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# Justice Cardozo Revisited: Phenomenological Contributions to Jurisprudence

WILLIAM H. ROBERTS \*

## I

GENY INTRODUCED INTO MODERN JURISPRUDENCE the concepts of the “given” and the “construed.” Facts are “given” if they exist objectively, *i.e.*, if man has to accept an existing situation as a reality which his intervention cannot change. He may use this reality as a springboard for further action; however, he has to accept the finality of its historical or juridical existence.<sup>1</sup> The “given” are, then, all contingent facts of history, the present state of human or international relations, etc.; we can constructively move forward from them, but the “given” itself stands unmoved and unmovable, subject to perception, knowledge and understanding, but not to change. Our perception of the “given” will, as perception always does, depend on our point of view—on our intention, end or purpose—on whatever layer of consciousness this intention may be lodged. Historians will look at a fact-situation differently—depending on their respective nationality, philosophical outlook, professional training, etc. The same fact-situation will be viewed in a completely different light by the lawyer—again partly depending on subjective factors similar to those mentioned above. However, the end the lawyer has in mind (his intention) will be an entirely different one from that of the historian. The latter will be satisfied with perception, knowledge—and possibly an understanding—of the fact-situation. The lawyer, on the other hand, will use it as a springboard for

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<sup>1</sup> GENY, *LES METHODES JURIDIQUES* 181-196 (1911); see also I GENY, *SCIENCE ET TECHNIQUE EN DROIT PRIVE POSITIF* 96-100 (1914). Cf. DABIN, *GENERAL THEORY OF LAW IN THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN* 318 (1950).

constructive action whether he is confronted with the situation in his capacity as advocate, adviser or judge. The "given"—including already existing legal principles, rules and norms which are part of the historical fact-situation in which we find ourselves—are subject to our elaboration and interpretation, i.e., to knowledge and understanding. Action based on this fact-situation belongs to an entirely different category, to which Gény referred as "construed." However, once the "construed" becomes part of objective reality, it is as much a part of the "given" as whatever preceded it.<sup>2</sup>

A fact-situation is a group of facts connected with each other by an intention, end or purpose tying them together. "Of course facts mean nothing," an Oxford lecturer is supposed to have remarked. His meaning really was: "A fact means surprisingly little, unless it is related to some other facts, or its significance is pointed out."<sup>3</sup> Savigny once remarked that the juristic meaning of a fact-situation depended on taking a point of view and then selecting from that vantage point certain facts as material and reducing others to immateriality. He referred to this as the "juristic style," comparing it to that of a painter.<sup>4</sup> It is, then, the underlying principle frequently appearing in the form of an intention, purpose or end which enables us to attach meaning to facts and to perceive a concrete fact-situation as a whole.<sup>5</sup>

This was essentially the point of view held by Cardozo when he said that "not the origin, but the goal is the main thing. . . . The teleological conception of his function must be ever in the judge's mind."<sup>6</sup> The "given," the fact-situation, is then actually seen in the light of an underlying philosophy (" . . . decisions are functions of some juristic philosophy;"<sup>7</sup>) or, in the light of a consciously willed intention, ("one wills at the beginning the result. . . ."<sup>8</sup>). This has also been expressed in Chesterton's words as related by Cardozo, namely that ". . . the most important thing about a man is his philosophy."<sup>9</sup> The choice of the desired result, or principle, in whose light the fact-situation is to be viewed is, as Julius Stone pointed out, a pre-logical one: ". . . it necessarily involves a reference to the facts and to standards of justice (however covert) . . ."<sup>10</sup>. The desired or desirable professional ends (or principles) which make us see fact-situations in a given light are intertwined with the

<sup>2</sup> *Ibid.*

<sup>3</sup> PLATT, STRATEGIC INTELLIGENCE PRODUCTION 54 (1957).

<sup>4</sup> SAVIGNY, *Beruf* 18 (1892) as quoted in RADBRUCH, *DIE NATUR DER SACHE ALS JURISTISCHE DENKFORM* 13 (1960).

<sup>5</sup> RADBRUCH, *op. cit. supra* note 4, at 32-33.

<sup>6</sup> CARDOZO, *The Nature of the Judicial Process* as reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 149 (1947).

<sup>7</sup> Frankfurter, *The Early Writings of O. W. Holmes, Jr.*, 44 *HARV. L. REV.* 717 (1931).

<sup>8</sup> SALEILLES, as quoted by CARDOZO, *op. cit. supra* note 6, at 179.

<sup>9</sup> CARDOZO, *Growth of the Law*, *op. cit. supra* note 6, at 212.

