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Law is a social practice that consists of argument, in large part. This article is a case study of legal argument. The author has undertaken the study in the belief that the forms assumed by legal argument relate to lawyers' conscious or unconscious understanding about what is persuasive in a given legal context. One can articulate these understandings by identifying and describing particular forms of argument and by determining the circumstances in which lawyers use each form. The author examines a set of Supreme Court opinions, using as a guide one of the few contemporary attempts to organize and classify forms of argument.

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My interest in the study of legal argument arose during a seminar guided by Professor Leon S. Lipson at the Yale Law School in 1972, when I wrote an early version of the present study.

> [T]o argue by example is neither like reasoning from part to whole, nor like reasoning from whole to part, but rather reasoning from part to part, when both particulars are subordinate to the same term, and one of them is known.**

I. INTRODUCTION

The general purpose of this study is to add to the development of an understanding of what is persuasive in legal argument. The subjects of the study are decisions made by the United States Supreme Court in the fall term of 1959, reported in volume 361 of *United States Reports*.[1] Judicial decisions are not the only source of examples of legal argument, but they do offer some comparative advantages for a case study. By studying signed opinions, one can follow a particular judge's style of argument over many decisions on different issues. Case reports, especially those of the United States Supreme Court, frequently present the arguments of a number of judges in majority, concurring, and dissenting opinions. Supreme Court cases thus offer a comparatively rich vein of argument to be explored. Decisions made by the Supreme Court in its 1959 Term are close enough to the present to represent contemporary legal argument, yet are distant enough for one to examine them with some detachment from the issues that disturb and divide us today.

Initially, I need to characterize the notion of a form of argument. I will adopt the usage and much of the classification developed by the Belgian scholar Chaim Perelman in his writings on the

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** ARISTOTLE, II PRIOR ANALYTICS 24:69a.13, in THE BASIC WORKS OF ARISTOTLE 103 (McKeon trans. 1968).

1. Bates v. City of Little Rock, 361 U.S. 516 (1960); NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960); Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960); United States v. Mersky, 361 U.S. 431 (1960); Forman v. United States, 361 U.S. 416 (1960); NLRB v. Deena Artware, Inc., 361 U.S. 398 (1960); Davis v. Virginian Ry., 361 U.S. 354 (1960); Goett v. Union Carbide Corp., 361 U.S. 340 (1960); Hess v. United States, 361 U.S. 314 (1960); Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); United States v. Robinson, 361 U.S. 220 (1960); Minneapolis & St. L. Ry. v. United States, 361 U.S. 173 (1959); Smith v. California, 361 U.S. 147 (1959); Inman v. Baltimore & O.R.R., 361 U.S. 138 (1959); Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959); Henry v. United States, 361 U.S. 98 (1959); United States v. Seaboard Air Line R.R., 361 U.S. 78 (1959); United Steelworkers v. United States, 361 U.S. 39 (1959); Harris v. Pennsylvania R.R., 361 U.S. 15 (1959).

nature of argumentation. The most important of these, *The New Rhetoric*,[2] written in collaboration with L. Olbrechts-Tyteca, is an ambitious attempt to develop a theory of *argumentation*, or informal reasoning, to stand alongside the theories of *demonstration*, or formal reasoning, that logicians have so richly developed since the middle of the last century.

Strict logical consequence is the subject of theories of formal reasoning. Legal argument, however, is not a matter of strict logical consequence.[3] The problems that lawyers encounter are not in the main resolvable by formal reasoning; we must reach our solutions by argumentation, or informal reasoning. The subject of the theory of argumentation is persuasion by discourse, much less tidy than strict logical consequence. "[T]he object of the theory of argumentation is the study of discursive techniques allowing us *to induce or to increase the mind's adherence to the theses presented for its assent.*"[4]

Although concerned with the means of securing adherence, Perelman's theory of argumentation is not a psychological theory, nor is it a linguistic theory.[5] The concern of *The New Rhetoric* is with characterizing *argumentative structures:* "We seek here to construct [a theory of argumentation] by analyzing the methods of proof used in the human sciences, law, and philosophy. We shall examine arguments put forward by advertisers in newspapers, politicians in speeches, lawyers in pleadings, judges in decisions, and philosophers in treatises."[6] Readers familiar with the study of rhetoric will recognize the influence of classical rhetoric[7] on Perel-

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2. C. PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC (J. Wilkinson & P. Weaver trans. 1969), *originally published as* LA NOUVELLE RHETORIC: TRAITE L'ARGUMENTATION (1958) [hereinafter cited as THE NEW RHETORIC].

3. *See, e.g.*, A. GUEST, *Logic in the Law*, in OXFORD ESSAYS IN JURISPRUDENCE 175 (1951).

4. THE NEW RHETORIC, *supra* note 2, at 4 (emphasis in orginial).

5. For an attempt to develop and apply a linguistic theory of constitutional adjudication, see J. BRIGHAM, CONSTITUTIONAL LANGUAGE: AN INTERPRETATION OF JUDICIAL DECISION (1978).

6. THE NEW RHETORIC, *supra* note 2, at 10.

7. There are four rhetorical traditions which, taken together, constitute the history of rhetoric. There is sophistic rhetoric, which has as its goal the effective manipulation of language without regard to truth and logic. This tradition continues in modern propaganda and in advertising techniques. There is Platonic anti-rhetoric, which stresses not the art of writing but the quality of the writer in his adherence to truth and virtue: a good writer is a good man writing. There is the rhetoric of literary criticism, which applies the categories and techniques of rhetoric to the analysis and evaluation of poetry, drama, and narration. And finally, there is Aristotelian rhetoric which had its origins in the law courts of

man's work. Perelman, however, emphasizes not the study of the technique or art of public speaking, but the "understanding [of] the mechanism of thought," through investigating the structure of argument.[8]

When arguing, a speaker attempts through discursive means to persuade his listeners to adhere to a thesis he is proposing for their assent.[9] The social context of the argument is the relationship between the speaker and the audience. This relationship is one of the factors that distinguish argumentation from demonstration. Demonstration transcends its immediate context; demonstration secures results that are valid and therefore independent of their acceptance by any particular audience,[10] so long as the principles of strict logical consequence[11] govern the reasoning. These principles are fundamental in any given social context, with the exception of certain philosophical puzzles.[12] But argumentation is always "field-dependent."[13] That is, the persuasiveness of any reasoning

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early Greece and which was expanded, systematized, and given a philosophic foundation by Aristotle. After being brought to perfection by Cicero and Quintilian, it constituted a basic, and at times *the* basic, discipline in Western education for fifteen hundred years.

Young & Becker, *Toward a Modern Theory of Rhetoric: A Tagmemic Contribution*, CONTEMPORARY RHETORIC 123, 126 (1975). The Aristotelian system of "classical rhetoric" emphasized the "process of developing and presenting a persuasive discourse." *Id.*

8. THE NEW RHETORIC, *supra* note 2, at 6.

9. For the historical background of this notion, see C. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT 134-42 (1963) [hereinafter cited as THE IDEA OF JUSTICE]. *Cf.* John Rawls on *justification:*

> [J]ustification is argument addressed to those who disagree with us, or to ourselves when we are of two minds. It presumes a clash of views between persons or within one person, and seeks to convince others, or ourselves, of the reasonableness of the principles upon which our claims and judgments are founded.

J. RAWLS, A THEORY OF JUSTICE 580 (1971).

10. But this does not apply to the universal audience. "Argumentation addressed to a universal audience must convince the reader that the reasons adduced are of a compelling character, that they are self-evident, and possess an absolute and timeless validity, independent of local or historical contingencies." THE NEW RHETORIC, *supra* note 2, at 32.

11. An example of strict logical consequence is the following form, based on the principle of noncontradiction: If P, Q, and R are each propositions, P implies R, and Q implies *not*-R, then *not*-(P *and* Q). *See* text accompanying note 129 *infra*.

12. "Philosophical puzzle" refers, for example, to the generation of "logical" consequences in a system in which one of the "fundamental principles of strict logical consequence" is modified or dropped, as in a three-valued logic that drops the law of excluded middle.

13. *See* S. TOULMIN, THE USES OF ARGUMENT 14 (1964).

> 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 different fields when the backing or the conclusions in each of the two arguments are not of the same logical type.

will depend on the relevant social context; its validity will not. Persuasiveness always depends on what the intended audience regards as persuasive.

Appraisal of an argument, therefore, presupposes a given social context. Appraisal involves an appreciation of the social characteristics of the speaker and his intended audience. The speaker will appeal, for example, to values he supposes his audience shares and to facts he believes the audience recognizes. His choice of argumentative forms will depend on his conception of the audience. In the case of a specialized field, such as law, the presuppositions of argumentation will include the speaker's cognizance that he and the audience share a special knowledge with its range of accepted procedures and values. An appropriate form of argument in law may not be appropriate in another field.

The speaker's conception of his role and his audience guides his arguments. Indeed, this conception may shift, thereby altering, in the speaker's mind, the social setting and thus the range of persuasive forms of argument. For example, Perelman quotes Tristram Shandy's description of argumentation between his parents:

> [My father] placed his arguments in all lights; argued the matter with her like a Christian, like a heathen, like a husband, like a father, like a patriot, like a man. My mother answered everything only like a woman, which was a little hard upon her, for, as she could not assume and fight it out behind such a variety of characters, 'twas no fair match: 'twas seven to one.[14]

Thus, from the speaker's perspective, the social setting of any argument may vary with his conception of the audience or, what amounts to the same thing, his conception of his social role vis-a-vis that audience. A Justice of the Supreme Court may be writing his opinion as lawyer, judge, federal judge, or Supreme Court Justice; he may be arguing for the Court, in concurrence, or in dissent.

Id. Toulmin characterizes the notions of *field-invariant* and *field-dependent* as follows:

> What things about the modes in which we assess arguments, the standards by reference to which we assess them and the manner in which we qualify our conclusions about them are the same regardless of field (field-invariant), and which of them vary as we move from an argument in one field to arguments in another (field-dependent)? How far, for instance, can one compare the standards of argument relevant in a court of law with those relevant when judging a paper in the *Proceedings of the Royal Society*, or those relevant to a mathematical proof or a prediction about the composition of a tennis team?

Id. at 15.

14. THE NEW RHETORIC, *supra* note 2, at 22 (quoting L. STERNE, 1 THE LIFE AND OPINIONS OF TRISTRAM SHANDY 42 (1965)).

He may be speaking to the parties, his colleagues on the Court, the federal judiciary, the bar or a portion of it (*e.g.*, the tax bar), law professors, Congress, the President, an administrative agency, or the general public. The speaker's view of this social setting, of his role and his audience, will affect the forms that his argument takes.

Any argument starts from a common ground between speaker and audience. The first common ground, the medium of argument, is language. Normally, the speaker and his audience start out with a common natural language and the enormous variety of admitted ideas that are implicated by this language.[15] For example, our use of language presupposes standards of discourse, such as those implied by our knowing how to use an expression like "it is doubtful that" or "it follows that." One may think of such standards as procedural. Second, our natural language reflects a heritage of common beliefs and values. Different users of the language may translate these beliefs and values into different specifics, but in their outlines they are common to the users. For example, such terms as "integrity," "intelligence," and "self-control" are commonly understood to reflect virtuous qualities. One may think of the acceptance of such beliefs and values as substantive. These bases of agreement provide common grounds or starting points for argument.[16]

In legal argument, we have a more specialized language common to its users, those who participate in the practice of law. Here, also, the procedural and substantive agreements are more specialized. A major ground of initial agreement in legal argument is implied by the acceptance of principles and rules of procedure. Lawyers also have a common ground in the substantive agreements implicit in their specialized use of such expressions as "due process," "reasonable use," and so on.[17]

One can summarize the importance of the social context in argumentation by noting that, although demonstration yields logically valid results, argumentation supports theses that persuade,

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15. THE NEW RHETORIC, *supra* note 2, at 153.

16. Given a language understood by his audience, the speaker can develop his argumentation only by linking it to theses granted by his auditors, failing which he is likely to be guilty of begging the question. It follows that all argumentation depends for its premises—as indeed for its entire development—on that which is accepted, that which is acknowledged as true, as normal and probable, as valid. THE IDEA OF JUSTICE, *supra* note 9, at 156.

17. We may severally have different *conceptions* of the applicability of such expressions in different situations, but the expressions themselves form part of our common legal "English." *Cf.* J. RAWLS, *supra* note 9, at 5 (discussing a public conception of justice).

the persuasiveness of any thesis depending largely on the particular audience. Starting from this principle, Perelman develops a theory of argumentation in terms of what he calls *forms of argument*. A given form of argument is an idealized characterization of a way of persuading. Different forms of argument persuade differently. Thus, we might disagree with Perelman's elaboration of his theory—the way he identifies particular forms of argument or the way he organizes these forms into a given system—and yet agree with him that the theory should start from the idea that different arguments persuade in different ways. This central idea distinguishes a theory of argumentation as rhetoric from theories that start from a sociological, psychological, or linguistic perspective. For purposes of the present study, I am using both Perelman's central idea and the particular elaboration of it that he and Olbrechts-Tyteca present in *The New Rhetoric*.

Section II of this article lays the groundwork by elaborating on the "starting points" of argument. The study then divides into sections, each treating a broad category of argument. These categories reflect, for the most part, Perelman's division of arguments into those based on, or corresponding to, a given way of seeing the world (the structure of reality); those based on models of formal, *i.e.*, logical or mathematical, reasoning; and those that establish or change the way in which we see the world.[18] Thus, in section III, I look at arguments based on a common understanding about reality. These arguments use established or accepted relations, especially the relation of causality, to move from an accepted judgment about reality to the proposed thesis. Section IV deals with arguments based on logical or mathematical models of reasoning. Sections V and VI take up arguments that, in different ways, affect our conceptual structure or the ways in which we understand things to relate to one another.

In each of these sections I will attempt first to describe the forms used in legal argument, and second to investigate the circumstances of their use, particularly examining the ways in which substantive considerations and the posing of legal issues for decision influence the forms of argument used.

II. The Starting Points of Argument

This section concerns the common ground that enables argument to proceed. Whereas the later sections focus on the forms of

18. The New Rhetoric, *supra* note 2, at 191-92.

argument used to persuade one's audience to assent to one's position, this section examines that which, at least for the moment of argument, is not in dispute.

For argument to be possible, the speaker and his audience must initially be in agreement about something. The argument proceeds from common ground. The subjects of these initial agreements—I will follow Perelman and call them starting points—are the concern of this section. I will attempt to show the argumentative uses that one can make of these starting points; the ways in which one can establish his own position as a matter of "common ground." I will look first at the role played by what Perelman calls the principle of inertia, then at *loci*—the storehouses or "common places" of agreement—and finally at the argumentative uses made of "facts"—the starting point of argument for lawyers, certainly.

A. *The Principle of Inertia*

The principle of inertia will be familiar to lawyers: it is the principle that the burden of justification falls on the person who wishes to change an existing state of affairs. Put another way, it is the principle that there must be a reason for change; what exists has value in its mere existence:

> Inertia makes it possible to rely on the normal, the habitual, the real, and the actual and to attach a value to them, whether it is a matter of an existing situation, an accepted opinion, or a state of regular and continuous development. Change, on the other hand, has to be justified; once a decision has been taken, it cannot be changed except for sufficient reason.[19]

The principle of inertia provides a starting point because it posits the initial acceptability of the way things are. In procedural terms, the allocation of the burden of proof to the proponent of change reflects this initial acceptability.

Professor Bingham recognized the force of this principle some years ago in a discussion of the influence of custom on judicial reasoning: "The potency of [custom's] influence is illustrative of a fundamental principle of good government:—that when no stronger considerations conflict, the wheels of society should not be forced from a smoothly worn groove."[20] As Perelman notes, the use of this principle in argument is effective because "having once

19. *Id.* at 106.

20. Bingham, *What Is the Law?* 11 MICH. L. REV. 109, 116 (1912).

adopted an opinion [we think] . . . it reasonable in general to hold to it, [and] not reasonable to abandon it without having some grounds for doing so."[21]

Perelman illustrates the argumentative uses of the principle with the following quotation from Pitt's objection to negotiation with France:

> Have the circumstances and situation of the country materially altered since the last motion on this subject, or since my honourable friend first found himself an advocate of negociation? Has the posture of affairs varied since that time so as to make negociation more eligible at the present moment than it was at any former period?[22]

A speaker uses this principle when he attempts to characterize his own position as the existing state of affairs. His opponent might accept this characterization, and attempt to justify his own position as a proposed change. Quite often, however, the opponent will reject this characterization and the burden of justification that it imposes on him, and instead describe his own position as the initial state of affairs. The resulting interaction is illustrated by arguments in the court-martial cases,[23] in which each side attempted to characterize the opposing view as a change and thus force its justification.

The government argued that the military has court-martial jurisdiction over noncapital crimes committed overseas by either civilian dependents of overseas armed services personnel or overseas employees of the military. This jurisdiction, the government asserted, is a "necessary and proper" incident to Congress's power "to make rules" governing the land and naval forces.[24] The government's argument rested in part on historical materials that, it concluded, "indicate a well-established practice of court-martial jurisdiction over civilians accompanying the armed forces, during Colonial days as well as the formative period of our Constitution."[25] Justice Whittaker picked up the government's argument in his dissenting opinion,[26] discussing at some length the history of

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21. THE IDEA OF JUSTICE, *supra* note 9, at 119-20.

22. THE NEW RHETORIC, *supra* note 2, at 106 (quoting W. PITT, ORATIONS ON THE FRENCH WAR TO THE PEACE OF AMIENS 93 (1917)).

23. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

24. *Kinsella*, 361 U.S. at 239; *see* U.S. CONST. art I, § 8.

