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# Introduction

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The review of Third Circuit decisions by the *Villanova Law Review* has become an established annual tradition. Extremely valuable to law students, the practicing bar, and the federal judiciary, this survey is a vehicle by which issues and decisions in adjudicated cases may be subjected to in-depth analysis and criticism. Academic writers who criticize these opinions, however, have advantages denied the judiciary. They have the luxury of time. For example, each active judge on our court considers over 300 fully briefed appeals per year plus almost an equal number of petitions for rehearing and, again, an equal number of motions and pro se cases. Academic writers also have the authority to range far beyond the frozen record of the tribunal of the first instance that is presented to the appellate court. Moreover, critics are not shackled by limitations imposed upon the court by appellate counsel presenting points for review. The "smell of the lamp" is always important in the review of matters decided in the hurly-burly world of a busy appellate court such as ours. When the review extends over a sampling of a court's output in a given year such an effort can be of help to both judges and practitioners in getting a "feel" for a court.

Thus, it is a valuable exercise to expose opinions of the Third Circuit to intelligent and thoughtful analysis. As a student of the judicial process, however, I offer two modest suggestions that may increase the quality of professional criticism. If opinion writing is a fine art, writing a criticism is an even finer one. First, it is essential that the analyst pinpoint the exact legal dispute between the parties. Second, if the critic casts stones at the opinion writer's reasoning, the stone thrower should recognize the distinctions among the court's reasoning process, the weight given to the arguments, and the court's exercise of value judgment. To implement these suggestions, the critic must fully understand the nature of the judicial decisionmaking process, as well as the sophisticated structure of "legal reasoning."

## I.

Our judicial system requires a continuing accommodation between the need to preserve a consistent and coherent set of ordering legal precepts and the quest for tolerable, if not satisfactory, results in indi-

vidual disputes. Our constant objective is to reconcile the demands of general and special justice. Occasionally, when this reconciliation is impossible, particular litigants must suffer for the sake of order and prediction. But the goal we seek is to increase the incidence of compatibility between the formal legal theories that dominate our judicial system, and basic justice for the litigants. We seek constant harmony between the two, and if at times there is a tension, and perfect accommodation is not attainable, at least we regard the ideal as always to be coveted.

Thus, the beginning point of any judicial decision is to identify the flashpoint of conflict between the litigants: In relation to the relevant body of law, where do the litigants agree, and where do they begin to disagree? Similarly, any professional analysis of a judicial opinion should begin at the same point, so that from the very start a proper focus on the controversy will exist.

Those critics who single out a particular case for analysis will serve the profession better if they identify the precise point where the litigants conflict. Are the parties disputing the choice of legal precepts (rules of law, principles, doctrines) that should control the facts as found by the factfinder—what Roscoe Pound described as "finding the law"? Or have the litigants agreed on the precept, and quarrel only over its interpretation, i.e., a question of construction of a particular statute? Or have the litigants agreed on a settled precept and an equally settled interpretation, and argue only whether it should apply to facts found by the factfinder in the tribunal of the first instance?

Law review treatment seems well suited to cases of the first category, where two or more relevant legal principles have clamored for attention, and the court had to decide which should control. A case recently before our court, for example, would provide fertile ground for scrutiny. That case involved the clash of the traditional teaching that the contents of corporate records are not privileged from production in grand jury and Internal Revenue Service investigations with the notion that a producer of the business records of a sole proprietorship may claim his fifth amendment privilege because the act of production may be testimonial in nature and incriminating. The question for the law review writer is: How should the court resolve this clash when the records of a corporation that is solely owned are subpoenaed?

When principles compete, the body resolving that competition must consider the relative weight of the conflicting principles. This weighing process lies at the heart of judicial decisionmaking. The process involves a choice that then becomes the major premise of the court's reasoning, in which logic compels the outcome of the decision.

The sociological jurisprudents—Holmes, Pound, and Cardozo—did several things for us. They argued that a rule of law may be developed by considering the consequences that are involved, rather than by simply identifying the wider principles that the rule presupposes. The soci-

ological jurisprudents contended that consideration of the ultimate consequence was valid and legitimate, because it is the conclusion of the judicial process, the ultimate decision, that has the effect on society. Therefore, the result of a decision should be considered in the initial process of weighing the competing principles.

