lower court opinion and other circuits or prevailing Supreme Court precedents;
> (3) the uniqueness of the fact situation or specific issue, with the attendant likelihood that the problem will not recur;
> (4) the danger of too narrow or too broad an interpretation of the decision;
> (5) the presence of unresolved issues of fact or the complexity of the fact situation;
> (6) the inappropriateness of review due to current economic, political, or social conditions which favor the status quo;
> (7) the unreasonableness of the timing of the petition, in light of recent legal developments in the area; and,
> (8) the fairness and correctness of the lower court decisions.[23]

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[21]U.S. Supreme Court Rule 19, 28 United States Code Annotated.

[22]Joseph Tanenhaus, Marvin Schick, Matthew Muraskin, and Daniel Rosen, "The Supreme Court's Certiorari Jurisdiction: Cue Theory," in The Federal Judicial System, edited by Thomas Jahnige and Sheldon Goldman (Hinsdale, Illinois: Dryden Press, 1968), pp. 109-121, esp. p. 115.

[23]Stephen W. Earp, "Sovereign Immunity in the Supreme Court: Using the Certiorari Process to Avoid Decisionmaking," Virginia Journal of International Law, 16 (1976), 911-912.

Prettyman[24] provides a longer list of 30 reasons for the denial of certiorari, although in many cases they overlap.

At times, the Supreme Court has attempted to articulate guidelines governing when they will rule on an issue. The most widely cited example of these guidelines is Brandeis' concurring decision in Ashwander v. Valley Authority:

> 1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding
> . . . .
> 2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'
> 3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'
> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.
> 5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.
> 6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.
> 7. 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[25]

What all these guidelines attempt to do is to establish some objective way to determine which arguments the Court should hear.

While the certiorari policy may appear to be unique to legal argument, the same function must be served in all fields. It is impossible to study all knowledge. The field as a field tends to

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[24]Prettyman, pp. 200-207.

[25]Ashwander v. Valley Authority, 297 U.S. 288, 346-348.

emphasize certain types of study over others. Kuhn poses the question that faces each scientist:

> On what aspects of nature do scientists ordinarily report? What determines their choice? And, since most scientific observation consumes much time, equipment, and money, what motivates the scientist to pursue that choice to a conclusion?[26]

The field must provide guidelines for members of the field to follow in determining what avenues of inquiry should be followed:

> A paradigm can, for that matter, even insulate the community from those socially important problems that are not reducible to the puzzle form, because they cannot be stated in terms of the conceptual and instrumental tools the paradigm supplies. . . . One of the reasons why normal science seems to progress so rapidly is that its practitioners concentrate on problems that only their own lack of ingenuity should keep them from solving.[27]

The field must develop standards, sometimes unspoken, to determine what argument in the field should be encouraged, and what should be tabled for future discussion. What experiments are worthwhile? What hypotheses should be tested? While this step is critical, it is often not articulated. Decisions about what research should be funded and what research should be discouraged all will affect the growth of the field. At the same time, research that may seem insignificant to the field may turn out to be most productive:

> A study of the 'Anti-bacterial Substance in Filtrates of Broth' resulted in the first workable penicellin. Out of a project called ' Sex life of the Screwworm'

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[26]Thomas S. Kuhn, The Structure of Scientific Revolutions (Chicago: University of Chicago Press, 1962), p. 25.

[27]Ibid., p. 37.

> came the eradication of a parasite that was destroying millions of dollars' worth of cattle every year.[28]

Thus, the creation of standards for determining what subjects are worth debate can hinder the flow of scientific knowledge:

> With standards set higher, no one satisfying the criterion of rationality would be inclined to try out the new theory, to articulate it in ways which showed its fruitfulness or displayed its accuracy and scope. I doubt that science would survive the change. What from one viewpoint may seem the looseness and imperfection of choice conceived as rules may, when the same criteria are seen as values, appear an indispensable means of spreading the risk which the introduction or support of novelty always entails.[29]

Thus the field is placed in a dilemma: It must develop some criteria for determining what arguments are worth arguing, while the creation of such a rule will distort the view of realtity and perhaps prevent the discovery of useful arguments.

