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The Stages of Legal Reasoning: Formalism, Analogy, and Realism

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THE STAGES OF LEGAL REASONING: FORMALISM, ANALOGY, AND REALISM

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IN the late 19th Century, legal reasoning was dominated by formalistic analysis.[1] Judges and lawyers reasoned deductively from base principles.[2] Legal historians have persuasively described how leading judges and scholars fomented a revolution in legal thought in the 20th Century.[3] Starting about 1910, legal realism—or policy analysis—entered legal reasoning[4] to the point that today it would be unusual to find a judicial opinion or brief that fails to explore the policy implications of an interpretation of the law. This historical shift from formalism to realism suggests that there are stages of legal reasoning.

In this Article, I argue that formalism, analogy and realism should be considered to be the stages of legal reasoning. First, psychological research suggests that these methods of reasoning correspond to stages of cognitive and moral development. Second, examination of judicial opinions in hard cases reveals that courts progress from formalism, to analogy, to realism, in resolving difficult questions of law. Third, these three forms of reasoning are necessary components in the evolution of rules and standards.

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1. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 16-17, 199 (1992) (describing emergence of formalism in English common law system); *see also* GRANT GILMORE, THE AGES OF AMERICAN LAW 41-67 (1977) (describing evolution of American law in period between Civil War and World War I). Horwitz characterizes American legal reasoning of the late 19th and early 20th centuries as "categorical" in nature, in light of the tendency of courts to interpret the law by invoking and defining general propositions of law. *See* HORWITZ, *supra*, at 17 (illuminating nature of Nineteenth century legal thought). Gilmore refers to the same period as "the age of faith," (*i.e.*, faith in legal principles) in contrast to "the age of anxiety" which followed it. GILMORE, *supra*, at 41 (examining perception of American law during period from Civil War to World War I).

2. *See* HORWITZ, *supra* note 1, at 199 (describing Legal Realists' critique of orthodox legal reasoning).

3. *See id.* at 199-200 (differentiating legal realism from conceptualism).

4. *See id.* at 18 (describing growing importance of policy in legal decision-making in early Twentieth century).

In characterizing these modes of analysis as "stages," I do not mean to imply that analogy is superior to formalism or that realism is superior to them both.[5] In fact, one might reasonably argue, as Justice Antonin Scalia would, that the hierarchy proceeds in the opposite direction, in that one is forced to resort to analogy only where formalism has failed, and that realism is the last resort of all.[6]

It would be even more accurate to reject hierarchy altogether, and the concomitant conceit that one form of legal analysis is superior to another. Rather than levels in a hierarchy, formalism, analogy and realism are all stages of a cycle, each of which is necessary for the law to progress. The ultimate purpose of legal analysis is to create a system of laws that is clear, consistent and just, a code of conduct that is universally understood and accepted. But this is a task that is beyond human ability. As H.L.A. Hart observed, a perfect system of laws cannot be created "because we are men, not gods."[7] However, formalism, analogy and realism each play a critical role in the attempt to create a code of conduct that is logical, predictable and fair.

Accordingly, Part I of this Article defines formalism, analogy and realism by describing the psychological theories of James Mark Baldwin, Jean Piaget and Lawrence Kohlberg insofar as they shed light upon the cogni-

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5. I describe the stages of legal reasoning as "soft stages" that appear or are invoked sequentially, that are structurally distinct and that "prepare the way" for subsequent stages. They are not the invariant and hierarchical "hard stages" of Piaget and Kohlberg. For a discussion of the stages of Piaget and Kohlberg, see *infra* notes 77-122 and accompanying text.

6. Justice Scalia criticizes realistic analysis as inappropriate judicial "fact-finding," but acknowledges that it cannot be "entirely avoided:"

> I have not said that legal determinations that do not reflect a general rule can be entirely avoided. We will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some of the opinions that use them. All I urge is that those modes of analysis be avoided where possible; that the *Rule* of Law, the law of *rules* be extended as far as the nature of the question allows; and that, to foster a correct attitude toward the matter, we appellate judges bear in mind that when we have finally reached the point where we can do no more than consult the totality of the circumstances, we are acting more as fact-finders than as expositors of the law.

Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175, 1186-87 (1989).

7. H.L.A. HART, THE CONCEPT OF LAW 128 (1994) (describing need for flexibility in legal rules due to inability of humans to prepare for all eventualities in universe that is not finite). Hart traces the ambiguity of legal rules to two human shortcomings: "our relative ignorance of fact" and "our relative indeterminacy of aim." *Id.* Larry Alexander concurs with Hart by saying "[a]uthoritative rules that are promulgated by human beings of finite reasoning and informational capacities and that are meant to improve the moral condition of human beings of finite reasoning and informational capacities will always fail to capture precisely the requirements of morality." Larry Alexander, *Can Law Survive the Asymmetry of Authority, in* RULES AND REASONING: ESSAYS IN HONOUR OF FRED SCHAUER 39, 41 (Linda Meyer ed., 1999) (asserting all human-made authoritative rules will be over- or under-inclusive).

tive and moral aspects of legal reasoning in general and formalism, analogy and realism in particular.[8] Formalism represents the "rule-bound" thinking characteristic of the Piagetian stage of concrete operations and the Kohlbergian stage of conventional thought. Realism, whose concern is what the law *might* be, represents the Piagetian stage of formal operations and the Kohlbergian stage of postconventional thought. Reasoning by analogy straddles both stages; formalist analogies are concrete and conventional, while realist analogies are abstract and postconventional.

Part II illustrates how formalism, analogy and realism are sequentially invoked to resolve hard cases.[9] When society changes, or other unexpected events occur that give rise to unforeseen legal problems, formalist rules fail us and we rely upon analogies. When these analogies prove insufficient as well, we turn to realism, balancing all of the underlying values and interests to develop new rules of law. In hard cases, reasoning by analogy serves as a bridge between formalism and realism.

Part III argues that the evolution of rules into standards, and standards into rules, also demonstrates the stages of legal reasoning.[10] Evolution of the law in both directions is achieved by drawing analogies. Realist analogies help turn rules into standards and formalist analogies help turn standards into rules. The law evolves from rules to standards and back again in an unending cycle of assimilation and accommodation.

I conclude that none of the three modes of analysis standing alone is adequate to produce a clear, consistent and just system of laws. Legal progress depends upon using all three modes of analysis.

I. DEVELOPMENTAL THEORY AND THE THREE STAGES OF LEGAL REASONING

Law comprises both logic and morals. Legal decisions are deduced from rules of law, however, to induce obedience, these decisions must not only be logical but must also reflect the prevailing mores of society.[11] Thus, legal reasoning inevitably attempts to meld the oft-conflicting strictures of logical rigor and moral justice. What we know of the development of logical and moral reasoning helps to explain how logic and morality are combined in legal reasoning.

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8. For a discussion the theories of Baldwin, Piaget and Kohlberg, see *infra* notes 68-122 and accompanying text.

9. For a discussion of the use of formalism, analogy and realism to resolve hard cases, see *infra* notes 178-353 and accompanying text.

10. For a further discussion of the evolution of rules into standards and standards into rules, see *infra* notes 354-90 and accompanying text.

11. *See* Edward S. Adams & Daniel A. Farber, *Beyond the Formalism Debate: Expert Reasoning, Fuzzy Logic, and Complex Statutes*, 52 VAND. L. REV. 1243 (1999) (asserting need for both textual analysis and evaluation of legislative history and social norms in statutory interpretation); Wilson Huhn, *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 SANTA CLARA L. REV. 813 (illustrating importance and limitations of using syllogistic reasoning to analyze judicial opinions).

As people mature they adapt their intellectual and ethical systems to meet new challenges. "*When I was a child, I spoke as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things.*"[12] Leading psychologists have charted sequential stages in the individual's patterns of cognitive and moral reasoning. In this Article, I suggest that legal reasoning, like cognitive and moral reasoning, progresses through certain well-defined stages. Complex forms of legal reasoning evolve from and build upon simpler forms, reflecting our attempts to meet new challenges or to progress beyond current understandings of the law. I propose that the stages of legal reasoning are formalism, analogy and realism.

A. *The Definitions of Formalism, Analogy and Realism*

Vincent Wellman, Richard Warner and Richard Posner have all identified three discrete forms of legal analysis.[13] Wellman calls these forms of legal reasoning "deduction,"[14] "analogy"[15] and "practical reasoning."[16] Warner refers to them as "the analogical model,"[17] "the deductive model"[18] and "the ideal reasoner model."[19] Posner uses the terms "syllogistic reasoning,"[20] "reasoning by analogy"[21] and "practical reasoning."[22] In this Article, I call these three forms of legal reasoning *formalism, analogy* and *realism.*

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12. 1 *Corinthians* 13:11 (describing imperfection of human knowledge).

13. *See generally* RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE (1990) (examining alternative theories of reasoning); Vincent Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45 (1985) (giving alternative interpretations of decision-making); Richard Warner, Note, *The Three Theories of Legal Reasoning*, 62 S. CAL. L. REV. 1523, 1551-70 (1989) (examining legal analysis in terms of analogical reasoning, deductive reasoning and ideal reasoner theory).

14. Wellman, *supra* note 13, at 64 (explaining that deductive reasoning "provides the appropriate model for legal reasoning in general and judicial justification in particular").

15. *Id.* at 80 (describing analogical reasoning as "reasoning by example").

16. *Id.* at 87 (asserting need for reasoning from ends to means in judicial justification).

17. Warner, *supra* note 13, at 1552 (describing analogical model of legal reasoning as "making analogical inferences").

18. *Id.* at 1555-56 (describing strength of deductive model as preservation of justification in legal reasoning).

19. *Id.* at 1565 (asserting justification for deciding cases exist if all relevant factors are considered dispassionately).

20. POSNER, *supra* note 13, at 38-39 (describing strength of syllogism in legal reasoning).

21. *Id.* at 86-87 (describing reasoning by analogy as inductive reasoning).

22. *Id.* at 71 (describing practical reasoning as "action-oriented").

1. *Formalism*

Formalism is the application of an existing rule of law by its terms to a set of facts.[23] Formalists attempt to resolve disputes by defining the terms of legal rules so as to include or exclude the facts of the case at hand. Formalist arguments are deductive in nature, and conform to the structure of a syllogism of deductive logic: the rule of law is the major premise, the facts of the case are the minor premise, and the legal result is the conclusion.[24]

Most formalists favor textual forms of analysis, and rely particularly upon the "plain meaning" of the words of the legal text.[25] This method of analysis aspires to discover an objective definition of the text. But formalism is not limited to textualism. Specific rules may be derived from exami-

23. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (defining formalism). As Frederick Schauer explained:

> With accelerating frequency, legal decisions and theories are condemned as "formalist" or "formalistic." But what *is* formalism, and what is so bad about it?
>
> At the heart of the word "formalism," in many of its numerous uses, lies the concept of decisionmaking according to *rule*. . . . [I]nsofar as formalism is frequently condemned as excessive reliance on the language of a rule, it is the very idea of decisionmaking by rule that is being condemned . . . .

Id. at 509-10.

24. *See* POSNER, *supra* note 13, at 38-39 (describing syllogistic method of logic); Wellman, *supra* note 13, at 64-79 (describing deductive form of legal analysis); Warner, *supra* note 13, at 1555-65 (defining deductive model). Hence, Wellman's and Warner's description of this type of reasoning as "deductive," and Posner's use of the term "syllogistic."; *see also* Huhn, *supra* note 11, at 814-18 (illustrating role that syllogistic reasoning plays in legal analysis).

25. Judge Patricia Wald, who is not a formalist, offers the following description of the plain meaning rule: "The Plain Meaning Rule basically articulates a *hierarchy* of sources from which to divine legislative intent. Text comes first, and if it is clearly dispositive, then the inquiry is at an end." Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 285 (1990). In addition to "plain meaning," the two other textual methods of legal analysis utilize "intratextual arguments" and "canons of construction." Wilson Huhn, *Teaching Legal Analysis Using A Pluralistic Model of Law*, 36 GONZ. L. REV. 433, 442 (2000-2001) (describing textual analysis form of legal argument).

nation of legislative intent,[26] from specific traditions[27] and even from policy arguments.[28]

The leading judicial advocate of formalism in American jurisprudence is United States Supreme Court Justice Antonin Scalia.[29] In *The Rule of Law as a Law of Rules*, Scalia argues that the doctrine of popular sovereignty dictates a formalist approach to legal reasoning,[30] and he of-

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26. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 515-24 (1989) (discussing legislative history of FED. R. EVID. 609). In *Green*, for example, even though the Supreme Court rejected a "plain meaning" approach to interpreting Federal Rule of Evidence 609, the Court nevertheless arrived at a specific understanding of the meaning of the rule based upon an exhaustive examination of its legislative history. *See id.* at 509, 515-24 (exploring Advisory Committee's analysis).

27. *See* Taylor v. Roeder, 360 S.E.2d 191, 195-96 (Va. 1987) (Compton, J., dissenting) (faulting majority's interpretation of Uniform Commercial Code (UCC) as inflexible, where Code's basic purpose is flexibility and adaptability to commercial usage). Business traditions (*e.g.*, trade usage) frequently define what is permissible under the Uniform Commercial Code. For example, in considering whether a note with variable interest qualifies as a negotiable instrument, one judge argued that "[i]nstruments providing that loan interest may be adjusted over the life of the loan routinely pass with increasing frequency in this state and many others as negotiable instruments. This Court should recognize this custom and usage, as the commercial market has, and hold these instruments to be negotiable." *Id.* at 196 (Compton, J., dissenting).

28. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 113-14 (1973) (balancing interest of State in health of mother against mother's rights). In *Roe v. Wade*, the Supreme Court utilized policy analysis to develop a relatively specific timetable limiting the scope of governmental regulation that is constitutionally permissible during each trimester of a woman's pregnancy. *See id.* at 163-64 (declaring point at which state's interest of health of mother emerges, after end of first trimester, when states may regulate abortion if regulation "reasonably relates to the preservation and protection of maternal health").

29. *See* William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 671 (1999) (describing Justice Scalia as leader of school of jurisprudence which favors "an uncompromising application of statutory plain meaning," deemed "the 'new textualism'"). Justice Scalia has suggested that in interpreting a federal statute the intent of Congress "is best sought by examining the language that Congress used." Moskal v. United States, 498 U.S. 103, 130 (1990) (Scalia, J., dissenting) (criticizing majority for using broad interpretation of "falsely made" to include "forged").

30. *See* Scalia, *supra* note 6, at 1176 (introducing relationship between "general rule of law" and "personal discretion to do justice"). To make this point Scalia invokes the image of good King Louis IX, listening to litigants and rendering justice under an oak tree. *See id.* at 1175-76. He then contrasts Louis's general dispensation of justice with the clarion call of Tom Paine: "For as in absolute governments the king is law, so in free countries the law *ought* to be king . . . ." *Id.* at 1176. Justice Scalia also quotes Aristotle in support of the proposition that laws should be as specific as possible:

> Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.

Id. (quoting ARISTOTLE, THE POLITICS OF ARISTOTLE, book III, ch. xi, § 19 at 127 (Ernest Barker trans., Oxford 1946)). James Wilson, on the other hand, has observed that Aristotle also advocated equitable justice stating "[e]quity must be ap-

fers four reasons why rules should be preferred to standards.[31] He states that when a legal standard leaves "a good deal of judgment to be applied,"[32]

> equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; [and] judicial courage is impaired.[33]

This devotion to formalism is the hallmark of Justice Scalia's jurisprudence. Scalia interprets the plain meaning of text,[34] sometimes with the aid of a dictionary,[35] and he rejects legislative history as a tool of interpretation.[36] Similarly, in construing our constitutional tradition, Scalia embraces the narrowest possible reading of our traditions, rejecting broad statements of principle.[37] He captured the essence of his jurisprudential position in this aphorism: "A rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all."[38]

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plied to forgivable actions . . . . Equity bids us to be merciful to the weakness of human nature." James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line—Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 825 (1995) (quoting ARISTOTLE, 1 RHETORIC, in THE COMPLETE WORKS OF ARISTOTLE 2153, 2188-89 (Jonathan Barnes ed., J.O. Urmson trans., 1984)); *see also generally* Maureen B. Cavanaugh, *Order in Multiplicity: Aristotle on Text, Context, and the Rule of Law*, 79 N.C. L. REV. 577 (2001) (asserting that Aristotle should be understood as requiring contextually nuanced approach to statutory interpretation).

31. *See* Scalia, *supra* note 6, at 1182 (noting disadvantages of not using rules).

32. *Id.* (asserting that judge in appellate position evaluation case via "totality of the circumstances" becomes finder of fact).

33. *Id.* (highlighting "unfortunate practical consequences" of applying standards instead of rules).

34. Justice Scalia describes himself as "[o]ne who finds *more* often . . . that the meaning of a statute is apparent from its text. . . ." Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L. J. 511, 521.

35. *See, e.g.*, M.C.I. Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225 (1994) (relying on dictionaries, Justice Scalia interpreted "modify" in Communications Act of 1934).

36. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29 (1997) (describing role of legislative history in statutory interpretation as inferior to analyzing language of statute itself). Justice Scalia maintains that legislative history "is much more likely to produce a false or contrived legislative intent than a genuine one." *Id.* at 32. He has observed that "to tell the truth, the quest for the 'genuine' legislative intent is probably a wild-goose chase anyway." Scalia, *supra* note 34, at 517.

37. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (attacking Justice Brennan's dissent on grounds that it appealed to societal tradition while failing to identify that tradition).

38. *Id.* at 128 (emphasizing need to use most "specific tradition as the point of reference" if "arbitrary decisionmaking is to be avoided").

2. *Reasoning by Analogy*

One step removed from formalism is reasoning by analogy. Formalism, in law, is to apply a rule of law to a case because the facts of the case are the *same* as the terms of the rule. Reasoning by analogy, in contrast, is the application of a rule of law to a case because the facts of the case are *similar* to the terms of the rule. While formalism is scientific and grounded in logic,[39] analogical reasoning is an art that is grounded in rhetoric.[40]

Reasoning by analogy is most closely associated with the invocation of precedent, but it is by no means limited to that modality. Courts frequently invoke statutory analogies, and scholars have studied their powerful impact.[41]

The leading American authority on analogical reasoning was Edward Levi, who served as Attorney General of the United States and Dean of the Chicago Law School. In the following much-cited passage from *An Introduction to Legal Reasoning*,[42] Levi described the process of analogical reasoning:

> The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.[43]

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39. *See* Huhn, *supra* note 11, at 823 (noting similarities and differences between law and science).

40. *See* Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1179 (1999) ("[A]nalogical reasoning is an unscientific practice with imperfect results . . . .").

41. *See generally* Hans W. Baade, *The Casus Omissus: A Pre-History of Statutory Analogy*, 20 SYRACUSE J. INT'L L. & COM. 45, 46 (1994) (giving historical account of how civil law and common law parted ways on use of analogy in applying statutes); Robert E. Keeton, *Statutory Analogy, Purpose and Policy in Legal Reasoning: Live Lobsters and a Tiger Cub in the Park*, 52 MD. L. REV. 1192, 1192 (1993) (asserting analogy as principal method by which judges decide cases).

42. *See* EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1948) (exploring process of legal reasoning). Larry Alexander refers to this as a "classic" work on legal reasoning. Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517, 523 (1998) (stating importance of analogical reasoning in addition to deduction based on precedents).

43. LEVI, *supra* note 42, at 1-2 (describing need for analogical reasoning due to impossibility of drafting laws which cover all situations with clarity).

Over the past decade analogical reasoning has received much attention from legal scholars. In particular, Cass Sunstein,[44] Scott Brewer,[45] Emily Sherwin[46] and Todd Brower[47] have made important contributions to our understanding of reasoning by analogy. Describing the advantages of reasoning by analogy, Sunstein observed that "analogical reasoning introduces a degree of stability and predictability."[48] Emily Sherwin identifies a number of other benefits of reasoning by analogy in the following passage:

> In my view, the virtue of analogical reasoning lies in a variety of indirect benefits that are likely to result when judges adopt it as a practice and consider themselves obliged to explain new decisions in terms of their relation to past cases. First, a diligent process of studying and comparing prior decisions produces a wealth of data for decisionmaking. Second, the rules and principles that result from analogical reasoning represent the collaborative efforts of a number of judges over time. Third, analogical reasoning tends to correct biases that might otherwise lead judges to discount the likelihood or importance of reliance on prior decisions. Fourth, analogical reasoning exerts a conservative force on law: by holding the development of law to a gradual pace, it

44. *See* Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 743-49 (1993) (explaining operation of analogical reasoning within law).

45. *See* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925, 926 (1996) ("developing a philosophical explanation of analogical reasoning. . . ."). Brewer describes two schools of thought regarding reasoning by analogy, which he calls "mystics" and "skeptics":

> Theories of analogy differ from each other in the degree of rational force they attribute to analogical argument. In one group are the "mystics," who place a high degree of confidence in analogical argument even though they neither have nor feel the need for an explanation of its characteristic concepts of "relevance" and "similarity." In the other group are the "skeptics," who have rather less confidence in the rational force of analogical argument.

Id. at 951.

46. *See* Sherwin, *supra* note 40, at 1179-83 (defending practice of analogical reasoning by judges).

47. *See* Todd Brower, *"A Stranger to Its Laws:" Homosexuality, Schemas, and the Lessons and Limits of Reasoning by Analogy*, 38 SANTA CLARA L. REV. 65, 66 (1997) (contending that reasoning by analogy has failed gays and lesbians). For a further exploration regarding the plight of gays and lesbians, see *infra* note 173 and accompanying text.

48. Sunstein, *supra* note 44, at 783 (stating importance of precedent on consistency to avoid injustice). Sunstein acknowledges that reasoning by analogy has inherent limitations as well stating that the "[u]se of analogies produces principled consistency, at best, and not truth at all." *Id.* at 777. Another scholar agrees, commenting that "[d]rawing analogies indiscriminately leads to questionable results." Bryan Beier, *The Perils of Analogical Reasoning: Joseph William Singer, Property and Sovereignty and Property*, 1 GEO. MASON L. REV. 33, 57 (1994) (noting that although reasoning by analogy is useful way of analyzing problems, it "has its limits and perils").

> limits the scope of error and contributes to public acceptance of law as a standard of conduct.[49]

But there is a powerful dissenting voice, that of Larry Alexander. In *The Banality of Legal Reasoning,* Alexander states generally that there is nothing special about legal reasoning to distinguish it from reasoning used in other settings or vocations.[50] In particular, Alexander reasons that lawyers do *not* reason by analogy: "There is no additional kind of reasoning—for example, 'analogical reasoning'—that lawyers employ."[51]

Alexander's principal contention is that reasoning by analogy boils down to either formalism or realism, and that analogical reasoning, therefore, should not be treated as a separate category.[52] I disagree. While there is wide agreement that analogical reasoning can be either formalistic or realistic,[53] this does not necessarily mean that there is nothing special about reasoning by analogy. In contrast, I contend that this is precisely what *is* special about analogical reasoning. Analogy is the link between formalism and realism.

To reason by analogy is to find similarities between the situation at hand and other known situations. In law, the most common form of ana-

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49. Sherwin, *supra* note 40, at 1186 (asserting that analogy to past cases strengthens predictability of law).

50. *See* Alexander, *supra* note 42, at 517 (stating that legal reasoning involves moral reasoning, empirical reasoning and deductive reasoning as well as normal reasoning). Alexander states:

> My intention is . . . to clear away the mysticism and mumbo jumbo that is usually associated with "thinking like a lawyer" and to claim that thinking like a lawyer is just ordinary forms of thinking clearly and well. More precisely, thinking like a lawyer boils down to moral reasoning, empirical reasoning, and deductive reasoning, and lawyers reason in these ways exactly as everyone else does. There is no additional form of reasoning, special to them, in which lawyers engage. Law schools are well-equipped to teach students how to think like lawyers; but because moral, empirical, and deductive reasoning are taught or refined in other venues, law schools have no monopoly.

Id.

51. *Id.* at 518 (asserting analogical reasoning is merely deduction after identification of appropriate norms); *see also* Sunstein, *supra* note 44, at 741 n.2 (listing number of other authorities critical of analogical reasoning).