Where several principles command the identical conclusion, the judicial opinion is strengthened. When a court chooses a single principle over those that command different results, the court must support that initial decision by persuasive reasoning, based on recognized legal principles or upon some justificatory principle of morality, justice, social policy or common sense. The decision must be genuinely principled, its analysis and reasoning quite transcending the immediate result that it achieves. Further, the decision must be reasonably calculated to find acceptance with the social groups intimately affected by the claim, demand, or desire that forms the basis of the litigation before the court.

Finally, the result should meet the test of the ends of law: Professor Harry W. Jones's test that the decision should contribute to the establishment and preservation of a social environment in which the quality of human life can be spirited, improving, and unimpaired. At the same time, the result also must respect the other ends-in-view of law: the public peace, just dispute settlement, reasonable security of expectations, and tolerable adjustment of conflicting social interests.

When the court opts that one principle is to yield to another in a given case, therefore, a value judgment is being made. The decision is grounded on just that, a value judgment, not a conclusion reached by a structured logical process. More likely than not, at least in the federal courts, that judgment constitutes the court's declaration of public policy, that very unruly horse, of which it has been said that once we get astride it, we never know where it will carry us. As early as 1880, Holmes taught in *The Common Law* that the business of judging is "the unconscious result of instinctive preference and inarticulate convictions, but none the less traceable to views of public policy in the last analysis." Later, Dean Eugene Rostow referred to judicial decisions as "social judgments as to what is fair and just in the conduct of society."

A key ingredient in Cardozo's masterpiece, *The Nature of the Judicial Process*, was his legitimation of decisionmaking on the basis of social welfare, "commonly spoken of as public policy, the good of the collective body." And Judge Andrews, Cardozo's dissenting colleague in *Palsgraf*, in discussing the term "proximate cause," is often quoted:

> What we do mean by the word "proximate" is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.

I purposely emphasize this point to demonstrate that the choice of

the controlling precept, where precepts conflict, is not the product of a reasoning process. The choice is, as I state, a value judgment reached from, in Lord Diplock's phrase, the cumulative experience of the judiciary. A formal reasoning process is implicated in justifying that choice, not necessarily in making it. Many critics of judicial opinions, students and professors alike, fail to recognize this crucial distinction. Rather than examining an opinion for real logical flaws, these commentators base their criticism solely on disagreements with a court's value judgment. This, of course, is a perfectly legitimate function, so long as the analysis is not shrouded by accusations of shoddy logic.

## II.

Also deserving of careful law review treatment is the second type of conflict—interpretation of the precept. More often than not, this conflict arises in the myriad of cases involving statutory construction. It is important to identify three separate problems of interpretation that are not always recognized by the critic. The first problem is one of language analysis in the strict sense, or, the presence of an unclear norm. This, I believe, is the easy case. The case presents a problem of semantics and the court says what it thinks the language means. To be most helpful, the critic should identify which of several interpretative techniques the court has used. Courts rely primarily on five techniques in interpreting statutes: (a) The Mischief Rule, originating in *Heydon's Case* (1584): what was the mischief that the statute attempted to alleviate?; (b) The Golden Rule: to declare the expressed intention of the legislature; (c) The (English) Literal Rule; (d) The (American) Plain Meaning Rule (first cousin to the Literal Rule); and finally, (e) The Search of Legislative History to divine the implied intention of the legislature, not readily discernible from statutory language (the darling of the present United States Supreme Court).

The second problem of statutory construction is the problem of lacunae, or the nonexistent norm. This problem is not strictly a question of language analysis, but of sailing on uncharted seas, or playing "let's pretend we're in the legislature." Over sixty years ago, a prescient John Chipman Gray identified what was to become one of the most serious problems facing courts today, especially federal courts, in problems of statutory construction. He spoke of the difficulties of interpretation "that arise when the legislature has had no meaning at all [in mind]; when a question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present." When this occurs, Learned Hand said, the judge "puts into the legislature's mouth the things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right.

Nobody does this exactly right; great judges do it better than the rest of us. It is necessary that someone shall do it, if we are to realize the hope that we can collectively rule ourselves."

I now address the third problem of statutory construction: the problem of evolution, the problem of the norm whose meaning changes although its text remains constant. Section 1983 of title 42 of the United States Code, the Civil Rights Act of 1871, is a classic example of the norm changing, and the text remaining the same, as courts apply an ongoing historical theory of interpretation. Likewise, I feel confident that the drafters of the Sherman and Clayton Acts would not recognize modern case law as reflective of their original legislative intent. The critical problem always is to resolve the tension between the legislature's original intent (legislative history) and an interpretation based on a subsequent external history of gloss added by layers of precedent.