25. 361 U.S. at 239.

26. *Id.* at 259-77 (Whittaker & Stewart, JJ., concurring in *Kinsella*, dissenting in *McEl-*

court-martial jurisdiction. He characterized the Court's decision as a restriction of the long-established practice of subjecting certain categories of civilians to military control. Justice Whittaker also argued that the Court's decision marked a change from its own practice in this area: "This Court has consistently held, in various contexts, that Clause 14 does not limit the power of Congress to the government and regulation of only those persons who are 'members' of the armed services."[27]

On the other hand, Justice Clark, writing for the Court, treated the government's and Justice Whittaker's position as an extension of the existing authority of Congress in this area:

> Our final inquiry, therefore, is narrowed to whether Clause 14, which under the second *Covert* case has been held not to include civilian dependents charged with capital offenses, may now be expanded to include civilian dependents who are charged with noncapital offenses . . . . We are . . . constrained to say that since this Court has said that the Necessary and Proper Clause cannot expand Clause 14 so as to include prosecution of civilian dependents for capital crimes, it cannot expand Clause 14 to include prosecution of them for noncapital offenses.[28]

Each position thus establishes a context that characterizes the desired result as the existing practice, and the opposing view as an alteration of it. Justice Clark used the context of clause 14, while Justice Whittaker (and the government) relied on the context of the historical application of the court-martial jurisdiction.[29]

B. *Loci*

The principle of inertia functions in argument as a very general, unspoken premise that what exists has value by its mere existence. In argument there are, in fact, many other unspoken premises about which we assume agreement. The classical rhetoricians organized such premises into different categories that they called *loci* (places). The appeal to inertia, for example, illustrates a pre-

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roy and *Grisham*).

27. *Id.* at 271.

28. *Id.* at 247-48.

29. *Cf.* THE NEW RHETORIC, *supra* note 2, at 106:

> To justification [*sic*] of the change one will often substitute an effort to prove that there has been no real change. This effort is sometimes made necessary by the fact that change is prohibited: thus, a judge who is unable to change the law may maintain that his interpretation does not modify it but corresponds better to the intention of the legislator; similarly, reform of the Church will be presented as a return to primitive religion and to Scripture.

mise drawn from the *locus* of quantity. *Loci* were treated as the "common places" or sources of these general premises that, without express assertion, serve as grounds or starting points for particular arguments:

> As used by classical writers, *loci* are headings under which arguments can be classified. They are associated with a concern to help a speaker's inventive efforts and involve the grouping of relevant material, so that it can be easily found again when required. *Loci* have accordingly been defined as storehouses for arguments. Aristotle made a distinction between the *loci communes*, or "common places," which can be used indiscriminately for any science and do not depend on any, and the special topics, which belong either to a particular science or [to] a particular type of oratory.[30]

Of the various *loci communes*, I will consider the two most often used: the *loci* of quantity and quality. I will first give some examples of premises drawn from each of these *loci* to help clarify the role of such common places in argument. Examples of premises of quantity are: many good things are better than few; that which is useful for many ends is better than that which is useful for few; that which endures is better than that which is short-lived; the whole is better than the part.[31] In each case, greater value is placed on that which is greater quantitatively. The principle of inertia, likewise, stresses the value of the common, the many, that which has always been.

Premises drawn from a *locus* of quality, on the other hand, are illustrated by the following: that which is unique is better than that which is common; that which is difficult to attain is better than that which is accessible; the precarious or threatened has more value than the durable (carpe diem). Here the stress is on the value of the uniqueness, the difference, the preciousness, of a thing. As one would expect, *loci* of quantity and quality are typically found on opposing sides in argument.[32] Since inertia, for example, represents the present and the common, the proponent of a

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30. *Id.* at 83 (footnotes omitted).

31. *Id.* at 85-86.

32. *Loci* of quality occur in argumentation when the strength of numbers is challenged, and it is in such a context that they are most readily perceived. They are used by reformers or those in revolt against the commonly held opinions. . . . [A]t the limit, the *locus* of quality leads to a high rating of the unique which, just like the normal, forms one of the axes of argumentation.

Id. at 89.

proposed change often implicitly appeals to a premise of quality.[33]

The most typical effect of the distinction between *loci* of quality and those of quantity on the interaction of arguments in our study is in the use of hierarchies.[34] A hierarchy is simply an ordered series, the principle of ordering being drawn from a *locus*, usually of quality or quantity. The assertion that "the cause is more perfect than its effects," for example, presupposes a hierarchy established by a *locus* of quality: the difference here is one of order or kind, not just one of degree. The view that "the whole is better than the part," on the other hand, presupposes (normally) a difference of degree only: the whole just has more of the same than does its part.

This distinction between hierarchies of kind and those of degree is useful in analyzing argument. The introduction of considerations of kind tends to minimize differences of degree. Thus, a speaker will attempt to characterize a distinction made by his opponent as involving only a difference of degree, in the light of his own more fundamental distinction. He may succeed even if the distinction made by his opponent appears, by itself, to be a difference of kind. He does this by introduction of a more fundamental difference between both of the existing terms and a third. The introduction of the new term emphasizes the common aspects of the two original terms, making their differences less important. For example, by introducing considerations of principle, a speaker may attempt to make utilitarian argument inapplicable: the value of a single human personality is incommensurable with that of any other; therefore the sacrifice of one person may never be justified by its beneficial consequences for others.

Such an attempt to reduce the significance of a posited hierarchy by introducing another is found in Justice Black's treatment of the majority opinion in *Smith v. California*.[35] In that case, the

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33. The passage from (the *normal*) that which is done most frequently, to that which should be done (the *norm*), "is a phenomenon of common occurrence and seems to be taken for granted." Arguments in favor of making this transition from common practice to normative value stem from the quantitative *locus*, *i.e.*, that frequency is a desirable characteristic to which we should conform. Such arguments, however, are rarely articulated because the norm and the normal are seen as coexisting values: "dissociating them and opposing them by claiming primacy of the norm over the normal would require justification by argumentation: this argumentation will aim at lowering the value of the normal, mostly by using *loci* other than those of quantity."

Id. at 88.

34. For a general discussion of hierarchies, see *id.* at 80-83, 337-45.

35. 361 U.S. 147 (1959).

Court had found a difference of kind—a constitutionally relevant distinction—between a criminal obscenity statute that has a scienter requirement and one that does not. Justice Black replied to this position as follows:

> The Court invalidates the ordinance solely because it penalizes a bookseller for mere possession of an 'obscene' book, even though he is unaware of its obscenity. The grounds on which the Court draws a constitutional distinction between a law that punishes possession of a book with knowledge of its 'obscenity' and a law that punishes without such knowledge are not persuasive to me . . . . The fact is, of course, that prison sentences for possession of 'obscene' books will seriously burden freedom of the press with or without knowledge of the obscenity.[36]

The more fundamental difference for Justice Black is between punishing (because of its effect upon freedom of the press) and not punishing persons for the possession of obscene books. Given this difference, the scienter distinction drawn by the Court seems one of mere degree.

United Steelworkers v. United States[37] illustrates another use of hierarchies. In that case, Justice Douglas sought to have the district court's decree ordering back to work all 500,000 steelworkers modified to one affecting only the workers employed by companies whose operation was considered essential to defense needs: "If 1,000 men, or 5,000 men, or 10,000 men can produce the critical amount the defense departments need, what authority is there to send 500,000 men back to work?"[38] For Douglas, the difference in the alternative orders was only one of degree: if the court can order 500,000 men back to work, surely it can order back only 5,000 men. There was no need, therefore, to disrupt the process of collective bargaining for the entire industry: "The rest—who are the vast majority of the 500,000 on strike—should be treated as the employers are treated. They should continue under the regime of collective bargaining and mediation until they settle their differences or until Congress provides different or broader remedies."[39]

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36. *Id.* at 156 (Black, J., concurring).

37. 361 U.S. 39 (1959).

38. *Id.* at 69.

39. *Id.* at 75-76. Justice Douglas's argument also reflects the premise of quantity that whatever is true of the whole is also true of the part, *i.e.*, if the court can fashion a decree for the whole, it can fashion one for the part. *Cf.* Justices Frankfurter and Harlan, concurring in the same case: "Given the power in Congress to vest in the federal courts the function to enjoin absolutely, it does not change the character of the power granted or undermine the professional competence of a court for its exercise that Congress has directed the

Justices Frankfurter and Harlan, however, concurring with the per curiam opinion, introduced considerations of kind to accentuate the difference between the district court's decree and the decree suggested by Justice Douglas: " 'The steel industry is too vast and complicated to be segmented' so as to alleviate the . . . peril to the national defense by the mere reopening of a few plants."[40] The suggestion that the industry be partitioned, they argued, would further require an extensive investigation of the relationships of the various components of the steel industry, which the Court ought not to require the government to undertake. Nor would it be an appropriate exercise of their judicial powers for the federal courts in equity to do so. In the face of these considerations, they argued that the decree of the district court was the only appropriate remedy under the existing law.

One may also use *loci* of quantity to belittle the argument of an opponent. By concentrating exclusively on the quantitative aspects of an adversary's position, one can reduce the attention given to its qualitative aspects and thus reduce the force of the argument. Justice Clark resorted to this device when, writing for the Court in the case of *Inman v. Baltimore & Ohio Railroad*,[41] he stated:

> [Ohio's Court of Appeals] found that there was "no evidence of prior occurrences of the kind here under consideration" in the record. Indeed, unless these *11 words* of the witness can be said with reason to be sufficient, there is none. Under such circumstances, they are too slender a reed for us to say that the decision of Ohio's court is erroneous.[42]

The "occurrences" in question were instances of car drivers' "jumping the gun" at the railroad crossing where petitioner worked as a night watchman. The eleven words were those of an eyewitness to the accident, who said the car in question was "like a lot of them I seen there, jumping the gun." A court should assess

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relief to be tempered." *Id.* at 62. In United States v. Mersky, 361 U.S. 431 (1960), Justice Frankfurter, dissenting, joined by Justices Harlan and Stewart, accused the majority of determining that construction of a "statute" includes construction of a regulation promulgated under the statute. *Id.* at 444-53. Justice Clark, however, writing for the majority, merely stated: "As we see it, a construction of the regulation necessarily is an interpretation of the statute." *Id.* at 437. The Court, Justice Frankfurter charged, had included the regulation in the statute, in effect as a part in a whole.

40. 361 U.S. at 49 (Frankfurter & Harlan, JJ., concurring) (quoting from the opinion of the court of appeals).

41. 361 U.S. 138 (1959).

42. *Id.* at 141 (emphasis added).

the probative value of such evidence, under Justice Clark's reduction, in terms of the quantity of the words. They were not, under that criterion, sufficient to overturn the state court's decision.

Alternatively, one can use premises of quantity to enhance a particular position. For example, Justice Whittaker, writing for the Court in *Minneapolis & St. Louis Railway v. United States*,[43] dealt with the contention that the Interstate Commerce Commission, in an application proceeding, had not sufficiently considered "anti-competitive" implications: "Here, the Commission gave extensive consideration to the anti-competitive contentions advanced by appellants, devoting *more than five pages* of its report to that matter."[44] Under this treatment, the adequacy of the Commission's consideration rested on the quantity of words rather than the nature or kind of attention devoted to the issue.

C. *Facts as Argument*

The functional division between participants who make findings of fact and those who apply law to the facts "as found" assures the place of the "facts" as a starting point in legal argument.[45] Appellate courts do not normally try facts; they apply law. Lawyers before an appellate court normally begin their arguments with a statement of the facts. Institutionally, therefore, the appellate court and counsel "begin" with facts and consider the questions of law before them in connection with those facts.

The "facts" are not in the courtroom, however. Counsel, in their briefs and oral arguments, and the court, in its opinions, begin with the facts *as described*. The description of facts is itself a means of argument and, indeed, sometimes the crucial stage of argument. In the remainder of this section I will analyze the role played by this descriptive process in a number of the cases under study.

In *Inman v. Baltimore & Ohio Railroad*,[46] petitioner Inman sued the Baltimore and Ohio Railroad Company under the Federal

43. 361 U.S. 173 (1959).

44. *Id.* at 188 (emphasis added).

45. Given the special prominence that legal procedure gives to "facts," we should bear in mind the caution advised by Professor Goodhart. In response to the statement: "in basing the validity of law upon the sense of right we stand upon the firm foundation of fact," Goodhart remarked, "What comforting things facts are, and how safe it is to stand upon them! Unfortunately what seems to be a fact to one person is only a chimera for another." Goodhart, *Law and the State*, 47 L.Q. REV. 118, 124 (1931).

46. 361 U.S. 138.

Employers' Liability Act ("FELA") to recover damages for injuries sustained when an automobile struck him while he was serving as a crossing watchman. The state trial court submitted to the jury the issue of the company's negligence, the jury returned a verdict for the watchman, and the court entered a judgment for $25,000. The state's appellate courts reversed this judgment, and, on certiorari, the Supreme Court affirmed. Justice Clark wrote the majority opinion, Justice Whittaker concurred in a separate opinion, and Justice Douglas, joined by three of his colleagues, wrote a dissenting opinion.

The legal issue was straightforward: Was the evidence sufficient to support a finding of negligence?[47] The decision would turn on the characterization of the facts, which Justice Whittaker described as follows: "Reduced to substance, the simple facts are that petitioner, a crossing flagman, while standing in a well-lighted intersection alongside a passing train in the nighttime and swinging a lighted red lantern in each hand, was struck, knocked down and run over by a drunken driver."[48] This description "goes to the essence" of the matter; it uses the *locus* of quality.[49] Such an approach emphasizes the character and nature of the incident and thereby implies that the truth of the matter lies in its essential character.

Justice Douglas's view of the facts, on the other hand, emphasized the *locus* of quantity:

> Petitioner, a nighttime crossing watchman stationed at respondent's railroad intersection, was seriously injured about midnight when an automobile driven by an intoxicated person ran into him from behind while he was flagging traffic for a passing train . . . .
>
> The crossing is at Tallmadge and Home Avenues. Tallmadge runs east and west; Home, northeast and southwest. Three of respondent's tracks, running northwest and southeast, extend through the intersection of these two streets, and its trains move over the parallel tracks in opposite directions and often near the same time.
>
> There was evidence that at the approach of a train peti-

47. The Court granted certiorari and decided the case against a background of criticism, from members of the Court and others, of the Court's acceptance of cases when the only issue was the sufficiency of the evidence. *See* Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960); Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959).

48. 361 U.S. at 142 (Whittaker, J., concurring).

49. *See* note 32 and accompanying text *supra*.

tioner had duties of the following character: (1) He was supposed to flag highway traffic moving in four directions to a stop, using lanterns and a whistle provided for that purpose. (2) If a second train was to pass at or about the time of another, he had to look for it before clearing the highway traffic. (3) He was to look for hotboxes on all passing trains and signal the conductor if he discovered any. (4) If a train was going east, he was to stand on the west side of the tracks the better to see trains coming from the west.

On the night in question petitioner received a signal that an eastbound train was approaching. Accordingly, he stationed himself a few feet west of the tracks, blowing the whistle and swinging the red lantern first toward Tallmadge Avenue traffic and then toward Home Avenue traffic. Then he stationed himself facing the tracks, his back to Tallmadge Avenue traffic.

Although respondent's tracks intersect Tallmadge and Home Avenues where those two streets cross, it is possible for a car going north on Home to make a left turn into Tallmadge even while a train is passing. There is, however, a stop sign on Home; and petitioner rightfully had halted all highway traffic. Nevertheless an intoxicated driver came through the stop sign on Home and made a squealing left turn into Tallmadge, hitting petitioner and injuring him.

There was evidence that at the time of the accident (1) the caboose of the passing train was just making the crossing; (2) the railroad block signal could not be seen from where petitioner stood; (3) another train from the opposite direction on the adjoining track was due to reach the crossing at any moment and petitioner was looking for its headlight; (4) petitioner remained standing with his back to the highway traffic as he was obliged to do if he performed these manifold duties; (5) this traffic was heavy in both streets; (6) on prior occasions cars had "jumped the gun" at this same intersection.[50]

The description by Justice Douglas makes a somewhat different use of the *locus* of quantity from the uses I have already noted. As explained above,[51] a *locus* or commonplace is a class or source of major premises that, although normally unstated, are generally accepted by the audience. The particular premise of quantity here is that greater value attaches to that which is quantitatively greater (more is better). Thus, Justice Douglas gives an extensive physical description of the accident, a numbered list of the various

50. 361 U.S. at 143-44 (Douglas, J., dissenting).

51. *See* text accompanying notes 30-31 *supra*.

duties of the watchman, and a numbered list of various propositions for which there was evidence. This long discussion tends to persuade the reader that the railroad company had negligently placed the watchman in a highly complex situation, expecting him to perform a number of different duties in a brief amount of time.[52]

Neither description, we may assume, is inaccurate. Nonetheless, the two descriptions support opposing arguments. Moreover, description is being used *as* argument. This use is possible because "facts" do not present themselves with an authoritative description. Their characterization depends on the point of view of the observer. The exchange described here is typical of such argument: one speaker "cuts to the marrow," relying on the *locus* of quality, and the other, using the *locus* of quantity, shows us how complex things are.[53] Each speaker, of course, is using the *locus* that most effectively puts forward his own view of the legal issue presented.