52. *See* Larry Alexander, *Incomplete Theorizing: A Review Essay of Cass R. Sunstein's Legal Reasoning and Political Conflict,* 72 NOTRE DAME L. REV. 531, 541 (1997) (critiquing Sunstein's application of analogical reasoning to law). Alexander observes:

> There are big stakes riding on the success of some defense of ARIL [analogical reasoning in law] as something other than either deduction from rules or RE [reflective equilibrium]. The autonomy of legal reasoning—and with it, the autonomy of law as a discipline—rests on such a defense of ARIL. Sunstein, I believe, has failed to provide such a defense. Given his formidable talent, Sunstein's failure should give backers of law's autonomy cause for worry.

Id.

53. For further information regarding formalistic and realistic legal analysis, see *infra* notes 55-56 and accompanying text.

logical reasoning is the use of precedent. In common law jurisprudential systems like ours, court decisions are recognized as a valid source of law.[54] When a previously decided case is discovered that is "on point," the rule of the previous case governs the case to be decided. Not infrequently, the previous case is not precisely on point with the case to be decided. In this circumstance, the court must decide whether the previous case is sufficiently analogous for its rule to govern the case to be decided. It also frequently happens that there is more than one case that arguably applies to the case at hand. In that circumstance, courts that reason by analogy must determine which of the previous cases is most similar to the case to be decided.

Several scholars have noted that analogies may be either formalistic or realistic. A formalist analogy is one based upon the similarities between the *facts* of the cited case and the facts of the case under consideration.[55] A realist analogy is based upon the similarities between the *values* served by the rule of law from the cited case and the values that are at stake in the case at hand.[56] Part III of this Article explores the difference between formalist and realist analogies, and demonstrates how reasoning by analogy serves as a bridge between formalism and realism.[57]

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54. *See generally* Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 446-49 (1996) (crediting Lord Chief Justices Edward Coke and Matthew Hale with investing precedent with force of law).

55. *See generally* Sunstein, *supra* note 44, at 756-57 (citing Holmes's "notorious" opinion in *Buck v. Bell*, 274 U.S. 200 (1927) as example of bad formalist analogy). Sunstein cites the inherent weakness of purely factual analogies:

> Formalist analogical thinking is no better than any other kind of bad formalism. Different factual situations are inarticulate; they do not impose order on themselves. Patterns are made, not simply found. Whether one case is analogous to another depends on substantive ideas that must be justified.

Id.

56. *See generally* Alexander, *supra* note 42, at 530 (stating that it is "principle immanent in [past] decisions [that] is the gauge of relevant 'likeness' and 'unlikeness' in analogical reasoning from the cases"); John Dickinson, *The Law Behind Law II*, 29 COLUM. L. REV. 285, 289-90 (1929) (noting that laws, unlike science, are "the result of value judgments, rather than judgment of fact . . ."). As Dickinson explained:

> The choice which a judge makes of one analogy rather than another is an expression of . . . a value-judgment; and the possibility of competing analogies therefore arises not merely or so much out of the doubtfulness of the factual resemblances among his materials, but rather out of the possibility of differences of opinion as to the comparative value of the different results which one analogy or the other would bring about.

Id. at 290. Richard Warner states, "The salient difference between *Columbia* and *Southern Concrete* is that, in the latter, the two companies had never dealt with each other before. Is this a relevant difference? Courts answer such questions by appeal to the legitimate goals and purposes of the law." Warner, *supra* note 13, at 1539-40.

57. For a discussion of the difference between formalist and realist analogies, see *infra* notes 259-73 and accompanying text.

3. *Realism*

Legal realism, also called policy analysis,[58] or practical reasoning,[59] emerged from the British school of utilitarianism and the American philosophy of pragmatism.[60] It is an ends-means analysis that entails a judicial balancing of the costs and benefits of a legal outcome. Legal realism is a method of legal reasoning that determines what the law is, not by invoking categorical legal principles, but rather by considering the law's probable *consequences*.[61] Law should be interpreted not by consulting a dictionary, but by inquiring into the underlying *purposes* of the law.[62] The courts should not seek a literal definition of the terms of the law, but should rather seek to fulfill the *values* that the law is intended to serve.

The guiding principle of legal realism was expressed by this nation's most eloquent jurist, Supreme Court Justice Benjamin Cardozo, who observed:

> The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. . . . Logic and history and custom have their place. We will shape the law

58. *See* Richard Posner, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 326, 326 (1988) (defining legal realism as "the use of policy analysis in legal reasoning").

59. *See generally* POSNER, *supra* note 13, at 71 (defining practical reasoning as use of deliberation and practical syllogism to make practical and ethical choice); Wellman, *supra* note 13, at 46 (suggesting use of practical reasoning as alternative to deductive reasoning).

60. *See* WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENTS 53-63 (2002) (describing history of relation between legal realism and teleological philosophy); *see also* Roberta Kevelson, *Semiotics and Methods of Legal Inquiry: Interpretation and Discovery in Law from the Perspective of Peirce's Speculative Rhetoric*, 61 IND. L.J. 355, 356 (1986) (analyzing relation between legal realism and philosophy of Charles Sanders Peirce); *see generally* LOUIS MENAND, THE METAPHYSICAL CLUB 201-34 (2001) (describing history of relation between Peirce, Holmes and other leading contextualists of late 19th and early 20th Century).

61. *See* Sunstein, *supra* note 44, at 787 (describing role of economic analysis in law). In distinguishing analogical reasoning from realist analysis, Sunstein notes "[o]ne cannot discover consequences by examining other judicial holdings." *Id.*

62. The principle that statutes should be interpreted in light of their legislative purpose is centuries old. In *Heydon's Case*, 76 Eng. Rep. 637 (1584), Lord Chief Justice Coke advised judges to take the following factors into account in the interpretation of statutes:

> 1st. What was the common law before the making of the act.
> 2nd. What was the mischief and defect for which the common law did not provide.
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.

Heydon's Case, 76 Eng. Rep. at 638.

> to conform to them when we may; but only within bounds. The end which the law serves will dominate them all.[63]

As noted above, when there are two existing rules of law that arguably apply by analogy to the present case, legal realists choose between them by determining which rule better achieves the underlying purposes of the law in the case.[64] This is realistic analogical reasoning. But what if neither of the existing rules precisely serves the values that are at stake in the case under consideration? In these circumstances, it is necessary to construct a new rule of law, taking into account all of the values and interests that will be affected by the new rule. Legal realism is the identification, interpretation and creation of rules of law in light of the intended purposes, underlying values and likely consequences of the law.

Richard Posner observes that people differ as to what the purposes, values and consequences of the law are, particularly in Constitutional Law, where fundamental human rights are at stake:

> When you think of all those constitutional theories jostling one another—Epstein's that would repeal the New Deal, Ackerman's and Sunstein's that would constitutionalize it, Michelman's that would constitutionalize the platform of the Democratic Party, Tushnet's that would make the Constitution a charter of socialism, Ely's that would resurrect Earl Warren, and some that would mold constitutional law to the Thomists' version of natural law—you see the range of choice that the approach legitimizes and, as a result, the instability of constitutional doctrine that it portends.[65]

Thus, legal realism is an analytic tool that can be wielded in service of any ideology.[66]

Policy analysis comprises a number of subsidiary skills. First, one must imagine the hypothetical consequences of interpreting the law one way or another. Second, one must identify the interest or abstract principle that a rule serves. Third, one must evaluate the weight of that interest or principle. Fourth, one must estimate the likelihood that the rule will accomplish its goal and serve this interest or principle. Finally, one must simultaneously balance the weight and likelihood of all of the competing

63. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66 (1921).

64. *See* Posner, *supra* note 58, at 326 (noting importance of using public policy to solve legal problems).

65. Richard Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 445 (1992) (asserting that due to numerous, strong, conflicting themes, there exists role for conscience in legal reasoning).

66. This is consistent with the neo-Kohlbergian view that postconventional thought "is not defined in terms of any single moral philosophy." JAMES REST ET AL., POSTCONVENTIONAL MORAL THINKING 40 (1999) (describing present state of moral philosophy as unsettled).

interests and principles.[67] All of these tasks require the skills that are developed at later stages of cognitive and moral development.

B. *The Developmental Theories of James Mark Baldwin, Jean Piaget and Lawrence Kohlberg*

In support of the thesis that formalism, analogy and realism are stages of legal analysis, I draw upon three influential theories of human development: James Mark Baldwin's theory of assimilation and accommodation, Jean Piaget's stages of intellectual development and Lawrence Kohlberg's model of moral development. These theories of human development, along with their associated stages, mirror the stages used in legal analysis and provide guidance into its understanding.

1. *James Mark Baldwin*

James Mark Baldwin was a student of the neo-Darwinian G. Stanley Hall, a founder of modern psychology who embraced Haeckel's theory that "ontogeny recapitulates phylogeny."[68] Like Hall, Baldwin compared the progress of an individual to the advancement of the human race, and described this progress as the successive adoption of "new modes of accommodation":

> Here are two great movements, one that of the individual growing constantly more competent to understand himself and to communicate what he understands; and here is society, made up of a series of generations of individuals, doing precisely the same thing and doing it upon precisely the same mass of materials. It is on the surface likely that the series of critical periods in both, marked by new modes of accommodation and due to new crises of a natural, moral, and political sort, would show a general serial correspondence.[69]

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67. These skills correspond to the five questions I teach students to ask when attacking policy arguments:

1. Is the factual prediction accurate?
2. Is the value at stake one of the purposes of the law?
3. Is the value at stake sufficiently strong?
4. How likely is it that the decision in this case will serve this value?
5. Are there other, competing values that are also at stake?

HUHN, *supra* note 60 at 133.

68. Barney Beins, *A Brief Biological Sketch of G. Stanley Hall*, 2002 G. Stanley Hall/Harry Kirke Wolfe Lectures, *at* http://www.ithaca.edu/beins/gsh/gsh.htm (last visited Aug. 5, 2002); *see also* ROBBIE CASE, INTELLECTUAL DEVELOPMENT: BIRTH TO ADULTHOOD 9 (1985) (giving brief background of Baldwin).

69. Christopher E. Green, *Classics in the History of Psychology*, *at* http:// psychclassics.yorku.ca/Baldwin/History/chap1-1.htm (last visited Aug. 5, 2002) (quoting JAMES MARK BALDWIN, HISTORY AND PSYCHOLOGY: A SKETCH AND AN INTERPRETATION (1913)). Here is how Baldwin explained his theory of "genetic development":

> To investigate the child by scientific methods is really to bring into psychology a procedure which has revolutionized the natural sciences; and it

In 1894, Baldwin articulated the first theory of intellectual development.[70] The heart of Baldwin's theory was that people respond to their environment in two fundamental ways—by means of "assimilation" and "accommodation."[71] Assimilation is the individual's habitual use of a behavioral or mental structure (a "schema") in response to external stimuli.[72] Baldwin suggested that a person assimilates and responds to familiar stimuli just as the body assimilates food.[73] For Baldwin, the process of assimilation explained habit formation, but it was inadequate to explain human development.[74]

Baldwin proposed a second process by which the individual adapts to unfamiliar stimuli, a process that he called "accommodation."[75] Accommodation is the adjustment of our behavioral and mental schemas in response to new stimuli. Baldwin's conception of the process of accommodation has been described as follows:

> First, the infant assimilates a new situation to an already existing schema. Second, it discovers that this assimilation is not successful. At this point it experiences conflict, and activates whatever other schemas or components of schemas seem of possible relevance. Finally, these schemas are coordinated into a higher order schema. The new schema is then applied, and the process of habit formation begins again.[76]

> is destined to revolutionize the moral sciences by making them also in a great measure natural sciences. The new and important question about the mind which is thus recognized is this: *How did it grow?* What light upon its activity and nature can we get from a positive knowledge of its early stages and processes of growth? This at once introduces other questions: How is the growth of the child related to that of the animals?—how, through heredity and social influences, to the growth of the race and of the family and society in which he is brought up? All this can be comprehended only in the light of the doctrine of evolution, which has rejuvenated the sciences of life; and we are now beginning to see a rejuvenation of the sciences of mind from the same point of view. This is what is meant when we hear it said that psychology is becoming "genetic".

JAMES MARK BALDWIN, THE STORY OF THE MIND 54 (1904) (discussing study of children's minds).

70. *See* CASE, *supra* note 68, at 9 (introducing Baldwin's work). "Baldwin . . . discerned a prelogical phase (based on imagination and memory), a logical phase (based on reasoning; concurrent with language acquisition), and a hyperlogical phase (based on flexible processes of problem solving transcending syllogistic reasoning) in the development of the child's mind." 1 ENCYCLOPEDIA OF PSYCHOLOGY 363 (Alan E. Kazdin ed., 2000).

71. CASE, *supra* note 68, at 10 (detailing Baldwin's theory of intellectual development).

72. *See id.* (describing process of schema activation).

73. *See id.* (noting how well-established schema are activated automatically and "a smooth, well coordinated response is observed").

74. *See id.* (postulating process that can "lead to higher levels of adaptation").

75. *Id.* (defining accommodation).

76. *See id.* (exploring process of accommodation).

I propose that Baldwin's theory of "assimilation and accommodation" helps explain the progression of legal reasoning from formalism, to analogy, to realism in hard cases.

2. *Jean Piaget*

Swiss psychologist Jean Piaget is considered the dominant figure in the field of developmental psychology.[77] He was trained in zoology and epistemology and, by establishing a link between these fields, he created a stage theory of cognitive development for which he is most famous.[78] He also initiated the study of moral development in children.[79]

Piaget built upon Baldwin's theories.[80] In particular, Piaget employed Baldwin's notions of assimilation and accommodation.[81] Piaget's understanding of these concepts is described as follows: "Assimilation involves the person's dealing with the environment in terms of his structures, while accommodation involves the transformation of his structures in response to the environment."[82]

Piaget utilized interviews with children to discover their cognitive patterns. Over a period of decades Piaget presented children with a variety of questions, problems and tasks, and observed the strategies they used to answer the questions, solve the problems or perform the tasks. Piaget concluded, like Baldwin, that children first attempt to assimilate new stimuli to existing mental structures. If this is unsuccessful, children accommodate their mental structures to take account of the new information. Piaget observed that people's intellectual strategies progress in well-defined steps, and he proposed the following system of cognitive stages:

1. Sensorimotor Period (approximately birth to two years old)[83]

77. *See* Robert L. Campbell, *Jean Piaget's Genetic Epistemology: Appreciation and Critique*, *at* http://hubcap.clemson.edu/~campber/piaget.html (last visited Aug. 5, 2002) (discussing Piaget's contributions to psychological research). "Developmental psychology owes a great debt to a Swiss thinker named Jean Piaget. Without his contributions, it is fair to say that the discipline would not exist." *Id.*

78. *See* CASE, *supra* note 68 at 10. (detailing history of Piaget's career); *see also* 6 ENCYCLOPEDIA OF PSYCHOLOGY 193 (Alan E. Kadzin ed., 2000) (giving background on Piaget).

79. *See* John M. Darley & Thomas R. Shultz, *Moral Rules: Their Content and Acquisition*, 41 ANN. REV. PSYCHOL. 525, 526 (1990) (giving brief history of study of moral judgments). "The major impetus for the empirical study of moral judgments was provided by Piaget's (1932) *The Moral Judgment of the Child . . . .*" *Id.*

80. *See* CASE, *supra* note 68, at 13 (detailing Piaget's theory of intellectual development). When James Mark Baldwin lived in Paris, he was "in contact with the young Jean Piaget, whom he strongly influenced." 1 ENCYCLOPEDIA OF PSYCHOLOGY 363-64 (Alan E. Kazdin ed., 2000) (exploring influences of James Mark Baldwin).

81. *See* HERBERT GINSBURG & SYLVIA OPPER, PIAGET'S THEORY OF INTELLECTUAL DEVELOPMENT 18 (1988) (outlining Piaget's theoretical framework).

82. *Id.* at 19 (discussing how assimilation and accommodation relate to each other).

83. *Development of Intelligence: Jean Piaget's Work*, Encyclopedia Britannica, *at* http://www.britannica.com/eb/article?eu=109299tocid=13349 (last visited Aug. 5, 2002) (describing sensorimotor period). In the sensorimotor period, the child

2. Preoperational Period (approximately two to seven years old)[84]
3. Concrete Operational Period (approximately seven to twelve years old)[85]
4. Formal Operational Period (after approximately twelve years old).[86]

Piaget observed that as people mature, their reasoning evolves in a number of fundamental yet related ways. First, he discovered that people only gradually acquire the ability to consider more than one aspect of a problem at a time.[87] As they master concrete operations, children develop the ability to manipulate a number of physical or factual variables simultaneously.[88]

Second, Piaget found that younger children lack certain mental operations that would enable them to understand the world in a more comprehensive fashion. At earlier stages, children equate changes in appearance

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"learns how to modify reflexes to make them more adaptive, to coordinate actions, to retrieve hidden objects, and, eventually, to begin representing information mentally." *Id.*

84. *Id.* During the preoperational period, the child "experiences the growth of language and mental imagery and learns to focus on single perceptual dimensions, such as colour [sic] and size." *Id.*

85. *Id.* During the period of concrete operations the child "develops an important set of skills referred to as conservation skills." *Id.*

86. *Id.* In the period of formal operations, the adolescent "develops thinking skills in all logical combinations and learns to think with abstract concepts." *Id.*

87. *See* GINSBURG & OPPER, *supra* note 81, at 108-09 (giving example of problem solving question posed to child). Ginsburg and Opper note:

> Piaget's studies of reasoning find that the child has a tendency to group together various different events into a loose and confused whole (syncretism), that he sometimes fails to see the relations among separate events (juxtaposition); that he fails to understand ordinal relations; and that he cannot deal with the relations between a part and the whole of which it is a member. All of these types of reasoning reveal a common deficiency: an inability to think simultaneously about several aspects of a situation.

Id. at 108. Describing a preoperational child (approximately four to seven years old):

> The child tends to focus on a limited amount of the information available. In the conservation of number, [the child] judges two sets equal when they are the same length, and ignores another relevant variable, the density. In the conservation of continuous quantity, the child judges two amounts equal when the heights of the columns of liquid are the same and ignores the width. In the construction of ordinal relations (the problem of ordering ten sticks in terms of height), he succeeds only by considering the tops of the sticks and ignoring the bottoms, or vice versa. In all these problems, the preoperational child deploys his attention in overly limited ways. He focuses on one dimension of a situation, fails to make use of another, equally relevant dimension, and therefore cannot appreciate the relations between the two.

Id. at 154 (noting that one general cognitive characteristic of this period is concentration).

88. *See id.* (describing concrete operational child). In contrast to younger children, a child who has mastered concrete operations "tends to focus on several dimensions of a problem simultaneously and to relate these dimensions." *Id.*

with essential changes,[89] they fail to anticipate that certain operations may be reversed[90] and they do not understand that certain relations are reciprocal.[91] Children slowly acquire these related concepts of conservation, reversibility and reciprocity.[92]

Third, Piaget confirmed that people only gradually develop the ability to engage in abstract reasoning. Children understand the world in immediate and concrete terms, while adolescents acquire the ability to consider abstract ideas. "Whereas earlier the adolescent could love his mother or hate a peer, now he can love freedom or hate exploitation."[93] This marks the transition from concrete operations to formal operations.

Fourth, Piaget found that at the level of formal operations children learn to perform logical functions to manipulate ideas just as they had earlier learned the skills of conservation, reversibility and reciprocity in the manipulation of physical objects.[94] The acquisition of these skills makes it possible for them to consider hypothetical situations. Just as younger children learn to physically manipulate concrete objects, older children learn to manipulate mental images to consider what is possible:

> In the stage of formal thought, the adolescent develops the ability to imagine the possibilities inherent in a situation. Before acting on a problem which confronts him, the adolescent analyzes it and attempts to develop hypotheses concerning what *might* occur. These hypotheses are numerous and complex because the

89. *See id.* at 154-55 (discussing differences between children at earlier and later stages). For example, younger children believe that changing the shape of an object makes "more" or "less" of it, because they have not yet acquired the concept of "conservation." *Id.*

90. *See id.* at 156 (discussing how thoughts of preopertaional children are static and unable to carry out actions mentally so as to understand they are reversible). Reversibility of an operation is illustrated by the discovery that a narrow, tall container may contain the same amount of liquid as a short, wide one: "By carrying out the action mentally, that is, by reversing the pouring in his mind, he is able to ascertain that the quantity of water in C (the lower wider glass) is the same as in B." *Id.*

91. *See id.* (explaining reciprocity and contrasting with reversibility). The container example, in which one is tall and narrow while the other is short and wide, provides an example of a reciprocal relationship. In comparing the liquid quantities within each container, "when the child says that one glass is longer and thinner, whereas the other is shorter and wider, he is canceling out the differences between the two glasses by an action of reciprocity." *Id.*

92. *See id.* at 155 (summarizing preoperational child's thought). A child who has mastered concrete operations "focuses on several aspects of a situation simultaneously, is sensitive to transformations, and can reverse the direction of thought." *Id.*

93. *Id.* at 203 (discussing thought process of adolescents).

94. *See id.* at 201-04 (commenting on actual use of formal operations). Piaget identified four logical functions that the adolescent learns to perform at the stage of formal operations: identity, negation, reciprocity and correlativity. *See id.* at 194-95.

> adolescent takes into account all possible combinations of eventualities in an exhaustive way.[95]

Fifth, Piaget discovered that children grow in their ability to understand and apply rules. He investigated this by observing how children played the game of marbles.[96] He found that young children had idiosyncratic understandings of the rules of the game of marbles, frequently differing from those of their playmates.[97] He also discovered, paradoxically, that young children believe that the rules of a game are absolute and inviolate.[98] In contrast, by the age of 10 to 12, children not only understand and obey the standard rules of the game, they also understand that the rules can be changed and they take pleasure in elaborating upon the rules to cover various contingencies. The following story illustrates in colorful fashion the "legalistic tendencies" of children at the stage of concrete operations:

> Piaget tells a delightful anecdote about the legalistic tendencies of this stage. He observed a group of boys aged 10 and 11 who were preparing to have a snowball fight. Before getting on with it, they devoted a considerable amount of time to dividing themselves into teams, electing officers, devising an elaborate set of rules to regulate the throwing of snowballs, and deciding on a system of punishments for transgressors. Before they had actually settled on all these legalistic aspects of the game, it was time to return home, and no snowball game had been played. Yet, all the players seemed content with their afternoon.[99]

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95. *Id.* at 206 (discussing stage of formal thought).

96. *See id.* at 96 (considering moral behavior and judgment through consideration of game of marbles).

97. *See id.* at 97 (discussing children's understanding of rules).

98. *See id.* at 99 (making observations from game of marbles).

99. *Id.* at 98. Carol Gilligan has observed that girls, in general, care less about the rules themselves than boys do. One pair of legal scholars drew these conclusions from Gilligan's findings:

> "[B]oys' games appeared to last longer not only because they required a higher degree of skill and were thus less likely to become boring, but also because, when disputes arose in the course of a game, boys were able to resolve the disputes more effectively than girls. . . . In fact, it seemed that the boys enjoyed the legal debates as much as they did the game itself." Perhaps then, the traditionally male-dominated legal profession, which is by nature a dispute-resolving discipline, became male-dominated out of primitive man's ability to effectively resolve the earliest playground disputes over the last drumstick from Tyrannosaurus Rex.
>
> But while males seem to demonstrate a talent for confrontation and debate, girls, as Gilligan observed, tend to be more pragmatic toward the rules of the game. For while males tend throughout childhood to become "increasingly fascinated with legal elaboration of rules and the development of fair procedures for adjudicating conflicts, [that fascination] does not hold for girls." Girls regarded rules as good as long as the rule compensated completely for any harm that may have been done by the rule's violation. Generally, the girls observed were more tolerant about

Thus, by the end of the period of concrete operations, children have acquired the ability to create and interpret rules in concrete settings.[100]

Sixth, followers of Piaget have also closely studied the development of the individual's cognitive ability to draw analogies, and discovered that a fundamental change occurs as the child moves from concrete to formal operations. Researchers found that by age 9 or 10, in the later stages of concrete operations and at about the same age that they master rules, children are capable of identifying analogies using concrete nouns, verbs and adjectives.[101] For example, children at this level can complete the following analogies:

1. Black is to white as hard is to _____ (steel, stone, solid, soft or blue).
2. _____ is to see as knife is to cut (fork, eye, look, shape or blue).
3. Ink is to pen as paint is to _____ (color, spray, brush or paper).[102]

But by age 11 or 12 there appears a qualitative shift in children's ability to draw analogies, in that children acquire the ability to identify abstract relations between concrete terms, as in the following problem:[103]

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violations of the rules, more willing to make exceptions, more easily reconciled to changes in the game, and more likely to resolve conflicts creatively. Gilligan's thesis is that care and relationships are largely overlooked by the judicial system's current methods of analyzing moral dilemmas. But "while they are used by both men and women, women focus on care and relationships considerably more than men do."