Perhaps nowhere is this choice more obvious than in academic debate, where a portion of the literature is devoted to the discussion of the selection of debate topics. The procedure is similar to that of Congress, which must first decide what bills should be discussed in a given term, and then it discusses the merits of the legislation. Freeley suggests some of the guidelines used by the academic forensics community:

> 1. Is there evidence of reasonably widespread interest in the area....

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[28]Robert A. Barr, "U.S. Research Grants: Butt of Fun and Fury," U.S. News & World Report, December 17, 1979, p. 82.

[29]Thomas S. Kuhn, The Essential Tension: Selected Studies in Scientific Tradition and Change (Chicago: University of Chicago Press, 1977), p. 332.

> 3. Is the weight of conflicting evidence and reasoning approximately equal?
> 4. Is most of the evidence available in the typical college library?
> ....
> 7. Is there a high degree of probability that the status quo will not change during the debate season?[30]

While these guidelines are directed toward an audience that will vote on specific topic, the principle behind them is the same as that of the Supreme Court's certiorari policy: the determination of what arguments are worth arguing can be as critical as the actual argument that takes place. One could not criticize Congress' arguments on women's rights in the late 1950's: the problem was not that the arguments used by Congress were bad, but rather that there were no arguments. Thus, at least one critical variable in examining argument in a field is not just analyzing what is argued, but to examine how the members of the field determine what should be argued.

Forums

Fields of argument can also be distinguished from each other by examining the forum in which argument takes place within each field. O'Keefe distinguishes between two types of argument, which he calls argument$_1$ and argument$_2$.[31] Argument$_1$ refers to the utterance, or the form of an argument. Argument$_2$ refers to an interaction, or the forum in which argument takes place.[32] Each

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[30]Austin J. Freeley, "What are the Criteria of a Good Debate Resolution?" Paper presented at the Annual Convention of the Speech Communication Association, November 11, 1979; pp. 1-6.

[31]Daniel J. O'Keefe, "Two Concepts of Argument," Journal of the American Forensic Association, 13 (1977), 121-128.

[32]See Walter Ulrich, "A Process View of Argument," Journal of Human Interaction, 1 (1978), 38-43.

field of argument has a distinct type of argumentative forum. Just as Bitzer suggested that each rhetorical action takes place in a "rhetorical situation"[33] each argument takes place in an argumentative forum. Each field develops professional forums "within which recognized 'reason-producing- procedures are employed to justify the collective acceptance of novel procedures."[34] Toulmin, Rieke and Janik suggest:

> The trains of reasoning that it is appropriate to use vary from situation to situation. As we move from the lunch counter to the executive conference table, from the science laboratory to the law courts, the 'forum' of discussion changes profoundly. The kind of involvement that the participants have with the outcome of the reasoning is entirely different in the different situations and so also will be the ways in which possible outcomes of the argument are tested and judged.[35]

The importance of the forum of debate to legal argumentation has already been alluded to. Levi argues:

> The forum protects tha parties and the community by making sure that the competing analogies are before the court. The rule which will be created arises out of a process in which if different things are to be treated as similar, at least the differences have been urged.[36]

The forum thus acts to insure that all ideas have their chance in a court. Given the importance of the forum of argument, it is

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[33]Lloyd F. Bitzer, "The Rhetorical Situation," Philosophy and Rhetoric, 1 (1968), 1-14.

[34]Toulmin, p. 379.

[35]Toulmin, Rieke and Janik, p. 7.

[36]Edward H. Levi, An Introduction to Legal Reasoning (Chicago: University of Chicago Press, 1949), p. 5.

appropriate to examine the nature of the legal forum.

There are three possible views of the importance of a forum in law. First, the forum can be seen as being irrelevant. Second, the forum can be viewed as being naturally desirable; and third, the forum can be viewed as having a neutral impact on argument. The first view suggests that a forum is unnecessary for argument to take place. This position is very superficial, since it ignores the human nature of argument. In a court, the rules of law and facts in a case do not spring into being, rather thay are sought after by humans. Discovering the nature of a crime, or the prior case law requires effort by individuals, as well as a forum for the materiaal to be presented before. This requires that some emphasis be placed on the nature of the forum.