A description of facts may achieve its argumentative effect by giving a sense of immediacy or *presence* to the elements stressed in the description. Some techniques create more presence than others. Specification of time and place and attention to sensible detail normally create a greater impression of actuality than does abstract description.[54] For example, in the description quoted above, Justice Douglas is particularly adept at the presentation of fact, imparting an impression of the actual. This impression results from the evocation of detail, including extensive accumulation and iteration of data. Justice Whittaker's description, on the other hand, lacks a strong sense of presence. Since one's sense of "what happened" will guide one's opinion of the ultimate legal issue, and since we are dealing with a concrete event, he might have responded more effectively with a more detailed description focused on aspects of the scene that supported his position, thereby countering the persuasiveness of Justice Douglas's version of what had happened.[55]

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52. "Petitioner's duties were much broader, as I have indicated. Yet the Court holds there was no jury question as to whether the place chosen for the performance of those several duties was a reasonably safe one. . . ." 361 U.S. at 144.

53. THE NEW RHETORIC, *supra* note 2, at 121 (referring to Gellner, *Maxims*, 60 MIND 383, 393 (1951): "The same process can indeed be described as the action of tightening a belt, assembling a vehicle, earning a living, or helping the export drive."). *See also* G. ANSCOMBE, INTENTION 37 (1969).

54. THE NEW RHETORIC, *supra* note 2, at 147.

55. I am not forgetting that Justice Douglas's opinion did not persuade a majority of the Court. Justice Clark's opinion for the Court, however, indicates the effectiveness of Jus-

Consider, for example, the opinions in *Davis v. Virginian Railway*,[56] another FELA case. Here, the Court decided that the presented evidence was sufficient to let the jury decide the issue of the employer's negligence. Justice Clark's opinion for the Court, like Justice Douglas's dissent in *Inman*, effectively gives the described event a keen sense of presence:

> Petitioner was a yard conductor for respondent. On July 3, 1957, he was instructed to "shift" or "spot" various railway cars to a loading platform on a spur track of the Ford Motor Company at Norfolk. There were 43 cars involved. Some were empty and standing at the loading tracks at the plant. These had to be moved out to make way for the loaded cars which were outside the plant in respondent's shifting yards. The job called for them to be lined up and then moved to particular positions or spots on the tracks at the loading platform in the plant where Ford employees might remove their contents. On the morning of the accident there were designated at the Ford loading platform some 22 spots to which the loaded cars were to be switched. Two brakemen were assigned to assist petitioner in the operation. Petitioner was to complete the spotting during the lunch period at the Ford plant, which was 30 minutes. The evidence shows that neither of the brakemen assigned to petitioner was experienced in this particular operation. The senior brakeman had never spotted cars at the plant before, nor had he worked as a senior brakeman. The other brakeman had spotted cars at the plant for only a short period. Railroad employees classed the Ford "switching operation" as "a hot job" because "you do your job a little faster there than you would in the yard." In the opinion of brakemen who had spotted cars there, the minimum time for completion of an operation involving this many cars was 50 minutes, and the maximum well over an hour. Since petitioner was instructed to perform the task in 30 minutes, it was necessary

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tice Douglas's description by providing a counter-description that carefully stresses, in detail, what was not shown by the evidence:

> There is no claim that the intersection was dark or that the the regular railroad crossing warning, lights, bells, etc., were not properly working at the time. Nor is it disputed that the petitioner was waving a lighted lantern in each hand. Likewise the intoxicated condition of the driver is not in controversy, nor is the fact that he passed through a traffic stop sign immediately before hitting petitioner and violated other local traffic safety measures designed to protect persons from injury at the crossing.

361 U.S. at 139. Justice Clark is telling us what happened: a drunken driver caused an accident under circumstances not created by the railroad company. We are urged to conclude that the accident was therefore not a result of the company's placing the watchman in an unsafe position.

56. 361 U.S. 354 (1960).

> for him to work faster than he normally would. In addition, the senior brakeman had informed petitioner of his inexperience, which required petitioner to take a position on top of the boxcars in order to be ready to assist the brakemen. Normally, petitioner would have taken his position on the ground where a conductor, such as he, usually carried out his assigned duties. When one of the brakemen called for assistance in the spotting operation, petitioner ran along the top of the boxcars toward the brakeman to give him help, but, upon coming to a gondola car, was obliged to descend the ladder of the boxcar next to it. Petitioner slipped on the ladder and fell to the ground, suffering the injury complained of here.[57]

Justice Harlan, in dissent, did not simply counter Justice Clark's description with another focused on the same series of events. Rather, he used a different technique. His opinion directs our attention to the moment of the conductor's fall, and challenges us to find negligence in the event as so limited:

> The record is barren of anything showing why this accident occurred. There was no evidence whatever that either the car or the ladder from which the petitioner fell was faulty. Petitioner admitted to being an experienced railroad worker whose duties had at times carried him up and down ladders, and on the tops of railroad cars. At the time of his fall the cars had stopped moving, or nearly so. When asked by the trial court to explain how he happened to fall, all petitioner could say was "it might have been grease or anything on my shoe"; and this was pure conjecture, as the record shows. More especially, petitioner did not say that he fell because he was "rushed."[58]

Justice Clark's description evokes in detail the circumstances surrounding the accident. Making use of the *locus* of quantity, he dwelt on the difficulty of performing a complex job assignment in the time allowed with inexperienced help, and on the circumstances leading to petitioner's being on top of the car. Justice Harlan's argument, on the other hand, shifts the focus to the fall itself. Justice Clark's description prompts us to ask about the role of the company in setting up the job assignment. For example, why could the railroad not have given the conductor more time? Why were inexperienced assistants assigned to help? Justice Harlan's argument, however, prompts us to ask about the role of the conductor in his own fall. Was there in fact grease on the rungs of the

57. *Id.* at 355-56.
58. *Id.* at 359.

ladder? How did it get there? Was he simply careless?

These FELA cases turn on the description of facts because the legal issue in each case is whether the presented evidence is sufficient for a jury determination of fault on the part of the employer. Another group of cases in which the description of facts may be critical to the outcome on appeal involves broadly drawn legal standards with content developed in a case-by-case consideration of particular circumstances.

The arguments in *Henry v. United States*,[59] for example, turned on the application of the probable cause standard to a felony arrest by federal agents. At issue was the authority of the Federal Bureau of Investigation to make felony arrests without a warrant. The ostensible governing authority was a federal statute[60] that permitted such arrests by federal agents when offenses were committed "in their presence," or when the agents had "reasonable grounds to believe that the person to be arrested [had] committed or [was] committing" a felony.[61] The Court, however, regarded the statutory standard as an elaboration of the standard of probable cause under the fourth amendment, and held there was no probable cause for the arrest in the circumstances as Justice Douglas described them in the majority opinion:

> The agents followed the car and saw it enter an alley and stop. Petitioner got out of the car, entered a gangway leading to residential premises and returned in a few minutes with some cartons. He placed them in the car and he and Pierotti drove off. The agents were unable to follow the car. But later they found it parked at the same place near the tavern. Shortly they saw petitioner and Pierotti leave the tavern, get into the car, and drive off. The car stopped in the same alley as before; petitioner entered the same gangway and returned with more cartons. The agents observed this transaction from a distance of some 300 feet and could not determine the size, number or contents of the cartons. As the car drove off the agents followed it and finally, when they met it, waved it to a stop.[62]

Justice Douglas's description is impressionistic, almost pointillist: each constituent element of the description remains isolated from the rest.

On the record there was far from enough evidence against him

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59. 361 U.S. 98 (1959).
60. 18 U.S.C. § 3052 (1958) (current version at 18 U.S.C. § 3052 (1976)).
61. 361 U.S. at 100.
62. *Id.* at 99.

> to justify a magistrate in issuing a warrant. So far as the record shows, petitioner had not even been suspected of criminal activity prior to this time. *Riding in the car, stopping in an alley, picking up packages, driving away—these were all acts that were outwardly innocent.*[63]

The description purports to be an objective collection of observations with no suggestion of the intent that might explain the actions. Justice Douglas's summary, which I have italicized, highlights only the "outwardly innocent" character of each item.

Compare Justice Clark's description, given in the dissenting opinion:

> The agents began a *surveillance* of petitioner and Pierotti after recognizing them as they came out of a bar. Later the agents observed them loading cartons into an automobile from a gangway *up an alley* in Chicago. The agents had been *trailing* them, and after it appeared that they had delivered the first load of cartons, the *suspects* returned to the same platform by a *circuitous route through streets and alleys.* The agents then saw petitioner load another set of cartons into the car and *drive off* with the same. A few minutes later the agents stopped the car, *alighted* from their own car, and approached the petitioner.[64]

Justice Clark's description seems like a story told from the agents' point of view. The description has a direction: We follow the "suspects" with the agents to the anticipated arrest, where they will "get their man." We share the agents' perception that a crime has occurred. We clearly seem to be in the presence of criminals.

The distinction between the given facts and the applicable law is surely fundamental to our legal practice. Nonetheless, as these cases show, legal argument does not stop at the questions of law, even in normal appellate adjudication. The description of facts is also part of the argument. As Perelman states:

> Nothing could be more arbitrary than the distinction made in textbooks between factual, neutral, descriptive speech, and sentimental, emotive speech. These distinctions . . . are harmful in that they imply that there are ways of expressing oneself that are per se descriptive, that there are [arguments] in which only facts, with their unquestionable objectivity, find a place.[65]

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63. *Id.* at 103 (emphasis added).
64. *Id.* at 105 (emphasis added).
65. THE NEW RHETORIC, *supra* note 2, at 150.

Rather, in law and other fields of argument, one attains the effect of the "facts" as starting points for argument through persuasive description. As soon as we accept a given description as the only one "present in our consciousness," it becomes part of the common ground of the ensuing argument.[66]

III. Arguments Based on the Structure of Reality

> [T]he arguments based on the structure of reality make use of this structure to establish a solidarity between accepted judgments and others which one wishes to promote. How is this structure presented? On what is belief in its existence founded? These are questions which are not supposed to arise as long as the agreements which sustain the argumentation do not provoke discussion. The essential thing is that they appear sufficiently secure to allow the unfolding of the argumentation.[67]

The *structure of reality* is Perelman's term for the relations that the speaker and his audience accept as constituting reality. The judgments about these relations that the speaker supposes his audience to accept, and that are in this sense presupposed by his use of arguments based on the structure of reality, may but need not be bedrock convictions. The judgments need only to be secure enough to allow the "unfolding of the argumentation."[68] The social context of a particular argument thus determines the structure of reality. In this sense it is a relative concept, although some of the relations that constitute it will, of course, be quite secure.

In this section, I will examine arguments based on the structure of reality as so understood. I will divide these arguments into those that presuppose judgments about sequential or causal relations and those that presuppose judgments about relations of coexistence. I will begin by looking at the forms of pragmatic argument that have flourished in recent American jurisprudence.

A. *Arguments Based on Sequential Relations*

1. PRAGMATIC ARGUMENT

Justice Cardozo recognized various methods of judicial reason-

66. *Id.* at 120-21. *Cf.* NLRB v. Deena Artware, Inc., 361 U.S. 398, 404 (1960) (Frankfurter, J., concurring) (emphasis added): "Due regard for the *controlling facts* in this case will *lay bare their legal significance.* This requires that the facts, and the procedural setting in which they are to be considered, be stated with particularity."

67. THE NEW RHETORIC, *supra* note 2, at 261.

68. *Id.*

ing. One, called "the method of sociology," particularly engaged him. He broadly characterized this method as the functional evaluation of a rule of law in terms of its consequences for the social welfare:

> Social welfare is a broad term. I use it to cover many concepts more or less allied. It may mean what is commonly spoken of as public policy, the good of the collective body. . . . It may mean on the other hand the social gain that is wrought by adherence to the standards of right conduct, which find expression in the *mores* of the community. In such cases, its demands are those of religion or of ethics or of the social sense of justice, whether formulated in creed or system, or immanent in the common mind. One does not readily find a single term to cover these and kindred aims which shade off into one another by imperceptible gradations.[69]

Cardozo's "method of sociology" thus refers broadly to the judicial testing of a rule in terms of its "social value."[70] One can describe such judicial evaluation generically as *pragmatic* reasoning:

> Not the origin, but the goal, is the main thing. There can be no wisdom in the choice of a path unless we know where it will lead. The teleological conception of his function must be ever in the judge's mind. This means, of course, that the juristic philosophy of the common law is at bottom the philosophy of pragmatism.[71]

The stress in the above quotation should fall on "teleological." Moral philosophers distinguish teleological from deontological arguments. Teleological arguments place value on things derivatively, by setting them in relation to an end or a goal (*telos*). Deontological arguments, typically used in opposition to teleological arguments, value things directly by invoking principles regarded as self-evident or established by a relation to other self-evident principles; value does not transfer from an end to a means that furthers its realization. Pragmatic reasoning, as I use the term, is teleological in the sense just described. Pragmatic arguments are forms of reasoning that take as given the value of a certain state of affairs regarded as an end. This value is transferred to acts, states of affairs, events, persons, and so on, by virtue of the causal relation

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69. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 71-72 (1921) (emphasis in original).

70. *Id.* at 730.

71. *Id.* at 102.

that they bear to this end. Besides permitting the transference of value from an accepted end to an advocated means, pragmatic reasoning has many other uses in argument:

> The pragmatic argument is not limited to the transference of a given value from an effect to another event which is taken to be its cause. It also allows one to pass from one domain of reality to another, from the evaluation of an action to the evaluation of the agent, from the fruit to the tree, from the utility of a certain course of conduct to the utility of the rule that governs it. It allows one further, and this is where it achieves its greater philosophical interest, to discover in the consequences of a thesis proof of its truth.[72]

Brian Barry draws an important distinction among pragmatic arguments in his book, *Political Argument*.[73] He points out that arguments invoking principles concerned with the satisfaction of wants (arguments pragmatic in the sense used here) may impose either aggregative or distributive criteria on political decisions.[74] The principle of classical utilitarianism is aggregative: it dictates the assessment of decisions in terms of their consequences for the welfare of the group taken in the aggregate. The principle of progressive income taxation, on the other hand, is distributive: it requires consideration of the distribution to individuals of opportunities for satisfaction of wants by means of the rate structure of the income tax. Barry's distinction is useful in reminding us that pragmatic arguments may be opposed by other pragmatic forms. For example, classical utilitarianism may be criticized by those who agree that things should be valued by reference to an end, but are concerned with the distribution to individuals of such derivatively good things.

Certain judicial decisions are so rife with consequences for the public welfare that their justification is necessarily in pragmatic terms. *United Steelworkers v. United States*[75] is such a case. In a per curiam opinion, the Court upheld a district court decree enjoining an industry-wide steel strike for eighty days under the authority of the Taft-Hartley Act. The strike involved some 500,000 steelworkers[76] and would have shut down the entire domestic steel industry. In a lengthy concurring opinion, Justices Frankfurter and

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72. THE IDEA OF JUSTICE, *supra* note 9, at 199-200.
73. B. BARRY, POLITICAL ARGUMENT (1965).
74. *Id.* at 38-39. Note that Barry speaks of policies, rather than decisions.
75. 361 U.S. 39 (1959).
76. *Id.* at 63.

Harlan focused on the seriousness of the case. They argued, *inter alia*, that pursuant to the Act, the President had determined that the strike endangered the "national health and safety," and that the institutional relationship between the executive and the judiciary required the courts to give due consideration to this finding by the President.[77] Furthermore, they argued, if the Court dissolved the injunction, the consequences would be seriously destructive to the national health and safety.

Justice Douglas, dissenting, argued that the federal courts sitting in equity must make their own determination of the relations between the national health and safety and the industrywide strike, not merely rubber-stamp a presidential finding. He pointed to evidence that only the absence of some 5,000 or 10,000 workers necessary to the supply of defense material would affect national defense needs, and suggested that the injunction cover only those strikers. He argued that the court should allow the rest of the workers to settle their differences through collective bargaining and mediation.[78] In support of this position, Justice Douglas argued that the consequences of the injunction issued by the district court would seriously disrupt the traditional pattern of collective bargaining. Thus, Douglas concluded that the Court should reverse the decree and remand the cause to the district court for particularized findings about how the steel strike would imperil the "national health," and which plants should remain open to protect the national safety.[79]

Both of these opinions use pragmatic arguments, but the particular legal issues and the way they are posed, as well as the institutional context of the dispute, influence the use of such arguments. Justices Frankfurter and Harlan argued that the Act vested in the executive the determination of the existence of a threat to the national health and safety. In their view, the executive could determine the existence of a threat by looking to the *aggregate* consequences of a continued national strike. They also make the pragmatic argument that interference with this determination by the federal courts would have harmful consequences. Justice Douglas counters that in the tradition of their equitable jurisdiction, the federal courts should determine the consequences of the strike with reference to the national health and safety. He attempts such

77. *Id.* at 48.
78. *Id.* at 75.
79. *Id.* at 76-77.

a determination in his opinion, employing a *distributive* criterion in considering not only the consequences for the nation, but the consequences to the steelworkers as well. The contextual consideration of the role of collective bargaining in industrial relations also influences his argument. He argues that the district court's decree would disrupt the settled role of collective bargaining in the resolution of labor disputes. Although the effect of the steel strike on the public welfare is the underlying issue, it does not preclude consideration of legal issues arising from statutory law and the institutional roles of the respective branches of government. Pragmatic argument in this case is not simply a matter of weighing the aggregate consequences of the strike; institutional as well as substantive considerations constrain and influence the uses of the formal argument.[80]

Pragmatic argument typically appears in constitutional adjudication as a way of determining the limits of governmental action that derogates from individual rights and liberties. Cases involving the consequences of otherwise proper governmental action upon protected speech illustrate this use.