Thus, precept interpretation merits critical analysis. A conscientious examination of the problems of statutory construction and the interpretive method used by the court to arrive at its decision should produce criticism that will steer the court away from making arbitrary "value judgments in the guise of legislative interpretation."

## III.

The third type of dispute found in the cases occurs when both the law and its interpretation are settled, and the sole question remaining is one of applying the law to the facts at bar. This situation characterizes approximately eighty percent of the cases coming before our court. Most of these cases do not deserve law review treatment, but some do.

The common law tradition is an incremental process. Generally, judicial history is not made if a precept is gradually extended to a new set of facts, or if the court decides to hold the line and not apply the previous rule to new facts. It is a different matter, however, when the court applies the method of analogy and makes a quantum leap forward, applying the law to facts that bear little resemblance to those already in the precedential line, or when the court refuses to apply a respected precedent to facts closely resembling those of previous cases. In such cases, the judges are using what Professor Karl Llewellyn called the "strict" precedent approach: the previous case applied only to "red-headed Walpoles driving magenta-colored Buicks."

Those influenced by "the smell of the lamp" in academic halls often are more willing to extend the law, to continue the aromatic metaphor, than those succumbing to "the smell of the conference room" in the courthouses. Probably because of the collegial composition of the multi-judge appellate structure, the courts, in the expression of Justice William H. Rehnquist in *Scott v. Illinois*, are "less willing to extrapolate an already extended line when, although the general nature of the principle sought to be applied is clear, its precise limits and the ramifications

become less so." But we do know at least that the line of motion in any precedent, in the formulation of Felix S. Cohen, is subjected to a special pull that skews it whenever it passes near a point of high value tension.

I turn now to a discussion of the mechanics of legal reasoning itself.

## IV.

Legal reasoning is subject to more scrutiny than any aspect of the judicial process. Forming the very fiber of argument and persuasion, logic is the heart of the written brief, the essence of the process of justification. Legal reasoning constitutes the foundation of the case method by which law students are trained. At times, criticism of the "reasoning" of courts appears to form the *raison d'être* for law reviews. Yet law reviews generally contain little analysis of reasoning *qua* reasoning. Often, an alleged attack on a court's "reasoning" is in reality a disagreement with the value judgment implicit in the court's major premise; a disagreement with the court's selection or its interpretation of the legal precept. This type of disagreement is actually a quarrel with the validity of a controlling legal norm, not with the court's reasoning process. Criticism of court opinions would be more professional, briefs more clear, points of friction between litigants earlier identified and accommodated with more fairness and durability, when resort to the overarching cosmos of "reasoning" is minimized, and attention directed instead to precise components of that cosmos. It is not too much to ask whether a party disagrees with the choice of the "authoritative starting point" (major premise) and, if so, why; or whether the quarrel is with the formal correctness of the syllogism used and, if so, where.

The essence of legal argument is that the structure of the presentation adhere to the rules of logic. The opinion's internal structure, the syllogism used by the court, must not be vulnerable to attack, either by concurring or dissenting opinions, or by piercing criticism in the law reviews. Moreover, the argument also must be free from material fallacies, i.e., where the error lies in the factual content of the argument, rather than its structure.

In this context of critiquing opinions, I issue a gold-plated caveat: do not use the expression, "the reasoning is flawed." These trite buzzwords seem to breed in damp places of dark law school classrooms. Do not use them unless you are prepared to go forward and identify the flaw in proper terms; unless you intend to prove that there is something sloppy in forming the logical premises and that this makes the logical structure invalid. Do not use the expression when the argument simply is not convincing.

### A.

I first address the opinion's internal logical structure. A court

should pattern its opinion's structure after the typical "Socrates-is-a-mortal" syllogism:

> An oral conveyance of real estate is invalid.
> This is an oral conveyance of real estate.
> Therefore, this conveyance is invalid.

To adhere to this syllogism is to present a formally valid argument. Such an argument, I emphasize, does not depend upon the truth of the premises (although I think that there is truth in the example I have given). Use of the syllogism means only that the conclusion logically follows from the premises. Professor Edward H. Levi had this in mind in his dandy article, *Introduction to Legal 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. This is a method of reasoning necessary for the law, but it has characteristics which under other circumstances might be considered imperfections.