The second view of the forum emphasizes that the nature of the forum is also unimportant because it will not effect the outcome of an argument. Drawing from the philosophy of advocates of free speech, this position suggests that, left alone, the truth will emerge within a field. This Mill argues:

> The steady habit of correcting and completing his own opinion by collating it with those of others, so far from causing doubt and hesitation in carrying it into practice, is the only stable foundation for a just reliance on it: for, being cognisant of all that can, at least obviously, be said against him, and having taken up his position against all gainsayers - knowing that he has sought for objections and difficulties, instead of avoiding them, and has shut out no light which can be thrown upon the subject from any quarter - he has a right to think his judgement better than that of any person, or any multitude, who have not gone through a similar process.[37]

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[37] John Stuart Mill, "On Liberty," in Essential Works of John Stuart Mill, edited by Max Lerner (New York: Bantam Books, 1971), p. 272.

This view tends to emphasize the marketplace of ideas concept: that, left alone, a field will naturally move toward the truth.[38] This view has a great deal of instrinsic appeal, being tied to First Amendment values.

While the assumption that an unregulated forum does produce the truth does have a great deal of support, it is not without its critics.[39] Thus Chafee suggests that a number of factors may prevent unlimited discussion from producing the truth including selective attention, information overload, and unequal distribution of access to the media.[40] Windes and Hastings, while advocating free speech, note that freedom of speech requires the exchange of ideas:

> For in the absence of debate unrestricted utterance leads to the degradation of opinion. By a kind of Gresham's law the more rational is overcome by the less rational, and the options that will prevail will be those which are held most ardently by those with the most passionate will.[41]

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[38]See, for example, Alexander Meiklejohn, Political Freedom (New York: Oxford University Press, 1965), Thomas I. Emerson, The System of Freedom of Expression (New York. Vintage Books, 1970), esp. pp. 3-20, and Franklyn S. Haiman, Freedom of Speech (Skokie, Illinois: National Textbook Company, 1976), esp. chapter 5: "Why Freedom of Speech: Challenge and Response."

[39]See Peter Radcliff, ed., Limits of Liberty: Studies of Mill's On Liberty (Belmont, California: Wadsworth Publishing Company, Inc., 1966).

[40]Zechariah Chafee, Jr., "Does Freedom of Speech Really Tend to Produce Truth," in The Principles and Practice of Freedom of Speech, edited by Haig Bosmajian (Boston: Houghton Mifflin Company, 1971), pp. 326-328.

[41]Russel R. Windes and Arthur Hastings, Argumentation and Advocacy (New York: Random House, 1965), p. 31.

What is interesting is that often those with the most vocal support of the freedom of speech are those that see a need to regulate the forum of communication. Thus in speech, while maintaining that restrictions on the content of speech are unjustified, many feel that an organized body should follow rules of parliamentary procedure, which regulates the forum of debate. Choase notes the paradox as it applies to law:

> In a court, it is of utmost importance that the truth be discovered. Whatever lawyers say when talking at large about freedom of speech, when it comes to their own affairs, they display great anxiety when truth and falsehood are grappling in a free and open encounter. The result is the most highly regulated marketplace for ideas imaginable. Who can speak, when they can speak, what they can speak about, the order in which people can speak, who is allowed to question them, what questions can be asked, and much more are all determined by the regulations of the court. It is apparent that lawyers believe, in their own business, that it is only through a highly controlled marketplace for ideas - that is, the absence of free speech as it is generally understood - that truth can be established.[42]

The importance of the regulation of the forum of legal argument leads to the third view of the forum: the importance of the regulation of the forum.

One way to view the importance of the regulation of a forum to a field is to view the field as an organization. In order for the field to operate, certain regulations are needed to insure the efficient operation of the organization.[43] In law, the overriding

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[42]R. H. Choase, "Advertising and Free Speech," in Advertising and Free Speech, edited by Allen Hyman and M. Bruce Johnson (Lexington, Mass.: D. C. Heath and Co., 1977), p. 7.