In *Smith v. California*,[81] for example, the Court overturned a conviction for possession of obscene literature. A local ordinance had made it unlawful "for any person to have in his possession any obscene or indecent writing, [or] book . . . [i]n any place of business where . . . books . . . are sold or kept for sale."[82] The appellant was the proprietor of a bookstore. At trial, the prosecutor had not shown that the proprietor had any knowledge of the contents of the book in question. The state courts had found that the ordinance did not require a showing of such knowledge. The Supreme Court, in an opinion by Justice Brennan, held that the ordinance, as interpreted and applied by the state court, was unconstitutional. Justice Brennan's argument was essentially pragmatic:

> By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction

80. For a discussion of the meaning of "formal," see notes 2-12 and accompanying text *supra*.

81. 361 U.S. 147 (1959).

82. *Id.* at 148 (quoting LOS ANGELES, CAL., MUNICIPAL CODE § 41.01.1).

> upon the distribution of constitutionally protected as well as obscene literature . . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted . . . . [This] would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.[83]

The argument proceeds from act to consequences. Imposing criminal liability for the possession of obscene material without regard to knowledge of its contents would discourage booksellers from selling any books they have not inspected. This would in turn affect the availability of all writings to the public, including those protected by the Constitution. The ordinance thus restricts the public's access to constitutionally protected speech. A premise of this argument is that government's restriction of public access to protected speech is unconstitutional if accomplished directly; it is unconstitutional if done indirectly.[84] The contents of the ordinance as such do not render it unconstitutional; rather, the consequences of its application make it so.[85]

Bates v. City of Little Rock[86] exhibits a similar use of pragmatic reasoning to establish the unconstitutionality of interference with the freedom of association through otherwise proper governmental acts. The Court held that compulsory disclosure of membership lists of local branches of the National Association for the Advancement of Colored People constituted an unjustified interference with the members' freedom of association. The Court had to find the existence of governmental interference before determining that the interference was unjustified. Justice Stewart, in his opinion for the Court, appealed to the structure of reality, *i.e.*, to accepted judgments about the pertinent causal relations as established by the evidence at trial:

> Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more

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83. *Id.* at 153-54 (footnote omitted).

84. Perry v. Sindermann, 408 U.S. 593, 597 (1971) (relying upon Speiser v. Randall, 357 U.S. 513, 526 (1958)).

85. "Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." 361 U.S. at 150-51.

As discussed below, Justice Brennan's use of pragmatic argument here is based on an approach to the resolution of incompatibility of values that is rejected in this context by Justices Black and Douglas.

86. 361 U.S. 516 (1960).

> subtle governmental interference . . . .
>
> . . . There was substantial uncontroverted evidence that public identification of persons in the community as members of the organizations had been followed by harassment and threats of bodily harm. There was also evidence that fear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organizations and induced former members to withdraw. This repressive effect, while in part the result of private attitudes and pressures, was brought to bear only after the exercise of governmental power had threatened to force disclosure of the members' names. Thus, the threat of substantial government encroachment upon important and traditional aspects of individual freedom is neither speculative nor remote.[87]

2. ARGUMENT FROM WASTE

There are a number of related forms of argument that appeal to causal relations, as does pragmatic argument, but these forms do so in ways different from the typical pragmatic assessment of things in terms of their consequences. Three of these forms seem important in legal reasoning: the argument from waste, the argument of direction, and a variation of the latter, the argument of unlimited development.

Argument from waste,[88] like pragmatic argument, appeals to provisionally established relations of cause and effect—*i.e.*, the structure of reality. The typical argument from waste is that a position taken should be maintained, or an endeavor begun continued, in order not to waste gains already realized or efforts already exerted. "[O]ne should continue in the same direction."[89] Perelman gives as an example of such reasoning the following quotation from Saint Theresa:

> [One would give up if it were not] that it gives delight and pleasure to the Lord of the garden, that one is careful not to throw away all the service rendered, and that one remembers the benefit one hopes to derive from the great effort of dipping the pail often into the well and drawing it up empty.[90]

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87. *Id.* at 523-24 (citation omitted). "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 523 (quoting NAACP v. Alabama, 357 U.S. 449, 462 (1958)) (citations omitted).

88. *See* THE NEW RHETORIC, *supra* note 2, at 279-81.

89. *Id.* at 279.

90. *Id.* (quoting SANTA TERESA DE JESÚS, VIDA 96).

In the cases under study, speakers typically use this argument and its variations to support concerns about the institutional role of the Supreme Court. These concerns are especially prominent in the opinions of Justice Frankfurter. Consider, for example, his opinion in *Inman v. Baltimore & Ohio Railroad*,[91] in which he evinced an interest that the decisions of the Court be *decisive* and thus attain their full effect:

> [T]he appropriate disposition [of this case] would be dismissal of the writ of certiorari as improvidently granted. If[, however,] these views were enforced under the special circumstances of this case, affirmance by an equally divided Court would result. Thereby this case would be cast into the limbo of unexplained adjudications, and the lower courts, as well as the profession, would be deprived of knowing the circumstances of this litigation and the basis of our disposition of it.[92]

The Court would waste its efforts if the Justices did not reach a decisive conclusion to guide the lower courts and the profession. Justice Frankfurter, explaining his decision to join the opinion of Justice Clark, stated that it would "make possible a Court opinion."[93] The argument from waste provided the justification for this action.

If his concurrence had not been necessary to provide a clear majority in *Inman*, Justice Frankfurter would have dissented on the ground that an FELA case in which the sole issue is the sufficiency of the evidence does *waste* the Court's limited energies.[94] He made the same argument in *Sentilles v. Inter-Caribbean Corp.*,[95] a case brought under the Jones Act that, like the FELA cases, involved only the sufficiency of the evidence in a personal injury suit:

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227. Thus Mr. Justice Holmes, speaking for a unanimous Court thirty-five years ago, summarized the practice of the Court in abstaining from exercising its certiorari jurisdiction for the purpose of reviewing facts and weighing evidence in relation to them . . . . [This Court has the responsibility for deciding cases] "involving principles the settlement of which is of impor-

91. 361 U.S. 138, 141 (1959) (Frankfurter, J., dissenting).
92. *Id.*
93. *Id.*
94. *Id.*
95. 361 U.S. 107, 111 (1959) (Frankfurter, J., dissenting).

tance to the public as distinguished from that of the parties."[96]

Because this case diverted the Court from its proper task, reasoned Frankfurter, it wasted its energies. Although pragmatic reasoning appears here, the characteristic persuasive element of Justice Frankfurter's argument is its stress on avoiding the waste of the Court's time and energy.

Justice Stewart, concurring in the same case, resorted to an appropriate implicit metaphor to make a similar point:

> Cases like this, I am firmly convinced, do not belong in this Court. To review individualized personal injury cases, in which the sole issue is sufficiency of the evidence, seems to me not only to disregard the Court's proper function, but also to deflect the Court's energies from the mass of important and difficult business properly here.[97]

Justice Stewart, however, went on to take a position on the merits. Another argument from waste provided his reason for doing so:

> Yet under our rule, when four members of the Court vote to grant a petition for certiorari, the case is taken. If this rule is not to be frustrated, I can, as presently advised, see no escape from the duty of considering a case brought here on the merits, unless considerations appear which were not apprehended at the time certiorari was granted.[98]

A passage from *Inman* shows that Justice Douglas approved of Justice Stewart's reasoning against waste: "[T]he withdrawal of a Justice from a decision on the merits after certiorari has been granted impairs the integrity of the practice of allowing the vote of four Justices to bring up any case on certiorari."[99] The Court has established the practice of granting certiorari when four Justices favor it. A Justice's refusal to participate in a given case once the Court grants certiorari undercuts the efficiency of this practice.

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96. *Id.* at 111-12 (quoting United States v. Johnston, 268 U.S. 220, 227 (1925), and Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)).

97. *Id.* at 111 (Stewart, J., concurring); *cf.* Harris v. Pennsylvania R.R., 361 U.S. 15, 25 (Harlan, J., dissenting):

> The opening of a new Term that confronts the Court with the usual volume of important and exacting business impels me to reiterate the view that cases involving only factual issues and which are of no general importance have no legitimate demands upon our energies, already taxed to the utmost.

One could call this approach an argument from exhaustion.

98. Sentilles v. Inter-Caribbean Corp., 361 U.S. 107, 111 (1959) (Stewart, J., concurring).

99. Inman v. Baltimore & O. R.R., 361 U.S. 138, 146 (1959) (Douglas, J., dissenting).

Considerations of fairness implicitly intertwine with the argument as well. The appropriate time for disagreement with the practice ended when the Court finally established the practice. Once the Court has agreed that four Justices may bring a case before it, each Justice should, in fairness, accept that decision by participating in the subsequent decision on the merits.

3. ARGUMENT OF DIRECTION

The argument of direction is based on the position that prior decisions or events form a sequence of steps leading progressively in a given direction. This argument essentially attempts to establish the sequential or causal relationship among the discrete cases or events: "[I]f you give in this time, you will have to give in a little more next time, and heaven knows where you will stop."[100] The argument of direction suggests that although each step may seem different from the previous steps, it is caused by them and will itself cause the next step in the same direction. We are on a seductive stairway. The argument is thus based on an appeal to the structure of reality.

Justice Black used this argument in *Smith v. California:*

> If, as it seems, we are on the way to national censorship, I think it timely to suggest again that there are grave doubts in my mind as to the desirability or constitutionality of this Court's becoming a Supreme Board of Censors . . . . It is true that the ordinance here is on its face only applicable to "obscene or indecent writing." It is also true that this particular kind of censorship is considered by many to be "the obnoxious thing in its mildest and least repulsive form . . . ." But "illegitimate and unconstitutional practices get their first footing in that way . . . ."[101]

Justice Douglas agreed: "[T]he test that suppresses a cheap tract today can suppress a literary gem tomorrow."[102]

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100. THE NEW RHETORIC, *supra* note 2, at 282.

101. Smith v. California, 361 U.S. 147, 159-60 (1959) (Black, J., concurring) (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

102. *Id.* at 168 (Douglas, J., concurring), quoting a paragraph from his dissent in Roth v. United States, 354 U.S. 476, 514 (1957). *Cf.* CORNFORD, MICROCOSMOGRAPHIA ACADEMIA: BEING A GUIDE FOR THE YOUNG ACADEMIC POLITICIAN 20-21 (1972), describing two principles that resemble the argument of direction:

> The *Principle of the Wedge* is that you should not act justly now for fear of raising expectations that you may act still more justly in the future—expectations which you are afraid you will not have the courage to satisfy. . . .

4. ARGUMENT OF UNLIMITED DEVELOPMENT

The argument of unlimited development is a variation of the argument of direction. The gist of the argument of direction is in showing that there *is* a progression with specific limits and a foreseeable outcome. In the argument of unlimited development this need not be shown: one characterizes one's opponent as having recognized and based his position on a progression that supposedly brings an increase in value but that has no clear limit. One agrees that there *is* a sequence of steps in the same direction, but argues that this progression will sooner rather than later undercut other values or interests.[103]

This form of argument typically occurs when competing rights or interests must be resolved or made compatible. In such a context, one must argue that the opponent is pursuing one interest without regard to the others. For example, in *NLRB v. Insurance Agents' International Union,*[104] the Board had found that a union, even though engaging in discussions with an employer, was nonetheless refusing "to bargain" by independently putting economic pressure on the employer. The pressure resulted from activities that fell short of a strike but still disrupted the employer's business.[105] The Court, through Justice Brennan, held that the Board had gone too far. The Board's concern with good faith bargaining had progressed to a position that would disallow any economic pressures. This position was inconsistent with the collective bar-

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> The *Principle of the Dangerous Precedent* is that you should not now do an admittedly right action for fear you, or your equally timid successors, should not have the courage to do right in some future case, which *ex hypothesi,* is essentially different, but superficially resembles the present one. Every public action which is not customary, either is wrong, or, if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time.

103. THE NEW RHETORIC, *supra* note 2, at 287-89. *Cf.* B. CARDOZO, *supra* note 69, at 40 (concerning the use of logic in judicial reasoning):

> The directive force of logic does not always exert itself, however, along a single and unobstructed path. One principle or precedent, pushed to the limit of its logic, may point to one conclusion; another principle or precedent, followed with like logic, may point with equal certainty to another. In this conflict, we must choose between the two paths, selecting one or the other, or perhaps striking out upon a third, which will be the resultant of the two forces in combination, or will represent the mean between extremes.

As we shall see, the argument of unlimited development is an aspect of the general topic of incompatibility of values, and is one of the arguments used to resolve such incompatibility.

104. 361 U.S. 477 (1960).

105. These activities included the agents' refusal to solicit new business, missing scheduled meetings, picketing the offices, and distributing leaflets. 361 U.S. at 480-81.

gaining statute the Board was enforcing.[106] As Justice Frankfurter pointed out in a concurring opinion, the Board's decision ran afoul of the section of the statute that prohibited interference with the right to strike.[107]

B. *Arguments Based on Coexistence*

Thus far, I have examined various forms of argument based on what Perelman calls the structure of reality. The forms I have discussed—pragmatic argument, argument from waste, argument of direction—depend on sequential (causal) connections. There are also several important arguments based on accepted relations of *coexistence*. These, like sequential relations, are constitutive of the structure of reality, our way of seeing the world.

In the cases under study, the Justices typically use the arguments based on relations of coexistence to support positions on the role of the Court as an institution. Such arguments emerge from the Justices' perception of the Court as a unique institution in American political life. As so perceived, the Court is related to its actions much as a person is related to his acts. The relation between a person and his acts is the prototype of the relations of coexistence:

> The connection between act and person seems to us the prototype of a series of ties which give rise to the same interactions and lend themselves to the same arguments: the connection between individual and group, the connection between an event and the epoch in which it occurs, and many other connections of coexistence of which the most general is that of act and essence.[108]

The relation between act and person rests on a distinction between the enduring human person and his acts. Using this distinction, arguments based on the interaction between the person and his acts are possible.

> The makeup of the human person and its separation from his acts is tied to a distinction between what is considered important, natural and characteristic of the being under discussion and what is regarded as a transitory and external manifestation thereof. The makeup of the person always gives us a rule, in virtue of which the essence may be distinguished from its

106. National Labor Relations Act § 8(b)(3), 29 U.S.C. § 158(b)(3) (1976).
107. 361 U.S. at 510 (Frankfurter, J., concurring).
108. THE IDEA OF JUSTICE, *supra* note 9, at 194-95.

manifestations.

> Since this connection between the person and his acts does not constitute a necessary link or possess the same sort of stability as the relation between an object and its qualities, a simple repetition of an act may involve either a reconstruction of the person or a reinforced adherence to the previous makeup. The precariousness of the relation determines a constant interaction between the act and the person.[109]

This analogy to the relation between act and person elucidates the characteristic concerns of the members of the Court about its institutional role. For example, like the person, the Court must be watchful of its reputation—*i.e.*, the public perception of its enduring character—and the impression its acts create in the minds of its audience: "Past care for the reputation [of the person] becomes a guaranty that nothing would be done that would bring about its loss. Previous actions and the reputation which results from them become a sort of capital which is incorporated in the person."[110] The concern of the Justices for the Court's reputation thus results in a sort of "capital" that helps to preserve this reputation when the Court makes an unpopular decision.

As I have already suggested,[111] Justice Frankfurter was most concerned about the institutional role of the Court. The other Justices, too, were well aware of the constraints imposed on them by this institutional role. These constraints have various sources; some arise from the traditions of the common law, some are grounded in the federal system of American law or in the doctrine of separation of powers, and many are based on the unique role of the Supreme Court. As Justice Frankfurter stated in *Smith v. California*, "[A] case before this Court is not just a case."[112] Within the analogy to the relation between act and person, these constraints represent an awareness of the interaction between the Court, as a special kind of person, and its acts. The Court's effectiveness in maintaining this unique role rests on its enduring institutional character, which in turn depends on how its different audiences perceive its acts.

Arguments concerning the institutional role of the Court may reflect a tension between the two kinds of values: abstract and concrete. Justice and fairness are abstract values; they are not at-

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109. *Id.* at 171.
110. *Id.* at 178.
111. *See* text accompanying note 92 *supra*.
112. 361 U.S. 147, 161 (1959).

tached to a particular entity.[113] On the other hand, concrete value attaches "to a living being, a specific group, or a particular object, considered as a unique entity,"[114] *i.e.*, as a person. For example, the values associated with tradition, such as loyalty, fidelity, and brotherhood are concrete, as are those attached to the common law.[115] Argument based on concrete values is often conservative;[116] such values reflect the status quo, that which stands as history at a given moment.[117] Arguments emanating from the established role of the Court as an institution reflect concrete values associated with the uniqueness of the institution and are in this sense conservative. By appealing to such concrete values, these arguments oppose acts that may change the nature of the institution.

Responses to such arguments frequently employ abstract values to justify the change.[118] Typically, one appeals to an ideal to justify change, and the shape a given ideal takes depends on the abstract values that inform it. For example, the eighteenth-century rationalists invoked abstract values to attack existing institutions such as the church and the monarchy.

The case of *United Steelworkers v. United States*[119] illustrates the interplay of concrete and abstract values in arguments about the role of the federal courts. In that case, President Eisenhower had determined that the nationwide steelworkers' strike endangered the health and safety of the nation. He sought to enjoin the strike under the Taft-Hartley Act. Justice Douglas argued that the district court should have exercised its traditional equitable discretion by shaping a decree applying only to those specific workers whose work directly affected the national defense.[120] He thus invoked concrete values associated with the equity tradition of the federal courts, *i.e.*, with their independence and sound

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113. THE NEW RHETORIC, *supra* note 2, at 77, 79.

114. *Id.* at 77. Many virtues and forms of behavior—*e.g.*, fidelity, loyalty, obligation—can be conceived only in relation to concrete values.