Sherrine M. Walker & Christopher D. Wall, *Feminist Jurisprudence: Justice and Care*, 11 BYU J. PUB. L. 255, 261 (1997) (quoting CAROL GILLIGAN, IN A DIFFERENT VOICE 9 (1982)); CAROL GILLIGAN, IN A DIFFERENT VOICE 9 (1982). For a discussion of Gilligan's influence on cognitive theory and jurisprudence, see *infra* notes 151-68 and accompanying text.

100. *See* GINSBURG & OPPER, *supra* note 81, at 101-02 (discussing children at end of period of concrete operations). Ginsburg and Opper state:

> [A]s he grows older the child evolves from a position of submission to adults to one of equality. He is also confronted with beliefs contradictory to those he has been taught. Both of these experiences influence the child to see rules as having a human, and hence fallible, origin, and to agree to participate in their formation and alteration. Since the child now has a hand in the formation of rules, they no longer exist as a foreign entity imposed on his conscience; they no longer exist as a code which may be unquestionably respected, occasionally obeyed, and seldom understood. The child now chooses to follow rules which are his own or at least freely agreed upon.

Id.

101. *See* CASE, *supra* note 68, at 217 (detailing studies of reasoning on verbal analogies).

102. *See id.* (presenting analogies that children can complete by end of period of concrete operations).

103. *See id.* at 218 (describing further analogical capabilities of children).

4. Food is to body as water is to _____ (storm, coat or ground).[104]

Between the ages of 13 and 15, children acquire the additional ability to solve analogies that involve abstract relationships between abstract entities:

5. Task is to _____ as problem is to solution (attempt, completion, work, end or question).[105]

In summary, Piaget and other developmental psychologists have discovered that as individuals master concrete operations, they acquire the concepts of conservation, reversibility and reciprocity in concrete terms; they develop the ability to follow and formulate rules; they acquire the ability to draw concrete analogies; and they learn to manipulate a number of physical or factual variables simultaneously.[106] As individuals make the transition to formal operations, they become capable of performing logical functions with abstract concepts; they learn to draw analogies involving abstract concepts and relations; they become capable of contemplating hypothetical situations; and they learn to manipulate a number of abstract concepts simultaneously. The transition from concrete operations to formal operations in cognitive reasoning corresponds to the transition from formalism to realism in legal reasoning.

3. *Lawrence Kohlberg*

Lawrence Kohlberg, a leading figure in the field of the psychology of moral development,[107] applied and extended Piaget's theories in an effort

104. *See id.* at 220 (demonstrating abstract relationship between concrete nouns).

105. *See id.* at 221 (exploring abstract relationship between abstract nouns).

106. *See generally id.* at 9-27 (giving overview of theories of intellectual development); GINSBURG & OPPER, *supra* note 81, at 153-204 (analyzing and critiquing Piaget and his theory of intellectual development).

107. *See* Darley & Shultz, *supra* note 79, at 527 (exploring Kohlberg's contributions to field). Kohlberg's stage theory of moral development has been called a "landmark" in the field of moral development. *See id.* It has formed the basis of hundreds of psychological studies, including dozens of cross-cultural studies testing the universality of the Kohlbergian stages. *See, e.g.*, Hing Keung, *The Chinese Perspectives on Moral Judgment Development*, 23 INT'L J. PSYCHOL. 201 (1988) (extending and revising Kohlberg's theory of moral development to integrate Chinese perspectives); Diomedes Markoulis, *Postformal and Postconventional Reasoning in Educationally Advanced Adults*, 150 J. GENETIC PSYCHOL. 427 (1989) (examining Stage Five moral reasoning); John R. Snarey, *Cross-Cultural Universality of Social-Moral Development: A Critical Review of Kohlbergian Research*, 97 PSYCHOL. BULL. 202 (1987) (summarizing and critiquing forty-five cross-cultural studies testing Kohlberg's theory).

Kohlberg's model has been applied to other fields as well. Kohlberg and others used the theory to design educational programs to stimulate moral development. *See* F. CLARK POWER, ANN HIGGINS, & LAWRENCE KOHLBERG, LAWRENCE KOHLBERG'S APPROACH TO MORAL EDUCATION 1-6 (1989) (describing experimental schools). The model has also been utilized by political scientists to account for differences in political belief. *See* Paul Sparks and Kevin Durkin, *Moral Reasoning and Political Orientation: The Context Sensitivity of Individual Rights and Democratic Prin-*

to measure people's ability to engage in moral reasoning. He adopted Piaget's research methods by constructing a series of hypothetical moral dilemmas and presenting them to research subjects during interviews.[108] For example, Kohlberg asked his subjects whether a man should steal a drug to save his wife's life, or whether an older brother should tell his father about a younger brother's disobedience that was revealed in confidence. Kohlberg categorized and evaluated the *type* of reasoning the subjects employed to answer these and other moral dilemmas.

Kohlberg concluded that moral reasoning, like cognitive reasoning, could be described as moving through stages of development. Kohlberg found that people solve moral problems by utilizing relatively consistent standard patterns of reasoning, and that an individual's pattern of moral reasoning progresses through stages that are analogous to, although lagging slightly behind, Piaget's stages of cognitive development.[109]

In addition, Kohlberg, like Piaget, utilized Baldwin's principles of "assimilation" and "accommodation" to describe people's reactions to moral problems and to explain their progression from one stage to another.[110] Individuals tend to assimilate moral problems by invoking the schema that is characteristic of their present stage of development.[111] If that schema is inadequate to successfully resolve the moral problem, the individual is influenced to accommodate his or her pattern of moral reasoning.[112]

Based upon his research, Kohlberg identified three levels of moral development, each of which consists of two stages:

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ciples, 52 J. OF PERSONALITY & SOC. PSYCHOL. 931, 934-35 (1987) (correlating moral stage and political orientation); Joseph Wagner, *Political Tolerance and Stages of Moral Development: A Conceptual and Empirical Alternative*, 8 POLITICAL BEHAVIOR 45, 74-6 (1986) (correlating moral stage with political tolerance).

Currently, psychologists are considering a competing theory of "information processing" to explain moral functioning. Recent studies explore the effects of deficits in information processing on aspects of behavior such as lack of empathy or aggressiveness. *See, e.g.*, Ersilia Menesini et al., *Interactional Styles of Bullies and Victims Observed in a Competitive and a Cooperative Setting*, 161 J. GENETIC PSYCHOL. 261, 261-65 (2000) (examining bullying as relationship behavior); Laura A. Thompson et al., *Aging and the Effects of Facial and Prosodic Cues on Emotional Intensity Ratings and Memory Reconstructions*, 25 J. NONVERBAL BEHAV. 101, 101-25 (2001) (examining "young and older adults' interpretation and memory for emotional content of spoken discourse").

108. *See* JOHN MARTIN RICH & JOSEPH L. DEVITIS, THEORIES OF MORAL DEVELOPMENT 87-104 (1985) (analyzing moral developmental theories, including those of Kohlberg).

109. *See id.* at 91-94 (discussing Kohlberg's premise that individual's structure of moral judgment is embodied in what he or she defines as valuable in moral issues raised).

110. *See* Kenneth E. Goodpaster, *Kohlbergian Theory: A Philosophical Counterinvention*, 92 ETHICS 491, 494 (1982) (discussing Kohlberg's theory of moral development and stage progression).

111. *See* RICH & DEVITIS, *supra* note 108, at 87-94 (exploring Kohlberg's claim that advanced moral reasoning depends upon one's level of logical reasoning).

112. *See id.* (explaining how individual views on moral judgment evolve from one's individual perspective).

Preconventional Level

At this level, the child is responsive to cultural rules and labels of good and bad, right or wrong, but interprets these labels in terms of either the physical or the hedonistic consequences of action (punishment, reward, exchange of favors) or in terms of the physical power of those who enunciate the rules and labels.

Stage 1. The Punishment and Obedience Orientation

Stage 2. The Instrumental Relativist Orientation

Conventional Level

At this level, maintaining the expectations of the individual's family, group, or nation is perceived as valuable in its own right, regardless of immediate and obvious consequences. The attitude is not only one of conformity to personal expectations and social order, but of loyalty to it, of actively maintaining supporting, and justifying the order and of identifying with the people or group involved in it.

Stage 3. The Interpersonal Concordance or "Good Boy—Nice Girl" Orientation

Stage 4. Society Maintaining Orientation

Postconventional Level

At this level, there is a clear effort to define moral values and principles that have validity and application apart from the authority of the groups or people holding these principles and apart from the individual's own identification with these groups.

Stage 5. The Social Contract Orientation

Stage 6. The Universal Ethical Principle Orientation.[113]

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113. LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT 17-18 (1981) [hereinafter KOHLBERG, MORAL DEVELOPMENT] (omitting detailed description of each stage). A more recent description by Kohlberg of each of the six stages of development is set forth below:

Level 1—Preconventional

Stage 1—Heteronomous Morality—Avoidance of punishment, and the superior power of authorities.

Stage 2—Individualism, Instrumental Purpose, and Exchange—To serve one's own needs or interests in a world where you have to recognize that other people have interests, too.

Level 2—Conventional

Stage 3—Mutual Interpersonal Expectations, Relationships, and Interpersonal Conformity—The need to be a good person in your own eyes and those of others. Your caring for others. Belief in the Golden Rule. Desire to maintain rules and authority which support stereotypical good behavior.

Stage 4—Social System and Conscience—To keep the institution going as a whole, to avoid the breakdown in the system "if everyone did it," or the imperative of conscience to meet one's defined obligations.

Level 3—Postconventional

Preconventional thought is essentially egocentric. Right and wrong are defined by the immediate consequences that will result from the individual's behavior. At Stage 1 of an individual's development, a person's concern is with reward and punishment. In response to the question of whether an older brother should tell his father about a younger brother's disobedience that was revealed in confidence, a ten-year old child stated:

> In one way it was right to tell because his father might beat him up. In another way it's wrong because his brother will beat him up if he tells.[114]

Three years later, however, at Stage 2, the same child offered a slightly more complex answer that took into account the possibility that the brothers might agree to keep each other's secrets:

> The brother should not tell or he'll get his brother in trouble. If he wants his brother to keep quiet for him sometime, he'd better not squeal now.[115]

As the child moves from the preconventional to the conventional level, the child's conception of morality evolves from commitment to a "deal" to a sense of "duty." This sense of duty may run to family and friends or to society as a whole. At Stage 3, the first stage of conventional thought, the individual is principally concerned with how his family would feel towards him, and how their feelings would make him feel. This is the classic "good boy" or "nice girl" approach:

> He should think of his brother, but it's more important to be a good son. Your father has done so much for you. I'd have a conscience if I didn't tell, more than to my brother, because my father couldn't trust me. My brother would understand; our father has done so much for him, too.[116]

> Stage 5—Social Contract or Utility and Individual Rights—A sense of obligation to law because on one's social contract to make and abide by laws for the welfare of all and for the protection of all people's rights. A feeling of contractual commitment, freely entered upon, to family, friendship, trust, and work obligations. Concern that laws and duties be based on rational calculation of overall utility, "the greatest good for the greatest number."
>
> Stage 6—Universal Ethical Principles—The belief as a rational person in the validity of universal moral principles, and a sense of personal commitment to them.

LAWRENCE KOHLBERG, CHILD PSYCHOLOGY AND CHILDHOOD EDUCATION: A COGNITIVE-DEVELOPMENTAL VIEW 284-86 (1987) [hereinafter KOHLBERG, CHILD PSYCHOLOGY].

114. KOHLBERG, CHILD PSYCHOLOGY, *supra* note 113, at 291 (examining responses given by children).

115. *Id.*

116. *Id.* at 290 (showing emerging of loyalty among siblings).

At Stage 4, the individual's reasoning is still conventional, but the subject's sense of duty is not limited to the family or immediate peer group. Instead, the person values law because it promotes social cohesion. This person, at Stage 4, has assumed the perspective of the "good citizen." To illustrate this transfer of concern from family to community, here is the answer of a 17-year-old to the question of whether the husband should steal the drug to save his wife's life:

> It's a matter of law. It's one of the rules that we're trying to help protect everyone, protect property, not just to protect a store. It's something that's needed in our society. If we didn't have these laws people would steal, they wouldn't have to work for a living and our whole society would get out of kilter.[117]

Seven years later, the same individual took an even broader perspective, marking the transition to postconventional thinking. In answer to the same question, this individual stated:

> It is the husband's duty to save his wife. The fact that her life is in danger transcends every other standard you might use to judge his action. Life is more important than property.[118]

At the postconventional level, instead of accepting the rules of society, people can question the purposes of the rules and balance these purposes against other values. They are able to do this because they have acquired a number of cognitive skills that are characteristic of the Piagetian stage of formal operations. First, people "become able to juggle more things in their minds in more complicated ways."[119] Second, people can form hypotheses about probable consequences and test them mentally.[120] Third, people can grasp abstract principles and can assign value to them.[121] Fourth, people at the highest stages of cognitive and moral development embrace the concept of "full reciprocity," that is, that moral rules should be applied universally.[122]

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117. *Id.* at 287 (evidencing maturation of ideals).

118. *Id.* at 290 (showing expansion into postconventional thinking).

119. REST ET AL., *supra* note 66, at 137 (examining "operations versus content").

120. *See id.* at 40-43 (stating that upon one's justification of act, one argues that act is not self-serving, but serves group goals consistent with principles and ideals).

121. *See id.* (stating positive and constructive aspect of postconventional thinking).

122. *Id.* at 42 (describing final element of postconventional schema). James Rest explains the difference between the partial reciprocity of conventional thought and the full reciprocity of postconventional thought:

> Whereas *partial* reciprocity was envisioned by the maintaining norms schema (i.e., that everyone alike is under the law and protected by the law) [conventional thought], at the postconventional level one realizes that the law itself may be biased; lawful acts may nevertheless favor some over others (e.g., such was the point of Martin Luther King's civil disobe-

Postconventional reasoning defines right and wrong by evaluating the situation in light of the consequences for everyone concerned and the fundamental values that are at stake. As an individual moves through the stages of development, he or she acquires the ability to consider the effects of a decision within an ever-broadening context, from self, to family and community, to consequences and values that embrace all of mankind.

Kohlberg's theory has been extremely influential, but it has also been the subject of sustained criticism. Some of the significant critiques of Kohlberg's work are described in the following section.

C. *Criticisms of Kohlberg's Stage Theory of Development*

There are a number of significant challenges to Kohlberg's theory of moral development. Four principal critiques of Kohlberg's model are discussed below.

1. *Kohlberg's Use of Narrative Responses to Hypothetical Questions*

Several researchers have challenged Kohlberg's research methods, adopted from Piaget, in which subjects are presented with hypothetical problems in a laboratory setting and their responses are recorded and subjectively scored by the experimenters.[123] Some argue that this method puts a premium on intellectual rationalizing, and is a poor way to gauge an individual's level of cognitive or moral functioning.[124] This criticism has led researchers in two divergent directions. It has impelled some to advocate measurement of cognitive or moral behavior rather than verbal explanation,[125] while other researchers have devised objective tests (multiple-choice or preference-ranking surveys) to measure the stages of cognitive and moral development.[126]

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dience). "Full" reciprocity entails not only uniform application of social norms, but also that the social norms themselves not be biased in favor of some at the expense of others.

Id.

123. For an extended critique of Kohlberg's methods, see PETER E. LANGFORD, APPROACHES TO THE DEVELOPMENT OF MORAL REASONING 191 (1995) ("The interview is only one of several methods that can be used to study moral reasoning.").

124. *See* REST ET AL., *supra* note 66, at 19-22 (discussing criticism of Kohlberg's reliance on verbal methods for assessing moral judgment). Elliott Turiel responds, however, that Kohlberg had "an abiding concern with judgment, action, and development." Elliott Turiel, *Moral Judgment, Action, and Development, in* THE LEGACY OF LAWRENCE KOHLBERG 32 (Dawn Schrader ed., 1990) (outlining Kohlberg's impact in field).

125. *See* Turiel, *supra* note 124, at 36-46 (evaluating Kohlberg's emphasis on "moral aspects of social interactions").

126. *See* REST ET AL., *supra* note 66, at 47 (outlining authors' neo-Kolhbergian approach entitled "Defining Issues Test"); Linda S. Gump et al., *The Moral Justification Scale: Reliability and Validity of a New Measure of Care and Justice Orientations*, 35 ADOLESCENCE 67, 68-70 (2000) (describing development of Moral Justification Scale).

The merits of this first criticism, although important in the field of psychology, are irrelevant to the thesis of this Article. The purpose of this Article is to describe and sequence the modes of analysis utilized by judges in formal written opinions. These opinions are not answers to hypothetical problems, but are actual cases. Furthermore, the authors of these opinions bear a professional obligation to persuade the parties, the profession and society that the decisions are dictated by law. The behavior being evaluated in this Article is judicial reasoning itself.

2. *The Concept of "Stage"*

The second important criticism of these developmental theories relates to the concept of "stage." Many scholars, perhaps most, now reject the "hard stage" model favored by Piaget and Kohlberg. The stage concept grew out of Baldwin's biological orientation, and was embraced by Piaget, whose original academic pursuit was zoology.[127] Consistent with this biological perspective, Piaget understood cognitive and moral development to proceed in an "invariant sequence,"[128] and Kohlberg, as one group of scholars explains, "advocated a particularly strong version of the 'stage' concept:"[129]

> The underlying metaphor for [Kohlberg's] notion of development was the staircase: Development consists of moving up the staircase one step at a time. Kohlberg contended that subjects were "in" one stage or another (i.e., on one "step" or another). Every subject would show stepwise, irreversible, upward progression in the stage sequence in longitudinal studies, with no stage skipping or reversals (one moves up the staircase one step at a time, and always forward).[130]

Researchers have challenged this understanding of stages as invariably sequenced discrete steps. Studies indicate that people may exhibit different stages of cognitive or moral development in response to different problems.[131] Rather than assign an individual to a single stage of development, some researchers now seek to measure

127. *See* GINSBURG & OPPER, *supra* note 81, at 1-2 (describing Piaget's early years).

128. *Id.* at 158 (detailing Piaget's notion of stages).

129. REST ET AL., *supra* note 66, at 17 (discussing "problems with the 'stage' concept").

130. *Id.* (exploring difficulties with Kohlberg's use of stages).

131. *See* GINSBURG & OPPER, *supra* note 81, at 159 (noting one difficulty of stage notion as existence of irregularities in development). "[T]he child is not always in the same stage with regard to different areas of thought. . . . Also . . . the child may display different levels of achievement in regard to very similar areas of thought." *Id.* "Certain tasks, which appeared to share the same logical structure, were found to be passed at widely different ages. . . . [and] correlations among developmental tasks were often low or insignificant." CASE, *supra* note 68, at 27 (reporting problematic data).

> [t]he degree to which the individual uses various types of thinking. Developmental sequence therefore is not a matter of a person abruptly changing from stage to stage (going up a staircase, step by step), but a matter of shifting distributions of stage use (using less of the lower stages and more of the higher stages of thinking).[132]

Although the invariant and discrete nature of "hard stages" may not be supported by psychological research, there are other aspects of the stage concept that are broadly accepted. First, the stages of development appear sequentially, if gradually. Second, the stages are differentiated in the sense that each stage is characterized by a distinct "underlying structure."[133] Third, each stage of development "prepares the way" for the stage to follow.[134] The stage theory presented in this Article reflects this notion of "soft stages," mental operations that appear sequentially, that can be distinguished from each other structurally and that build upon each other to create increasingly complex forms.

3. *Multiplicity*

Kohlberg originally believed that he could derive fundamental moral truths, *i.e.*, "right answers," at Stage 6, the highest stage of moral reasoning. However, Kohlberg eventually abandoned Stage 6 as a separate category, finding no evidence for its existence.[135] James Rest and his colleagues, self-described "Neo-Kohlbergians," define postconventional thought as follows:

> The defining characteristic of postconventional thinking is that rights and duties are based on sharable ideals for organizing cooperation in society, and are open to debate and tests of logical consistency, experience of the community, and coherence with accepted practice.[136]

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132. REST ET AL., *supra* note 66, at 56 (discussing assessment of developmental progress as more than simply qualitative analysis).

133. *See* GINSBURG & OPPER, *supra* note 81, at 158 (discussing "concept of a stage").

134. *See id.* (stating that, in cases of conservation, initial centration prepares for vacillation among available dimension leading to subsequent decentration).

135. *See* Paul T. Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 TUL. L. REV. 1237, 1274-77 (1988) (discussing Kohlberg's stages of moral development and elimination of Stage Six). The collapse of Kohlberg's stage 6 (universality) into stage 5 (utilitarian balancing) is consistent with John Harsanyi's conclusion that rational morality is based upon rule utilitarianism. "If we care about the common good, then reason will clearly tell us what moral code to follow: it will tell us to follow the rule utilitarian moral code." John C. Harsanyi, *Does Reason Tell Us What Moral Code to Follow and, Indeed, to Follow Any Moral Code at All?*, 96 ETHICS 42, 55 (1985) (discussing relationship between "rationality and morality").

136. REST ET AL., *supra* note 66, at 40-43 (discussing four elements that make up postconventional schema).

Rest contends that postconventional thought is not characterized by adherence to a single school of moral philosophy, but by the ability to utilize moral philosophy to evaluate society.[137] According to Rest, conventional moral thinking is "the morality of maintaining social norms,"[138] whereas postconventional moral thinking is "the morality that rules, roles, laws, and institutions must serve some shareable ideal of cooperation."[139]

Paul Wangerin addresses this fundamental disagreement about the nature of postconventional thought in his article *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, which is the most comprehensive treatment of the developmental theories of Piaget and Kohlberg in legal scholarship to date.[140] Wangerin describes the

137. *See id.* (clarifying that postconventional thought is not defined by any single philosophy, but is broad and less partisan).

138. *Id.* at 2 (noting devlopment in thinking toward postconventional from conventional).

139. *Id.* (highlighting "[t]he shift from conventional to postconventional thinking" as growing awareness of how people interrelate among new concern with morality).

140. *See* Wangerin, *supra* note 135, at 1273-89 (discussing both Piaget and Kohlberg's developmental theories). A number of researchers have evaluated the moral reasoning of attorneys and law students using the Kohlbergian scale. *See* Nina J. Crimm, *A Study: Law School Students' Moral Perspectives in the Context of Advocacy and Decision-Making Roles*, 29 NEW ENG. L. REV. 1, 14-15 (1994) (discussing Kohlberg's model of moral reasoning); Susan Daicoff, *Articles Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1396-99 (1997) [hereinafter Daicoff, *Know Thyself*] (discussing analysis of Kohlberg's theory of moral development); Susan Daicoff, *(Oxymoron?) Ethical Decisionmaking by Attorneys: An Empirical Study*, 48 FLA. L. REV. 197, 203-06 (1996) [hereinafter Daicoff, *Ethical Decisionmaking*] (discussing Kohlberg's theory of moral development with regards to moral and ethical attorney decisionmaking); Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 196-99 (1991) (discussing Kohlberg's expansion of Piaget's scheme). Psychologists have also examined the effect of moral stage on juror decisionmaking. *See* Michael B. Lubfer et al., *The Influence of Level of Moral Reasoning on the Decisions of Jurors*, 127 J. SOC. PSYCHOL. 653, 657-67 (1987) (discussing results of four experiments conducted to assess influence of cognitive and attitudinal factors on decisions reached by individual jurors when asked to deliberate on simulated trial).