[43]See, for example, Bobby R. Patton and Kim Griffin, Decision-making Group Interaction, second edition (New York: Harper & Row, Publishers, 1978).

governing principle for the field is the use of the adversary process. While there is not a lot of material on the nature of the adversary process,[44] there appear to be two justifications for the use of the adversary process. First, the adversary process is justified because it promotes the truth. The American Bar Association Project on Standards for Criminal Justice notes:

> The adversary system which is central to our administration of criminal justice is not the result of abstract thinking about the best means to determine disputed questions of law and fact. It is the result, rather, of the slow evolution from trial by combat or by champions to a less violent form of testing by argument and evidence.[45]

While some may argue that many of the characteristics of the advocacy system may resemble trial by combat,[46] the assumption behind the adversary system is that it can promote the attainment of the truth better than alternative means:

> Two adversaries, approaching the facts from entirely different perspectives and objectives and functioning within the framework of an orderly and established set of rules, will uncover more of the truth than would investigators, however industrious and objective, seeking to compose a unified picture of what had occurred.[47]

By assigning advocates to represent both sides in a conflict, presumably the truth will emerge.

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[44]Anne Strick, Injustice for All: How our Adversary System of Law Victumizes Us and Subverts Justice (New York: Penguin Books, 1978), pp. 20-21.

[45]American Bar Association Project on Standards for Criminal Justice, The Prosecution Function and the Defense Function (New York: Institute of Judicial Administration, 1971), p. 2.

[46]Strick, p. 39.

[47]George C. Christie, "Objectivity in the Law," Yale Law Journal, 78 (1969), 1329-1330.

In addition to the truth-seeking function of the adversary process, the adversary process also aids in giving all parties involved the impression that they have been treated fairly. Christie argues:

> It will be assumed that the primary social purpose of the judicial process is deciding disputes in a manner that will, upon reflection, permit the loser as well as the winner to feel that he has been fairly treated. As Professor Fuller has contended, this goal requires that courts grant the parties the right to present proofs and reasoned arguments to them and that the courts squarely meet the proofs and reasoned arguments addressed to them by the parties.[48]

Fuller suggests that the justification for the adversary process is "to preserve the integrity of society itself. It aims at keeping sound and wholesome the procedures by which society visits its condemnation on an erring member."[49] The adversary process increases the likelihood that a person will feel that they have been treated fairly.

> For the accused, a neutral tribunal serves to increase his assurance that he will be treated fairly, and tends to establish confidence that leads him to stand trial rather than flee or otherwise seek to subvert the legal process and, if he is found guilty, to accept the penalties in a spirit conducive to his rehabilitation.[50]

To insure these goals, several guidelines must be drawn up by the members of the field. Ehninger and Brockriede outlined six such

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[48] Ibid., p. 1329-1330.

[49] Fuller, "The Adversary System," p. 39.

[50] American Bar Association Project on Standards for Criminal Justice, p. 4.

guidelines for an advocacy system in general when they argued that all parties in an advocacy system must:

1. Enter the competing views into full and fair competition to assess their relative worth.
2. Let this competition consist of two phases. First, set forth each view in its own right, together with the most convincing supporting proofs. Second, test each view by seeing how well it withstands the strongest attacks an informed opponent levels against it.
3. Delay a decision until both sides have been presented and subjected to testing.
4. Let the decision be rendered not by the contending parties themselves but by an external adjudicating agency.
5. Let this agency weigh the competing arguments and produce a decision critically.
6. Let the participants agree in advance to abide by such a decision.[51]

One implication of this view of the forum is that there is a clear separation between the advocates and the judge. Each party has a distinct function in the advocacy system, which requires different rules:

> The philosophy of adjudication that is expressed in 'the adversary system' is, speaking generally, a philosophy that insists on keeping distinct the function of the advocate, on the one hand, from that of the judge, or of the judge from that of jury, on the other. The decision of the case is for the judge, or for the judge and jury. That decision must be as objective and as free from bias as it possibly can.[52]

This would prescribe certain rules for both the advocate and the judge. Simon suggests that there are four principles of conduct for the advocate:

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[51]American Bar Association Project on Standards for Criminal Justice, p. 4.

[52]Fuller, "The Adversary System," p. 34.

> The first principle of conduct is the principle of neutrality. This principle prescribes that the lawyer remain detached from his client's ends. . . .
>
> The second principle of conduct is partianship. This principle prescribes that the lawyer work aggressively to advance his client's ends. . . .
>
> (Third) is the principle of procedural justice. In its most general usage, procedural justice holds that the legitimacy of a situation may reside in the way it was produced rather than its intrinsic properties.
>
> (Fourth) is professionalism. In its most general usage, the term professionalism refers to the notion that social responsibility for the development and application of certain political and specialized disciplines should be delegated to the practitioners of these disciplines.[53]

For the judge, there is a separate, though less articulated function. The judge is to remain neutral and to attempt to avoid injecting his/her biases into the decision.