<sup>10</sup> STONE, *THE PROVINCE AND FUNCTION OF LAW* 139 (1946).

lawyer's or judge's professional and private personality.<sup>11</sup> The choice of the principles indicates the ideological assumptions underlying the administration of the law which, as Holmes, Cardozo and Pound have pointed out, are hidden by the traditional reluctance of the judges to disclose and discuss them openly.<sup>12</sup> The materiality or immateriality of facts in a given situation is, therefore, basically not a legal or logical but an ethical or philosophical question.<sup>13</sup>

The "given" and the "construed" are the two aspects of contingent reality with which man is confronted. One aspect, the "given" is designated by the term *realis* which is derived from *res*; the other, the "construed" from *actualis*, which is, in turn, derived from *actus*. The "given"—whether thing or fact-situation—is *res*, *i.e.*, that which con-fronts the onlooker, *ob-iectum*. *Res*, then, is not only the thing but also the historical, *i.e.*, completed fact-situation with which we find ourselves con-fronted and which we have to accept as reality.<sup>14</sup> Things and fact-situations are the very foundations of our knowledge from which we have to proceed in shaping the future by our actions.<sup>15</sup> It is one of the great shortcomings of the still prevailing Kantian and neo-Kantian thought patterns that they, as Goethe once said, prevent us from ever reaching the ob-ject, the *res*.<sup>16</sup> Kantian and neo-Kantian schools have maintained that man is unable to penetrate to the very essence, the nature of the *res*, whereas the traditional schools of philosophic realism postulated that this was one of the principal, if not the principal, tasks of the intellect.<sup>17</sup>

<sup>11</sup> "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action." CARDOZO, *The Nature of the Judicial Process*, *op. cit. supra* note 6, at 109. Also: "Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge." CARDOZO, *The Nature of the Judicial Process*, *op. cit. supra* note 6, at 178. Cf. ORTEGA Y. GASSET, *THE MODERN THEME* 20 (1961).

<sup>12</sup> Cf. HOLMES, *THE COMMON LAW* 35-36 (1948); HOLMES, *THE PATH OF LAW* in *COLLECTED LEGAL PAPERS* 181-84 (1920); CARDOZO, *The Nature of the Judicial Process*, *op. cit. supra* note 6, at 109.

<sup>13</sup> STONE, *op. cit. supra* note 10, at 189.

"It may seem a bold and reckless statement to assert that an adequate discussion of cases like *Berry v. Donovan*, *Adair v. United States*, or *Commonwealth v. Boston and Maine R.* involves the whole medieval controversy over the reality of universals. And yet, the confident assertion of 'immutable principles of justice inhering in the very idea of free government' made by the writers of these decisions, and the equally confident assertion of their critics that there are no such principles, show how impossible it is to keep out of metaphysics." COHEN, *The Place of Logic in the Law*, 29 *HARV. L. REV.* 628 (1916).

<sup>14</sup> PIEPER, *DIE WIRKLICHKEIT UND DAS GUTE* 11 (1956).

<sup>15</sup> "*Ipsae res sunt causa et mensura scientiae nostrae.*" AQUINAS, *QUAESTIONES DISPUTATAE DE POTENTIA DEI* 7, 10 ad 5.

<sup>16</sup> GOETHE, Letter of September 18, 1831, to Schultz.

<sup>17</sup> *Intellectus penetrat usque ad rei essentiam. . .*" AQUINAS, *SUMMA THEOLOGICA* I, II, 31, 5. Similarly, Goethe once stated that all human action depended on the clear perception of the *res* and its very nature. GOETHE, as quoted in PIEPER, *op. cit. supra* note 14, at 7.

It must not be assumed that these considerations apply only to the judicial process; they are equally important for the advocate and adviser.

The jockeying for position by advocates in stating the facts of the conflict to be judged is a preliminary skirmish of utmost importance in the effort to persuade the judge to see the facts legally, that is, in terms of the particular legal contexts, so chosen that the "proper" values—those favorable to the particular advocate—will dominate judgment. "These are the facts; is it or is it not interstate commerce? Is it or is it not an affair of states' rights? Is it property, or is it contract?" . . . To formulate the "facts" in one way and not in the other is to get one kind of a decision and not another.<sup>18</sup>

## II

Although even the perception of *res* in its meaning of "thing" provides great problems, we are here mainly concerned with the perception of *res qua* fact-situation. How do we proceed in demarcating the limits of a fact-situation—avoiding the equally dangerous errors of either establishing too narrow or too wide a field? What facts are to be included and which ones are to be excluded in setting up the field?