Scholars have investigated the relation between the "moral stage" of adolescents and their interaction with the legal system, including their competency to stand trial, the validity of their consent to search and their behavior as mock jurors. *See* Adele M. Ackerman et al., *Defendant Characteristics and Judgment Behaviors of Adolescent Mock Jurors*, 13 J. YOUTH & ADOLESCENCE 123, 128-29 (1984) (reporting findings on impact of certain evidence on adolescent jurors and relating this to moral judgment); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 10-11 (1997) (considering moral stage and ability to stand trial along with children's preconventional view of rights as bestowed by authority); Lourdes M. Rosado, *Minors and the Fourth Amendment: How Juvenile Status Should Invoke Different Standards for Searches and Seizures on the Street*, 71 N.Y.U. L. REV. 762, 787-90 (1996) (discussing need for juvenile standard for consent); *see also* Robert Batey, *The Rights of Adolescents*, 23 WM. & MARY L. REV. 363, 370-83 (1982) (discussing adolescents' decision-making capacities).

In addition, scholars have discussed the influence of Kohlberg's theory on the "discourse ethics" of Jurgen Habermas. *See* Myra Bookman, *Still Facing "The Dilemma of the Fact": Gilligan and Habermas (Re)Visited*, 76 DENV. U. L. REV. 977, 983-87

schism in the field of developmental psychology between those theorists who, like Kohlberg, reject multiplicity and relativism, and those who embrace it.[141] He also observes a similar schism in the field of legal education.[142] Drawing on educational theorists, Wangerin argues persuasively that "the transition between dualistic and relativistic thinking is the most difficult instructional moment faced by students,"[143] and that "studies suggest that as students move through law school, they rapidly develop an increased ability to see various sides of an issue and increased tolerance for ambiguity."[144]

4. *The Ethic of Care*

A related criticism of Kohlberg's theory, and one that has similar implications for the substance of his model of moral development, is that his reliance on the cognitive aspect of moral reasoning fails to account for the

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(1999) (looking at researchers' consideration of "discourse ethics"); Craig Calhoun, *Social Theory and the Law: Systems Theory, Normative Justification, and Postmodernism*, 83 NW. U. L. REV. 398, 415-33 (1989) (discussing Habermas's discourse ethics); Mark Gould, *Law and Philosophy: Some Consequences for the Law Deriving from the Sociological Reconstruction of Philosophical Theory*, 17 CARDOZO L. REV. 1239, 1257-59 (1996) (exploring Habermas's emphasis that cultural values must be tested from outside perspectives); Evan Simpson, *The Development of Political Reasoning*, 30 HUMAN DEV. 268, 269-80 (1987) (discussing Kohlberg's schema of moral development, as well as Piaget's, regarding how its impact on political attitudes).

One scholar uses Kohlbergian analysis to criticize the jurisprudential school of "law and economics," equating it with preconventional reasoning. *See* Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309, 1323 (1986) (examining self-interest of economics).

Legal scholars have made fruitful use of Carol Gilligan's model of moral development, the "ethic of care," which has provided a scientific basis for feminist critical scholarship. For a complete discussion of Gilligan's "ethic of care," see *infra* notes 151-68 and accompanying text.

141. *See* Wangerin, *supra* note 135, at 1288-1300 (noting different perspectives on theories within developmental psychology). Wangerin explains:

> An enormous schism that divides the various schools of developmental psychology can now be clearly seen. Lawrence Kohlberg does not accept multiplicity or relativism as the underlying epistemological stance that climaxes moral development, nor do Professors Kitchener and King, the originators of the cognitive development theory of reflective judgment. These theorists insist that certain universally applicable and objectively true ideas and principles do exist. For them, development involves movement toward acceptance of that fact. Thus, they follow in the tradition of Plato. Conversely, William Perry for the cognitive development psychologists and Norma Haan for the moral development psychologists believe that objective truth does not exist and that development principally involves the ability to live with that uncomfortable fact. In a sense, therefore, they follow in the tradition of Protagoras.

Id. at 1287-88.

142. *See id.* at 1288 (examining varying views on legal education theories).

143. *Id.* at 1255 (commenting on pain and anxiety experienced by law students).

144. *Id.* at 1254-55 (arguing that law students' greatest challenges are necessary shifts in thinking modes).

emotional nature of morality. Many leading scholars have persuasively argued that Kohlberg ignored the role of empathy in favor of a cognitive approach that emphasizes individual commitment to abstract rights.[145] James Rest argues that Kohlberg, like Immanuel Kant[146] and John Rawls,[147] attempted to "[construct] a moral point of view solely from rational imagination."[148] Rest observes that "[c]ritics of Kohlberg claim that his stage sequence favors abstract, impartial principles over loyalty, friendship and close relationships."[149] In contrast, for many people, the essence of morality is to fulfill responsibilities to the people who depend upon them: their spouses, their children, their co-workers, patients, clients, students, customers, neighbors and friends. The advocates of empathy and caring contend that Kohlberg undervalues the importance of responsibility and emotional concerns.[150]

This critique, denominated "the ethic of care," was forcefully articulated by Kohlberg's onetime student and colleague Carol Gilligan.[151] Her groundbreaking work, *In a Different Voice*, argued that Kohlberg's analysis was flawed because it was drawn solely from a male perspective. In particular, Dr. Gilligan argues that: "Kohlberg's six stages that describe the development of moral judgment from childhood to adulthood are based empirically on a study of eighty-four boys whose development Kohlberg has followed for a period of over twenty years."[152]

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145. *See* Justin D'Arms, *Empathy and Evaluative Inquiry*, 74 CHI.-KENT L. REV. 1467, 1468-70 (2000) (affirming proposition that empathy is important as precursor to or motivator of moral behavior); Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1578 (1987) (discussing empathy as phenomenon that exists to expand understanding of others); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099, 2100 (1989) (discussing empathy as related to more individualized justice and as model for encouraging attorneys to pay attention to unique life stories of their clients).

146. One formulation of Kant's categorical imperative is: "Act as if the maxim of your action were to become through your will a general natural law." *Immanuel Kant*, Microsoft Encarta Online Encyclopedia 2002 (outlining Kant's life and accomplishments), *available at* http://encarta.msn.com/find/Concise.asp?z=1&pg=2&ti=761560445&cid=6#p6 (last visited Aug. 30, 2002).

147. Rawls's ingenious metaphor, the "veil of ignorance," invites us to construct rules of morality with perfect knowledge of the human condition, but without particular knowledge of our own station in life. *See* JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971) (asserting that parties do not know how alternatives will affect their own particular case and are forced to evaluate principles solely on general considerations).

148. REST ET AL., *supra* note 66, at 17 (outlining problems with Kolhberg's "stage" theory).

149. *See id.* at 5 (presenting outline of criticisms of Kohlberg's theories).

150. *See id.* (pointing at Kohlberg advocates' loyalty to abstractions over loyalty to persons).

151. *See* Mark F. Goldberg, *Restoring Lost Voices: An Interview With Carol Gilligan*, 81 PHI DELTA KAPPAN 701, 701-04 (May 2000) (noting Gilligan's critique of Kohlberg); RICH & DEVITIS, *supra* note 108, at 117-20 (exploring Gilligan's work in light of her mentor Kohlberg).

152. GILLIGAN, *supra* note 99, at 18 (criticizing Kohlberg's omission of females from his research). "[Gilligan] suggests that Kohlberg's scoring system may be

According to Gilligan, Kohlberg relegated women's moral orientation to Stage 3, characterizing caring and attentiveness to personal relationships as less mature than concern with "rights":

> Prominent among those who thus appear to be deficient in moral development when measured by Kohlberg's scale are women, whose judgments seem to exemplify the third stage of his six stage sequence. At this stage morality is conceived in interpersonal terms and goodness is equated with helping and pleasing others. This conception of goodness is considered by Kohlberg and Kramer to be functional in the lives of mature women insofar as their lives take place in the home.[153]

Under Gilligan's model of moral development, people progress from conventional to postconventional thought not solely because they have advanced cognitively, but because they have acquired a deeper and broader sense of empathy. The "good boy" or "nice girl" of Stage 3, who desires to please his or her family and friends may evolve into a person who is sensitive to the interests and the values of others generally. In a similar manner, the "good citizen" of Stage 4, who identifies with the social norms of the community, may evolve into an autonomous citizen capable of evaluating the effect of the laws and institutions of his or her society on all persons.[154]

Gilligan asserts that Kohlberg, by focusing entirely on rational analysis, missed the "heart" of moral reasoning.[155] Gilligan contends that

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biased against women because of the disproportionate numbers of males in research samples and that the developmental theories themselves tend to be formulated by men." RICH & DEVITIS, *supra* note 108, at 96 (discussing Gilligan's assertion that Kohlberg's theory is biased against women because research sample was disproportionately male and theory was formulated by male).

153. GILLIGAN, *supra* note 99, at 18 (applying Kohlberg's theory to females). "Gilligan notes that Kohlberg found women, in light of their strong interpersonal orientation, to favor Stage 3, a stage he held to be functional and adequate for them. She laments that the traits that have conventionally defined the 'goodness' of women – their care and sensitivity to the needs of others – are those that mark them as deficient in moral development." RICH & DEVITIS, *supra* note 108, at 96 (discussing Gilligan's disappointment that traits which conventionally defined "goodness" of women are used by Kohlberg to mark them deficient in moral development).

154. This conception of the transition from conventional to postconventional thought is consistent with the influential "domain theory" of Elliott Turiel, who contends that conventional and postconventional thinking belong to separate domains, and that they evolve on parallel tracks. *See* REST ET AL., *supra* note 66, at 146 (discussing Turiel's theories on conventional and postconventional thinking as alternative to Kohlberg).

155. *See* GILLIGAN, *supra* note 99, at 23 (arguing that, until acknowledgement is made of importance of attachment in human life cycle within women's development, then theories remain limited).

moral problems arise "from conflicting responsibilities rather than from competing rights":[156]

> This conception of morality as concerned with the activity of care centers moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights and rules.[157]

In her signature work, Gilligan analyzed women's approaches to resolving a number of moral decisions with interpersonal dimensions such as whether to have an abortion,[158] whether to marry a boyfriend[159] or how to react to a family member's suicide.[160] Gilligan determined that, in these contexts, women analyze problems in terms of the effect that their decision would have on themselves and their loved ones, and not on the basis of legal rights and rules.[161] Gilligan's theory has spawned an outpouring of scholarship on feminist legal theory.[162] As a result, the role of

156. *Id.* (arguing that different constructions of moral problems by women is critical reason why they fail to develop within Kohlberg's system).

157. *Id.* (describing how conception of morality for women is different because men focus on human rights and emphasize separation rather than connection thus, relationships for men are secondary to individual).

158. *See id.* at 71-105 (discussing conflict women experience when considering abortion).

159. *See id.* at 134-35 (reflecting one woman's view on morality and marriage).

160. *See id.* at 137-38 (discussing viewpoints on morality of suicide).

161. *Id.* at 19 (discussing how women differ and why they fail to develop within other theorist's systems). Gilligan relies on research studies showing that "the moral judgments of women differ from those of men in the greater extent to which women's judgments are tied to feelings of empathy and compassion . . . ." *Id.* at 69. Critics of Gilligan's work contend that interpersonal aspects dominate the decision-making of the women she interviewed because the domain of the problems they faced were interpersonal in nature. *See, e.g.*, REST ET AL., *supra* note 66, at 10 (pointing out Gilligan's assumptions and focus on some phenomena while ignoring others). For example, James Rest suggests that Kohlberg's theory of moral reasoning applies to questions of "macromorality," that is the morality of society as reflected in its laws and rules, while Gilligan's "ethic of care" applies to questions of "micromorality," that is, the morality of questions of friendship, family and individual choice. *See id.* at 2-3 (arguing that conditions for establishing society-made system requires impartiality and acting on shared ideals, not acting on behalf of our friends and kin). The weakness of this criticism of Gilligan's thesis is that Kohlberg's moral dilemmas were also presented to subjects as questions of family, friendship and individual choice. The examples of whether to steal a drug for one's wife or whether to tell on a younger brother are every bit as personal as whether to have an abortion or whether to marry.

162. *See, e.g.*, Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2667 (1993) (considering how Gilligan's ethic of care might alter contours of lawyer's ethical responsibilities); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1609-14 (1991) (looking at feminist reading of *Antigone*); Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 858-62 (1992) (questioning prominence of relational feminism by showing its tension with needs of many women); Suzanna Sherry, *Civic Virtue*

empathy in the interpretation of the law has received increased attention from legal scholars.[163]

Researchers have investigated Gilligan's thesis that preferences for "justice" versus "caring" correlate with gender, but the results of these studies are divided.[164] Whether or not the "ethic of care" is gender-based, there are powerful arguments to support the conclusion that the ability to empathize with others is an important constituent of moral reasoning. There is now substantial evidence to support the conclusion that small children have the capacity to empathize, that people's ability to empathize with others develops over time and that empathy may be conceived as an ever-widening and ever-deepening phenomenon.[165] At the most advanced levels of development, the ethic of caring may encompass a number of philosophic outlooks because the essence of caring is the ability to see a problem from many different viewpoints.[166] Gilligan refers to this as the "postconventional ethic of care."[167] Myra Bookman describes Gilligan's contribution as "a moral stage that transcends both the impediments of conventional ethical life and the empty formalisms of abstract reason and replaces both with an awareness of need and avoidance of detach-

and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543, 543-44 (1986) (discussing women's perspectives on world as being more closely aligned with classical Republican theory); Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243, 247 (1988) (using Gilligan's work on moral development to find ways of integrating doctrine, practice and theory in classroom); Joan Chalmers Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 300 (1991) (arguing that outsider jurisprudence and feminist narrative have greater potential for offering useful descriptions of difference than relational feminists). Legal scholars have made creative use of Gilligan's context-sensitive "ethic of care." For example, Paul Spiegelman suggested that the adoption of this orientation would justify profound changes in legal education. *See* Spiegelman, *supra*, at 255-61 (referring to example of Amy and Jake, two 11-year-old children with contrasting approaches to moral decision-making described in Gilligan's work).

163. *See* Henderson, *supra* note 145, at 1578-86 (discussing relationship between empathy and moral choice).

164. *See* Gump et al., *supra* note 126, at 2 (examining both Gilligan's and Kohlberg's work). One scholar, summarizing these studies, concludes:

> Using measures designed to investigate more interpersonally oriented forms of moral reasoning, a number of studies have found gender differences, with males primarily focusing on issues of justice and females primarily focusing on interpersonal issues. However, other studies have not found significant differences.

Id. (referencing division in "justice" versus "caring" studies).

165. *See* REST ET AL., *supra* note 66, at 22-23 (noting that children can empathize). Researchers have observed that adolescents shift "from a personal perspective to a sociocentric perspective." *Id.* at 39.

166. *Cf.* Wangerin, *supra* note 135, at 1293 (noting that caring voice "is abstractly related to multiplicity and relativism").

167. Carol Gilligan & John Michael Murphy, *Development from Adolescence to Adulthood: The Philosopher and the Dilemma of the Fact*, *in* INTELLECTUAL DEVELOPMENT BEYOND CHILDHOOD 85, 86 (Deanna Kuhn ed., 1979) (discussing philosophical outcome of ethic of care).

ment."[168] For these reasons, the "ethic of care" is a powerful component of postconventional moral reasoning.

Accordingly, Kohlberg's stage theory of moral development must be adjusted in three principal ways in order to describe the stages of legal reasoning. First, the stages of reasoning should be described as "soft stages"—which are sequential, structurally distinct and increasingly complex—and not as "hard stages"—which are invariant and hierarchical. Formalism, analogy and realism appear sequentially, are structurally distinct and are increasingly complex, but all are necessary for the law to evolve, and none of these methods of reasoning is inherently superior to the others.

Second, postconventional thought is not characterized by the adoption of a single philosophic outlook, such as the philosophy of Immanuel Kant or John Rawls. Instead, postconventional thought, like realist analysis, is characterized by the ability to critique laws and institutions by reference to any one of a number of philosophic tools, including the consideration of consequences and fundamental values.

Third, postconventional thought utilizes not only increasingly complex cognitive functions, but also draws upon an increased capacity for empathetic awareness, which grows out of the more parochial desires for acceptance and identity that emerge at the level of conventional thought. Both logic and empathy play a fundamental role in the postconventional ability to evaluate laws and institutions.

With these three clarifications or modifications to Kohlberg's developmental theory in mind, we now return to a description of the stages of legal reasoning.

D. *The Stages of Legal Reasoning*

In light of the fact that both cognitive and moral reasoning exhibit distinct stages of development, we should expect legal reasoning, which is the confluence of logical and moral reasoning, to exhibit a similar stage structure. We should not expect to find, in a judicial opinion, childish forms of reasoning reflective of preoperational or preconventional thought. We should not, however, be surprised to find a combination of concrete and formal operations, as well as conventional and postconventional thought. I suggest that formalism, analogy and realism may be characterized as the stages of legal reasoning for the following reasons.

First, the cognitive elements of formalism, analogy and realism appear sequentially in correspondence with stages of development described by Piaget and Kohlberg. Formalism—the understanding and application of rules—is mastered at the level of "Concrete Operations" under Piaget's theory, and represents "Conventional Reasoning" in Kohlberg's model of moral development. Children also acquire the ability to construct con-

168. Bookman, *supra* note 140, at 982 (examining Gilligan's work).

crete analogies (formalist analogies) at the level of Concrete Operations and can draw analogies based on abstract relations and abstract terms (realist analogies) later in adolescence, as they master Formal Operations. To engage in realist analysis, a person must be able to understand abstractions, frame hypotheses and consider multiple abstract aspects of a problem at the same time. These are the same cognitive operations that are characteristic of Formal Operations and Postconventional thought. Kohlberg observed the same progression stating: "Paralleling evidence on universal moral levels, the development of individual orientations vis-à-vis legal or rule systems shows consistent movement from a preconventional law-obeying, to a conventional law-maintaining, to a postconventional law-making perspective."[169]

Second, not only do reasoning by analogy and realistic analysis emerge sequentially in the individual because they call upon increasingly complex cognitive skills, but they also require a broader and more sensitive ability to empathize with others.[170] This is emblematic of the Kohlbergian notion of "full reciprocity"[171] or Gilligan's "postconventional ethic of care."[172] A critical component of reasoning by analogy is identifying the similarities and differences among cases, and a crucial step in realist analysis is imagining how people will be affected by the interpretation of the law. Todd Brower eloquently explains how judges' lack of empathy has hampered their ability to fairly apply precedent to gays and lesbians:

> An important component of the study of case precedent and reasoning by analogy is the ability to recognize when things are meaningfully similar or dissimilar and to treat them accordingly. As gay rights issues proliferate in the courts, however, judges and lawyers seem to have forgotten how to determine similarity and difference. Cases that are otherwise similar are decided differently when they involve lesbians and gay men.[173]

Empathetic awareness—the "ethic of care"—plays a central role in realist analogies and realist analysis.

Third, each stage of legal reasoning is incorporated into and prepares the way for the succeeding stage. One must be able to apply a rule according to its terms before one can apply it to analogous cases. One must be able to identify factual similarities between one situation and another

169. June Louin Tapp & Lawrence Kohlberg, *Developing Senses of Law and Legal Justice, in* LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY 89 (June Louin Tapp & Felice J. Levine eds., 1977) (noting research on development of legal perspective).

170. *See generally* D'Arms, *supra* note 145, at 1470 (stating that empathy "is a device for learning about what matters and why").

171. For a further discussion of analogical reasoning, see *supra* notes 39-57 and accompanying text.

172. For further discussion of modes of thinking concerning relationships and human development, see *supra* notes 68-122 and accompanying text.

173. Brower, *supra* note 47, at 66 (discussing difficulty faced by judges in cases involving gays and lesbians).

before one can identify similarities in the values or interests that are at stake. Finally, one must be able to identify the relevant values that are at stake in a situation before one is able to evaluate their relative likelihood and weight. Thus, formalism, formalist analogies, realist analogies and realism represent an evolution of successively more complex modes of reasoning.

Fourth, according to the theory of assimilation and accommodation, we progress from one stage to another when an existing schema is inadequate to resolve the case at hand. I argue in the following portion of this Article that this is precisely what happens in hard legal cases. When a court is faced with a novel fact situation, or in cases where the values of society are in flux, the courts of necessity tend to employ all three methods of legal reasoning. First, the courts attempt to apply existing rules of law to new facts; this is the deductive, formalistic approach. Under this approach, the courts try to clarify any ambiguities in an existing rule by defining the terms of the rule. If the ambiguities in the rule cannot be resolved through the definition of terms,[174] courts turn to the second approach and attempt to apply existing rules of law by analogy to the case under consideration.[175] If the facts of the case under consideration are so novel that the analogies break down,[176] courts turn to the third approach in order to decide the case.[177] Through an inductive, realist approach, the courts devise new rules of law by balancing the relevant values and interests.

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174. As Richard Warner notes, the problem with a deductive approach is that the minor premise of a legal syllogism is frequently in question. For instance, "[t]he question is whether 'the cumulative effect of a series of connected, or independent negligent acts' add up to recklessness. It is difficult to cast the court's reasoning about this point in deductive form for the relevant rule seems not to exist." Warner, *supra* note 13, at 1553 (noting frailties of deductive reasoning).

175. *See* State v. Flynn, 55 P.3d 324, 347 (Kan. 2002) (describing evidence in case as "relevant by analogy"); Gunaji v. Macias, 31 P.3d 1008, 1010 (N.M. 2001) (stating that proper remedy should be determined by drawing analogy to Code). Scott Brewer states the first step of analogical reasoning occurs:

> in a context of doubt about the extension of some predicate or the meaning of some text; probably the most typical "contexts of doubt" in legal arguments are instances in which a legal concept or term is actively vague—that is, instances in which a judge or lawyer is undecided about whether to apply the concept to a given object or event.

Brewer, *supra* note 45, at 962 (summarizing model of exemplary reasoning).

176. Todd Brower suggests:

> [T]he most opportune time for change appears to be when the existing schema ceases to function adequately; that is, when the schema does not properly represent factual circumstances or generate legal outcomes consistent with appropriate precedent.

Brower, *supra* note 47, at 145-46.

177. As Larry Alexander has observed: "[I]n the uncontrolled case, where no canonical legal norm or precedent governs . . . lawyers employ moral or policy arguments." Alexander, *supra* note 42, at 517 (noting occasions when lawyers resort to policy arguments).

In the following section, I present evidence to support the argument that in hard cases the reasoning of the courts progresses from formalism, to analogy and, finally, to realism.

II. THE STAGES OF LEGAL REASONING IN HARD CASES

Technological capability and social understanding are advancing at ever-increasing rates, and the law must adapt to each new state of affairs. As Justice William Brennan stated:

> The mists which have obscured the light of freedom and equality for countless tens of millions are dissipating. For the unity of the human family is becoming more and more distinct on the horizon of human events. The gradual civilization of all people replacing the civilization of only the elite, the rise of mass education and mass media of communication, the formulation of new thought structures due to scientific advances and social evolution—all these phenomena hasten that day.[178]

Like James Mark Baldwin, Brennan believed in human progress and attributed this progress to the development of "new thought structures" that have been and are being evolved.[179] Changes in the patterns of legal reasoning have become apparent because the "hydraulic pressure" that technological and social change exert on the law works to reveal the underlying structure of legal thinking.[180] As new facts force changes in legal paradigms, the different types of legal reasoning are thrown into bold relief. In particular, judges progress from formalism to analogy to realism when resolving difficult questions of law.

David Friedman has observed that:

> Technological change affects the law in at least three ways: (1) by altering the cost of violating and enforcing existing legal rules; (2) by altering the underlying facts that justify legal rules; and (3) by changing the underlying facts implicitly assumed by the law, making existing legal concepts and categories obsolete, even meaningless.[181]

In a similar vein, Steven Quevedo has identified three ways in which a rule or an analogy can "age" and require revision or replacement: (1) When "new cases have materially different facts;" (2) "if the factual assumptions upon which the analogy is based become more and more sus-

178. WILLIAM J. BRENNAN, JR., AN AFFAIR WITH FREEDOM 319 (Steven J. Friedman ed., 1967) (discussing changing face of society).

179. *See* William J. Brennan, Jr., *How Goes the Supreme Court?*, 36 MERCER L. REV. 781, 786 (1985) (discussing evolution of constitutional doctrine).

180. *Id.* (stating that political and cultural differences cannot stop progress, which compels field of law to rethink its role).