While the adversary system is most commonly associated with the legal system, its benefits at promoting truth and increasing satisfaction has led to calls that it be used in other fields. Janis and Mann note:

> A number of experts on the psychology of large organizations have called attention to some of the procedural implications of management studies showing that conflicts and disagreements among the members of a decision-making group, including those stemming from clashing interests among rival subunits within a bureaucracy, can have a constructive effect on the quality of the group's search for and analysis of alternatives.[54]

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[53]William H. Simon, "The Ideology of Advocacy· Procedural Justice and Professional Ethics," Wisconsin Law Review, 1978 (1978), 36-38.

[54]Irving L. Janis and Leon Mann, Decision Making: A Psychological Analysis of Conflict, Choice and Commitment (New York: The Free Press, 1977), p. 397.

They therefore recommend that in all meetings "devoted to evaluating policy alternatives, one or more members 'should be assigned the role of devil's advocate.'"[55] In science, Kantrowitz has suggested an adversary proceeding to resolve disputes:

> . . . when two sides disagreed on a scientific policy question, the opponents would be asked to appear before a specially constituted panel composed of distinguished scientists from fields other than the one under dispute. Advocates, who would also be publicly supported when necessary, would present their arguments to the panel and would actually cross-examine each other. The panelists would then examine the arguments and publish their judgement on the facts.[56]

While Kantrowitz's suggestion has not received much support, it does illustrate that by examining the nature of argumentative forums in various fields, suggestions for the modification of other fields can be made.

The legal argumentative field does have a distinct forum for argumentation. The emphasis is on the adversary process, through which competing views of the nature of the law are presented and evaluated. The ultimate decision between views of the law is made by a third party. This procedure is justified both because it increases the probability that truth will be found and that all concerned will feel that they have been treated fairly. The adversary process does, however, rely on human actors, and thus raises questions about the nature of the members of the field.

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[55] Ibid., p. 399.

[56] "Weighing the Evidence," TIME, February 23, 1976, p. 45.

Members of a Field

The final area of distinction between fields consists of the members of the fields. Each field consists of a community of individuals with similar characteristics. Argument is a human activity, involving the interaction of human beings, and thus a study of argument should also consider the nature of those involved in argument:

> A collective human enterprise takes the form of a rationally developed 'discipline', in those cases where men's shared commitment to a sufficiently agreed set of ideals leads to the development of an isolable and self-defining repertory of procedures; and where those procedures are open to further modification, so as to deal with problems arising from the incomplete fulfilment of those disciplinary ideals.[57]

Like the legal system, the members of the field fall into two categories, although depending on the field these can overlap. The first set of members are the advocates; those that do the detailed work and present the arguments to be evaluated:

> A scientific community consists, in this view, of the practitioners of a scientific speciality. Bound together by common elements in their education and apprenticeship, they see themselves and are seen by others as the men responsible for the pursuit of a set of shared goals, including the training of their successors. Such communities are characterized by the relative fullness of communication within the group and by the relative unanimity of the group's judgement in professional matters.[58]

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[57] Toulmin, p. 359.

[58] Thomas S. Kuhn, "Second Thoughts on Paradigms," in The Structure of Scientific Theories, edited by Frederick Suppe (Urbana: University of Chicago Press, 1977), p. 461.

While sharing common views of the field, members advance their positions on the specific matter of controversy. In law, there are certain guidelines governing the advocates, especially in the post-Watergate era. Restrictions are placed on the manner in which an advocate can present material, and so on. The legal field also has unarticulated standards for the nature of the advocate. Jeans suggests that an advocate should have intellectual breadth, desire, an active mind, conbativeness, stomach, and sensitivity.[59] While the existence of these characteristics is not needed for an individual to be a member of the community, they do illustrate or provide a prototype for an "ideal" member of the community. Johannesen argues that in other forums similar guidelines for the advocates exist.[60]

These guidelines for the arguer are not, in the strictest sence, logical in nature. Rather, they are descriptive of desired behavior; in Fuller's terminology, they set up a morality of aspiration. It is desirable that individual advocates attempt to understand all the issues; that the advocacy take place in a cooperative environment; that the advocates seek the truth, but there is no objective way to measure the subjective motivations of the individual arguer. The field can thus create certain characteristics for individual advocates to aspire to, but these

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[59]James W. Jeans, Trial Advocacy (St. Paul: West Publishing Company, 1975), pp. 3-7.