> Argumentation is based, according to the circumstances, now on abstract values, now on concrete values: it is sometimes difficult to perceive the role played by each. When a person says that men are equal because they are children of the same God, he seems to be relying on a concreate value to find an abstract value, that of equality. . . .

Id. at 77-78.

115. *Id.*

116. *Id.* at 79.

117. *Id.* at 77-78.

118. *Id.* at 79.

119. 361 U.S. 39 (1959).

120. *Id.* at 70.

discretion.

> We are dealing here with equity practice which has several hundred years of history behind it . . . .
>
> An appeal to the equity jurisdiction of the Federal District Court is an appeal to its sound discretion. One historic feature of equity is the molding of decrees to fit the requirements of particular cases . . . . Equity decrees are not like the packaged goods this machine age produces. They are uniform only in that they seek to do equity in a given case.[121]

Although his position favors a change, *i.e.*, that the Court upset the lower court's order, Justice Douglas based his argument on the conservative appeal to a concrete value—the equity tradition. The argument in effect treats the district court's order as a departure from this tradition.[122]

Justices Frankfurter and Harlan responded to Justice Douglas's argument by invoking abstract values associated with the constitutional principles[123] governing the relationships among the three branches of government. They argued that equitable discretion is inappropriate when both Congress and the President have made decisions "preempting" it. They also argued, however, that the case was simply not one in which shaping a specific decree would be appropriate:

> No doubt a District Court is normally charged with the duty of independently shaping the details of a decree when sitting in equity in controversies that involve simple and relatively few factors—factors, that is, far less in number, less complicated and less interrelated than in the case before us. But a court is not qualified to devise schemes for the conduct of an industry so as to assure the securing of necessary defense materials. It is not competent to sit in judgment on the existing distribution of factors in the conduct of an integrated industry to ascertain whether it can be segmented with a view to its reorganization for the supply exclusively, or even primarily, of government-needed materials. Nor is it able to readjust or adequately to reweigh the forces of economic competition within the industry or to appraise the relevance of such forces in carrying out a defense program for the Government.[124]

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121. *Id.* at 70-71 (Douglas, J., dissenting).

122. Justice Douglas also uses the principle of inertia in this argument. For a discussion of this principle, see notes 19-22 and accompanying text *supra*.

123. For example, the term "equity" as an abstract value is associated with the constitutional principle of "equal protection."

124. 361 U.S. at 50-51 (Frankfurter and Harlan, JJ., concurring).

Although this argument accepts the concrete values associated with the equity tradition, it rejects Justice Douglas's application of those values in this particular circumstance.

IV. Quasi-Logical Forms

In the preceding section, I analyzed arguments in terms of the relations on which they appear to rely. Pragmatic arguments, for example, rely on the causal relation, the prototype of which is the connection between an act and its consequences. In contrast, arguments about the role of an institution rely on the relation of essence and act, the prototype of which is the relation between the person and his acts. These arguments have in common their reliance on relations that are presupposed in the way we look at the world. In Perelman's words, these relations are constitutive of reality; they compose the structure of reality.

In this section I will examine arguments whose persuasiveness depends on their resemblance to patterns of formal reasoning. As I stated at the outset, formal reasoning is reasoning that, by virtue of its form, yields a *valid* result. The arguments of logic and mathematics are formal in this sense.

Perelman calls the forms of argument I will be discussing in this section "quasi-logical."[125] Perhaps "quasi-formal" is more appropriate: these arguments resemble formal arguments, but are not rendered valid by virtue of their form. Persuasion results from perception of that underlying formal model.[126] The extent of persuasion depends upon the context in which the argument arises. Thus, Perelman quotes the following example of quasi-logical argument from the works of John Locke: "For whatsoever is not lawful to the whole Church cannot by any ecclesiastical right become lawful to any of its members."[127] This argument persuades by reducing the Church's relation to its members to the mathematical relation of a whole to its parts.[128] The principle behind the argument is: what is not true of the whole cannot (logically) be true of its parts.

Of the various forms of quasi-logical argument discussed by Perelman, I will look at the arguments of inconsistency, incompatibility, and sacrifice. Each of these forms of argument appears frequently in the cases under study here.

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125. The New Rhetoric, *supra* note 2, at 193.

126. *Id.*

127. *Id.*, at 231 (quoting Locke, *A Letter Concerning Toleration*, in 35 Great Books of the Western World 7 (1952)).

128. The argument also makes use of the *locus* of quantity.

A. *Argument of Inconsistency*

The argument of inconsistency has the simplest structure of the three forms just mentioned. The argument is that one's opponent is urging a position that is either intrinsically inconsistent or inconsistent with some other position that the opponent takes (or, perhaps, should take).

The underlying formal structure of the argument is: If P, Q, and R are each propositions, P implies R, and Q implies not R, both P and Q cannot be true. This structure is formally valid because it rests on the contradiction entailed by propositions P and Q. Readers may recognize this as the principle of noncontradiction introduced earlier.[129] It is the concept of a logically consistent system of general propositions. The characteristic of logical consistency ensures that application of such a system will never generate a formal contradiction among its member propositions.[130] This characteristic is a requirement of a formal system.

The quasi-logical argument, of course, actually urges an inconsistency instead of a logical contradiction in the formal sense. The argument of inconsistency merely received its persuasiveness from resemblance to the formal model.[131] One of the virtues of formal reasoning is that it uses a formal language. Formal languages are neither vague nor ambiguous. The design of a formal language can guarantee logical consistency. In contrast, argumentation is carried on through a natural language. A natural language does not provide the conditions necessary to guarantee strict logical

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129. *See* note 11 *supra.*

130. THE NEW RHETORIC, *supra* note 2, at 195-97.

131. The use of quasi-logical forms in legal reasoning presupposes, of course, a "consistency rule" in law. *Contra,* Stone de Montpensier, *The Logic of Ethical Statements,* 32 PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 297, 308 n.6 (1972):

> The objectivist in ethics wants to show that in ethical statements or systems there is a consistency rule as there is in mathematics, law and logic. It seems to be a prerequisite of argument, to be rational and knowledge to be knowledge, that self-contradiction be eliminated. This, of course, is what some call a metaphysical matter, what others call a meta-matter or second-order matter. Is it *a priori* and necessarily true that any meaningful statement must exclude self-contradiction? Some say that every meaningful question has a right answer. I would want to deny that. This again brings out the unsatisfactory feature of the objectivist's position, when he relies on the argument that ethical judgments are objectively true because ethical statements are like other statements which a metaphysician, in Wisdom's sense of the term, can demonstrate by the case by case procedure.

The charge of inconsistency relies also on our perception of the relation between act and person: the person is identified by his acts, which must therefore be consistent if such identification be (logically) possible. *See* THE IDEA OF JUSTICE, *supra* note 9, at 168-88.

consistency:

> When the statements are perfectly univocal, as is the case with formal systems, where the signs alone are sufficient, by their combination, to make the contradiction undeniable, one can only bow to the evidence. But this is not the case with statements in ordinary language, whose terms can be interpreted in different ways. Normally, when someone asserts a proposition and its negation simultaneously, we do not think he is trying to say something absurd, and we wonder how what he says should be interpreted in order to avoid inconsistency. The language used in argumentation can indeed rarely be considered as entirely univocal, as would be that in a formal system.[132]

The failure of the argument of inconsistency to conform fully to the underlying formal structure is characteristic of quasi-logical arguments. Because of this failure, the argument of inconsistency has a much richer variety of argumentative uses than the principle of noncontradiction has.

The following excerpts from the opinions under study illustrate this variety. Example 1: "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates."[133] Example 2:

> It seems plain to me that petitioner, having asked [for] and obtained an erroneous but far more favorable charge than he was entitled to, certainly invited the error, benefited by it, and surely may not be heard to attack it as prejudicial to him, especially when, as seems quite plain, it was prejudicial only to the Government.[134]

Example 3: "Respondents cannot be heard to assert that wages are ordered to be paid for services which were not performed, for it was the employer's own unlawful conduct which deprived the employees of their opportunity to render services."[135]

The first example asserts an inconsistency between *acts:* it is inconsistent to condemn that which one generally tolerates. There is, however, no formal contradiction between these two acts. Even if one expresses the acts as propositions there is no necessary contradiction: A condemns B's doing X; A generally condones anybody's doing X. Of course, it may well be unreasonable to condemn

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132. THE NEW RHETORIC, *supra* note 2, at 195.

133. Smith v. California, 361 U.S. 147, 171 (1959). (Harlan, J., concurring in part and dissenting in part).

134. Forman v. United States, 361 U.S. 416, 429 (1960) (Whittaker, J., concurring).

135. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 293 (1960).

B's doing X while condoning others' doing X. Whether or not this is so depends on the context. If we are persuaded that the behavior is unreasonable, then the argument of inconsistency succeeds here.

The second example shows especially well the close connection of the argument of inconsistency with the relation between act and person. Having urged a position at trial, petitioner is now "owner" of that position and may not disown it. What he may now *reasonably* do is restricted to acts consistent with what he has done in the past. Of course, we commonly allow, indeed encourage, persons to disown their earlier acts. When others have relied on one's earlier acts, however, it is unreasonable to attempt to disown them. The argument of inconsistency in this case relates to the idea of fairness—in particular, to the form of fairness that underlies the idea of estoppel.

The structure of the third example resembles that of the second: an employer may not traverse the substantive claim of its employees by an argument that implicitly disowns the earlier act of the employer that gave rise to the claim. As in the case of the first example, the second and third examples involve no formal contradiction.

A final example shows the argument of inconsistency in yet another form, the appeal to preserving the integrity of a single entity—in this case, a lower court's decree: "To fail to accord [the decree] at least the implied effect of a direction not to act solely for the purpose of defeating it, makes of the decree less than a *brutum fulmen* and transmutes it into a mockery."[136] The argument consists simply in stressing the inconsistency of accepting the decree and at the same time acting to vitiate it. The argument depends on the coherence that we attribute to the individual essence. Perelman illustrates this attribution with the following quotation from Simone Weil, attacking Aristotle for his views on slavery.

> Even if we reject that particular notion of Aristotle, we are necessarily led in our ignorance to accept others that must have lain in him at the root of that one. A man who takes the trouble to draw up an apology for slavery cannot be a lover of justice. The age in which he lived has nothing to do with it.[137]

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136. NLRB v. Deena Artware, Inc., 361 U.S. 398, 413 (1960) (Frankfurter, J., concurring).

137. THE NEW RHETORIC, *supra* note 2, at 299 (quoting S. WEIL, THE NEED FOR ROOTS 243-44 (1952)).

B. *Argument of Incompatibility*

The principle of noncontradiction is the underlying formal model for the next form of quasi-logical argument as well. Perelman calls this form the argument from incompatibility. Arguments of this form seek to avoid or, if necessary, resolve an incompatibility between interests[138] that, were it not for such incompatibility, would severally be pursued. Consistency concerns the relationship of the premises of the argument to each other. Compatibility requires the argument to conform to notions outside the structure of the argument.

Argumentation, particularly in justification of a decision, concerns practicable action, compatible with the other elements of the context in which the action is being considered. This is rather different from, although related to, the concern for logical consistency:

> [I]t is permissible only in exceptional cases—when the speaker happens to borrow several links of his argument from a formal system—to claim the presence of a contradiction in the opponent's system. Usually the line of argument tries to show that the theses one is disputing lead to an *incompatibility*, which resembles a contradiction in that it consists of two assertions between which a choice must be made, unless one rejects one or the other . . . .[139]

As Perelman explains, contradictions and incompatibilities derive from different sources:

> Incompatibilities can result from the application of several moral or legal rules, or of legal or sacred texts, to definite situations. While contradiction between two propositions implies a formal system, or at least a system of univocal concepts, incompatibility is always relative to contingent circumstances, whether the latter be determined by natural laws, particular events or human decisions.[140]

Perelman stresses here the *critical* use of quasi-logical arguments of incompatibility. My interest, however, is in the *constructive* use of such arguments to avoid or resolve incompatibility among interests one wishes to pursue simultaneously.

The Supreme Court often perceives the pursuit of one interest

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138. "Interests" is used broadly here to include anything that is desired or desirable in the given context.

139. THE NEW RHETORIC, *supra* note 2, at 195-96 (emphasis in original).

140. *Id.* at 196-97.

to involve the sacrifice of others. The Court then regards the interests as incompatible, and the justices turn to one or more quasi-logical techniques to resolve the incompatibility. Choice of one technique over another depends on the nature of the interests (*i.e.*, on the substantive legal issues) involved in the case. Thus, in one approach to the resolution of incompatibility, the Court might articulate separate zones of application for the interests seen as incompatible. This is a general resolution; it establishes a relation among the incompatible interests that can govern future cases as well as the present dispute. Or the Court might resort to another technique of general resolution, simply subordinating one interest to the other in any context. If a general resolution is not possible or not desirable, the Justices may seek a practical resolution for the case at hand that may or may not work in future cases. Such ad hoc resolution conforms with the judicial tradition that a court should concern itself only with the issues presently before it. The Court will accordingly "balance" the interests to reach a decision under the particular circumstances of the case.[141]

Still another approach, classic in jurisprudence, is to establish *relative weights* for the incompatible interests, to guide both present and future adjudication. For example, in considering the extent to which state interests may be asserted in areas predominantly governed by federal law, the Justices may prefer to fix an enduring relation among the competing interests rather than leave future cases to be decided on their particular facts.[142] A line of decisions involving the interaction of maritime tort principles with state wrongful death statutes illustrates this preference.

In *Hess v. United States*[143] the survivor of an employee of a government contractor brought an action to recover for the death of the employee in Oregon's navigable waters. The plaintiff sought damages under Oregon's general wrongful death statute, which imposed a standard of care roughly equivalent to the standard of care accepted in admiralty, and under Oregon's Employers' Liability

141. For a thorough discussion of the Supreme Court's use of "balancing" in constitutional adjudication, see Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978).

142. *E.g.*, due process and equal protection questions. Goodhart, *supra* note 45, at 121-22: "[U]nder the American federal system, with its conflict between national and state laws, the question of the correct definition of law is of the greatest practical importance. . . . '[L]iberty,' 'property,' and 'due process of law' . . . are part of the constitution and must be construed as legal terms." *But see, e.g.*, Henkin, *supra* note 141, at 1039 (commerce clause decisions).

143. 361 U.S. 314 (1960).

Law, which imposed a much broader standard of care. Because the death occurred in navigable waters, the laws of admiralty applied. Yet admiralty itself confers no remedy for wrongful death. Conflicts between admiralty and state law must be resolved in favor of admiralty, according to the Supremacy Clause.[144] Although it seemed as though Hess had no remedy, *The Hamilton* and its progeny had held that an action in personam for wrongful death occurring on navigable waters could be brought under a state wrongful death statute.[145] The district court applied Oregon's general wrongful death statute, but found no liability thereunder, and held that the high standard of care required by the Employers' Liability Law rendered its application unconstitutional.[146] On appeal, Hess claimed to have been erroneously deprived of his opportunity to recover, under these stricter standards.[147] Thus, the issue facing the Supreme Court was whether admiralty law permits an action against the United States by "adopting" a state law in which the conduct said to give rise to liability is measured by greater substantive standards of due care than those that would have governed the same conduct in admiralty had death not occurred.[148]

The Court held that the district court should have applied the Employers' Liability Law. The court delineated mutually exclusive ranges for admiralty's standards of duty and a state's substantive standards: state substantive law determines liability in an action for wrongful death in the state's territorial waters, and admiralty's standards apply otherwise.[149] The Court chose a general principle for future guidance in resolving the incompatibility of federal and state laws.[150] The majority's choice illustrates the first approach to

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144. *See* the discussion in *id.* at 324-28 (Harlan, J., dissenting).

145. *Id.* at 322.

146. *Id.* at 317.

147. *Id.*

148. *Id.* Under the Employers' Liability Law, a defendant is liable for failure to "use every device, care and precaution which it is practicable to use for the protection and safety of life and limb." *Id.* at 316. The wrongful death statute permitted recovery only for "the wrongful act or omission of another." *Id.* at 315.

149. *Id.* at 319.

150. The conflict in *Hess* was not "between two different rules [federal and state], but between one rule [presented in *The Hamilton* and its progeny] and the consequences resulting from the very fact that it has been affirmed." THE NEW RHETORIC, *supra* note 2, at 203. That is to say, it is the possible consequences of the one rule that lead to the possible conflict. Perelman calls this type of incompatibility "*autophagia*": Generalizing a rule, applying it without exception, may lead to preventing its application, indeed, to destroying the rule itself. To take an example from Pascal: "Nothing fortifies more than that there are some who are not sceptics; if all were so, they would be wrong." *Id.* at 203-04 (quoting B. PASCAL, PENSEES, in 33 GREAT BOOKS OF THE WESTERN WORLD 237 (1952)). Of course, in

the resolution of incompatibility, set forth above.

Justice Harlan rejected the Court's approach. He took great pains to articulate a principle for avoiding what he perceived to be the recognition of state interests over federal interests.