181. David Friedman, *Does Technology Require New Law?*, 25 HARV. J.L. & PUB. POL'Y 71, 71 (2002) (discussing how technology is changing law).

pect as time passes;" and (3) "if the value or policy assumptions governing the selection of the relevant similarity or difference are called into question."[182]

During the last half of the Twentieth Century, technological advances in two fields have had a particularly significant impact on the way we live. The telecommunications revolution has opened up a new world of information and entertainment, while innovations in reproductive technology have created new ways to conceive and bear children. The social changes created by these technological advances have in turn generated a host of new legal problems. I examine below how changes in telecommunications have required a reexamination of the First Amendment, and how the new reproductive technology has affected the law of parentage.

A. *The First Amendment and Telecommunications: From Doctrine to Balancing*

In recent years the Supreme Court has decided a number of cases applying the First Amendment to new forms of communication—including cable television,[183] the Internet[184] and computer-generated images.[185] Over a half century ago, Justice Robert Jackson noted that First Amendment doctrine is particularly sensitive to technological change, because each new form of media has different characteristics.[186] He stated "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck, and the street corner orator have differing natures, values, abuses, and dangers."[187]

182. Steven M. Quevedo, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CAL. L. REV. 119, 144-45 (1985) (examining how legal concepts can "age").

183. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 826-27 (2000) (invalidating provision of Telecommunications Act of 1996 which required cable operators to either "fully scramble" sexually explicit channels or to limit their hours of transmission); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 216-17 (1997) (upholding "must-carry" provisions of Cable Television Consumer Protection and Competition Act of 1992).

184. *See* Ashcroft v. ACLU, 122 S. Ct. 1700, 1713-14 (2002) (considering whether it is constitutional to evaluate whether postings on Internet are "harmful to minors" on basis of "contemporary community standards"); Reno v. ACLU, 521 U.S. 844, 876-83 (1997) (invalidating provisions of Communications Decency Act of 1996, which attempted to protect minors from "indecent" and "patently offensive" speech on Internet).

185. *See* Ashcroft v. Free Speech Coalition, 112 S. Ct. 1389, 1405 (2002) (holding that Congress could not outlaw computer generated images of child pornography).

186. *See* Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (noting that each method of "communication of ideas" has different characteristics).

187. *Id.* at 94 (Jackson, J., concurring) (noting relationship between First Amendment and technology). Two scholars concluded, however, that technological change may be simply an excuse, and not a reason, for changing the law: "the rhetoric of technological change provides freedom—a freedom that can be exploited to advance [the judge's] particular jurisprudential agendas." Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunica-*

Has the rapid change in communications technology had an effect on First Amendment jurisprudence generally? In the past two terms alone, the Court has decided eleven First Amendment cases.[188] The most striking aspect of the Court's recent jurisprudence in this area is the increasing tendency of the Court to reject established doctrine in place of a balancing approach. Of course, balancing approaches are nothing new to First Amendment jurisprudence. The "clear and present danger" test, developed by Oliver Wendell Holmes,[189] and Learned Hand's standard, which took into account "the gravity of the 'evil' discounted by its improbability,"[190] both called for judicial balancing. What is different about the Court's recent cases is its abandonment of standard balancing formulas, such as strict scrutiny and intermediate scrutiny, in favor of *ad hoc* balancing tests.

Until recently, the classic paradigm for First Amendment analysis had been for the Court to address a number of threshold issues and, depending on the how these questions were answered, to set a standard of review. The principal threshold issue under the First Amendment is whether the

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tions Reform in Congress and the Court, 97 COLUM. L. REV. 976, 1009 (1997) (suggesting that judges feel more comfortable modifying doctrine to account for technological change rather than change in legal theory).

188. *See* Republican Party of Minn. v. White, 122 S. Ct. 2528, 2542 (2002) (holding Minnesota Supreme Court canon of judicial conduct unconstitutional); Watchtower Bible and Tract Soc'y of New York v. Stratton, Ohio, 122 S. Ct. 2080, 2091 (2002) (holding that ordinances requiring permit for door-to-door religious solicitation violated First Amendment); *Ashcroft*, 122 S. Ct. at 1713-14 (holding that Child Online Protection Act was not unconstitutionally overbroad); Los Angeles v. Alameda Books, Inc., 122 S. Ct. 1728, 1735-39 (2002) (holding that city could reasonably rely on police department study correlating crime patterns with concentration of adult businesses when businesses brought First Amendment challenge); *Free Speech Coalition*, 122 S. Ct. at 1405 (holding computer generated child pornographic images protected by First Amendment); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 569 (2001) (holding that regulation prohibiting advertisement of smokeless tobacco violated First Amendment); Fed. Elec. Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 465-82 (2001) (holding that coordinated campaign expenditure limits conflict with First Amendment guarantees); United States v. United Foods, 533 U.S. 405, 410-17 (2001) (holding that mushroom advertisement assessment requirement violated First Amendment); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107-11 (2001) (holding school's exclusion of club which uses Christianity to teach moral value was impermissible viewpoint discrimination); Bartnicki v. Vopper, 532 U.S. 514, 528-35 (2001) (holding that First Amendment protection of publishing rights outweighed claims against privacy rights); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 540-45 (2001) (holding that funding restriction prohibiting Legal Services Corporation from distributing funds to organizations who represent clients in effort to amend or challenge existing welfare law is impermissible viewpoint discrimination).

189. Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

190. United States v. Dennis, 183 F.2d 201, 215 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951) (discussing balancing test appropriate to determine statute's constitutionality).

law under review is "content-based" or "content neutral."[191] If the law under review is content-based,[192] then the standard of review depends upon the value of the category of speech that is being suppressed; high value speech is protected by strict scrutiny review,[193] while laws affecting mid- to low-value speech are judged by lower standards of review, such as intermediate scrutiny[194] or rational basis.[195] If the law is content neutral, then the standard of review depends upon whether speech is being suppressed in a public forum or a nonpublic forum; content neutral laws limiting speech in a public forum are judged by a form of intermediate scrutiny,[196] while laws regulating nonpublic fora are reviewed under a form of the rational basis test.[197]

But recent cases have not followed the standard doctrines. For example, in *Bartnicki v. Vopper*,[198] a radio station had repeatedly played a tape of a cellular telephone conversation that had been illegally recorded.[199] The participants in the conversation sued the radio station under the Omnibus Crime Control and Safe Streets Act, which prohibits the interception of electronic communications and imposes civil and criminal liability on anyone who discloses such a conversation knowingly.[200] Justice Stevens

191. As Daniel Farber explains:

> The content distinction is the modern Supreme Court's closest approach to articulating a unified First Amendment doctrine. Government regulations linked to the content of speech receive severe judicial scrutiny. In contrast, when government is regulating speech, but the regulation is unrelated to content, the level of scrutiny is lower.

DANIEL A. FARBER, THE FIRST AMENDMENT 21 (Foundation Press 1998).

192. *See* Burson v. Freeman, 504 U.S. 191, 197-98 (1992) (noting that law is content-based if intent of lawmaker was to suppress idea or content of expression; conversely, law is content neutral if intent of lawmaker was to restrict time, place or manner of expression).

193. *See id.* at 197 n.3 ("[A] content-based regulation of political speech in a public forum is valid only if it can survive strict scrutiny.").

194. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995) ("[W]e engage in "intermediate" scrutiny of restrictions on commercial speech . . . .").

195. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-61 (1973) (stating that Georgia legislature could reasonably determine connection between antisocial behavior and obscene material). The Supreme Court implicitly applied the lenient rational basis test to evaluate the constitutionality of a law regulating obscene speech: "[T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity . . . . The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime." *Id.* at 57-58.

196. *See* Turner Broad. Sys., Inc., v. FCC, 512 U.S. 622, 642 (1994) ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . .").

197. *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 679 (1992) (noting that regulation of speech on public property that is not traditional or designated public forum "need only be reasonable").

198. 532 U.S. 514 (2001).

199. *See id.* at 518-19.

200. *See id.* at 515 (summarizing Omnibus Crime Control and Safe Streets Act).

traced the difficulty of the case to the fact that "[t]he Framers of the First Amendment surely did not foresee the advances in science that produced the conversation, the interception or the conflict that gave rise to this action."[201] Justice Stevens determined that the law was content neutral,[202] which would normally require that the law merely satisfy the "intermediate scrutiny" test.[203] However, Justice Stevens did not apply intermediate scrutiny. Instead, the Court simply balanced the competing interests that it found to be at stake:

> [T]hese cases present a conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech. . . . [H]aving considered the interests at stake, we are firmly convinced that the disclosures made by respondents in this suit are protected by the First Amendment.[204]

The dissenting Justices took the majority to task for failing to apply intermediate scrutiny to what was admittedly a content neutral law.[205]

Similarly, in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*,[206] the Court applied an *ad hoc* balancing test to determine the constitutionality of spending limits contained in the Federal Election Campaign Act.[207] The Court held that the appropriate standard to evaluate the constitutionality of a spending limit imposed on a political party's coordinated spending is whether the law is "closely drawn" to serve "sufficiently important" governmental interests.[208] The dissent insisted that this type of campaign finance law was a content-based restriction on political speech and, as such, should be subjected to strict scrutiny.[209]

Another challenge to existing First Amendment doctrine lies in the difficulty that the Court has in drawing the line between content-based

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201. *Id.* at 518 (acknowledging difficulty arising from interests of privacy and of free dissemination of public information).

202. *See id.* at 526 (defining content neutral laws).

203. *See* Bartnicki v. Vopper, 200 F.3d 109, 123 (3d Cir. 1999), *aff'd*, Bartnicki v. Vopper, 532 U.S. 514 (2001) (holding that law is content neutral and requires intermediate scrutiny).

204. *Bartnicki*, 532 U.S. at 518, 529-35 (balancing relevant competing interests).

205. *See id.* at 544-49 (criticizing majority's failure to apply intermediate scrutiny).

206. 533 U.S. 431 (2001).

207. *See id.* at 456 (noting appropriate scrutiny standard).

208. *Id.* (citing Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 387-88 (2000)) (stating that standard of scrutiny is same as applied to other political actors).

209. *See id.* at 465-66 (Thomas, J., dissenting) (stating that campaign financing law failed strict scrutiny).

and content neutral laws.[210] This difficulty is exemplified by the Court's decision this term in *City of Los Angeles v. Alameda Books, Inc.*[211] In *Alameda*, the Court considered the constitutionality of a municipal ordinance that, in effect, limited multi-use adult business establishments by requiring each separate type of adult business (i.e. arcades, bookstores, massage parlors, etc.) to be located 1000 feet from each other.[212] While the plurality of the Court found this law to be content neutral,[213] Justice Kennedy, in his concurrence, found the plurality's designation of the law to be "imprecise,"[214] but nevertheless applied "intermediate scrutiny" in determining its constitutionality.[215]

In summary, the Supreme Court has moved from applying doctrine to a balancing approach in resolving First Amendment cases. This represents a progression from formalism, to analogy, to realism. This progression is demonstrated in the various judicial opinions from a single First Amendment case: *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*[216]

B. *The Stages of Legal Reasoning: The* Denver Area *Case*

The recent tendency of the Court to blur the distinction between content-based and content neutral laws and to utilize *ad hoc* balancing tests in place of standard formulas in First Amendment cases is traced to the 1996 decision of the Court in *Denver Area.*[217] In *Denver Area*, the United States Supreme Court reexamined First Amendment principles as applied to the

210. The line between content-based and content neutral laws is not always an easy one to draw. *Compare* United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding federal law that prohibits knowingly destroying or mutilating draft card is content neutral), *with* United States v. Eichman, 496 U.S. 310, 310 (1990) (holding federal law that prohibits knowingly mutilating, defacing, physically defiling, burning, maintaining on floor or ground or trampling upon American flag is content-based).

211. 122 S. Ct. 1728 (2002).

212. *See* City of Los Angeles v. Alameda Books, Inc., 122 S. Ct. 1728, 1731-33 (discussing facts of case).

213. *Id.* at 1737 (relying on *Renton v. Playtime Theatres*, 475 U.S. 41 (1986), which found that similar ordinance was content neutral).

214. *Id.* at 1739 (Kennedy, J., concurring) (disagreeing with holding in *Renton v. Playtime Theaters*, 475 U.S. 41 (1986)).

215. *Id.* at 1741 (Kennedy, J., concurring) (stating that zoning restriction designed to decrease secondary effects and not speech is subject to intermediate scrutiny).

216. 518 U.S. 727 (1996).

217. *See generally* Diana Israelashvili, *A Fear of Commitment: The Supreme Court's Refusal to Pronounce a First Amendment Standard for Cable Television in* Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 71 ST. JOHN'S L. REV. 173 (1997) (describing how Court in *Denver Area* was reluctant to announce First Amendment standard and decided specific claims only instead); Charles Nesson & David Marglin, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act*, 10 HARV. J.L. & TECH. 113, 118-19 (1996) (exploring type of balancing used). In addition to demonstrating how legal reasoning progresses from formalism, to analogy, to realism, *Denver Area* also illustrates the clash between reli-

medium of cable television. By vastly increasing the flow of information into our homes, cable television has generated a number of issues centered on access to the cable platform.[218] Additionally, cable television presents the Court with novel problems of interpretation because it has "the unique communications role of being both a First Amendment 'speaker' and a conduit for the speech of others."[219] While the opinions of the lower court and the Supreme Court offer examples of all three stages of legal reasoning, the novel aspects of the cable television communications medium made formalistic analysis impossible and strained analogistic reasoning to the breaking point. The plurality of the Court decided the case utilizing a flexible, balancing approach. What makes the case particularly instructive is that, in separate opinions, justices of the United States Supreme Court vigorously debated the relative merits of reasoning by analogy and realist analysis in order to resolve the issues before the Court.[220]

The *Denver Area* case concerned the constitutionality of three provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the Cable Act or Act).[221] By means of this Act, Congress sought to regulate and limit the dissemination of indecent programming[222] via cable television. The provision of law provoking the sharpest division among the justices was Section 10(a) of the Act,[223] which authorized cable

ance on two different sources of law—precedent and policy. *See* HUHN, *supra* note 60, at 171-75 (discussing facts and analysis of *Denver Area*).

218. *See* Norman M. Sinel et al., *Recent Developments in Cable Law, in* 642 PLI/Pat 9 (2001) (providing overview of developments in cable law).

219. Jonathon H. Beemer, Denver Area Telecommunications Consortium, Inc. v. FCC *and the Public Forum Status of Cable Access Channels*, 63 BROOK. L. REV. 955, 955 (1997) (discussing problems associated with cable television and law). Another commentator suggests that it is the convergence of television and Internet technologies that is upsetting the existing legal paradigms: "When lurid and graphic Internet sites can be accessed from a television remote control, cries for new "decency" legislation may be impossible to ignore." Stephen M. Astor, *Merging Lanes on the Information Superhighway: Why the Convergence of Television and the Internet May Revive Decency Standards*, 29 SW. U. L. REV. 327, 328 (2000) (discussing interpretation problems confronted in cable television cases).

220. *Compare Denver Area*, 518 U.S. at 732-68 (utilizing realistic balancing approach), *with Denver Area*, 518 U.S. at 812-38 (Thomas, J., concurring in judgment in part, dissenting in part) (rejecting balancing of interests and advocating analysis by analogy). Jonathan Beemer observed: "Perhaps the most salient aspect of the Court's decision in *Denver Area* is the disparity of judicial approaches used to analyze a First Amendment question within the context of a relatively new communications medium." Beemer, *supra* note 219, at 965.

221. *See Denver Area*, 518 U.S. at 732-33 (analyzing constitutionality of Cable Television Consumer Protection and Competition Act of 1992); *see also* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-305 §§ 10(a)-(c), 106 Stat. 1486 (codified as amended at 47 U.S.C. §§ 532 (h), (j) and note following § 531 (1994)).

222. "Indecent programming" was defined in Section 10(a) of the Act as programming that the "operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner." 47 U.S.C. § 532(h).

223. *See id.* (providing codification of section 10(a) of Cable Act).

television operators to refuse to carry indecent programming on leased access channels.[224]

1. *The Formalist Approach of the Court of Appeals*

The lower court, the United States Court of Appeals for the District of Columbia Circuit, issued an *en banc* decision[225] upholding the constitutionality of Section 10(a) of the Act. The Court of Appeals concluded that this case was governed by existing law. Specifically, the Court found that there was no "state action" present in this case.[226] The Court of Appeals held that cable television operators, as private actors, were not subject to First Amendment constraints, and that the law in question, Section 10(a), merely authorized them to do what they were in any event entitled to do under the Constitution—that is, to exercise editorial control over the programming disseminated over their privately owned cable system.[227] In short, the Court of Appeals found this to be an easy case, squarely governed by existing state action doctrine.

2. *The Supreme Court's Rejection of the Formalist Approach*

Six justices of the Supreme Court authored opinions regarding the constitutionality of Section 10(a), but no single opinion received five votes, and no single line of reasoning commanded the support of a majority of the court.[228]

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224. Since 1984, federal law has required cable operators to reserve ten to fifteen percent of their channels for lease to unaffiliated producers. *See* 47 U.S.C. § 532(b) (requiring specific proportion of channels to be reserved for commercial use by persons unaffiliated with cable operator). These reserved channels are the "leased access" channels. *Id.*

225. *See* Alliance for Cmty. Media v. FCC, 56 F.3d 105, 110 (D.C. Cir. 1995) (upholding constitutionality of Section 10(a)). For a critique of the Circuit Court's opinion, see James N. Horwood, *Public, Educational, and Governmental Access on Cable Television: A Model to Assure Reasonable Access to the Information Superhighway for All People in Fulfillment of the First Amendment Guarantee of Free Speech*, 25 SETON HALL L. REV. 1413, 1434-36 (1995) (arguing for immunity for programmers).

226. *Alliance*, 56 F.3d at 123 ("Because we find no state action here and because that essential element cannot be supplied by treating access channels as public forums, we do not reach petitioner's First Amendment attack on sections 10(a) and 10(c).").

227. *See id.* at 114-15 ("The First Amendment . . . certainly did not compel prohibiting cable operators from exercising any editorial control over access programming."). The Court of Appeals relied principally upon *Blum v. Yaretsky*, 457 U.S. 991 (1982), in which the Supreme Court held: "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." *Alliance*, 56 F.3d at 118 (quoting *Blum*, 457 U.S. at 1004-05).

228. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 727 (1996) (affirming in part and reversing in part lower court decision). In upholding the constitutionality of Section 10(a) of the Cable Act, Justice Breyer, writing for the plurality, was joined by Justices Souter, Stevens and O'Connor, each of whom wrote a separate concurring opinion. Justice Thomas, joined by Justices Scalia and Rehnquist, concurred in the judgment. Justice Kennedy, joined by Jus-

The Supreme Court affirmed the Court of Appeals' decision upholding the constitutionality of Section 10(a) of the Act, but on grounds different from those relied upon by the Court of Appeals. The Supreme Court found "state action" to be present in the enactment of Section 10(a), which altered the legal relations of private parties.[229]

Justice Thomas, who wrote the concurring opinion, and Justice Kennedy, who dissented, agreed that the *Denver Area* case was governed by established First Amendment doctrine, and reasoned by analogy to previously decided cases. They disagreed, however, as to which previous cases were analogous to the case at hand, and this led them to different conclusions regarding the constitutionality of Section 10(a) of the Act.[230] Justice Breyer, who wrote the plurality opinion, rejected both the formalism of the circuit court and the analogistic approach of Justices Thomas and Kennedy, and instead crafted an opinion dominated by the third method of legal reasoning: a realistic balancing approach.[231]

3. *The Analogistic Approaches of Justice Thomas and Justice Kennedy*

As noted above, cable television is unlike other communications media in one important respect: it is both a speaker and a conduit for the speech of others.[232] This dual role made it difficult for the Supreme Court to draw a clear analogy between cable television and other media. In reasoning by analogy, Justice Thomas and Justice Kennedy each perceived only one aspect of television's dual role. Justice Thomas characterized cable operators as "speakers," while Justice Kennedy conceived of cable operators as "conduits."

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tice Ginsburg, dissented. *See id.* at 727-31 (documenting opinions given by respective authors).

229. *Id.* at 737 ("Although the court [of appeals] said that it found no 'state action,' it could not have meant that phrase literally, for, of course, petitioners attack ('as abridg[ing] . . . speech') a congressional statute – which, by definition, is an Act of 'Congress.'") (alteration in original) (citations omitted). Justice Kennedy added: "The plurality at least recognizes this as state action, avoiding the mistake made by the Court of Appeals." *Id.* at 782 (Kennedy, J., concurring in judgment in part, and dissenting in part) (citations omitted).

230. *Compare id.* at 733-53 (utilizing realistic balancing approach to find Section 10(a) constitutional), *with id.* at 812-38 (Thomas, J., concurring in judgment in part, dissenting in part) (analogizing cable operators to publishers, rather than broadcasters, therefore stating that they are entitled to full First Amendment protection and finally agreeing that Section 10(a) was constitutional). *But see id.* at 780-812 (Kennedy, J., concurring in part, concurring in judgment in part, dissenting in part) (analogizing common carriers to public forums, therefore applying strict scrutiny and finding Section 10(a) unconstitutional). For a further discussion of the different analogies used by Justices Thomas and Kennedy, see *infra* notes 232-52 and accompanying text.

231. *See id.* at 732-68 (utilizing realistic balancing approach in plurality opinion).

232. For a further discussion of cable television as a form of communication, see *supra* notes 183-216 and accompanying text.

Justice Thomas, in his concurrence, voted to uphold Section 10(a) of the Act on the ground that cable operators have the First Amendment right to exercise editorial control over the programming they carry, and that this statute did nothing more than reaffirm that right. He first observed that the Court, in *Red Lion Broadcasting Co. v. F.C.C.*,[233] had distinguished the broadcast media from the print media in respect of freedom of expression in light of the scarcity of broadcast frequencies, and declared the First Amendment rights of broadcasters to be more limited than the rights of publishers.[234] In the opinion of Justice Thomas, the principal issue was whether cable television was more analogous to the print media or to the broadcast media. Reasoning by analogy, Justice Thomas concluded that cable operators were entitled to the full First Amendment protection of publishers, rather than the more limited First Amendment protection due to broadcasters.[235]

Justice Thomas drew three analogies between cable operators and the print media; specifically, he equated a cable television operator with the owner of a bookstore, the editor of a collection of essays and a newspaper publisher. Justice Thomas stated:

> Drawing an analogy to the print media, for example, the author of a book is protected in writing the book, but has no right to have the book sold in a particular bookstore without the store owner's consent. Nor can government force the editor of a collection of essays to print other essays on the same subject. . . .

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233. 395 U.S. 367 (1969) (upholding FCC order requiring radio station to allow for response time to person whose character had been attacked during broadcast).

234. *See id.* at 388 ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."); *see also* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117-18 (1973) ("A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper.").

235. *See Denver Area*, 518 U.S. at 814 (Thomas, J., concurring in judgment in part, dissenting in part) ("Over time, however, we have drawn closer to recognizing that cable operators should enjoy the same First Amendment rights as the nonbroadcast media."). In support of his conclusion that *Red Lion* was inapplicable to cable operators, Justice Thomas cited *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) [hereinafter *Turner I*]. In particular, concerning constitutionality of "must carry" provisions of federal law:

> In *Turner*, by adopting much of the print paradigm, and by rejecting *Red Lion*, we adopted with it a considerable body of precedent that governs the respective First Amendment rights of competing speakers. In *Red Lion*, we had legitimized consideration of the public interest and emphasized the rights of viewers, at least in the abstract. Under that view, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." 395 U.S. at 390. After *Turner*, however, that view can no longer be given any credence in the cable context. It is the operator's right that is preeminent.

Id. at 816 (Thomas, J., concurring in the judgment in part, dissenting in part) (alteration in original) (citations omitted).