[60]Richard L. Johannesen, Ethics in Human Communication (Wayne, New Jersey: Avery Publishing Group, Inc., 1978), pp. 27, 55-56.

act merely as goals for advocates.

A second type of individual (or group of individuals) in a field's community is the judge. This individual evaluates the arguments that others in the field present. Toulmin notes:

> To the extent that some group of men can be identified whose judgement carries dominant weight with professional colleagues in the science concerned, the approval of these men does more than anything else to ensure the success or failure, not only of new societies, journals, and meetings, but also of new ideas.[61]

The judges are members of the community, not outside figures. All argument within a community is directed to members within the community, not an outside audience:

> One of the strongest, if still unwritten rules of Scientific life is the prohibition of appeals to heads of state or to the populace at large in matters scientific. Recognition of the existence of a uniquely competent professional group and acceptance of its role as the exclusive arbiter of professional achievements has further implications.[62]

The judge role may not be centralized in one member. In law, for example, in some trials there are bifurcated juries; one jury will determine guilt or innocence, the other will determine the sentence.

In law, at least a portion of the responsibility of the judge has been to insure that the legal field maintain an image of rationality:

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[61]Toulmin, p. 283.

[62]Kuhn, Structure, p. 167.

> Part of the Court's power, for example, comes from the great public respect or even reverence for the law. Included here is what might be called the myth of a government of laws, not men. This concept, although largely true as a statement of the American heritage, has never been very satisfactory as a realistic and literal description of the political process; indeed it would seem better to say that laws are 'made, enforced, and interpreted by men.'[63]

A large portion of the power of the judiciary rests on the mystique that surrounds it and the assumption that it operates in a rational manner. This may oversimplify the workings of the Court. As Wechsler's critics have pointed out, it is often hard, if not impossible, to develop neutral principles for evaluating cases. One of the most devastating blows to the view of the legal system as operating rationally came with the December, 1979 publishing of The Brethren, by Bob Woodward and Scott Armstrong.[64] Dispelling the myth that Supreme Court Justices are more rational than mortal men, Woodward and Armstrong examined the inside workings of the Supreme Court. The picture described is one where decisions are are made based on internal court politics and personal dislikes. Warren Burger is said to have commented that "We are the Supreme Court and we can do what we want,"[65] and Douglas, when asked how he could decide a case when he was too blind to read replied, "I'll listen and see how the Chief votes and vote the other way."[66]

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[63]David L. Grey, "The Supreme Court as a Communicator," Houston Law Review, 5 (1968), p. 407.

[64]Woodward and Armstrong, op. cit.

[65]Ibid., p. 61.

[66]Ibid., p. 391.

While at one level this merely illustrates that the justices may not be following the precepts of legal reasoning, as Wechsler's critics have observed, it may be hard to develop neutral principles to govern the evaluation of argument. Rather than strive for ways to develop strict guidelines to govern the ways that argument can be evaluated, it may be wise to develop certain values that he (or she) should promote:

> The professional judgements of a 'Supreme Court Justice' in any science are never (as we saw) totally free, capricious or subjective: no standard, well-established procedure can guide the authoritive scientist in devising a new intellectual strategy, yet he is obliged to stake his own reputation on the outcome of his intellectual reappraisal.[67]

Thus Miller and Howell, in their response to Wechsler, argued:

> . . . neutrality, save on a superficial and elementary level, is a futile quest; that it should be recognized as such; and that it is more useful to search for the values that can be furthered by the judicial process than for allegedly neutral or impersonal principles which operate within that process.[68]

The judge should emphasize a commitment to the goals of the field. Indeed, many legal scholars argue that an understanding of the nature of the human condition is more important for a good judge than the following of the standards of "correct" legal reasoning.[69]

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[67]Toulmin, p. 502.

[68]Arthus S. Miller and Ronald F. Howell, "The Myth of Neutrality in Constitutional Adjudication," University of Chicago Law Review, 27 (1960), 661.