> [T]he proper point of departure is, I believe, to recognize that in permitting use of wrongful death statutes admiralty is endeavoring to accommodate itself to state policies represented by such statutes. . . .
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> . . . The true inquiry thus becomes one involving the nature of the state interest in a wrongful death statute, the extent to which such interest intrudes upon federal concerns, and the basis of the reasoning that led Mr. Justice Holmes to state summarily in *The Hamilton* that resort to such statutes would not result in "any lamentable lack of uniformity" in maritime law. . . .[151] [W]here the duty imposed by a state death act is no greater than that already existing under federal law [if the injured party had not died], the application of the statute is solely, or nearly so, a reaction to strong, localized state interests, and there is no real encroachment on federal interests [if the state law is applied].
>
> Far different is the case when a State purports, as here, to impose a duty which under federal law a person does not bear. Then it can hardly be said that the State is not seeking to regulate conduct within federal maritime jurisdiction. The very purpose of a statute like the one here invoked is to induce those to whom it applies to take the precautions required by it. In such a case, the mere fact that it is a death act which imposes the duty cannot be thought to render the import of the matter of "local" concern only. The state interests given expression no longer are predominantly those peculiarly within state concern. By the same token the intrusion into federally regulated interests is no longer minimal.[152]

Justice Harlan thus preferred to avoid any incompatibility in the application of federal and state law by subordinating state interests to the uniformity of federal law: whenever joint application would endanger the uniformity of admiralty law, he would have disregarded the state statute. This illustrates the second approach to resolution of incompatibility, presented above.

Hess, the rule is not destroyed; although the concurring Justices advocated overruling the extension of it, they felt that the rule bound them to hold constitutional the application of Oregon's Employers' Liability Law. 361 U.S. 314, 321-22.

151. 361 U.S. 330-31.

152. *Id.* at 333-34 (footnote omitted).

Justice Whittaker's dissenting opinion in the accompanying case of *Goett v. Union Carbide Corp.*[153] suggests another approach to avoid incompatibility. Whittaker pointed out that the cause of action was a federal one, and that admiralty adopts merely the remedy of the state wrongful death statute when no remedy is available at maritime law solely because the injured person has died.

> [T]he West Virginia Wrongful Death Statute, like most others, creates a cause of action only in the sense of providing a *remedy* for death resulting from an act made wrongful by other laws—whether common, statutory or maritime laws—which would have redressed the wrong "if death had not ensued." . . . And when, in a case encompassed by the terms of the State's Wrongful Death Statute, admiralty "adopts" such a statute it does so only to afford a *remedy* for a substantive cause of action created by the maritime law which, "if death had not ensued," would have redressed it.[154]

According to this view, admiralty might have "adopted" the remedy provided by Oregon's general wrongful death statute, but had not adopted Oregon's Employers' Liability Law. Although similar in outcome to Justice Harlan's approach, Justice Whittaker's argument is different in structure; he simply rules out conflict by making it impossible as a matter of definition. The state statute provides only a remedy and does not change admiralty's standard of duty. If no federal cause of action exists, because the employer has met admiralty's standard of duty, there will be no available remedy.

Each of these resolutions—Justice Stewart's, Justice Harlan's, and Justice Whittaker's—attempts to formulate, in general principles, a means of avoiding incompatibility that will apply to future cases as well as to those at hand. Formulating the principles requires weighing the relative interests legitimately to be protected, and in this sense balances them. As mentioned earlier, balancing may also be done on an ad hoc basis, to reach a decision in a given case that may not affect the outcome of future cases.

C. *Argument by Sacrifice*

In either case, balancing is structurally or quasi-logically a form of argument by comparison; it appeals to the mathematical

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153. 361 U.S. 340, 345 (1960).

154. *Id.* at 346 (citation omitted) (emphasis in original).

concept of commensurability. This concept implies a measure that permits the establishment of an ordered series among the things to be compared.[155] The measure of weight, for example, together with the relation *greater than*, makes possible an ordered series among physical objects. Comparison of values, however, as in the balancing of constitutional interests, is normally quasi-logical because no such measure of weight exists—*i.e.*, the values are not strictly commensurable. As a substitute, the interests are measured by one another. This is argument by *sacrifice*.

> One of the most frequently used of the arguments by comparison is that which is based on the sacrifice which one is willing to make in order to achieve a certain result. . . .
>
> In argumentation by sacrifice, the sacrifice is a measure of the value attributed to the thing for which the sacrifice is made.[156]

The idea behind this argument is similar to that behind the expressions "trade-off" and "opportunity cost." To illustrate: "[I]f they had to seal their doctrine in their own blood, and at the expense of their own life, one could see how much it would mean to them."[157] In this example, the value of one term (the unspecified doctrine) is measured by the known value of another term (life), which is being sacrificed to the first. Thus, the notion of sacrifice permits the indirect quantification of an unknown term through a known and quantifiable term.[158]

The court-martial cases discussed earlier[159] provide a good example of the argument of sacrifice in constitutional adjudication. Those cases confront the issue whether the fifth and sixth amendments prohibit the court-martialling of civilian dependents of overseas armed services personnel and overseas employees of the mili-

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155. THE NEW RHETORIC, *supra* note 2, at 247.

156. *Id.* at 248.

157. *Id.* (quoting 1 J. CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 16 (Westminister ed. 1936)).

158. The quasi-logical character [of argument from sacrifice] is especially pronounced when in order to give something greater value some other thing is transformed into a means calculated to bring it about and measure it. Thus, Socrates in the *Panegyric of Athens* writes:

> In my view it is some god who has brought about this war out of admiration for their courage, in order to prevent them from being unrecognized and ending their lives in obscurity.

Id. at 252 (quoting SOCRATES, PANEGYRIC OF ATHENS § 84).

159. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960). *See* notes 23-29 and accompanying text *supra*.

tary who are charged with noncapital crimes while overseas. The government had unsuccessfully argued that the potential burden of removing such persons from the court-martial jurisdiction, at least in noncapital cases, outweighed the benefits of affording them the protection of the fifth and sixth amendments. Justice Clark, writing for the Court, regarded the cost of affording such protections as a measure of the value of the constitutional rights for which the sacrifice was being made.[160] The costs to the government—one term of the comparison—were quantifiable and therefore provided a measure of the constitutional interests that prevailed.

Frequently, neither of the terms of comparison will be quantifiable. Incompatibility between legitimate state interests and first amendment liberties is a familiar example. In *Smith v. California*,[161] the Court, with the exception of Justices Black and Douglas,[162] viewed a penal ordinance as an expression of the state's legitimate interest in suppressing obscenity. By choosing to enforce this interest without regard to the booksellers' knowledge of the content of the books they sold, however, the state had created an incompatibility between this interest and the first amendment's protection of speech. The ordinance in question would have sacrificed protected speech, as well as obscene speech. The Court resolved the incompatibility through the technique suggested by the government—weighing the competing interests in the particular circumstances presented.

Justice Harlan concurred, believing that the suppression of obscenity is always a legitimate object of the state police power and that when the exercise of the police power for this purpose affects first amendment freedoms, any restriction on speech must be balanced against the state's interest.[163] Since the statute had no element of *scienter*, it imposed too high a cost (too great a sacrifice of freedom of speech) and was unconstitutional. If the state had expressed its interest in suppressing obscenity in a statute with a

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160. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. at 287.

161. 361 U.S. 147 (1959).

162. Justices Black and Douglas took a different view. *See* text accompanying notes 169-70 *infra*.

163. In his opinion for the court in Bates v. Little Rock, 361 U.S. 516, at 524, Justice Stewart describes the balancing between the state's legitimate interests and the freedoms of speech and association: "Decision in this case must finally turn, therefore, on whether the cities as instrumentalities of the State have demonstrated so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will effect."

scienter requirement, the Court would have found the balance tipped in favor of the state's interest. Henkin has called this technique "balancing as doctrine."[164]

The following excerpt illustrates a different technique, called "balancing as interpretation," and then contrasts it with balancing as doctrine.

> In *[United States v.] Nixon* balancing is exegetic, a mode of constitutional *interpretation.* The Court invoked a principle of constitutional construction that conflicting constitutional claims might be balanced, and it looked within and about the Constitution for weights to be assigned to each. By such balancing the Court produced a substantive constitutional principle of general application: that executive privilege based on the needs of executive confidentiality is to be weighed against competing needs. In consequence, the Court developed a sub-principle that the needs of the administration of justice outweigh executive privilege. Unless modified by the Court, that principle presumably will be applied in all future cases; there will be no occasion to balance in applying it, no weighing in particular cases of the presidential need for confidentiality or the competing judicial need for executive testimony or documents.[165]

The *Hess* Court used balancing as doctrine over the strenuous objections of Justice Harlan, who advocated the use of "balancing as interpretation."[166] The Court believed it appropriate to decide cases like *Hess* by weighing in each case the federal interest in uniformity of admiralty law against the applicable state's interests in compensation for wrongful deaths.[167] Justice Harlan, on the other hand, believed that the need for uniformity of federal maritime law should predominate over any state interests.[168] Since one can formulate this principle of subordination independently of particular cases there is no need to decide a particular case by balancing the competing interests involved—those interests have been adequately considered in the formulation of the general principle.

Justice Black's and Justice Douglas's concurring opinions in *Smith v. California* take an approach similar to Justice Harlan's in the *Hess* case; they formulate the general principle that the freedoms of speech and press must predominate over incompatible

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164. *See* Henkin, *supra* note 141.
165. *Id.* at 1027 (emphasis added).
166. *Id.* at 1028-46.
167. 361 U.S. 314, at 319.
168. *Id.* at 338.

state interests. The Court must give a higher value at the outset to the first amendment liberties and decide all cases in light of this priority: "I read 'no law . . . abridging,'" said Justice Black, "to mean *no law abridging*. The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press . . . ."[169] In a similar vein, Douglas urged that "neither the author nor the distributor of this book can be punished under our Bill of Rights for publishing or distributing it."[170] Thus, these two Justices believed that the Constitution has already determined the subordination of the exercise of the police power for the general welfare to the exercise of these liberties by individuals. In principle, then, no incompatibility can arise here; a state may never legitimately use police power to abridge freedom of speech.

Perelman points out that comparing terms irrespective of the result may work to the advantage of one of those terms.[171] This helps us understand Justice Black's position. He objects not only to any comparison that imputes more weight to a state's interest in the exercise of its police power than to an individual's interest in freedom of speech, but also to the implication that these terms are commensurable: "What are the 'more important' interests for the protection of which constitutional freedom of speech and press must be given second place? . . . What express provision or provisions of the Constitution put freedom of speech and press in this precarious position of subordination and insecurity?"[172]

Similarly, in *Hess*, Justice Harlan's objection to allowing state interests, even if strongly held, to "intrude" on the federal interest in uniformity of the maritime law rests on his conviction that the federal interest is incommensurable[173] and that the Court may con-

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169. 361 U.S. 147, at 157 (Black, J., concurring) (emphasis in original).

170. *Id.* at 167 (Douglas, J., concurring).

171. THE NEW RHETORIC, *supra* note 2, at 243. He quotes from the Sermons of Bossuet the following interesting example: "'. . . pious sovereigns are willing that all their glory disappear before that of God; and, far from being saddened that their power is thereby diminished, they know that they are never more profoundly revered than when they are humbled by comparison with God.'" *Id.* at 244. The attempt to avoid such comparisons, then, is related to the high value given to that which is unique. *See* the discussion of concrete values, *supra* at note 115. A refusal to compare is illustrated by Plotinus' invocation of the uniqueness of the "One": "Let us separate him from everything else. Let us not even say that things depend on him and that he is free . . . he must have absolutely no connection with anything . . . ." THE NEW RHETORIC, *supra* note 2, at 244.

172. 361 U.S. 147, at 157.

173. *See* text accompanying notes 150-51 *supra*, discussing Justice Harlan's opinion in Hess v. United States, 361 U.S. 314 (1960).

sider state interests only after a prior determination that uniformity will not be destroyed thereby.

V. Dissociation

The forms of argument discussed in sections II and III involve what Perelman calls processes of *association:* "By processes of association we understand schemes which bring separate elements together and allow us to establish a unity among them, which aims either at organizing them or at evaluating them, positively or negatively, by means of one another."[174] Associative arguments work from a field of accepted agreements and do not alter the relations among the subjects of these agreements. In other words, arguments of association accept the presumed structure of the real and the presumed field of concepts that render this reality intelligible.

For example, arguments based on the structure of reality seek to establish an "agreement with the very nature of things."[175] Pragmatic argument, in particular, takes a certain causal relation as given, and argues from the value of the effect (viewed as an end) to the value of the cause (viewed as a means). The argument works from the presumed acceptance of the causal relation, and does not attempt to alter the audience's understanding of that relation. Quasi-logical arguments are associative as well. Their use presumes acceptance of forms of valid reasoning used as models for arguments that, although not formally valid, derive their persuasiveness from the logical or mathematical forms. The formal model is a given; the argument does not attempt to alter the audience's understanding of the model. In both cases, associative argument presumes agreement and argues from this agreement.

In contrast, dissociative arguments characteristically alter otherwise accepted relations. By processes of *dissociation,* we mean techniques of separation that have the purpose of dissociating, separating, and disuniting elements that are regarded as forming a whole or at least a unified group within some system of thought: dissociation modifies such a system by modifying certain concepts that make up its essential parts.[176] Dissociation is characteristic of

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174. The New Rhetoric, *supra* note 2, at 190.

175. *Id.* at 191.

176. *Id.* at 190. The distinction of associative and dissociative arguments is analytical; all arguments involve, expressly or otherwise, both of these aspects because they complement one another. Thus, by calling arguments either dissociative or associative, we are stressing the particular way in which the argument persuades. Perelman makes this clear:

> Psychologically and logically, all association implies dissociation, and, con-

all original thought. Its typical use in argument is to alter accepted conceptual relations in order to avoid incompatibilities inherent in their application:

> The dissociation of concepts, as we understand it, involves a . . . profound change that is always prompted by the desire to remove an incompatibility arising out of the confrontation of one proposition with others, whether one is dealing with norms, fact, or truths. . . . [O]n the theoretical level, [dissociation] leads to a solution that will also be valid for the future, because, by remodeling our conception of reality, it prevents the reappearance of the same incompatibility. . . . A typical example is the Kantian solution to the antinomy between universal determinism and man's freedom, which is to dissociate the concept of causality into intelligible causality and perceptible causality. This dissociation is itself made possible by the dissociation of the concept of reality into phenomenal reality and noumenal reality.[177]

If we stress the use of dissociation to avoid incompatibility, we see that it relates to quasi-logical argument.[178] Because it involves the introduction of differences of order,[179] dissociation also relates to argument based on the structure of reality: it appeals to *loci* of quality. The characteristic of dissociation I am stressing, however, is its way of altering existing conceptual relations. Attention to this effect helps us to understand characteristic forms of legal argument, particularly the characteristic uses of distinction.[180] Once more, the court-martial cases[181] provide examples.

Kinsella v. Singleton and its accompanying cases involved the following:

> versely: the same form which unites various elements into a well-organized whole dissociates them from the neutral background from which it separates them. The two techniques are complementary and are always at work at the same time; but the argumentation through which a datum is modified can stress the association or the dissociation which it is promoting without making explicit the complementary aspect which will result from the desired transformation.

Id.

177. *Id.* at 413.

178. *See* text accompanying note 138 *supra*.

179. *See* text accompanying note 34 *supra*.

180. When a judge encounters a juridical antinomy in a case he is hearing, he cannot entirely neglect one of the two rules at the expense of the other. He must justify his course of action by delimiting the sphere of application of each rule through interpretations that restore coherence to the juridical system. He will introduce distinctions . . . .

THE NEW RHETORIC, *supra* note 2, at 414.

181. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

(i) a civilian dependent of a member of the overseas armed forces charged with a noncapital offense committed overseas;
(ii) a civilian employee of the overseas armed forces charged with a capital offense committed overseas; and
(iii) civilian employees of the overseas armed forces, charged with noncapital offenses committed overseas.

Prior authority did not identify the entire class of persons who are exempt from court-martial jurisdiction. In fact, the Court in *Reid v. Covert*,[182] the closest case at that time, "actually *decided* . . . [only] that Article 2(11) could not be constitutionally applied to civilian . . . *dependents* charged with *capital* offenses,"[183] a category of persons as narrow as that presented in each court-martial case and one that excludes all categories of persons in the three court-martial cases. Because the categories of persons who would compose the class exempted from court-martial jurisdiction were as yet unknown, the main arguments in the three court-martial cases were directed to the determination of the class. The Court found an exemption in each case. Thus, the majority view in each of the cases, taken together, establishes that the class exempt from court-martial jurisdiction comprises civilians who commit either capital or noncapital offenses while overseas with the armed forces. The majority view implicitly recognizes that the categories of persons represented by each of the cases combine into one unified concept, which forms the class.[184]

The dissenting Justices, however, sought to dissociate (make distinctions within) this concept that the majority implicitly recognized. Justice Harlan, for example, argued that only civilians (dependents or employees) charged with capital crimes overseas are exempt because the Court's test of military "status" wrongly restricts application of article 1, section 8, clause 14 of the Constitution to soldiers and sailors.[185] Moreover, said Harlan, "[i]t is further suggested that the difference between capital and noncapital offenses is not constitutionally significant, . . . but "this passes

182. 354 U.S. 1 (1957). The case was before the Court on rehearing, having initially been decided in Reid v. Covert, 351 U.S. 487 (1956).

183. *Kinsella*, 361 U.S. at 252 (Harlan and Frankfurter, J.J., dissenting in *Kinsella* and *McElroy*, concurring in *Grisham*) (some emphasis added).

184. Seemingly distinct ideas can be unified into one concept if sufficient commonality is present in their natures. "Bossuet presents the life and death of a sinner as forming an indissoluble unity: 'Death [he says] has no distinct being which separates it from life; it is nothing but a life coming to an end.' " THE NEW RHETORIC, *supra* note 2, at 191 (quoting 2 BOSSUET, SERMONS 221-22).