> Like a freelance writer seeking a paper in which to publish newspaper editorials, a programmer is protected in searching for an outlet for cable programming, but has no freestanding First Amendment right to have that programming transmitted.[236]

Justice Thomas observed that the First Amendment rights of the bookstore owner, editor and newspaper publisher all predominate over the rights of authors and the rights of the reading public.[237] To compel a publisher, editor or bookstore owner to publish or sell unsolicited works would be "forced speech," and a serious infringement of First Amendment freedoms.[238] Justice Thomas concluded that to compel a cable operator to carry indecent programming against its will is likewise forced speech and a violation of First Amendment rights.[239]

Extending the analogy comparing cable television to the print media, Justice Thomas expressly found the Court's decision in *Miami Herald Publishing Co. v. Tornillo*[240] controlling. In *Tornillo*, the Court invalidated a state law that required newspapers to give persons a "right of reply" to editorial attacks.[241] Justice Thomas reasoned that in light of *Tornillo* the *only* rights of any constitutional significance in this case were the rights of the cable operators, stating: "If *Tornillo* . . . [is] applicable, and I think [it is], . . . then, when there is a conflict, a programmer's asserted right to transmit over an operator's cable system must give way to the operator's editorial discretion."[242] In the context of this case, he concluded that the interests of programmers and viewers may not even qualify for First Amendment consideration:

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236. *Id.* at 816-17 (Thomas, J., concurring in judgment in part, dissenting in part) (balancing rights of programmers with rights of viewers).

237. *See id.* (Thomas, J., concurring in judgment in part, dissenting in part) (commenting on predomination of rights of bookstore owners, editors and newspaper publishers over original authors).

238. Justice Thomas stated: "In no other public forum that we have recognized does a private entity, owner or not, have the obligation not only to permit another to speak, but to actually help produce and then transmit the message on that person's behalf." *Id.* at 829.

239. *See id.* at 820 ("There is no getting around the fact that leased and public access are a type of forced speech."). Anticipating the issue that was later decided in *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) [hereinafter *Turner II*], Justice Thomas took the position that "the proper question is whether the leased and public access requirements . . . are improper restrictions on the *operators'* free speech rights." *Id.* at 822. In *Turner II*, the court rejected Justice Thomas's position, and upheld the constitutionality of the "must carry" provisions of federal law. *Turner II*, 520 U.S. at 213-25.

240. 418 U.S. 241 (1974).

241. *See id.* at 258 ("Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.").

242. *Denver Area*, 518 U.S. at 816 (Thomas, J., concurring in judgment in part, dissenting in part) (acknowledging importance of transmitter discretion).

> None of the petitioners in these cases are cable operators; they are all cable viewers or access programmers or their representative organizations. . . . It is not intuitively obvious that the First Amendment protects the interests petitioners assert, and neither petitioners nor the plurality have adequately explained the source or justification of those asserted rights.[243]

Like Justice Thomas, Justice Kennedy reasoned by analogy to existing First Amendment law. In contrast to Justice Thomas, however—who had found that cable operators were analogous to bookstore owners, editors or newspaper publishers—Justice Kennedy found that cable television operators were analogous to telephone companies: "Laws requiring cable operators to provide leased access are the practical equivalent of making them common carriers, analogous in this respect to telephone companies: They are obliged to provide a conduit for the speech of others."[244] Accordingly, the correct analogy was to the Court's decision in *Sable Communications v. F.C.C.*,[245] where the Court had struck down a federal law prohibiting "indecent" commercial telephone messages because such a law "has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear."[246] Next, Justice Kennedy analogized common carriers to public forums: "A common carriage mandate, nonetheless, serves the same function as a public forum. It ensures open, nondiscriminatory access to the means of communication."[247] Accordingly, Justice Kennedy concluded that strict scrutiny should apply: "The functional equivalence of designating a public forum and mandating common carriage suggests the same scrutiny should be applied to attempts in either setting to impose content discrimination by law. Under our precedents, the scrutiny is strict."[248] Applying strict scrutiny, Justice Kennedy found that Section 10(a) of the Act was unconstitutional because it was not "narrowly tailored" to protect children from indecent programming. Justice Kennedy noted that, under the law, cable operators could choose to transmit indecent programming, in which case children could see it, or cable operators could choose not to transmit it, in which case adults as well as children would be prevented from seeing it.[249]

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243. *Id.* at 817 (Thomas, J., concurring in judgment in part, dissenting in part).

244. *Id.* at 796 (Kennedy, J., concurring in judgment in part, dissenting in part). For an extended analysis arguing that cable television should be treated as a public forum, *see generally* Beemer, *supra* note 219.

245. 492 U.S. 115 (1989).

246. *Id.* at 131 (stating that law limits adult conversation).

247. *Denver Area*, 518 U.S. at 797-98 (Kennedy, J., concurring in judgment in part, dissenting in part).

248. *Id.* at 798 (Kennedy, J., concurring in judgment in part, dissenting in part) (advocating open access of communication).

249. *See id.* at 806-07 (Kennedy, J., concurring in judgment in part, dissenting in part) (noting that restriction limits not only child access but adult access as well).

Like Justice Thomas, Justice Kennedy decided that under relevant case law only some of the parties had First Amendment rights that were at stake. Unlike Justice Thomas, however, Justice Kennedy found that the rights of the cable operators had been "extinguished:"

> For purposes of these cases, we should treat the cable operator's rights in these channels as extinguished, and address the issue these petitioners present: namely, whether the Government can discriminate on the basis of content in affording protection to certain programmers. I cannot agree with Justice Thomas that the cable operator's rights inform this analysis.[250]

According to Justice Kennedy, the relevant interests, for constitutional purposes, were the rights of the programmers and the viewing public, and government is not free to "exclude speech it dislikes by delimiting public fora."[251] Justice Kennedy noted, "[m]inds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media."[252]

4. *The Realist Approach of Justice Breyer*

Arguing by analogy, Justice Thomas treated cable operators as speakers, and Justice Kennedy treated them as conduits for other speakers. In contrast, by refusing to adopt any specific analogy, Justice Breyer was able to treat cable operators both as speakers *and* as conduits.

Instead of identifying a single analogous case and applying the rule of that case to the case at hand, Justice Breyer sought to identify all of the relevant values and interests that were at stake. Justice Thomas had found that the *Denver Area* case was controlled by *Tornillo*, in which the editorial discretion of the newspaper publisher predominated. Justice Kennedy had found common carrier cases such as *Sable Communications* to be controlling, and that, like telephone companies, the rights of cable operators were not at stake; the only rights of any significance were the rights of persons utilizing and viewing the cable platform.

Justice Breyer, in his plurality opinion, declined to follow the examples of Justice Thomas and Justice Kennedy in attempting to unravel the knotty doctrinal questions raised by the case. A series of related public forum questions that Justice Thomas or Justice Kennedy addressed, but that Justice Breyer did not, included: (1) whether cable operators are "common carriers;" (2) whether public access and leased access channels on cable are a "public forum;" (3) whether private property may ever be

250. *Id.* at 796 (Kennedy, J., concurring in judgment in part, dissenting in part) (citations omitted).

251. *Id.* at 802 (Kennedy, J., concurring in judgment in part, dissenting in part) (discussing interest in not limiting speech).

252. *Id.* at 802-03 (Kennedy, J., concurring in judgment in part, dissenting in part) (commenting on reach of public forum).

considered a public forum; and (4) whether content discrimination in a public forum should be treated as a limitation on the forum.[253] Justice Breyer not only declined to address the public forum issues in this case, he did not answer basic threshold issues such as whether Section 10(a) of the Act is a content-based or a content neutral law, and whether indecent speech is fully protected or only marginally protected under the First Amendment.[254]

Justice Breyer bypassed the threshold issues and proceeded directly to a realist analysis. His explanation for this mode of review was that the threshold issues had nothing to do with the ultimate constitutionality of the law. He characterized the threshold categories (content-based or content neutral law, high value or low value speech, public forum or nonpublic forum) as mere "labels," that do not change the underlying realities of the law or the speech being suppressed.[255]

By leapfrogging the threshold issues, Justice Breyer also avoided using established standards of review such as strict scrutiny, intermediate scrutiny and rational basis.[256] Justice Breyer's reasoning is a nearly pure exam-

253. Justice Breyer expressly acknowledged his decision not to resolve these public forum issues. He explained: "Rather than decide these issues, we can decide this case more narrowly, by closely scrutinizing § 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." *Id.* at 743.

254. Breyer observed: "Nor need we here determine whether, or the extent to which, *Pacifica* does, or does not, impose some lesser standard of review where indecent speech is at issue." *Id.* at 755 (Breyer, J., plurality). In *FCC v. Pacifica Foundation*, Justice Stevens, writing for the plurality, found that indecent speech received lesser First Amendment protection. *See* FCC v. Pacifica Found., 438 U.S. 726, 745-48 (commenting that "government must remain neutral in the marketplace of ideas"). While Justice Powell, concurring in part and concurring in the judgment, thought that indecent speech was fully protected speech. *See id.* 438 U.S. at 761-62 (Powell, J., concurring in part, concurring in judgment) (pointing to individual to decide decency).

255. Breyer noted:

> But unless a label alone were to make a critical First Amendment difference (and we think here it does not), the features of these cases that we have already discussed—the Government's interest in protecting children, the "permissive" aspect of the statute, and the nature of the medium—sufficiently justify the "limitation" on the availability of this forum.

Id. at 750.

256. "In adjudicating Sec. 10(a) . . . , the plurality elected not to use traditional First Amendment standards." Elizabeth Nau Smith, Note, *Children's Exposure to Indecent Material of Cable:* Denver Area Educational Telecommunications Consortium, Inc. v. FCC, *an Interpretation of the Cable Television Consumer Protection Act of 1992*, 47 DEPAUL L. REV. 1041, 1078 (1998) (describing plurality's reluctance to use traditional First Amendment analysis). Strict scrutiny requires proof that the law is "necessary" to accomplish a "compelling governmental interest." Intermediate scrutiny requires proof that the law is "substantially related" to achieving an "important governmental purpose." The standard employed by Justice Breyer in *Denver Area* studiously avoids adopting either formula: "[W]e can decide this case . . . by closely scrutinizing Section 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." *Denver Area*, 518 U.S. at 743.

ple of "legal realism," characterized by the balancing of interests and the absence of doctrine. Justice Breyer did not apologize for this absence of doctrine; instead, he maintained that the interests of the parties and the reasonableness of the law were unaffected by the legal category that might apply.[257]

Justice Breyer's realist approach enabled him to consider the interests of all of the interested parties, making his analysis more comprehensive than the analogistic approaches of Justice Thomas and Justice Kennedy. Unlike Justice Thomas, who considered only the rights of the cable operators, and unlike Justice Kennedy, who gave weight only to the rights of programmers and the viewing public, Justice Breyer considered and balanced the rights of *all* of the parties.[258]

5. *The Difference Between Formalist and Realist Analogies: Justice Breyer's Realist Analogy to the Pacifica Case*

Justice Breyer rejected the traditional categorical analysis of First Amendment jurisprudence, but he did not altogether abandon reasoning by analogy. He identified and followed a case he thought analogous,[259] *F.C.C. v. Pacifica Foundation*.[260] In *Pacifica*, the Court considered the constitutionality of a federal law prohibiting the broadcasting of "obscene, indecent, or profane language," as applied to a daytime radio broadcast of George Carlin's "Filthy Words" monologue.[261] The *Pacifica* Court held

257. Justice Breyer stated: "Finally, and most important, the effects of Congress' [sic] decision on the interests of programmers, viewers, cable operators, and children are the same, whether we characterize Congress' [sic] decision as one that limits access to a public forum, discriminates in common carriage, or constrains speech because of its content." *Denver Area*, 518 U.S. at 750.

258. Justice Breyer wrote: "While we cannot agree with Justice Thomas that *everything* turns on the rights of the cable owner, we also cannot agree with Justice Kennedy that we must ignore the expressive interests of cable operators altogether." *Id.* at 747. Jerome Barron approves of Breyer's comprehensive approach: "[T]he new balancing analysis highlights the entire gamut of interests in play." Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817, 817 (1998).

259. Justice Breyer stated: "Rather than seeking an analogy to a category of cases, however, we have looked to the cases themselves. And, as we have said, we found that *Pacifica* provides the closest analogy and lends considerable support to our conclusion." *Denver Area*, 518 U.S. at 747-48.

260. 438 U.S. 726 (1978). Scholars anticipated that *Pacifica* would apply to cable television. *See* Thomas G. Krattenmaker & Majorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 FORDHAM L. REV. 606, 613-20 (1983) (analyzing future of cable television within First Amendment jurisprudence); Lynn D. Wardle, *Cable Comes of Age: A Constitutional Analysis of the Regulation of "Indecent" Cable Television Programming*, 63 DENV. U. L. REV. 621, 646-47 (1986) (discussing effects of *Pacifica* on cable television and radio broadcasting).

261. *See Pacifica*, 438 U.S. at 742 (noting issue before Court).

that, considering the nature of the speech,[262] the time of day,[263] the intrusiveness of the medium of radio[264] and its accessibility to children,[265] that the law was constitutional as applied.[266] Justice Breyer noted that the nature of the speech that was banned by Section 10(a) of the Cable Act, as well as the pervasiveness of cable television and its accessibility to children, was similar to *Pacifica* and that the cases were therefore analogous.[267]

Despite finding the facts in *Pacifica* analogous to the facts in *Denver Area*, and despite his decision to reach the same result, Justice Breyer did not apply the reasoning of the *Pacifica* decision. He did not find Section 10(a) to be content-based, as the plurality did in *Pacifica*.[268] He also did not ascribe a lower value to offensive speech, as the plurality did in *Pacifica*.[269] In short, Justice Breyer did not mechanistically apply the reasoning of *Pacifica* to the facts. Instead, he drew the analogy in order to identify the interests and values that the Court would take into account in weighing the validity of the law in question. In so doing, Justice Breyer made a realist analogy, not a formalist analogy.

As noted above, reasoning by analogy may be either formalist or realist.[270] A formalistic analogy compares the factual elements of an existing case to the facts of a new case and, if the facts are sufficiently similar, then the rule of the first case is applied to the new case. But practically all cases can be distinguished in some respect from a case already decided.[271] For example, *Denver Area* involved the regulation of indecent speech on cable television, while *Pacifica* concerned the regulation of indecent speech on

262. *See id.* at 744-48 (recognizing obscene nature of speech as well as its limited social value).

263. *See id.* at 750 (noting that broadcast of indecent language during daytime was less protected than same broadcast at night).

264. *See id.* at 748-49 (discussing pervasive presence of broadcast media in lives of Americans).

265. *See id.* at 749-50 (discussing how radio's immediate nature and unregulated access reaches more children than other types of media).

266. *See id.* at 750-51 (upholding constitutionality of law based on specific facts present).

267. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 744 (1996) (noting that factors relied upon in *Pacifica* existed in cable television).

268. *See Pacifica*, 438 U.S. at 744 ("[T]he content and the context of speech are critical elements of First Amendment analysis . . . .").

269. *See id.* at 746 (noting that "[offensive] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality") (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

270. For a further discussion of formalism and realism, see *supra* notes 23-38, 58-67 and accompanying text. *See also* HUHN, *supra* note 60, at 120-25 (providing examples of each).

271. *See* Brewer, *supra* note 45, at 932 (noting that "everything is similar to everything else in an *infinite* number of ways, and everything is also *dissimilar* to everything else in an infinite number of ways.").

radio. Is this difference important? A natural response to that question is, "Important compared to what?" When drawing an analogy, how do we measure the importance of a factual similarity or distinction?

Steven Burton refers to this as "the problem of importance,"[272] and it cannot be resolved simply by comparing the facts of one case to the facts of another case. Without knowing the values or interests that are served by a rule of law, there is no basis for deciding whether or not an existing rule of law rule ought to be extended to a new case.

A critical step in the reasoning process is to determine what values and interests are at stake. How is this accomplished? One could attempt to simply imagine what the various values and interests are, and arbitrarily assign them weight, but this effort is likely to fail. Richard Warner has described the difficulty of using a mere "thought experiment" to identify all of the relevant interests and values at stake, and instead recommends: "Looking retrospectively over a long series of cases reveals differences and distinctions that mere imagination is likely to miss."[273] Although purely formalist analogies that compare the facts of one case to the facts of another case are of limited utility, reasoning by analogy is a critical step in constructing a realist argument because, by examining cases with similar facts, we may identify the relevant values and interests that are implicated in the case under consideration.

In *Denver Area*, for example, all of the analogies contributed to the eventual realist analysis of the case. Justice Thomas's analogy to the law of print media highlighted the First Amendment value of protecting the editorial discretion of the owners of media. Justice Kennedy's analogy to the public forum cases identified the value of maximizing public access to the means of communication, in view of the fact that the principal means of public communication no longer takes place in the streets and parks, but through telecommunications and mass media. Justice Breyer's analogy to *Pacifica* implicated the value of shielding children from a pervasive and intrusive source of offensive speech. Realistic reasoning, therefore, uses analogies to identify all of the values and interests implicated by a case so that a court may weigh them and make an informed choice. Justice Breyer used all of the competing analogies for this purpose, and in balancing the interests of cable operators, programmers and viewers, concluded that giving cable operators editorial control over indecent speech on leased channels was constitutional.

272. STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 83-84 (1985) (identifying problem of importance as determining which facts should lead courts to decide one way or another).

273. Warner, *supra* note 13, at 1560 (acknowledging that imagination alone will not reveal relevant differences).

6. *The Justices' Dispute over Realism and Reasoning by Analogy*

Justice Kennedy opened his dissenting opinion with the words, "[t]he plurality opinion, insofar as it upholds Section 10(a) of the 1992 Cable Act, is adrift."[274] He deplored the indeterminacy of Justice Breyer's reasoning, decrying its lack of predictability, particularly in light of the fact that the result was nonprotective of speech.[275] He believed "the most disturbing aspect of the plurality opinion" was "its evasion of any clear legal standard in deciding this case."[276] He characterized the reasoning as "a legalistic cover for an ad hoc balancing of interests" that would "sow confusion in the courts."[277] While admitting that the advance of technology creates difficult cases, he argued that this does not justify ignoring established precedent and well-settled doctrine: "The novelty and complexity of the case is a reason to look for help from other areas of our First Amend-

274. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 780 (1996) (Kennedy, J., concurring in part, concurring in judgment and dissenting in part) (criticizing lack of specificity within holding).

275. *See id.* at 787 ("The novelty and complexity of these cases is a reason to look for help from other areas of our First Amendment jurisprudence, not a license to wander into uncharted areas of law with no compass other than our opinions about good policy."). One pair of scholars has suggested that even Justice Cardozo would not have approved of Justice Breyer's "pure" realistic approach:

> Justice Kennedy is correct. The approach followed by the plurality would have been shocking to Justice Cardozo because the plurality is saying that history is unclear, the method of analogy is too confusing, we are uncertain about applicable customs, and social values give uncertain guidance. Therefore, rather than pursuing these analyses, we'll just balance the interests and hope we did the right thing.

Jonathan Wallace & Michael Green, *Bridging the Analogy Gap: The Internet, the Printing Press and Freedom of Speech*, 20 SEATTLE U. L. REV. 711, 731-32 (1997) (arguing that adherence to standards, even when protecting unpopular speech, is central achievement of First Amendment jurisprudence).

Several student commentators have also agreed with Justice Kennedy on this point. *See* Jeffrey D. Kaiser, Comment, *The Future of Cable Regulation Under the First Amendment: The Supreme Court's Treatment of Section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992*, 5 UCLA ENT. L. REV. 103, 139 (1997) ("The Status of the First Amendment regarding cable television now seems more unpredictable and vague . . . and leaves open several undesirable possibilities."); James L. Simmons, Note, *The Continuing Struggle to Find a Place for Cable Television in the Pantheon of First Amendment Precedent:* Denver Area Educational Telecommunications Consortium v. FCC, 34 HOUS. L. REV. 1607, 1635 (1998) ("The approach espoused by Justice Breyer sets a dangerous precedent in the realm of First Amendment jurisprudence."); *see also* Mara Andre Glaser, Casenote, *Cable Television's New Standard Is No Standard: An Analysis of the Supreme Court's Balancing Act in* Denver Area Educational Telecommunications Consortium v. FCC, 30 CREIGHTON L. REV. 1461 (1997) (concluding that Supreme Court should have declared standard of scrutiny for cable television); Jarrod V. Henshaw, Note, Denver Area Telecommunications Consortium, Inc. v. FCC*: Reconciling Traditional First Amendment Media Jurisprudence with Emerging Communications Technologies*, 41 ST. LOUIS U. L.J. 1015, 1017 (1997) ("Denver represents . . . an aberration from precedent . . . .").

276. *Denver Area*, 518 U.S. at 784 (Kennedy, J., concurring in part, concurring in judgment in part, dissenting in part) (critiquing plurality opinion).

277. *Id.* at 786 (criticizing plurality's restatement of legal tests and standards).

ment jurisprudence, not a license to wander into uncharted areas of the law with no compass other than our own opinions about good policy."[278] Finally, Justice Kennedy asserted a vigorous defense of reasoning by analogy, noting that "[t]his newfound aversion to analogical reasoning strikes at a process basic to legal analysis."[279]

Justice Breyer countered by noting the inapplicability of the analogies cited by Justices Kennedy and Thomas:

> Both categorical approaches suffer from the same flaws: They import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect.[280]

Justice Breyer traced his rejection of established standards and analogies to the fast pace of technological change:

> But no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. That is not to say that we reject all the more specific formulations of the standard—they appropriately cover the vast majority of cases involving government regulation of speech. Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now.[281]

Justice Breyer's balancing approach received explicit support from the concurring justices. Justice Stevens said, "[l]ike Justice Souter, I am convinced that it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this."[282] Justice O'Connor added, "I agree with Justice Breyer that we should not yet undertake fully to adapt our First Amendment doc-

278. *Id.* at 787 (commenting on plurality's approach to media).

279. *Id.* at 799-800 (relying on EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1949)).

280. *Denver Area*, 518 U.S. at 740. Justice Thomas, who concurred in the judgment with Justice Breyer, nevertheless joined Justice Kennedy's criticism of Breyer's analysis: "It is true that the standard I endorse lacks the 'flexibility' inherent in the plurality's balancing approach, but that relative rigidity is required by our precedents and is not of my own making." *Id.* at 818 (Thomas, J., concurring in judgment in part, dissenting in part) (citations omitted).

281. *Id.* at 741-42 (examining history of First Amendment jurisprudence and its impact on current issue).

282. *Id.* at 768 (Stevens, J., concurring) (adding opinion advocating less categorical approach to industry).

trine to the new context we confront here."[283] Justice Souter echoed this theme, noting: "All of the relevant characteristics of cable are presently in a state of technological and regulatory flux."[284] Furthermore, he observed that "as broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others."[285] Justice Souter was, in effect, unwilling to cast First Amendment doctrine in stone at a time when society was beginning to communicate in cyberspace.[286] Justice Souter's closing remark contained this caution: "Maybe the judicial obligation to shoulder these responsibilities can itself be captured by a much older rule, familiar to every doctor of medicine: 'First, do no harm.'"[287]

The *Denver Area* case is instructive not only because the justices of the United States Supreme Court utilized both analogy and realism in reaching their decisions, but because they debated the relative merits of each mode of reasoning. The justices implicitly agreed that the case could not be resolved with the certainty of formalism. Justice Kennedy and Justice Thomas argued that the Court ought to embrace the consistency and predictability of reasoning by analogy, while Justice Breyer and the concurring justices employed a realistic approach in order to avoid the straightjacket of analogy in this rapidly changing technological setting.

In the following section of this Article, I discuss a series of cases in which the courts moved from formalism to analogy in determining a legal

283. *Id.* at 779-80 (O'Connor, J., concurring in part, dissenting in part) (supporting more conservative application of First Amendment).

284. *Id.* at 776 (Souter, J., concurring) (advocating slower resolution of issues due to volatile nature of industry).

285. *Id.* at 776-77 (Souter, J., concurring) (commenting on outreaching effects of decisions associated with media at issue). One year later, the Supreme Court struck down provisions of the Communications Decency Act which attempted to limit children's access to "indecent" or "patently offensive" speech over the Internet. *See* Reno v. ACLU, 521 U.S. 844, 849 (1997) (holding that CDA provisions abridged First Amendment protected "freedom of speech"); *see generally* Steven R. Salbu, *Who Should Govern the Internet: Monitoring and Supporting a New Frontier*, 11 HARV. J.L. & TECH. 429 (1998) (recommending targeted federal preemption of Internet activities); Kim L. Rappaport, Note and Comment, *In the Wake of* Reno v. ACLU*: The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online*, 13 AM. U. INT'L L. REV. 765 (1998) (analyzing difficulty posed by *Reno* for Internet regulation).

286. Justice Souter quoted and agreed with Professor Lessig that "if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong." *Denver Area*, 518 U.S. at 777 (Souter, J., concurring) (quoting Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1745 (1995)).