[69]See Holmes, op. cit., pp. 457-478, Pound, op. cit., pp. 605-623, Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed," Vanderbilt Law Review, 3 (1950), 395-406, Louis D. Brandeis, "The Living Law," Illinois Law Review, 10 (1916), 461-471, and Hutchenson, op. cit., pp. 274-288.

Fuller would emphasize that a judge emphasize the possibility that an individual be able to follow the law, and thus the judge should emphasize those values that enable individuals to be able to be governed by rules.[70] Similar guidelines may exist in other fields. Janis and Mann, for example, would suggest that a policy-maker follow seven principles:

> The decision maker, to the best of his ability and within his information-processing capabilities:
> 1. thoroughly canvasses a wide range of alternative courses of action;
> 2. surveys the full range of objectives to be fulfilled and the values implicated by the choice;
> 3. carefully weighs whatever he knows about the costs and risks of negative consequences, as well as the positive consequences, that could flow from each alternative;
> 4. intensively searches for new information relevant to further evaluation of the alternatives;
> 5. correctively assimilates and takes account of any new information or expert judgement to which he is exposed, even when the information or judgement does not support the course of action he initially prefers;
> 6. reexamines the positive and negative consequences of all known alternatives, including those originally regarded as unacceptable, before making a final choice;
> 7. makes detailed provisions for implementing or executing the chosen course of action, with special attention to contingency plans that might be required if various known risks were to materialize.[71]

While these are not rules of logic, they serve as standards for behavior, or procedures to be followed by a decisionmaker. The implication is that many fields, including law, set up certain standards of behavior for members of the field which act as constraints on the decision-making behavior.

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[70] See Fuller, The Morality of Law.

[71] Janis and Mann, p. 11.

The four characteristics of a field help us to compare one field to another. In some cases two fields will differ in all four areas, while in other cases two fields may differ in only a few areas. This suggests that these four characteristics may not have equal weight in distinghishing between fields.

If two types of argument differ across all four characteristics - that is - they are aimed at different goals, use different criteria for determining relevance, use different forums, and have a distinct membership - then the two types of argument can be considered to be in different fields. When two types of argument share only one or two of these characteristics, the problem of determining if they are in the same field is a little more complex. The same individuals may belong to two or more fields.

Similarly, the same forum can be shared by two or more fields (for example, some newspapers are part of the forum for the fields of economics, sociology, and political science). It would appear that the first two characteristics of a field - its goal and its criteria for relevance - distinguishes one field from another. The criteria for relevance can also help us discover subfields within a field unified by one goal. The last two characteristics help us to compare two fields, and perhaps to discover subfields.

Other Implications of Legal Argument

While several implications of legal argument for a general theory of argumentation have been mentioned throughout this study,

two should be highlighted. First, legal argument may serve as a paradigm for argument for other fields. By combining both inductive and deductive reasoning, Levi has outlined a type of reasoning that has implications for other fields. The analogy to Kuhn's view of the philosophy of science has already been mentioned.[72] Lichtman, Rohrer and Misner develop a similar model for policy analysis.[73] The pattern is simple: past events are observed, and similarities and differences are observed. From this, a general classificatory scheme is developed that would include the immediate event that the arguer is attempting to classify. Wechsler would carry this one step further and require that the arguer at least consider the implications of the classification of future decisions.[74]

The nature of the individual events (or precedents) will vary from field to field. In some cases, each precedent will consist of both a decision and a result. For example, in public policy, a policymaker may look at past actions and their results and note that certain policies have had certain desirable results while others have had certain undesirable results. In deciding a future policy, the decisionmaker would attempt to find common themes

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[72] See Chapter II.

[73] Allan J. Lichtman, Daniel M. Rohrer, and Joseph Misner, "The Role of Emperical Evidence in Debate· A Systems Approach," in Advanced Debate· Readings in Theory, Practice and Teaching, second edition, edited by David A. Thomas (Skokie, Illinois: National Textbook Company, 1979), pp. 272-286.

[74] See Chapter IV.

for past failures and attempt to show that the proposed policy does not have the same characteristics, while sharing the characteristics of successful policies. The process will be ongoing; as new data comes in the classification system will change.