But we must pause to parse the syllogism, the basic structure of legal reasoning. The categorical major premise, in most instances, is a legal precedent that relates the middle term (facts contained in the precedent) and the major term (a declared legal consequence). The minor premise relates the minor term (the facts found by the factfinder in the case at bar) to the middle term. The conclusion then relates the minor term to the major term. It bears emphasis that the correct interrelation of the minor, major and middle terms speaks only to logical form, structure, or validity. The relationship does not necessarily address truth-preserving qualities and vice versa. For example, examine the following structure that, although seemingly valid, does not correctly follow requisite formal requirements:

> All crimes are punishable.
> Murder (larceny) is punishable.
> Therefore, murder (larceny) is a crime.

This may be true in fact, but the syllogism is false in form. Because neither the major term (punishable) nor the minor term (murder/larceny) is compared with all of the middle term (all crimes), the middle term is undistributed and the fallacy of the undistributed middle exists.

Nor is the following example valid. It utilizes an illicit process —

the major premise does not express a universal and the minor term does not relate to the middle term:

Murder is a crime.
Larceny is not murder.
Therefore, larceny is not a crime.

But a revision can be made, patterned on a formally valid syllogism:

All crimes are punishable.
Murder (larceny) is a crime.
Therefore, murder (larceny) is punishable.

I emphasize, if not bolster, this point in an exhortation that if a critic believes that the reasoning is "flawed" in a judicial opinion, he should demonstrate where the flaw occurs in the structure. Keep in mind that in a deductive argument, the premises purport to be sufficient to establish the conclusion as true. A good deductive argument is one that is formally valid, with all of its premises being true.

B.

Keep also in mind the distinction between (1) the logical form of the argument and (2) the content of the argument (premises). If your criticism of the opinion is with its content, say so, and explain. Do not muddle the criticism by taking a poke at the opinion's logical form.

To be sure, the flaw can appear in the facts contained in the structure, rather than the structure itself. This problem is referred to as a "material" fallacy. Do not be content with saying that something is "fallacious." Locate the fallacy, and identify it specifically. Frequently occurring fallacies include: the fallacy of irrelevance or irrelevant conclusion; the appeal to prestige; the ad hominem appeal to personal ridicule; appeal to the masses; the appeal to terror; the fallacy of accident; the converse fallacy of accident (hasty generalization); false cause (post hoc); and non sequitur.

But the fallacy of begging the question is one of the most frequent of all fallacies. Often, this fallacy slips by unnoticed. For example, one of the very serious questions I had in our court's 1982 Abscam case was how we could find federal jurisdiction without the Government's establishing an obstruction of interstate commerce under the Hobbs Act. In that case, an FBI agent posed as an agent of an Arab sheik who, he said, was interested in building a hotel in Philadelphia. This story, of course, was fanciful. I agreed with the district court's holding that the Hobbs Act did not operate to confer federal jurisdiction "over purely hypothetical potential impacts in commerce which could never occur." The government's answer to this jurisdictional problem, accepted by the majority, was that factual impossibility to complete a conspiracy is no defense. Such an argument begs the question. The argument is a clas-

sic example of the fallacy of *petitio principii* — assuming the conclusion, i.e., that federal jurisdiction did in fact exist. In response I said, "They confuse *proof* of the crime of conspiracy with the jurisdictional *power* to punish the crime."

C.

I strongly emphasize the necessity of identifying the "flaw" in the reasoning because often the quarrel with an opinion is not with its logical interpretation but with the process that enters into the construction of the major and minor premises.

The major premise of the opinion is the critter at which you often can aim your pot shots. As I said before, more often than not, a value judgment has gone into its selection. If you disagree with the selection, it is fair game to question the court's exercise of judgment and state why you disagree.

Here, too, a dichotomy exists, because your criticism may be either substantive or structural. For example, you may disagree with the substantive premise. A hotly debated issue in our court today is whether the sixth amendment precludes admission of hearsay statements of a coconspirator, unless the government first proves the unavailability of the coconspirator and the reliability of his statements. You either agree or disagree with this proposition, and chances are that either position will be legitimate and sound.