287. *Denver Area*, 518 U.S. at 778 (Souter, J., concurring); *see* Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 362-63 (1996) (agreeing with Justice Souter's careful approach). *But see* Israelashvili, *supra* note 217, at 195 (stating that Court's failure in *Denver Area* to declare First Amendment standard for cable television has injured First Amendment principles).

question that some legal scholars have urged is now ripe for realistic analysis.

C. *Family Law and the New Reproductive Technology*

Biomedical advances have made possible new ways of procreating a child and have led to the creation of a new being—human embryos outside the womb.[288] These technological advances have, in turn, given rise to new legal questions regarding the determination of parentage and the nature of parental or ownership rights over potential human life.

1. *Parentage in Gestational Surrogacy Cases*

Technological breakthroughs in biology and medicine have made gestational surrogacy possible,[289] and have also created a novel question of law: Who is the legal mother of the child? Three gestational surrogacy cases posing this issue have reached the courts: *Johnson v. Calvert*,[290] decided by the California Supreme Court, *Belsito v. Clark*,[291] decided by an Ohio Probate Court and *In Re Marriage of Buzzanca*,[292] decided by the Cali-

288. In vitro technology has not only made possible a new way to procreate, it has also opened the window to human genetic engineering and stem cell research, raising a host of bioethical and legal questions. *See generally* LORI B. ANDREWS ET AL., GENETICS: ETHICS, LAW AND POLICY (2002) (providing comprehensive study of ethical and legal aspects of genetic research).

289. *See* Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 498 n.6 (1996) (listing several procedures available to solve infertility); *see also* Pamela Laufer-Ukeles, *Approaching Surrogate Motherhood: Reconsidering Difference*, 26 VT. L. REV. 407, 409 (2002) (commenting on various methods employed in battle against infertility); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 597-98 (2002) (discussing assisted reproduction); Kimberly R. Willoughby & Alisa A. Campbell, *Having My Baby: Surrogacy in Colorado*, COLO. LAW., Jan. 31, 2002, at 103 (describing law of gestational surrogacy).

290. 851 P.2d 776 (Cal. 1993). *See generally* Todd M. Krim, *Beyond* Baby M.*: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 ANNALS HEALTH L. 193 (1996) (reviewing *Johnson* case in context of various approaches in determining who is legal mother); Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265 (1995) (advocating decision of who is legal mother based upon parties' intentions); Robert M. Kort, Casenote, Johnson v. Calvert, *California Supreme Court Enforces Surrogacy Contract*, 26 ARIZ. ST. L.J. 243 (1994) (providing critical analysis of *Johnson* case).

291. 644 N.E.2d 760 (Ct. Com. Pl. Ohio 1994). *See generally* Victoria L. Fergus, Note, *An Interpretation of Ohio Law on Maternal Status in Gestational Surrogacy Disputes:* Belsito v. Clark, 21 DAYTON L. REV. 229 (1995) (advocating legislative action to settle future disputes); Michelle Pierce-Gealy, Comment, *"Are You My Mother?": Ohio's Crazy-Making Baby-Making Produces a New Definition of "Mother"*, 28 AKRON L. REV. 535 (1995) (analyzing impact of *Belsito*); Stephanie F. Schultz, Comment, *Surrogacy Arrangements: Who Are the "Parents" of a Child Born Through Artificial Reproductive Techniques?*, 22 OHIO N.U. L. REV. 273 (1995) (reviewing different approaches courts have adopted to determine legal parent).

292. 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

fornia Court of Appeal for the Fourth Circuit. The cases arose amid different facts, but presented the same legal question of maternity.

In *Johnson*, Mark and Crispina Calvert desired to have a child, but Crispina, though fertile, was unable to carry a pregnancy. The Calverts entered into a surrogacy agreement with Anna Johnson, pursuant to which an embryo created from the Calvert's gametes would be implanted into Anna's womb; Anna agreed to bear their child and relinquish the child to the Calverts at birth. When the child was born, however, Anna changed her mind and sought to retain custody of him.[293]

In *Belsito*, the procreative facts were identical to those of the *Johnson* case. Shelly Belsito could produce viable ova, but was unable to gestate a child. Her sister, Carol Clark, agreed to bear the pregnancy on behalf of Shelly and her husband Anthony. Unlike Anna Johnson, Carol was at all times faithful to the surrogacy arrangement. In *Belsito*, the parties were suing for a declaration that upon the birth of the child Shelly and Anthony would be considered the lawful parents, making an adoption procedure unnecessary.[294]

The *Buzzanca* case presented an even more baffling question of parentage. Luanne and John Buzzanca had agreed to create their child by having a donated embryo, genetically unrelated to either of them, implanted into a gestational surrogate.[295] John filed for divorce one month before the child (Jaycee) was born. In the divorce case, he claimed that he and Luanne were not Jaycee's legal parents, while Luanne contended that they were the legal parents.[296] The surrogate who bore Jaycee delivered her to Luanne and made no claim of parentage.[297] In *Buzzanca*, unlike *Johnson* and *Belsito*, neither of the intended parents were genetically related to the child. Also unlike *Johnson* and *Belsito*, neither the birth mother nor the genetic mother made any claim to the child. In determining maternity, the practical choice before the court in *Buzzanca* was between the intended mother and *no* mother.

a. *The Formalist Argument*

Only one of the courts in the gestational surrogacy cases embraced a purely formalist approach to resolving the question of parentage, and that court handed down a remarkable decision. The trial court in *Buzzanca* found this to be a clear case under existing law; it reached the unprece-

293. *See Johnson*, 851 P.2d at 777-92 (discussing facts of case).

294. *See Belsito*, 644 N.E.2d at 760-62 (contending couple are genetic and natural parents and are entitled to legal status of parenthood); Pierce-Gealy, *supra* note 291, at 551-52 (asking to be recognized as natural parents to avoid adopting child genetically their own).

295. *See Buzzanca*, 72 Cal. Rptr. 2d at 282 (discussing facts of case).

296. *See id.* (filing petition alleged that no existence of children during marriage while response stated parties were expecting child by way of surrogate contract).

297. *See id.* (appearing in court, birth mother made no claim to child).

dented conclusion that Jaycee was born without legal parents.[298] Ruling on Luanne's claim to be the lawful mother, the court said: "One, there's no genetic tie between Luanne and the child. Two, she is not the gestational mother. Three, she has not adopted the child. That, folks, to me, respectfully, is clear and convincing evidence that she's not the legal mother."[299]

The trial court formalistically applied the rules of law setting forth the legal criteria for motherhood (genetics, gestation or adoption), and found that Luanne failed to qualify as the legal mother under any of those rules.[300] The court determined that the child had no mother or father in the eyes of the law. Despite the fact that all of the people who created the child were alive, in the opinion of the trial court, the child was born an orphan.[301]

The appellate court in *Buzzanca* overruled the trial court's decision.[302] The California Court of Appeal rejected the formalist approach of the trial court, choosing instead to reason from analogy and by reference to public policy.[303] Analogical reasoning and policy analysis also dominated the opinions of the courts in *Johnson* and *Belsito.*

b. *Analogical Reasoning*

Prior to the gestational surrogacy cases of *Johnson, Belsito* and *Buzzanca,* the leading surrogacy case was *In Re Baby M.*[304] As in *Johnson,* the surrogate in *Baby M.* changed her mind upon giving birth to the child and sought to retain custody.[305] A key difference between the gestational surrogacy cases and *Baby M.,* however, was that the birthmother of Baby M., Mary Beth Whitehead, was also the genetic mother, the child having been conceived through artificial insemination. The New Jersey Supreme Court considered Mary Beth Whitehead to be the child's legal mother.[306] The *Johnson* and *Belsito* courts declined to apply the rule of *Baby M.* on the ground that the traditional rule conferring maternity on the birthmother had never been intended to apply to cases of gestational surrogacy.[307]

298. *See id.* at 289 (noting legal paradigm adopted by trial court).

299. *Id.* at 283 (quoting trial judge).

300. *See id.* (citing trial court's analysis).

301. *See id.* at 289 (noting trial court holding that, absent adoption, children of artificial reproduction with no biological relationship with intended parents will be dependents of state).

302. *See id.* at 293-94 (reversing trial court judgment).

303. *See id.* at 289 (according public policy in favor of establishing legal parenthood).

304. 537 A.2d 1227 (N.J. 1988).

305. *See id.* at 1235-37 (discussing facts of case).

306. *See id.* at 1263 (finding that Mrs. Whitehead "is not only the natural mother, but also the legal mother" of Baby M.).

307. *See* Johnson v. Calvert, 851 P.2d 776, 789 (Cal. 1993) (distinguishing surrogacy arrangement in *Baby M.* from "gestational" surrogacy in present case); Bel-

Having distinguished *Baby M.*, the courts were without a clearly applicable rule to guide them, thus they proceeded to reason from analogy. The courts were faced with no shortage of analogies from which to draw a rule of decision.[308] The problem was that for each analogy drawn in favor of finding parentage in a particular party, a contradictory analogy was found. The parties argued and the courts discussed a welter of analogies thought to govern the question of parentage in cases of gestational surrogacy. Competing analogies were drawn from the fields of contract law, family law and the law of gender equality.[309] In addition, the *Buzzanca* court relied upon a fourth analogy, comparing gestational surrogacy to the practice of artificial insemination.

2. *Contract Law: Contract for the Sale of Goods or Contract for the Sale of Services*

In *Johnson*, both sides argued that the gestational surrogacy agreement between Anna Johnson and the Calverts was a contract, but they disagreed about whether it was more like a contract for the sale of goods or more like a contract for services. Counsel for Anna Johnson contended that the agreement was a contract for the sale of goods—Anna's baby—and, therefore, that the contract amounted to "babyselling," which is prohibited by statute.[310] The California Supreme Court in *Johnson* rejected the "babyselling" analogy,[311] finding that a surrogacy contract is more like a lawful agreement for the rendering of gestation services,[312] and awarded the child to the Calverts on the ground that this was the result consistent with the intent of the parties to the contract.[313]

3. *Family Law: Adoption or Foster Parenthood*

The Ohio Probate Court in *Belsito* rejected both of the foregoing analogies to the law of contract, and also rejected the "intent of the parties" test employed by the California Supreme Court in *Johnson*.[314] Instead, the

sito v. Clark, 644 N.E.2d 760, 763-64 (Ct. Com. Pl. Ohio 1994) (declining to extend traditional rule).

308. *See Johnson*, 851 P.2d at 782 (relying on parties' intentions and public policy issues).

309. *See id.* at 791-93 (noting contractual issues regarding relationships between parents and children, as well as dehumanization argument).

310. *Id.* at 783-84; *see also* CAL. PENAL CODE § 273 (West 1999) (making payment for adoption misdemeanor).

311. *See Johnson*, 851 P.2d at 785 ("We are . . . unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it.").

312. *See id.* at 784 ("The payments to Anna under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up 'parental' rights to the child.").

313. *See id.* at 782 (discussing intent of contracting parties).

314. *See* Belsito v. Clark, 644 N.E.2d 760, 764-66 (Ct. Com. Pl. Ohio 1994) (rejecting *Johnson* test).

Ohio court noted that abundant precedent existed for a traditional standard for determining parentage: namely, genetic relationship. The court held that maternity is to be determined by genetic relationship, unless the genetic parent waives parental rights (as in the case of a sperm or egg donor),[315] and the court entered judgment for the genetic mother. In support of this conclusion, the *Belsito* court initially noted that a gestational surrogacy arrangement bears resemblance to a private adoption agreement that would normally require a postpartum waiver of maternal rights by the mother.[316] Accordingly, because the genetic mother had not waived her maternal rights, the Ohio court ruled that she was the legal mother of the child at birth.[317]

The *Johnson* court had rejected the adoption analogy, reasoning that gestational surrogacy is comparable to adoption only if one assumes the very point in controversy, viz. that either the genetic mother or the gestational mother is the lawful mother whose parental rights predominate unless waived.[318] The California trial court in *Johnson* offered a competing analogy. Instead of finding gestational surrogacy comparable to a private adoption, it likened gestational surrogacy to foster parenthood.[319] The court reasoned that the surrogate merely has custody of another person's child for a time that the true parents are unable to care for it.[320]

4. *Gender Equality: Paternalism or Involuntary Servitude*

Anna Johnson's attorneys drew a third analogy on behalf of their client. It was argued that gestational surrogacy is a form of slavery or involuntary servitude, exploitative of women and, therefore, against public policy.[321] The California Supreme Court responded to the surrogate's argument by adopting a competing analogy. The court found Johnson's

315. *See id.* at 766 ("The consent to procreation and the surrender of the right to raise a child of one's own genes must be considered the surrender of basic rights.").

316. *See id.* at 767 (discussing waiver of parental rights in adoption process).

317. *See id.* (ruling genetic mother had not waived her rights to be natural and legal parent of child).

318. *See Johnson*, 851 P.2d at 784 (discussing difference between gestational surrogacy and adoption). One scholar has proposed that a gestational surrogate, like a mother who has promised to give up her child for adoption, should have the power to keep the child if this right is exercised within five days after the birth of the child. *See* Amy Garrity, Comment, *A Comparative Analysis of Surrogacy Law in the United States and Great Britain—A Proposed Model Statute for Louisiana*, 60 LA. L. REV. 809, 830 (2000) (extolling rights of mothers to have sufficient time after birth in which to make decisions).

319. *See Johnson*, 851 P.2d at 786 n.13 (analogizing Anna's relationship with child to that of foster mother).

320. *See* Alice Hofheimer, *Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy*, 19 N.Y.U. REV. L. & SOC. CHANGE 571, 580 (1993) (discussing holding in *Johnson*); Catherine Gewertz, *Genetic Parents Given Sole Custody of Child Surrogate*, L.A. TIMES, Oct. 23, 1990, at A-1 (discussing *Johnson* case).

321. *See Johnson*, 851 P.2d at 784 (discussing involuntary servitude argument involved in gestational surrogacy); *see also* George J. Annas, *Using Genes to Define*

proposed restrictions on gestational surrogacy analogous to paternalistic laws that prohibited women from entering professions or earning a livelihood.[322]

5. *The Analogy Between Gestational Surrogacy and Artificial Insemination*

In *Buzzanca*, the Court of Appeal reversed the trial court's decision of Jaycee's "legal orphanage," and found that Luanne and John were Jaycee's legal mother and father.[323] In crafting its opinion, the court reasoned principally from analogy[324] and, like the Ohio Probate Court in *Belsito*, drew an analogy to an existing rule of family law to reach a decision.[325] In assessing John Buzzanca's claim that neither he nor Luanne were Jaycee's lawful parents, the court analogized gestational surrogacy to the practice of artificial insemination.[326] The court noted that a husband who consents to his wife's artificial insemination is the legal father of the resulting child under the case law[327] and statutory law[328] of the State of California, even though he is not the genetic father. In drawing the analogy between artificial insemination and the facts of *Buzzanca*, the Court of Appeal noted specifically the husband's *consent* to the procedure and his role in *causing* the creation of the child militated in favor of finding him to be the legal father of the child.[329]

Motherhood—The California Solution, 326 NEW ENG. J. MED. 417, 419 (1992) (discussing use of terms that objectify and dehumanize gestational mothers).

322. *See Johnson*, 851 P.2d at 785 (discussing analogy of restrictions on gestational surrogacy to paternalistic laws and equality of women); *see generally* Lori B. Andrews, *Surrogacy Wars, Slavery or Blessing? After Six Years of Emotional Battle, Paid Motherhood is Still Controversial*, CAL. LAW., Oct. 12, 1992, at 43 (commenting on debates surrounding surrogacy decisions).

323. *See In Re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293-94 (Cal. Ct. App. 1998) (declaring Luanne lawful mother and John lawful father of Jaycee).

324. *See id.* (using analogies in reasoning). The court also cited precedent, noting that in *Johnson* the California Supreme Court had anticipated the fact situation in *Buzzanca* and proposed a solution by way of *obiter dictum*:

> In what we must hope will be the extremely rare situation in which neither the gestator nor the woman who provided the ovum for fertilization is willing to assume custody of the child after birth, a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability for the child.

Id. at 210 (quoting Johnson v. Calvert, 851 P.2d 776, 783 (Cal. 1993)).

325. *See id.* at 292 (engaging in act which merely opened possibility of procreation results in responsibility for consequences).

326. *See id.* at 284-88 (analogizing gestational surrogacy to practice of certified insemination).

327. People v. Sorensen, 437 P.2d 495, 499-500 (Cal. 1968) (holding that husband who consents to wife's artificial insemination is legal father of child).

328. *See* CAL. FAM. CODE § 7613 (West 1994) ("If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.").

329. The court stated:

In a traditional surrogacy case, the Supreme Judicial Court of Massachusetts declined to apply the artificial insemination statute because the result would have made the husband of the surrogate, who had consented to the procedure, the legal father of the child—a result that was not intended by the legislature.[330]

a. *The Realist Argument*

Ultimately, the gestational surrogacy cases drew analogies that were strained at best. The decision in *Johnson* applying the law of contract to surrogacy agreements suffers from the flaw that many aspects of surrogacy contracts are unenforceable. For example, several jurisdictions have limited payment to surrogates.[331] Additionally, the surrogate's constitutional right to bodily integrity would trump the contractual rights of the intended parents. Prior to viability, the surrogate probably has an absolute right to choose an abortion rather than fulfill the agreement.[332] It is even doubtful that the intended parents could specifically enforce provisions of the surrogacy agreement imposing restrictions on the surrogate's behavior such as forbidding the use of tobacco or alcohol.[333] Accordingly, it is anomalous to apply the law of contract to determine parentage.

The analogical reasoning of the *Belsito* court—resulting in the application of the genetic relationship test to cases of gestational surrogacy—while adequate to decide the case before the court, would not have sufficed in *Buzzanca*, where neither the birthmother nor the genetic mother sought legal parentage. Similarly, the analogy drawn in *Buzzanca* between

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> John argues that the artificial insemination statute should not be applied because, after all, his wife did not give birth. But for purposes of the statute with its core idea of estoppel, the fact that Luanne did not give birth is irrelevant. The statute contemplates the establishment of lawful fatherhood in a situation where an intended father has no biological relationship to a child who is procreated as a result of the father's (as well as the mother's) *consent* to a medical procedure.

Buzzanca, 72 Cal. Rptr. 2d at 288.

330. *See* R.R. v. M.H., 689 N.E.2d 790, 795-96 (Mass. 1998) (doubting legislature intended MASS. GEN. LAW § 4B to apply to child of married surrogate mother); *see also* Storrow, *supra* note 289, at 608-09 (refusing to apply artificial insemination statute).

331. *See* Daniel Rosman, *Surrogacy: An Illinois Policy Conceived*, 31 LOY. U. CHI. L.J. 227, 233-34 (2000) (describing Illinois statute authorizing gestational surrogacy, and noting that Illinois, like most states, limits payment to surrogates).

332. *See* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (reaffirming *Roe* holding recognizing woman's right to choose abortion before fetal viability); Roe v. Wade, 410 U.S. 113, 141 (1973) (holding, before end of first trimester, woman has right to choose abortion free from state interference). *But see* Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier's Right to an Abortion*, 70 FORDHAM L. REV. 93, 174-79 (2001) (arguing that gestational surrogate could be forced to carry child to term unless her life or health is in danger).

333. *See* Abby Brandel, *Legislating Surrogacy: A Partial Answer to Feminist Criticism*, 54 MD. L. REV. 488, 519 (1995) (advocating use of home studies rather than coercive contract clauses on alcohol or drug use).

gestational surrogacy and artificial insemination also seems inapposite. A sperm donor is a close equivalent to an egg donor,[334] but is not similarly situated to a gestational surrogate who carries and gives birth to a child.

The analogical reasoning in *Johnson*, *Belsito* and *Buzzanca* has the same strengths and weaknesses as the analogical opinions of Justice Kennedy and Justice Thomas in the *Denver Area* case. Kennedy and Thomas each invoked existing rules of law by analogy to govern a new case—the regulation of indecency on cable television. Their approaches had the advantages of familiarity and predictability, but suffered from the inability to take into account the relevant interests of all of the affected parties. Similarly, although the *Johnson*, *Belsito* and *Buzzanca* courts identified a number of relevant analogies from contract law, family law and the law of women's rights, ultimately no single analogy offers a persuasive rationale.

In *Johnson* and *Belsito*, the courts expressly noted that they had resolved a novel question of maternity by invoking an existing rule of law by analogy.[335] In the opinion of Professor Malina Coleman, both the rationale in *Johnson* (contract law) and the rationale in *Belsito* (genetic relationship) undervalue the contribution of the gestational mother, and are inadequate to protect her legitimate interests.[336] The *Johnson* and *Belsito* courts, although acknowledging the novelty of the issues presented, at-

334. *See, e.g.*, McDonald v. McDonald, 608 N.Y.S.2d 477, 481 (N.Y. App. Div. 1994) (holding that child conceived with donated egg implanted into woman with husband's consent was lawful child of marriage). In *McDonald*, the similarity of a sperm donor and an egg donor was the decisive factor. *See id.* at 480.

335. *See* Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993) (resolving dispute before court by interpreting use of term "natural mother" within meaning of Civil Code § 7003, subd. (1)); Belsito v. Clark, 644 N.E.2d 760, 766 (Ct. Com. Pl. Ohio 1994) (believing more prudence in traveling known path with existing law as guide to legal pattern in order to fashion new law). Both courts disclaimed that they were developing new law, and instead indicated that it was the province of the legislature to make such changes. The California court stated, "It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so . . . ." *Johnson*, 851 P.2d at 787. The Ohio Probate Court echoed this sentiment:

> If a break with traditional law and public policy, as represented by the Johnson test, is to be made part of the law of this state, it must be argued that the legislature, through the scrutiny of public hearings and debate, is better situated than a judicial proceeding to test the effectiveness and appropriateness of such a change.

Belsito, 644 N.E.2d at 766.

336. *See* Coleman, *supra* note 289, at 510-14, 517-18 (explaining how gestational contribution was undervalued in *Johnson*); *see also* Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 49 (2000) (citing lack of uniformity for laws concerning surrogates); John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 925-27 (1996) (proposing number of protections for gestational surrogates). One scholar has argued that the gestational surrogate "cannot be fully marginalized as a womb for rent and must be afforded some rights as a woman with 'motherly' claims." Laufer-Ukeles, *supra* note 289, at 445. Amy Garrity's proposed surrogacy statute contains a number of protections for gestational surrogates, including the right to custody of the child. *See* Garrity, *supra* note 318, at 822-32.

tempted to resolve these cases by resorting to familiar rules of law. Professor Coleman argues for a more nuanced balancing of the public policies and private interests than was adopted by either court.[337]

In the course of their opinions, the gestational surrogacy courts identified a number of interests and policies that influenced their determinations of parentage including the procreative rights of an infertile married couple,[338] the interest of the state in assigning parentage to all children,[339] the likelihood that the intended parents are more likely to protect the child's interests than persons connected merely through genetics or gestation,[340] the policy of discouraging private agreements to give up parental rights,[341] the right of a person to be given an unpressured opportunity before a neutral magistrate to surrender parental rights,[342] the responsibility of the state to supervise the placement of a child,[343] the promotion of stability and finality in placement decisions[344] and the right of a genetic provider to consent to the use of his or her unique genes.[345]

The analogies drawn by the parties and the courts were the vehicle by which these interests and values were brought to the forefront. As in the *Denver Area* case, the analogical arguments served to identify the policies that inform a realist analysis. The task that still awaits the courts is to balance all of these interests and policies in formulating a new and comprehensive law of parentage in cases of gestational surrogacy.

In the following section of this Article, I discuss a case where the court, like the plurality in *Denver Area*, rejected reasoning by analogy for a realistic approach.

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337. *See* Coleman, *supra* note 289, at 529 (advising legislatures and courts to establish system of rules with recognition of legal parenthood based on parties' intentions). Coleman "recommends that intent should be the determinative factor, but only if a system of rules is in place to protect against overreaching in surrogacy agreements. Otherwise, motherhood should be based on gestation alone." *Id.* at 499.

338. *See Johnson*, 851 P.2d at 786-87 (explaining right to create family through medical procedures).

339. *See In Re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 289-90 (Cal. Ct. App. 1998) (citing compelling state interest in establishing parentage).