185. 361 U.S. 234, at 253.

over too lightly the awesome finality of a capital case . . . ."[186] Justice Whittaker argued that only civilian dependents who commit capital or noncapital crimes overseas are exempt; employees are too closely associated with the armed forces to be exempt.[187] He also pointed out that the policy of the *Covert* case does not conflict with a differentiation of civilian employees from civilian dependents because "each of the three opinions supporting the conclusion reached in *Covert* was at pains to limit the decision to *civilian dependents*."[188]

The majority believed these attempts at dissociation unwarranted in light of existing constitutional law. The persuasiveness of either position depends on one's understanding of the body of thought existing in this area of the law before formation of the position. This latter point, incidentally, evokes the principle of inertia, discussed earlier.[189] No participant in *Kinsella* wished to be perceived as engaged in an alteration of the existing constitutional concepts. Of course, logic dictates that one side or the other was doing just that.[190]

In *Lewis v. Benedict Coal Corp.*,[191] the Court had to decide the validity of a coal company's claimed excuse from its duty to pay royalties to a union trust fund under an agreement with the union. The union had breached one of its own duties under the agreement; the company argued that the trust fund was a third-party beneficiary of its agreement with the union and that under applicable contract doctrine the union's breach excused the company from having to perform. After discussing legal doctrine applicable to agreements involving a third-party beneficiary, Justice Brennan, writing for the Court, dissociated the agreement before him. He did so by characterizing it as merely a vehicle for creation of an employee welfare fund.

> This collective bargaining agreement, however, is not a typical third-party beneficiary contract. The promisor's interest in the third party here goes far beyond the mere performance of its promise to that third party, *i.e.*, beyond the payment of royalty.

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186. *Id.* at 255.

187. *Id.* at 264-65.

188. *Id.* at 264 (emphasis in original).

189. *See* text accompanying notes 19-22 *supra*.

190. Smith v. California, 361 U.S. 147, 162-63 (1959) (Frankfurter, J., concurring), offers a familiar example of dissociation of the constitutional concept of *speech:* "[T]he constitutional protection of non-obscene speech cannot absorb the constitutional power of the States to deal with obscenity."

191. 361 U.S. 459 (1960).

> It is a commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death. While employees in many other industries assume this burden directly, this welfare fund was jointly created by the coal industry and the union for that purpose.[192]

Justice Frankfurter, in dissent, rejected Justice Brennan's dissociation:

> Underlying the Court's view is the assumption that the law of contracts is a rigorously closed system applicable to a limited class of arrangements between parties acting at arm's length, and that collective bargaining agreements are a very special class of voluntary agreements to which the general law pertaining to the construction and enforcement of contracts is not relevant. As a matter of fact, the governing rules pertaining to contracts recognize the diversity of situations in relation to which contracts are made and duly allow for these variant factors in construing and enforcing contracts.[193]

In *NLRB v. Insurance Agents' Int'l Union*,[194] Justices Brennan and Frankfurter were again unable to agree on the conceptual field of labor law. Justice Brennan argued, in his opinion for the Court, that the concepts of economic pressure and good-faith bargaining in the law of industrial relations could coexist without loss of integrity and indeed ought to be treated in that manner:

> [T]here is simply no inconsistency between the application of economic pressure and good-faith collective bargaining.[195]
>
> . . . .
>
> . . . [T]he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining.[196]

Strictly speaking, this argument involves not dissociation, but the maintenance of the integrity of concepts. At least, this was Justice Brennan's position.

Justice Frankfurter concurred with the result, but disagreed with the argument: "No conduct in the complex context of bargaining for a labor agreement can profitably be reduced to such an

192. *Id.* at 468.
193. *Id.* at 475.
194. NLRB v. Insurance Agents' International Union, 361 U.S. 477 (1960).
195. 361 U.S. at 494-95.
196. *Id.* at 495.

abstraction as 'economic pressure.' An exertion of 'economic pressure' may at the same time be part of a concerted effort to evade or disrupt a normal course of negotiations."[197] For Justice Frankfurter, there was one standard to apply—"good-faith bargaining." Everything else was merely evidence for the Board to consider in its application of that standard. Although Justice Brennan saw two independent concepts (legitimate economic pressure and good-faith bargaining), Justice Frankfurter saw one concept (good-faith bargaining) and the criteria for its application. Thus, Justices Brennan and Frankfurter differed on the conceptual structure of industrial relations law.

Sometimes dissociative argument so emasculates a concept that it is reduced to a figure.[198] To admit the dissociation would destroy the concept. *United States v. Robinson*[199] illustrates this variation. *Robinson* turned on the authority of a United States Court of Appeals to permit late filing under the Federal Rules of Criminal Procedure when the rule in question[200] prescribed a fixed time (ten days) for filing the notice of appeal after entry of judgment. In this case, the filing had occurred eleven days after the ten-day period had expired, yet the United States Court of Appeals permitted the filing. The issue was whether this action constituted "enlargement" under a rule[201] that proscribed enlargement of the period for taking an appeal. The United States Court of Appeals decided that permitting the filing "would not be to 'enlarge' the period for taking an appeal, but rather would be only to 'permit the act to be done' after expiration of the specified period."[202] Although Justice Whittaker took pains to consider the arguments in support of the decision by the court of appeals, he noted at the outset:

> On its face, Rule 45(b) appears to be quite plain and clear. It specifically says that "the court may not enlarge . . . the period for taking an appeal." We think that to recognize a late notice of appeal is actually to "enlarge" the period for taking an appeal. Giving the words of 45(b) their plain meaning, it would seem that the conclusion of the Court of Appeals is in direct conflict

197. *Id.* at 505.

198. A symbol, a myth. *See* THE NEW RHETORIC, *supra* note 2, at 394.

199. 361 U.S. 220 (1960).

200. FED. R. CRIM. P. 37(a)(2).

201. FED. R. CRIM. P. 45(b). The United States Court of Appeals, District of Columbia Circuit, regarded Rule 45(b) as containing two standards, that of "enlargement," and that of "permitting an act to be done." 361 U.S. at 223.

202. 361 U.S. at 223.

with that Rule.[203]

In Justice Whittaker's view, the dissociative argument by the court of appeals was so radical that it would have destroyed the integrity of the concept of "enlargement."

The use of dissociation in constitutional adjudication occurs primarily when the Court perceives an incompatibility in the application of existing doctrines to given case. As I have stated, in this sense dissociative argument is quasi-logical. But the effect of dissociative argument on the characterization of existing conceptual patterns in constitutional law merits the separate treatment given it here. The Justices are understandably reluctant to be perceived as altering the existing constitutional concepts, even when that is the practical result of their opinions. They therefore use the principle of inertia to characterize their position as that which faithfully reflects existing law.

This section and the preceding two sections of this study have analyzed legal arguments organized under one or another of the following categories: arguments based on the structure of reality, quasi-logical arguments, and dissociative arguments. Although dissociative arguments contain elements of the first two kinds of arguments, I stressed, with Perelman, the distinct function of dissociation in modifying or altering a given conceptual structure. The paradigmatic use of dissociation in legal argument is to avoid potential incompatibility by drawing a distinction, a difference of order, between the elements normally regarded as covered under a given concept. Although relegated to a footnote on this point because of its familiarity,[204] *Smith v. California* illustrated the distinction between protected speech and obscene speech, which the first and fourteenth amendments do not protect. This is a classic instance of dissociation that reconciles a potential incompatibility between accepted state interests and the constitutional liberties of the individual.

VI. Arguments That Establish the Structure of Reality

A. *Argument by Example*

In this final section I will look at arguments of a fourth category: those that *establish* the structure of reality. The forms that I will examine, argument by example and analogy, have been consid-

203. *Id.* at 224.
204. Note 189 *supra.*

ered by a number of writers to be characteristic of legal reasoning. I will discuss this position as set forth by some of its proponents. Accordingly, this section will be relatively more critical than the earlier sections.

Argument by example and argument by analogy are two distinct forms of argument. Although both are important in argument, only the first, argument by example, is characteristic of *legal* argument. Indeed, analogical reasoning is fundamentally at odds with the characteristic function of legal reasoning, the application of rules.

According to Perelman, argument by example is both a way of establishing and a way of changing the structure of reality.[205] Thus, it is basically a creative form of argument. As used in legal argument, argument by example is a complex form that contains elements of the principles of inertia[206] and formal justice.[207] In the form of argument from precedent, it is fundamental to judicial reasoning. I hope to clarify the structure of argument by example and show how its creative use in legal argument relates to that structure.

The reader may recall the quotation from Aristotle at the head of this article: "To argue by example is neither like reasoning from part to whole, nor like reasoning from whole to part, but rather reasoning from part to part, when both particulars are subordinate to the same term, and one of them is known."[208] The following passage selected by Perelman from Aristotle's *Rhetoric* illustrates this process:

> We must prepare for war against the king of Persia and not let him subdue Egypt. For Darius of old did not cross the Aegean until he had seized Egypt; but once he had seized it, he did cross. If therefore the present king seizes Egypt, he also will cross, and therefore we must not let him.[209]

This form of argument is neither deductive nor inductive. Deduc-

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205. THE NEW RHETORIC, *supra* note 2, at 350.

206. For an explanation of the principle of inertia, see text accompanying notes 19-22, *supra*.

207. According to the principle of formal justice, "beings in the same essential category should be treated in the same way." THE IDEA OF JUSTICE, *supra* note 8, at 15. For an explanation of the rule of justice, which recognizes the argumentative value of formal justice, see text accompanying note 214 *infra*.

208. ARISTOTLE, II PRIOR ANALYTICS 24:69a. 13 in THE BASIC WORKS OF ARISTOTLE 103 (McKeon trans. 1968).

209. THE NEW RHETORIC, *supra* note 2, at 352 (quoting ARISTOTLE, II RHETORIC 20:1393b).

tive argument moves from premises to conclusion by application of a validating rule of inference. Induction moves from disparate instances of a term to a generalization concerning the term; the generalization is more or less trustworthy, depending on the experimental or experiential procedures used.

One writer has called argument from example "paraduction"[210] to emphasize its characteristic appeal to significant similarities[211] in decided or accepted cases for the purpose of warranting a conclusion about the case under consideration. Unlike induction, argument by example does not lead to the formulation of a general principle. Nonetheless, by subsuming the given cases and the instant case under a single term (in Aristotle's usage, subordinating each particular to the same term), one implicitly relies on something like a general principle to warrant the conclusion reached:

> The notions used in describing the particular instance that serves as example implicitly operate as the rule enabling the passage from one instance to another.
>
> . . . .
>
> Criticism of argument from the particular to the particular, which is characteristic of the Socratic dialogues, will center on the conceptual material by means of which passage is made from one situation to another.[212]

Professor Levi, in his discussion of argument by example, has stressed the effect that subsumption of particular cases under a given concept has on the development of the concept:

> It may be objected that this analysis of legal reasoning places too much emphasis on the comparison of cases and too little on the legal concepts which are created. It is true that similarity is seen in terms of a word, and inability to find a ready word to express similarity or difference may prevent change in

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210. Stone, *Ratiocination not Rationalisation*, 74 MIND 463, 480 (1965).

211. The expression "significant similarities" is drawn from Professor Christie's concept of *significant difference*. Christie says of his proposed model of objective decision:

> The model requires that anyone who wishes to use a statute in the course of legal reasoning give what he believes to be the paradigm case or cases covered by the statute. "Presenting a paradigm case" does not mean divining the "true meaning" of the statute—the model makes no such demand—but only presenting a case as to which it is asserted that, whatever else *may also* be covered by the statute, this case *is*. The party must then argue that the instant case is or is not significantly different from *any* such paradigm case.

Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1334 (1969).

212. THE NEW RHETORIC, *supra* note 2, at 352-53.

> the law. The words which have been found in the past are much spoken of, have acquired a dignity of their own, and to a considerable measure control results. . . .
>
> But . . . [i]n the long run a circular motion can be seen. 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 terms 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 is no longer desired.[213]

Lawyers make arguments by example mainly in reasoning with precedent. In arguing from precedent, lawyers use not only argument by example—resort to the particular case—but also the principle of inertia and its more specific derivative, the rule of justice. Perelman characterizes the rule of justice as the formal requirement that individuals who differ from one another in no relevant characteristics must be treated similarly: "The rule of justice requires giving identical treatment to beings or situations of the same kind. The reasonableness of this rule and the validity that it is recognized as having[,] derive from the principle of inertia, from which originates in particular the importance that is given to precedent."[214]

In a separate essay on the concept of justice, Perelman has

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213. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 8-9 (1949). Perelman also notes the importance of language in argument by example:

> The stronger the desire to subsume the examples under a single rule without modifying it, the greater the importance of the role played by the use of language for assimilating the different cases. This is especially true in law. In the making of a legal decision, the assimilation of new instances is not just a matter of passing from the general to the particular. It also contributes to the foundation of judicial reality, that is, of norms, and as we have already seen, new examples react on earlier ones and modify their meaning. It has rightly been emphasized that through what is called *projection* this assimilation of new cases that were unforeseeable or not taken into consideration when the law was elaborated is effected quite easily, without recourse to any technique of justification. Language is often one step ahead of the jurist. In turn, the jurist's decision—for language does not impose a decision on him, but facilitates his task—may react on the language.

THE NEW RHETORIC, *supra* note 2, at 357 (footnote omitted).

214. THE NEW RHETORIC, *supra* note 2, at 218-19.

suggested that the rule of justice is a requirement of reason or of rational discourse, that extends to all fields of argumentation:

> The idea of justice has always been compared with that of equality, and I think it may be useful to seek a first approximation to the rule of justice by starting with an analysis of what the relation of equality implies.
>
> Two objects *a* and *b* are interchangeable, if, that is, every property of one of these objects is also a property of the other. In normative terms it follows that, if *a* and *b* are equal, everything that is said of one of these objects must be able to be said of the other, for these two affirmations are equivalent and have the same truth value. In saying that it is just to treat equal beings alike—since every property of one of these beings is also a property of the other and there consequently exists no reason which would make it possible to justify treating them unequally—just treatment puts itself forward as the treatment based on reason because in conformity with the principle of sufficient reason. The normative consequences with respect to assertions about two equal objects might even be regarded as a particular case of just treatment: if all just treatment of two equal objects ought to be equal, then the same must be the case with assertions about them, for saying is a particular case of doing.[215]

Thus, justice as fairness can be regarded as an application of justice as rationality—*i.e.*, as an expression of the requirement of consistency in action, thought, and decision.[216]

The use of precedent, then, is a particular application of the more general requirement of rationality: "The establishment of a reasonable order quite naturally presupposes conformity with precedent (*stare decisis*). The rule of justice invites us in effect to transform into precedent, that is, into an instance of applying an implicit rule, every earlier decision emanating from a recognized authority."[217]

Of course, one needs to supplement this account by the particular institutional rules in a given legal system that establish the relations of authority among the different courts in the system. Even though there may be sufficient reason to change the treat-

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215. THE IDEA OF JUSTICE, *supra* note 9, at 80.

216. *Cf.* E. ROSTOW, THE SOVEREIGN PREROGATIVE—THE SUPREME COURT AND THE QUEST FOR LAW 8 (1962) (emphasis added): "This generalizing aspect of law derives from the basic *moral* principle, acknowledged by every legal system we know anything about, that similar cases should be decided alike."

217. THE IDEA OF JUSTICE, *supra* note 9, at 82.

ment given to a certain class of individuals, a lower court simply may not have the authority to ignore applicable precedent set by a higher court. Perelman's account is thus not adequate, in this sense, to describe the role of *stare decisis* in a particular system. Rather, his account attempts to describe the persuasive structure of argument from precedent, as used in any legal system. In legal argument, argument by example has a special authority in the context of the use of precedent. The use of precedent requires consistency in the treatment of similar cases, and argument by example is the creative method that establishes the similarity of cases.

The concurring opinion in *Hess v. United States*[218] illustrates the authoritative force of precedent. Therein, *The Tungus v. Skovgaard*,[219] an earlier decision by the Court, provided authority for applying a state statute that imposed a different standard of care from admiralty's, despite admiralty jurisdiction. *The Tungus* held that federal courts must observe *limitations* imposed by state law "on the assertion of causes of action for unseaworthiness and negligence . . . [under] the state wrongful death statute"[220] when the courts allow the assertion of the state cause of action in their admiralty jurisdiction. The state law at issue in *Hess enlarged* the possible assertions of a cause of action by imposing a higher standard of care on defendants than admiralty imposed in tort actions when death had not occurred.[221] The statute, however, was not a general wrongful death statute, so *The Tungus* applied only through argument, not directly. The *Hess* Court accepted the argument from *The Tungus* and held that the district court should apply the state statute. Chief Justice Warren and Justices Black, Brennan, and Douglas, all of whom had dissented in *The Tungus*, concurred in the *Hess* opinion. Their remarks show the value of precedent, and thus the value of argument by example, in legal reasoning.

> [We] join the opinion of the Court, but solely under compulsion of the Court's ruling in *The Tungus v. Skovgaard*. [We] believe that as long as the view of the law represented by that ruling prevails in the Court, it should be applied evenhandedly, despite the contrary views of some of those originally joining it that state law is the measure of recovery when it helps the defendant,

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218. 361 U.S. 314 (1960).

219. 358 U.S. 588 (1959).

220. 361 U.S. at 322 n.1.

221. The tort actions in admiralty are permitted against the United States. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 (1976).