Some major premises, however, are such well established precedents that they cannot be the victims of assault, e.g., the defendant's right to an attorney when charged with a felony. Still other premises may be attacked, not for their substance, but because of the procedure by which they were created. This problem arises when the relevant precedents are neither hefty nor hearty, and the court has to construct the major premise leading to its conclusion by use of the common law tradition. As every first-year law student knows, the common law tradition is a combination of both inductive and deductive reasoning. When courts use inductive reasoning to fashion the major premise, they cannot state with absolute assurance that the resultant premise is the embodiment of truth. All a court can say is that the premise it fashions is more likely to be true than false, that the premise is probably right. Recognition of this limitation is important because courts utilize inductive reasoning to construct a major premise, and then deduce a conclusion (and a decision for the case) from the constructed premise. Courts use two major tools in this construction business: generalization and analogy. As courts proceed to build the argument, they can become vulnerable, and a keen analyst can easily detect the weak spots in the construction.

In the common law tradition, each case produces a narrow legal conclusion based on a detailed set of facts — what Pound called a rule of

law in the narrow sense. When a court has a number of narrow holdings in a certain field of the law, it begins to enumerate the cases and distill from them a more generalized precept, usually called a legal principle. This structured principle is valid because the court relied on a sufficient number of instances in an inductive reasoning process to reach it:

*A* is a criminal and *A* is vicious.
*B* is a criminal and *B* is vicious.
*C* is a criminal and *C* is vicious.
. . .
*H* is a criminal and *H* is vicious.
Therefore, all criminals are vicious.

The degree of vulnerability of the principle is related directly to the number of specific instances used to justify a generalized conclusion, that, in the ebb and flow of inductive-deductive reasoning, then serves as a major premise from which to deduce another conclusion, the decision in the case. My example can be criticized because it failed to distinguish between felons who resort to violence and sedate white collar felons who simply plan swindles or income tax dodges. If the principle's construction is insufficient, the court rightfully is open to an accusation that its reasoning is indeed "flawed" because it has relied on a fallacy, either the converse fallacy of accident, the fallacy of insufficient or selected instances, or hasty generalization.

The best candidates for this "logical" attack are opinions in which the writer resorts to legislative history (take a look at Supreme Court cases, as well as the Third Circuit's):

Senator Arlen Specter said the bill was designed to aid single, working mothers.
Senator John Heinz said the bill was designed to aid single, working mothers.
Therefore, we can conclude that it was the intention of the Congress that the bill was designed to aid single, working mothers.

This conclusion may or may not be true. The senators could have been speaking for the benefit of particular Pennsylvania constituents only, and not reflecting the views of the drafting committee, the conference committees, or a consensus of Congress.

Closely akin to reasoning by generalization is reasoning by analogy, which is the basis of the Socratic method of teaching law. Pursuant to this method, the courts do not fashion the major premise from an enumeration of instances, but proceed from certain given or assumed resemblances to an inferred resemblance. In this respect, too, courts often are vulnerable to attacks on their reasoning. A court must identify the number of respects in which the compared objects resemble one another (let us call these similarities positive analogies) and the number of respects in which they differ (negative analogies). Unlike the method of

generalization, with the method of analogy numbers do not count. Instead, what is important is relevancy; whether the compared objects resemble, or differ from, one another in relevant respects. For example, assume:

> Able Chevrolet Company, located in Philadelphia, is liable for violating the antitrust laws for requiring a tie-in purchase of a refrigerator manufactured by Mrs. Able if you want to buy a Camaro.

It is not difficult to analogize that liability also would follow from these facts:

> Baker Pontiac Company required a tie-in purchase of a refrigerator manufactured by Mrs. Baker if you want to buy a Firebird.

What about other circumstances? There are many resemblances in the following fact situation, but are the resemblances relevant?

> Villanova had a championship basketball team in 1984-85.
> Team members came from high schools A, B, C, D, E, and F.
> Villanova has now recruited new players from high schools A, B, C, D, E, and F.
> Therefore, Villanova will have a championship basketball team in 1985-86.

An appreciation of these methods of reasoning will not only sharpen your analysis, but will produce criticism that will illuminate when a court has gone too far, or not far enough.

## V.

In sum, those who take the time to prepare criticisms of judicial opinions make a valuable contribution to the law. The exercise is valuable because courts are the only agencies in our society where what we say is as important as what we do. A reported opinion is a "performative utterance," because what is uttered today performs tomorrow in planning and directing the personal and business affairs of private persons and public officials.

Be as careful in your criticism of these utterances as you would have the authors be. A professional critic, student or practitioner, is a pathologist of the law, performing post-mortems. Always be certain that you examine the entire anatomy of the opinion, that you know the proper nomenclature for all its relevant parts, and that your examination is thorough enough and accurate enough to identify and justify your observations. If you do this, you will be preserving the tradition of the American law review at its finest.