340. *See id.* at 290 (choosing to bring child into being is more likely to result in having child's best interest at heart).

341. *See* Belsito v. Clark, 644 N.E.2d 760, 765 (Ct. Com. Pl. Ohio 1994) (citing that, as matter of public policy, states will not enforce or encourage private agreements to give up parental rights).

342. *See id.* (stating adoption laws of Ohio require that natural mother have opportunity to be heard before magistrate before relinquishing rights).

343. *See id.* (noting state's interest in protecting child).

344. *See id.* (noting public policy in providing stability to adopted child).

345. *See id.* at 766 (stating that "replication . . . should occur only with the consent of that individual").

b. *The Legal Status of the Human Embryo*

In vitro fertilization, the same medical technology that makes gestational surrogacy possible, has also brought into existence a new form of being: a human embryo which can, in frozen state, survive outside the womb. The novel legal question created by this technology is, in the event of a dispute, what are the rights of various parties with respect to this form of life?[346]

In *Davis v. Davis*,[347] the Tennessee Supreme Court confronted the question of defining the legal status of human embryos. Junior and Mary Sue Davis had begun treatment at a Knoxville fertility clinic. At the time of their divorce, seven preembryos created from their gametes were in frozen storage at the clinic. Each spouse sought possession of the embryos; Mary Sue wanted to donate the embryos to an infertile couple for implantation, and Junior wished to have them destroyed.[348]

Two analogies from the law of domestic relations potentially applied to this case. If the embryos were considered children, then the court should award custody to the parent best able to care for them. If the embryos were property, then the court ought to divide the embryos among the parties along with the other marital property.

The trial court followed the first analogy, and awarded the "children" to their "mother" in accordance with the rule that custody is to be determined by reference to "the best interests of the child."[349]

The intermediate appellate court did not expressly identify the nature of the parties' legal interests in the embryos, but, in the opinion of the Tennessee Supreme Court, the lower appellate court had "left the implication that it is in the nature of a property interest."[350]

The Tennessee Supreme Court rejected both analogies, finding that human embryos were neither "persons" nor "property."[351] The court expressly adopted a realist approach to resolve this case: "[W]e must weigh

346. *See generally* Lori B. Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357 (1986) (addressing legal status of embryo in medically-assisted reproduction); John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437 (1990) (addressing legal status of embryos).

347. 842 S.W.2d 588 (Tenn. 1992) (deciding custody of frozen embryos); *see Developments in the Law—Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1542-46 (1990) (discussing implication of *Davis*); Jennifer Marigliano Dehmel, Note & Comment, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes Over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377, 1385-92 (1995) (summarizing *Davis* procedural history and holding); Alise R. Panitch, Note, *The* Davis *Dilemma: How to Prevent Battles over Frozen Preembryos*, 41 CASE W. RES. L. REV. 543, 553-65 (1991) (analyzing arguments over legal status of frozen embryos).

348. *Davis*, 842 S.W.2d at 589-90 (discussing dispute).

349. *Id.* at 594 (determining that entities were not preembryos but "children in vitro").

350. *Id.* at 596 (noting lower court failure to precisely define "interest").

351. *Id.* at 597 ("We conclude that preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life.").

the interests of each party to the dispute, in terms of the facts and analysis set out below, in order to resolve that dispute in a fair and responsible manner."[352] In balancing the interests of the parties, the court decided in favor of the husband, concluding that "Mary Sue Davis's interest in donation is not as significant as the interest Junior Davis has in avoiding parenthood."[353]

In summary, in hard cases, the reasoning of the courts progresses from formalism to analogy to realism. Realist analogies serve as the bridge between formalism and realism by identifying all of the underlying values and interests that must be taken into account. In the following portion of this Article, I argue that it is this evolution of rules and standards that reveals the stage structure of legal reasoning.

III. THE STAGES OF LEGAL REASONING IN THE EVOLUTION OF RULES AND STANDARDS

Law may take the form of rules or of standards. A law requiring drivers to stop at a red light is a rule. A law requiring drivers to proceed cautiously through a blinking yellow light is a standard. To determine guilt or innocence, the application of a rule depends solely on the existence of specific facts (i.e., did the car stop?).[354] The application of a standard involves the consideration of one or more facts in light of one or more underlying values (i.e., how fast was the car going, what were the weather, road and traffic conditions and how much danger will the law tolerate?).[355] Larry Alexander offers the following distinctions between rules and standards:

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352. *Id.* at 591 (setting out analysis with regard to custody).

353. *Id.* at 604 (holding that husband's interest outweighed wife's). The court noted:

> Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered.

Id. at 604.

354. Several scholars have observed this fundamental distinction between rules and standards. *See generally* David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829, 834 (1993) ("Implicit in rules-based application is a straightforward factual determination."); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 25 (2000) ("Rules establish legal boundaries based on the presence or absence of well-specified triggering facts."); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) ("Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere.").

355. *See generally* Sullivan, *supra* note 354, at 58 ("A legal directive is a 'standard'—like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.").

> Rules are often described as "bright-line" (clear and easy to follow), "formal" (to be applied without regard to substance of the results but only with regard to the rule's terms) and "opaque" (to the rules' background justifications).
>
> Standards are norms that have the opposite characteristics. A standard can be applied only by engaging in evaluation. Therefore, to the extent that evaluation is contentious and uncertain, standards will be as well. Standards are thus vague, substantive (as opposed to formal), and transparent (to background values).[356]

One of the most significant choices between rules and standards in American law occurred in the drafting of the exceptions to the hearsay rules under the Federal Rules of Evidence. In 1969, the Advisory Committee on the Rules of Evidence proposed the following standard for determining admissibility as an exception to the rule against hearsay: "A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy."[357] Ultimately, this basic approach to the law of hearsay was rejected, and the Federal Rules incorporated a lengthy list of specific exceptions to the rule against hearsay.[358] The only remnant of the Advisory Committee's original standard is the "residual exception" to the rule against hearsay, now codified in Rule 807, which provides that a hearsay statement is admissible if it has equivalent circumstantial guarantees of trustworthiness and is more probative of a material fact than other available evidence.[359] Legis-

356. Alexander, *supra* note 52, at 541.

357. 46 F.R.D. 161, 345 (1969) (stating Proposed Rule 8-03(a) (1969 Preliminary Draft)); *see also* David E. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867, 871-72 (1982) (citing Proposed Rule) ("In short, the 1969 draft contained no specific exceptions to the hearsay rule; any hearsay that met the relatively unguided standard of Rules 8-03(a) and 8-04(a) could be admissible.").

358. *See* Sonenshein, *supra* note 357, at 872-75 (citing procedural history of Rule); *see also* Joseph W. Rand, *The Residual Exceptions to the Federal Hearsay Rule: The Futile and Misguided Attempt to Restrain Judicial Discretion*, 80 GEO. L.J. 873, 879-880 (1992) (citing procedure and adoption of present residual exceptions).

359. *See* FED. R. EVID. 807 (citing to Rule in present form). Rule 807 provides:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id.

lative history indicated that Congress intended for this exception to be applied only in exceptional circumstances.[360] Legal scholars have disagreed on the question of whether or not courts have abused their discretion in interpreting the residual exceptions.[361]

In their derivation, rules and standards do not correspond with formalism and realism. Both rules and standards can be derived either formalistically or realistically. A court can create a rule of law by balancing competing interests and values,[362] or it can consider itself bound to apply a standard because the standard is set forth in definitive text or precedent.[363] It is in the application of law that there is a correspondence between rules and formalism, and a correspondence between standards and realism. Rules are usually applied formalistically (i.e., did the driver stop?), and standards must be applied realistically (i.e., did the driver proceed cautiously?).[364]

The "rules versus standards" debate has engrossed jurisprudential scholars.[365] Many authors have examined the relative merits of rules and

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360. *See* Rand, *supra* note 358, at 880 (noting that overbroad exceptions would weaken hearsay rule).

361. *Compare* Leonard Birdsong, *The Residual Exception to the Hearsay Rule—Has It Been Abused—A Survey Since the 1997 Amendment*, 26 NOVA L. REV. 59, 108 (2001) (finding no abuse of discretion), *with* James E. Beaver, *The Residual Hearsay Exception Reconsidered*, 20 FLA. ST. U. L. REV. 787, 791 (1993) (finding that "the catchall exceptions are being used more generally than in rare and exceptional circumstances").

362. *See, e.g.*, Faigman, *supra* note 354, at 839 (observing that "actual malice" rule from *New York Times v. Sullivan*, 376 U.S. 254 (1964), "was molded out of a close examination of the balance of rights and interests inherent in the First Amendment"); Peter Krug, *Justice Thurgood Marshall and News Media Law: Rules Over Standards?*, 47 OKLA. L. REV. 13, 14 (1994) (describing number of rules that Justice Marshall derived from standards).

363. *See* Wilson, *supra* note 30, at 786 (noting "a pragmatic functionalist can be a doctrinal formalist").

364. The connection between rules and formalism, and standards and realism, was mentioned by William Eskridge. *See* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J. L. & PUB. POL'Y 21, 21-22 (1998):

> Formalism might be associated with bright-line rules that seek to place determinate, readily enforceable limits on public actors. Functionalism, at least as an antipode, might be associated with standards of balancing tests that seek to provide public actors with greater flexibility.

Id. at 21.

365. *See, e.g.*, Faigman, *supra* note 354, at 830 (stating that "the amount of ink spilled over debating the virtues of rules versus standards would lead the reasonable observer to believe that something momentous was at stake").

standards, particularly from the standpoint of efficiency[366] and fairness.[367] Other scholars have explored whether the choice between rules and standards correlates with ideological perspective.[368] The point that I wish to make in this Article is that the stages of legal reasoning play a role in the evolution of rules and standards.

Rules and standards are not the only forms that laws can take. Instead, laws fall along a spectrum of generality.[369] The more specific a law

366. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557-68 (1992) (discussing relative costs of creating and applying rules and standards). He concludes that economic efficiency turns on "the extent to which the law should be given content before individuals act (rules), rather than waiting until afterward (standards)." *Id.* at 621. *But see* David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 884 (1999) (arguing that anti-abuse standards would be more efficient than rules at curbing tax avoidance); *see also* Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. ECON. & ORG. 256, 258 (1995) (examining relative efficiency of two-party bargaining under rules and standards); Korobkin, *supra* note 354, at 30-35 (reviewing economic and behavioral implications of rules versus standards). Economic efficiency is not, of course, the only value that the law serves. *Compare* J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 450 (1994) (arguing that courts could improve their efficiency by developing "stable, certain, and predictable rules of law"), *with* Joseph R. Grodin, *Are Rules Really Better Than Standards?*, 45 HASTINGS L.J. 569, 570 (1994) (responding that "judicial economy seems a questionable basis for formulating common-law legal doctrine").

367. Several scholars have argued that rules, as compared to standards, are over- and under-inclusive. *See* Alexander, *supra* note 7, at 42 (stating that inclusiveness of rules does not compare to their background or moral reasoning); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 268-70 (1974) (arguing that rules are arbitrary, as compared to standards). *But see* Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, The Rules/Standards Dilemma and the Line Item Veto*, 44 VILL. L. REV. 189, 200-01 (1999) (arguing that while rules may be under- and over-inclusive, "standards create the possibility that similar people will be treated differently"); Kaplow, *supra* note 366, at 589 (contending that specific standards may also miss their mark); *see also generally* Faigman, *supra* note 354, at 838 (contending that in defining rights "the court must weigh the social importance of the government action against the value of individual liberty infringed by that action").

368. *See* Sullivan, *supra* note 354, at 96 (concluding that liberal and conservative justices used both rules and standards in their reasoning). "[R]ules and standards simply do not map in any strong or necessary way onto competing political ideologies, or, in the setting of constitutional adjudication, onto the side of rightholders or the state." *Id.* In a landmark article, Kathleen Sullivan examined the use of rules and standards by justices of the United States Supreme Court during the 1991-1992 term. In that work, Sullivan sought to determine whether there was a correlation between political affiliation and the judge's affinity for rules versus standards. Sullivan suggests, however, that "[i]deological poles tend to attract rules," and that "[s]tandards moderate ideological swings between poles." *Id.* at 122.

369. *See* Korobkin, *supra* note 354, at 26 (stating that "the two types of legal forms are better understood, as a descriptive matter, as endpoints of a spectrum than as dichotomous categories"); *accord* Faigman, *supra* note 354, at 831 (asserting that there is no categorical distinction between rules and standards); Kaplow, *supra* note 366, at 561 (noting that "legal commands mix the two (rules and standards)"); Wilson, *supra* note 30, at 773 (describing variety of forms along this spec-

is, the more "rule-like" it is, and the more general it is, the more "standard-like" it is.[370] Over time, rules of law are often modified to become more standard-like, and standards are frequently modified to become more rule-like.

A number of scholars have traced this evolution from rules to standards, or from standards to rules, in different fields of the law.[371] Authors have detected trends from rules to standards in commercial law[372] and civil procedure,[373] while movement from standards to rules has been observed in attorney ethics,[374] juvenile criminal law,[375] criminal sentencing,[376] federal income tax law[377] and corporate law.[378] In some areas of the law, the pendulum has swung back and forth between rules and standards. For example, on the question of whether a cause of action is barred by the lapse of time, the last century saw specific statutes of limitation replace the general doctrine of laches[379] but, more recently, courts have attempted to mitigate the harshness of statutes of limitations by formulating tolling doctrines such as the "discovery"[380] and "adverse domina-

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trum, including exceptions to rules, multi-factor tests, totality of circumstances tests, "escape hatches" and "peepholes").

370. *See, e.g.*, Korobkin, *supra* note 354, at 28 (stating "[m]ulti-factor balancing tests are less pure and more rule-like than requirements of 'reasonableness' because they specify ex ante (to a greater or lesser degree of specificity) what facts are relevant to the legal determination.").

371. *See* Sullivan, *supra* note 354, at 123 (concluding her review of Supreme Court's 1991 term by observing that "the cycle of rules and standards will continue; this Term's divisions were but a chapter").

372. *See* G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 Nw. U. L. REV. 1198, 1204 (1988) (observing that many of these emerging standards were statutorily enacted).

373. *See* Kelly D. Hine, Comment, *The Rule of Law is Dead, Long Live the Rule: An Essay on Legal Rules, Equitable Standards, and the Debate Over Judicial Discretion*, 50 SMU L. REV. 1769, 1777 (1997) (reporting that reform led to open and flexible system of court procedure).

374. *See* Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117, 1124-42 (1999) (tracing transformation from standards to rules in United States).

375. *See* Lee E. Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, 1991 B.Y.U. L. REV. 351, 352 (citing movement in juvenile system to be more like rules oriented criminal system).

376. *See id.* at 360 (examining emphasis on rule-based sentencing).

377. *See* James W. Colliton, *Standards, Rules, and the Decline of the Courts in the Law of Taxation*, 99 DICK. L. REV. 265, 265 (1995) (citing progression of tax law from system "governed by broad standards to a law dominated by specific rules").

378. *See* Matthew G. Dore, *Statutes of Limitation and Corporate Fiduciary Claims: A Search for Middle Ground on the Rules/Standards Continuum*, 63 BROOK. L. REV. 695, 773-75 (1997) (recalling importance of bright line rules in development of corporate law).

379. *See id.* at 720-22 (setting forth that majority view "emerged that claims against corporate directors and officers were more in the nature of claims for a breach of an implied trust, to which statutes of limitation could apply").

380. *Id.* at 733-35 (explaining tolling until discovery in fraud cases).

tion" theories.[381] In a counter-response to the uncertainty created by these equitable doctrines, some legislatures have attempted to enact statutes of repose.[382]

Several scholars have examined how rules become standards, and how standards become rules. Russell B. Korobkin has concisely described this process: "Just as a pure rule can become standard-like through unpredictable exceptions, a pure standard can become rule-like through the judicial reliance on precedent."[383]

The defining characteristic of a rule is that it can be applied by making a simple factual determination. However, as Korobkin notes, rules become more standard-like through the creation of exceptions.[384] As a rule is interpreted in case after case, the courts often discover that, in light of the underlying purpose of the rule, it ought not be applied strictly according to its terms. Thus, exceptions to the rule are created in certain factual situations. The more exceptions that arise, the less determinative the rule is. If an underlying policy is identified that explains the rule and all of its various exceptions, the law may be more simply[385] expressed in light of this underlying policy, and the rule has evolved into a standard.[386] In

381. *Id.* at 709-15 (citing "three rationales most often advanced for tolling limitations under the adverse domination theory"). These rationales include "(i) a corporate entity is 'disabled' and cannot sue wrongdoing directors or officers when they control it; (ii) during the period of their control, directors and officers are in a position to conceal information about their own wrongdoing from those who might try to bring suit on behalf of the corporation; and (iii) the corporation should not be charged with 'notice' of claims against wrongdoing directors and officers while they control the entity." *Id.* at 710-11.

382. *See* State *ex. rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1085-87 (1999) (striking down tort reform act on state constitutional grounds). The Ohio legislature has repeatedly attempted to enact a statute of repose as part of its efforts at tort reform. *Id.*

383. Korobkin, *supra* note 354, at 29 (illustrating how courts may modify standards to rules based on precedent). James Wilson agrees: "After several cases have been litigated in a related area, litigants, scholars, and judges may be able to infer a more rigid rule where only an impulse initially existed." Wilson, *supra* note 30, at 820.

384. *See* Korobkin, *supra* note 354, at 27 (stating that "at the extreme, when a rule is enforced rarely or randomly, it can be said that the law's form has migrated across the legal form spectrum and become a standard"); Book Note, *The Bureaucrats of Rules and Standards*, 106 HARV. L. REV. 1685, 1687-88 (1993) (reviewing IAN AYRES AND JOHN BRAITHWAITE, RESPONSIVE REGULATION (1992)) (observing that exceptions to rules tend to create standards). "The . . . suggestion that agencies enforce only the 'spirit' of the laws, either by granting informal waivers or by approving compliance plans, amounts to a proposal for a broad shift from rules to standards." *Id.*

385. I thank Elizabeth Reilly for the suggestion that at some point in the evolution of a rule it becomes simpler to express the law in terms of a standard. This is an application of "Occam's Razor" to principles of law.

386. *See* Korobkin, *supra* note 354, at 26-27 (illustrating how rule can evolve into standard). Korobkin states:

> The more qualifications and exceptions a rule has, however, the more likely it will be applied unpredictably. . . . At the extreme, when a rule is enforced rarely or randomly, it can be said that the law's form has mi-

other words, the exceptions have swallowed the rule. The initial draft of the Federal Rules of Evidence attempted to achieve this result by creating a single standard that would replace all of the specific exceptions to the rule against hearsay.[387]

In a similar manner, standards become more rule-like as the courts gain experience with them. The defining characteristic of a standard is that its application requires a weighing of multiple policy considerations. As a standard is construed, in case after case, eventually factual similarities are discovered among the cases. If the factual patterns in these cases are consistent, then it may be simpler to express the legal consequences of the standard as contingent upon the presence of those factual patterns rather than upon a weighing of the underlying policies, and the standard has evolved into a rule.[388] In other words, the holdings have swallowed the standard. In this manner, the interpretation of the residual exception to the rule against hearsay may eventually result in the recognition of specific additional exceptions to the hearsay rule.[389]

Therefore, a critical component in the evolution of rules into standards and standards into rules is judicial experience. Both exceptions to rules and specific applications of standards are developed by case law and, as a body of case law accumulates, the courts reason from these cases with arguments by analogy. Nonetheless, the analogies that the courts employ in the evolution of rules are different from the analogies drawn in the evolution of standards. The order of the progression of the stages of legal reasoning is reversed in the two situations. The evolution of rules is the mirror image of the evolution of standards.

As rules evolve into standards—as the law moves from formalism to realism—a key step in the process occurs when the courts, through the use of *realist* analogies, identify the underlying values that justify exceptions to the rule. In contrast, as standards evolve into rules—as the law moves

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grated across the legal form spectrum and become a standard. For example, if courts will enforce a rule that mothers are entitled to custody only after reviewing all the unique circumstances of a divorce and determining that the rule should not be abrogated for some reason, it is more appropriate to classify the law as a standard.

Id.

387. *See* Beaver, *supra* note 361, at 789-90 (warning that because courts have improperly invoked residual hearsay exceptions in cases that were not "exceptional," "[t]he residual hearsay exceptions threaten to swallow the hearsay rule").

388. *See* Colliton, *supra* note 377, at 266 (describing how resulting rule is frequently erected statutorily). "As controversies develop, the I.R.S. and the courts interpret the statutory standard in ways that cause Congress to amend the statute by providing more detailed rules." *Id.*; *see also* Kaplow, *supra* note 366, at 621 (observing that standard may be "transformed into a rule by precedent"); Sullivan, *supra* note 354, at 62 (stating that "[a] rule is a standard that has reached epistemological maturity.").

389. *See, e.g.*, Lizbeth A. Turner, *Admission of Grand Jury Testimony Under the Residual Hearsay Exception*, 59 TUL. L. REV. 1033, 1064-70 (1985) (proposing three-step approach to develop uniform guidelines for admission of grand jury testimony).

from realism to formalism—the key step in the process occurs when the courts use *formalist* analogies to identify the factual similarities in the cases that apply the standard. As rules age, the courts increasingly question their validity as they are applied to unforeseen facts, and as standards age, the courts incrementally determine their meaning.[390] As noted in the previous portion of this Article, reasoning by analogy is the bridge between formalism and realism.

Just as law is an amalgam of logic and morals, legal reasoning comprises both formalism and realism. Rules evolve towards standards to serve justice, while standards evolve towards rules to enhance consistency and predictability. Both justice and consistency are fundamental to a rational system of justice. Each is a necessary counterweight to the other. The evolution from rules to standards, and from standards to rules, represents the complex interplay of these fundamental values of the legal system, as legal reasoners engage in an unending cycle of assimilation and accommodation.

IV. CONCLUSION

Legal reasoning embodies both logic and moral reasoning. As such, legal reasoning exhibits the same stage structure that has been observed by psychologists in the development of cognitive and moral reasoning. This structure becomes evident when changes in society, including changes that result from scientific progress, give rise to novel legal problems. When faced with new fact situations, the reasoning of the courts frequently follows a typical sequence. First, courts attempt to formalistically apply existing rules of law according to their terms to new facts. If the courts are unable to define the terms of existing rules so that they apply to the new case, then the courts draw analogies between the new situations and familiar ones, applying the existing rules by analogy. If these analogies break down, courts fashion new rules by means of a realistic balancing of policies and interests. The progression from formalism to realism reflects the process of assimilation and accommodation described by James Mark Baldwin, the cognitive change from concrete operations to formal operations described by Jean Piaget and the change from conventional to postconventional moral thought described by Laurence Kohlberg.

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390. *See* Grodin, *supra* note 366, at 572 (describing swing of pendulum between rules and standards). He states that:

> [A] tension typically develops between the rules and perceived principles of justice, and courts begin to allow for exceptions. Some bright law student writes a law review note observing that the exceptions are so numerous and so vaguely defined as to "swallow the rule," and the courts proceed to adopt the multi-factored standards that the bright student has proposed. And so it goes, until someone suggests that the standards provide insufficient predictability, and that a "clear bright line" is needed.

Id.

Reasoning by analogy may be either formalist or realist. Courts may draw analogies by noting the factual similarities between previous cases and new cases and, if these formalist analogies are deemed sufficient, then the rule of the previous case will be applied to the case at hand. If the formalist analogy is deemed insufficient, the courts may proceed to identify the values that are served and the interests that are protected by existing rules of law in considering whether those interests and values will be similarly promoted by applying the existing rule to the case at bar. If the realist analogy is also insufficient to persuasively justify a result, the courts may then proceed to the third stage of legal reasoning, and may develop new rules of law by directly balancing the underlying values and interests that were identified through the use of realist analogies. In this way, reasoning by analogy serves as a bridge between formalism and realism.

Furthermore, as rules evolve into standards, and as standards evolve into rules, a critical stage in the process is judicial experience in applying the law. For standards to become rules, the courts must draw formalist analogies between cases interpreting the standards, and for rules to become standards, the courts must draw realist analogies among the cases interpreting the rules. This pattern in the evolution of rules and standards supports the concept that formalism, analogy and realism are the stages of legal reasoning, and that analogy serves as the bridge between formalism and realism.