> as in *Tungus*, and is not the measure of recovery when it militates against the defendant as it does here. However, [we] note [our] continued disagreement with the ruling in *The Tungus*, and reserve [our] position as to whether it should be overruled, particularly in the light of the controversy application of it has engendered among its original subscribers. See the various separate opinions in this case and in *Goett v. Union Carbide*.[222]

The force of this concurring opinion emanates from its expression of the Court's obligation to act consistently with its existing decisions, that is to say, to abide by the rule of justice. It illustrates an effective tactic in legal argument. It is to say, "This is the result of your own position, and you ought to be consistent with that position by concurring in the present decision." This tactical use of precedent is an example of "retort," in the sense that approval of the *Hess* holding appears to contradict the concurring Justices' view of the law.[223]

Lawyers use argument by example to apply precedent consisting of statutory interpretations as well as precedent consisting of exposition of the common law—the type of precedent just discussed. The presence of a statute that arguably answers the issue at hand introduces a complexity into the use of argument by example. The source of this complexity is the authoritative character of statutory language. When the Court applies broad constitutional language, it has a freedom approaching that of the common law judge who looks to holdings rather than to authoritative language. The presence of a statute drawn in more specific language, however, shifts the Court's attention to the interpretation of the language. In this context, prior cases function both as examples of similar cases and as authoritative interpretations of the statutory language.

The following quotations from the Court's opinion in *United States v. Seaboard Air Line Railroad*,[224] written by Justice Douglas, provide a good example of this shift in attention:

> The meaning of the word "train" as used in the Act has been before the Court four times. In *United States v. Erie R. Co.*, . . . it was recognized that while "switching operations" were not "train" movements within the meaning of the Act, the movement of cars from one yard to another yard of the same carrier was covered. It was emphasized that this movement, like

222. 361 U.S. at 321-22 (citations omitted).
223. THE NEW RHETORIC, *supra* note 2, at 204.
224. 361 U.S. 78 (1959).

> other main-line movements, took the cars over switches and other tracks where the traffic was exposed to the hazards against which the Act was designed to afford protection.
>
> . . . .
>
> . . .The Act, therefore, should be liberally construed as a safety measure. Movements which, though miniature when compared with main-line hauls, have the characteristics of the customary "train" movement and its attendant risks are to be included.[225]

Within some universal, unconsciously understood line at which a "train" is no longer a train, a court's application of the statute will be determined by recognition of significant similarities and differences between the facts at hand and those of prior decisions in which courts found or refused to find the existence of a train.[226]

Argument by example—the subsumption of similar particulars under the same term—is thus characteristic of legal argument. Lawyers resort to argument by example not only in connection with court-made law, but also in applying constitutional and statutory law. Its use satisfies the requirement of rationality that Perelman calls the rule of justice.[227]

B. *Argument by Analogy*

Despite some apparent similarity, argument by analogy significantly differs from argument by example and appears relatively rarely in legal reasoning. The reason for this lies in the differing structure of analogy. Some writers have characterized as an analogy the common judicial practice of looking for relevant or significant similarities between a problematic case and accepted or decided cases. This is to treat argument by example and analogy as equivalent forms. Professor Levi appears to have done this in his writings on legal reasoning.[228] Professor Christie, who offers an

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225. *Id.* at 80, 83 (citation omitted).

226. *Cf.* Christie, *supra* note 211.

227. *See* text accompanying note 214 *supra*.

228. 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. Moreover, the examples or *analogies* urged by the parties bring into the law the common ideas of the society. The ideas have their day in court, and they will have their day again.

LEVI, *supra* note 213, at 5 (emphasis added). For another example:

> I would not want to say here that what is usually called reasoning by analogy is the sole judicial technique in opinion writing, nor even that it is the concealed starting point for the judge's own working out of the problem. But I do think

"objective" model of legal reasoning whereby one argues from statutes and from decided and hypothetical cases to a case under consideration, similarly characterizes his model: "The key to the basically analogical model of legal reasoning . . . described here is the concept of a significant difference.[229] Both Professor Christie's model and Levi's description of legal reasoning, however, are basically systems of reasoning by example.

Argument by analogy is not argument by example. Analogical reasoning has a different use in argument—the development and extension of concepts beyond present understanding. This possibility arises from the structure of analogical reasoning, a structure more complex than that of argument by example. The remainder of this section will examine this differing structure and will demonstrate that this structure is incompatible with the characteristic function of legal reasoning: the application of rules.

The structure of analogy consists of an asserted resemblance between the relation of one pair (a:b) and the relation of a second pair (c:d). Following Perelman,[230] I call these relations respectively the "theme" (the problematic relation that one is seeking to understand) and the "phoros" (the known relation that one is using *analogically* to describe the theme).

Medieval philosophers made extensive use of analogy to characterize the divine attributes. For example, the expression "God the Father" is a metaphor based on the following analogy: The relation of God to the faithful resembles the relation of a father to his children. The attempt to understand the nature of the relation between God and the faithful by analogizing it to the relationship between a father and his children was helpful only because the relation of father to children was so well understood compared to the relation of God to the faithful.

Analogy is useful only when the nature of one relation is not well understood. If the nature of this relation, the theme, is al-

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that a closer look at how reasoning by analogy or example works in the judicial process reveals some interesting problems.

LEVI, *The Nature of Judicial Reasoning*, 32 U. CHI. L. REV. 395, 398-99 (1965).

229. Christie, *supra* note 211, at 1337. Professor Christie is, however, well aware of the usage suggested by Perelman: "Not surprisingly, Perelman concluded that analogical reasoning plays a relatively minor role in legal argument, because what many people would call analogical reasoning, Perelman believes to be only the presentation of examples or instances of general rules." *Id.* at 1325 (footnote omitted).

230. THE NEW RHETORIC, *supra* note 2, at 373; *cf.* Hesse, *On Defining Analogy*, in 60 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 79, 87 (1960):

"Aristotle's analogies properly so-called are all suggested by the form of a mathematical proportion with four terms and are what the Scholastics called 'analogy of proportionality'."

ready clearly understood, use of analogy would be otiose. On the other hand, assuming lack of knowledge about one of the relations, one must know something about the other relation, the phoros, before an analogy will be useful:

> If we are to be able to say that statements are analogical, metaphorical, or parabolic, some at least of their terms must in the literal sense be understood by us. You can only know that "The lion is the king of the beasts" is a metaphor if you know something (although it need not be much) about lions, or beasts, or kingship. So, we may say, you can only know that "God is our Father" is an analogy if you understand certain things about God [?] or Fatherhood—that is, certain non-analogical things.[231]

In McPherson's example, our "non-analogical" understanding must be about fatherhood, not God, or the analogy would be otiose. Since the analogy uses what we know about fatherhood to extend our thought about the relation of God to the faithful, the analogy does aid our understanding.

For Perelman, the argumentative importance of analogy lies in just this "extension of thought." Unless familiarity has reduced a certain analogy to a figure of speech, its use enables us to understand the relationship of *a* and *b*, the terms of theme, in a new way. One achieves this effect by using a phoros that comes from a "sphere of thought" other than that of the theme.[232] The notion of a sphere of thought depends on a difference of order, not just a difference of degree.[233] When things differ in order, they are said to belong to different spheres of thought; when they differ in degree only, they belong to the same sphere.

The following examples illustrate the point. If the difference between God and man is considered one of order or kind, rather than one of degree, the relation of God and his perfections of character belongs to a different sphere of thought than that of the relation of man and his qualities of character. On the other hand, if the difference between man and the primates is considered one of degree only, the assertion of similarity between man's tendency to violence and the primates' tendency to violence is not analogy. The effect of the assertion is simply to subsume the two cases under a single rule. In this case, "we have not analogy but argument by

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231. McPherson, *Assertion and Analogy* in 60 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 155, 164 (1960) (footnotes omitted).

232. THE NEW RHETORIC, *supra* note 2, at 373.

233. See text accompanying note 34 *supra*, for a discussion of the differences of order and degree.

example or illustration, in which the theme and the phoros represent two particular cases of a single rule."[234] The establishment of differences of order in argumentation will, therefore, facilitate the use of analogy.

The requirement that theme and phoros belong to different spheres of thought explains the precarious tension characteristic of analogical reasoning: the resemblance between theme and phoros must not reduce to an identity, *i.e.*, they cannot be too similar or the analogy will collapse.[235] An analogy collapses when the difference between the two relations reduces from one of order to one of degree only; the phoros and theme then become two instances of a single relation. The similarity is complete, but it is no longer *analogical.*

Although the requirement that phoros and theme be drawn from different spheres of thought limits the use of analogy, it accounts for the striking development and extension of concepts from one field to another that is possible when one uses analogy effectively. McPherson states that: "Good analogies are those that make their point simply and clearly; and they are those that are fruitful—those that suggest naturally the possibility of development in more than one direction, those that help to bring out connections that we might have overlooked."[236] One "good" analogy in the history of ideas, for example, is that of electrical to hydraulic phenomena: "The scientists who first described electricity as a 'current' forever shaped science in this field."[237] Another is the analogy of knowledge to illumination, which historically has provided a model for much of the philosophy of knowledge.

Analogy is not possible within a field of argument considered as a system. Lawyers regard a legal system as a unified and internally consistent system of norms or rules. This is not "mechanical" jurisprudence. It is the ideal of coherency presupposed by the legal process. A contemporary legal philosopher has recently put the point as follows:

> [Legal scientists] speak of rules being enacted, annulled, applied, extended by analogy, generalized, inferred, deduced, distinguished, modified, expanded, and analyzed. In all these contexts, the primary point of reference (the rule) is the meaning-

234. THE NEW RHETORIC, *supra* note 2, at 373.

235. *Id.* at 396-97.

236. McPherson, *supra* note 231, at 162-63.

237. THE NEW RHETORIC, *supra* note 2, at 385, quoting Harding, *Science at the Tower of Babel*, 5 PHILOSOPHY OF SCIENCE 338, 347 (1938).

> content of a certain normative expression, formulated by the legislature, by a judge or by the legal scientist himself. When it is said by a legal scientist that one rule contradicts another, it is not being alleged that some people somewhere act in inconsistent ways, or make inconsistent criticisms. The assertion is that, logically or purposively, the normative propositions represented by the two rules cannot stand together.[238]

Thus, when lawyers or judges treat a problematic case as "analogical" to another, they are really arguing that the same rule ought to cover both cases. By subsuming both cases under a single rule, they are treating them as falling in the same sphere of thought; there is no difference of order between the two cases. The cases have some connection with each other, but they are not analogous. They are variations on a common theme, examples of a single category. As Perelman puts it:

> In the field of law, reasoning by true analogy appears to be restricted to comparison as to particular points of systems of positive law separated by time, place, or content. On the other hand, whenever resemblances between entire systems are sought, the systems are regarded as examples of a universal system of law. Similarly, whenever someone argues in favor of the application of a given rule to new cases, he is thereby affirming that the matter is confined to a single domain. Accordingly, if pursuant to the wish of certain jurists to see in analogy *something more than the term by which one's opponent's example is disqualified*, there is to be a rehabilitation of analogy as a device for wider interpretation, this result can be achieved only if analogy is given a different meaning from the one we have proposed.[239]

The point Perelman is making is this: to argue that applicable case or statutory law subsumes a given case is to undercut the very condition that makes analogy possible. This condition is that the instant case and the existing sources of law belong to different spheres of thought.

In *Smith v. California*,[240] the state made an argument by "analogy" to defend the validity of an ordinance prohibiting the possession of obscene books regardless of the possessor's knowledge of their contents. Justice Brennan stated that "[t]he appellee and the court below analogize this strict liability penal ordi-

238. J. HARRIS, LAW AND LEGAL SCIENCE 63 (1979).

239. THE NEW RHETORIC, *supra* note 2, at 374 (emphasis added).

240. 361 U.S. 147 (1959).

nance to familiar forms of penal statutes which dispense with any element of knowledge on the part of the person charged, food and drug legislation being a principal example."[241] The state here had drawn an "analogy" between the evil of obscenity and the public interest in its suppression (the theme) and the evil of impure food and drugs and the public interest in their disappearance (the phoros). In the case of impure food and drugs, the courts had decided that the public interest justifies the use of strict-liability penal statutes. The "analogy" asserted here would have justified the use of such laws to suppress obscenity. Accordingly, the argument went, since strict liability laws had been upheld in the one case, they should be upheld in the other.

Under Perelman's analysis of the structure of analogy, we have seen that the use of analogy depends on at least a provisional acceptance of a difference of order between the sphere of the theme and the sphere of the phoros. In *Smith v. California,* however, the state's argument implied that no such difference existed there. The state argued that the principle of strict liability, already applicable to criminal laws controlling the distribution of impure food and drugs should apply also to criminal laws controlling the presence of obscene literature. This amounts to argument by association, *i.e.,* to an argument that there is no significant difference between the two uses of the principle of strict liability, each justified by the strong public interest against the admitted evil.

Similarly, Justice Brennan's response to the state's argument did not reject the "analogy," but refused to associate the two cases under this same principle: "There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller."[242] Justice Brennan countered the state's argument by introducing a difference of order. Thus, the very condition that makes analogy possible—a difference of order—made *improper* this extension of the same legal principle to both cases. This example illustrates and clarifies Perelman's point: "We have seen that, in law, reasoning by analogy has a much smaller place than one might think for the reason that, when it is a question of applying a rule to new cases, we are at once confined

241. *Id.* at 152.
242. *Id.* at 152-53.

within a single field, as a basic requirement of law . . . ."[243]

The use of analogy presupposes that the analogical relations belong to separate spheres, and its effect derives from maintaining this separation even while asserting the analogical similarity. This principle explains the comic effect produced by analogy when there is an interaction between the relations in question, as in the following example:

> "Brave! brave, by heaven!" cried my Uncle Toby, "he [King William] deserves a crown."
>
> "As richly, as a thief a halter," shouted Trim [the faithful corporal].[244]

To summarize: Analogy is not the same process as "looking for significant similarities or differences" in preceding and hypothetical cases.[245] Analogy is not argument by example. The latter, but not analogy, is a characteristic process in any reasoning that involves making decisions consistent with prior decisions (the rule of justice). Analogy depends on the existence of relations found in different spheres of thought yet similar in ways thought worth stressing.

This is not to say, however, that we do not ever find analogy in legal argument. There are, first of all, incidental uses of analogy. For example, Justice Douglas makes use of a series of analogies and related metaphors in criticizing the Court's holding in the *Steelworkers* case:

> We cannot lightly assume that Congress intended to make the federal judiciary a rubber stamp for the President. . . . If a federal court is to do it, it must act in its traditional manner, not as a military commander ordering people to work willy-nilly, nor as the President's Administrative Assistant. If the federal court is to be merely an automaton stamping the papers an Attorney General presents, the judicial function rises to no higher level than an IBM machine. Those who grew up with equity and know its great history should never tolerate that mechanical conception.
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> . . . Equity decrees are not like the packaged goods this machine age produces. They are uniform only in that they seek to do equity in a given case.[246]

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243. THE NEW RHETORIC, *supra* note 2, at 397.

244. *Id.* at 378, quoting 8 STERNE, THE LIFE AND OPINIONS OF TRISTRAM SHANDY 517.

245. As shown in text accompanying note 229 *supra*, Professor Christie contended that it was the same process.

246. 361 U.S. 39, 70-71 (1959) (Douglas, J., dissenting).

Formally, this argument is a series of analogies. But it seems to degenerate to a series of stylistic figures with little argumentative effect. As Perelman notes:

> We consider a figure to be *argumentative*, if it brings about a change of perspective, and its use seems normal in relation to this new situation. If, on the other hand, the speech does not bring about the adherence of the hearer to this argumentative form, the figure will be considered an embellishment, a figure of style.[247]

Here, the phoroi so exaggerate the aspect of the theme emphasized by Douglas—the relation between the federal judiciary and its decrees—that as *analogy* the argument does not persuade. If the argument does have some force, it is only figurative.

Another example of merely figurative effect may be found in this quotation from *Smith v. California* on the protection of the freedoms of speech and press: "Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."[248]

Beyond this incidental use, there seems to be at least one very important use of analogy in legal argument. Analogy may offer solutions when presently understood concepts are inadequate to deal with puzzling new cases. When a court confronts such problems, it sometimes draws on analogies to relations (phoroi) outside the field of law for guidance. This use is true analogy, since the court must, as an institutional requirement, keep the spheres of thought separate. The development of conceptual fictions, such as the corporate "personhood," illustrates this use.

One of the more powerful analogies in constitutional law has been the analogy of freedoms of speech, movement, and so forth to the source of a river's flow: "To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources."[249] The phoros here, of course, is the relation of the flow of a river to its source. This is a genuine analogy.[250] Most often, however, suggested analogies in the cases

247. THE NEW RHETORIC, *supra* note 2, at 169.

248. 361 U.S. 147, 155 (1959), quoting Roth v. United States, 354 U.S. 476, 488 (1957).

249. Smith v. California, 361 U.S. at 152, quoting Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

250. Analogy may give rise to metaphor. "In the context of argumentation, at least, we

under consideration are limited to their figurative effect.

VII. CONCLUSION

Not much is needed by way of conclusion to this study. It does not represent jurisprudence in any traditional sense of the term. I have not presented a theory of adjudication or a theory of law. Using Perelman's theory of argumentation, I have attempted to elucidate the ways in which legal arguments can persuade, and to determine the circumstances or the legal contexts in which lawyers use the various forms of argument.

The analysis of arguments in this study does not differ greatly from the analysis a lawyer makes in practice. What difference there is, however, is significant. My analysis attempts to describe the persuasive character of the arguments examined in the general terms of a *theory*. Better theories may be developed, but presently Perelman's is unique in its breadth and detail. My hope is that the study will contribute to an appreciation of the importance of developing an understanding of the ways in which legal arguments can persuade, and thus contribute to a more informed evaluation and use of these arguments.

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cannot better describe a metaphor than by conceiving it as a condensed analogy, resulting from the fusion of an element from the phoros with an element from the theme." THE NEW RHETORIC, *supra* note 2, at 399. The "evening of life," *id.*, is an example of an implicit metaphor.