Legal argument also aids in the guidance of future study. By emphasizing possible ways that the data can be interpreted, it emphasizes ways to test one classification scheme against another. For example, if one discovers that an individual behaves in a certain way whenever you see him, there are several conclusions one could draw: 1) the person behaves that way at all times; 2) that person behaves that way whenever he sees you; 3) the person behaves that way the time of day you see him; and so on. Each scheme explains the behavior of the individual, just as several principles may govern a set of legal case. To determine the most accurate description, the observer would isolate a prediction that one theory would predict, but not another, and see if the prediction is accurate.

The final implication of legal argumentation is the importance of the articulation of reasons for judgement. One of the restrictions placed on a judge is that the judge be required to articulate the reasons for the decision. As Wechsler has observed, this would place some constraints on the judge. Leflar notes:

> One function that is recognized both by detached students of the judicial process and by opinion writers themselves is that the necessiry for preparing a formal opinion assures some measure of thoughtful review of the faxts in a case and of the law's bearing upon them. Snap judgements

> and lazy preferences for armchair theorizing as against library research and time-consuming cerebral efforts are somewhat minimized.[75]

The act of justifying a decision explains to the advocates the reason for decision and also allows them to modify their positions in subsequent arguments. To a degree, it also highlights the separation of the judge from the advocate. The judge must address the arguments made by the advocates, but the decision is more of an evaluation of the arguments and the weighing of the positions, as opposed to the initiation of new arguments, although sometimes the line between the two positions is not clear. By the attempt to explain to both parties why the decision went the way it did the judge attempts to leave both parties satisfied.

Conclusion

The study of legal argumentation can lead to a vast number of implications for the student of argument, only some of which have been discussed in this study. Consistent with Toulmin's theory of reasoning, the legal community would appear to be a distinct field of argument, although it has some similarities to other fields. The major characteristics of legal argument that distinguish it from the other fields are its goals, its standard for relevance of argument, the forum in which its argument takes place in, and the nature of its community. All of these characteristics have some importance for the study of argumentation.

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[75]Robert A. Leflar, "Some Observations Concerning Judicial Opinions," Columbia Law Review, 61 (1961), 810.

The goal of a field will also affect the type of argument that takes place. While many fields may seek the understanding of a specific branch of knowledge, other considerations may also enter into the argument. A field may view other goals as being more important, such as justice, efficiency, or sensitivity to an individual, and thus may develop rules that may not be "rational" in the traditional sense. The standard of relevance answers the question what items should be argued. In a world with a large number of potential arguments, choices must be made, and a field must develop criteria for making those choices. While the Supreme Court's certiorari policy is one way of addressing the problem, other fields may want to develop more precise guidelines.

The forum in which an argument takes place is also critical. Argument does not take place in a vacuum; rather it involves human beings in a specific argumentative situation. The specific characteristics of that situation can influence the willingness of individuals to argue, the amount of information open to the arguers, the amount of time available for each individual to argue, and many other elements important to argument. Law, through the adversary system, provides one such forum for argument, but many others exist. It may will be productive for future scholars to examine both the common features of argumentative forums, as well as those characteristics that encourage productive arguments.

The members of the field are also an important part of the argumentative situation. All members of the community tend to share certain values and goals. A field may also create certain

standards of excellence; a morality of aspiration, for the members of the field. Since the members often have discretion about how to argue and how to evaluate argument, certain goals are provided and standards of conduct are provided for members of the field. Again, it may be desirable for other fields to articulate the prototype advocate and judge of that field.

The four characteristics of a field help us to compare one field to another. The first two characteristics - the goal of a field and the criteria for relevance - help us to distinguish one field of argument from another. The last two characteristics - the forum of the field and the field's membership - help us to compare two fields.

Finally, the format of legal argument can be applied to some other fields, both the form (the moving classification system) and the forum (the advocacy system). The requirement that the judge articulate reasons for a decision can also aid other fields in placing check on decisions.

Since the time of Aristotle, law and speech have been interconnected. Unfortunately, law has developed an image of its own, as a super-rational system that overlooks many of the discretionary aspects of justice. While some aspects of the legal system place restrictions on the decision, such as the adversary system, the use of the decision, and stare decisis, it still has elements of the irrational. Perhaps argumentation theory should learn from law that total absence of discretion and values in argument is neither possible or desirable, and rather we

should emphasize the forum in which argument takes place, the people who argue, and the restraints (though not total) on discretion in an argumentative situation.

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