Cardozo, like others, laid stress on the intuition of the "skilled craftsman" to establish the appropriate limits (the field) of the fact-situation. He maintained that we depended in law, as we do in most other intellectual disciplines—and he singled out history—on intuition or insight ". . . transcending and transforming the contributions of mere experience."<sup>19</sup> Pound made the same point when he referred to the fact that

The trained intuition of the judge continually leads him to right results for which he is puzzled to give unimpeachable legal reasons. . . . The instinct of the experienced workman operates with assurance. . . . It has been gained by long experience which has made the proper inclusions and exclusions by trial and error until the effective line of action has become a habit.<sup>20</sup>

What is it that the "skilled craftsman" knows and to which Cardozo and others have referred as "intuition"? Holmes once said that a man who "has a working knowledge of his business can spend his leisure time better than in reading all the reported cases he has time for. They are apt to be only the small change of legal thought."<sup>21</sup> In other words, the "skilled craftsman" who has firmly grasped the principles of his art—be he a lawyer, historian, intelligence analyst, etc.—will subconsciously, *i.e.*, without conscious effort, select

<sup>18</sup> GARLAN, *LEGAL REALISM AND JUSTICE* 37-38 (1941).

<sup>19</sup> CARDOZO, *Growth of the Law*, *op. cit. supra* note 6, at 225.

<sup>20</sup> POUND, *The Theory of Judicial Decisions*, 36 *HARV. L. REV.* 951, 952 (1923).

*Cf.* HUTCHESON, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, as quoted in COHEN AND COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 467-472 (1951).

<sup>21</sup> HOLMES, *I CONTINENTAL LEGAL HISTORY SERIES* xlvii (1912).

those principles which will assist him in patterning the facts of the case in such a way as to find a desirable solution. In patterning the facts according to the principles selected, he will exclude and include facts and assign to them materiality or immateriality. It is in this way, by intuitively, *i.e.*, without conscious effort, arriving at the right principles for patterning the facts, that he will automatically establish the relevant field of perception, the fact-situation, the *res* material to his investigation. This is what Pound meant when he referred to "... the intuitive knowledge of the judge as to what will achieve justice in the concrete case ..." which he will derive from his experience and in-sight into the *ratio legis*.<sup>22</sup> Max Radin in developing this idea further pointed out that the judge first considers a certain result desirable because of his insight that certain "jural consequences ... ought to flow from the facts." And only then, as Radin told us, does he try to make his decision accomplish the result. The intuitive knowledge of the principles applicable to the case is, then, our guide in establishing the appropriate field of perception.<sup>23</sup>

This is as true of law as it is of other fields of intellectual endeavor. The mathematicians Gauss and Poincaré relate similar methods which the latter sums up by saying: "Most striking at first is this appearance of sudden illumination, a manifest sign of long, unconscious prior work. The role of this unconscious work in mathematical invention appears to me incontestable."<sup>24</sup> Hadamard then develops the point fully by applying William James' concept of fringe-consciousness to the finding of the correct principles for structuring the fact-situation.<sup>25</sup> We get a similar account from the inventor of the Diesel engine:

An invention consists of two parts: the idea and its execution. How does the idea originate? It may be that it sometimes emerges like a flash of lightning; but usually after laborious searching it will hatch itself out of innumerable errors; and by comparative study will gradually separate the essential from the non-essential, and will slowly permeate the senses with ever greater clarity, until at last it becomes a clear mental picture.<sup>26</sup>

The professional craftsman does not deal with the "raw" fact-situation; probably nobody is equipped to do that. He transforms and transposes the

<sup>22</sup> Pound, *supra* note 20, at 951.

<sup>23</sup> "... *res autem naturalis mensurans et mensurata; sed intellectus noster est mensuratus, non mensurans quidem res naturales, sed artificiales tantum.*" AQUINAS, *QUAESTIONES DISPUTATAE DE VERITATE* I, 2.

<sup>24</sup> HADAMARD, *THE PSYCHOLOGY OF INVENTION IN THE MATHEMATICAL FIELD* 14 (1945). *Cf.* WALLAS, *THE ART OF THOUGHT* 80, 82, 94, 96 (1926).

<sup>25</sup> HADAMARD, *op. cit. supra* note 24, at 24-25.

<sup>26</sup> KLEMM, *A HISTORY OF WESTERN TECHNOLOGY* 342 (1959).

“raw” situation into a legal or, as the case may be, a scientific one; it is this situation with which he actually deals.

In its raw state, the “given” is difficult to seize for the human mind; at least there is needed for its comprehension an operation of the intelligence which cannot proceed without a certain more or less deforming conceptual elaboration. In relation to the “raw fact,” the “scientific fact” is “construed.” Yet the whole effort of science tends to as exact as possible a restitution of the real, naturally in accordance with the means at the disposal of science.<sup>27</sup>

The structuring of the already existing, the “given” fact-situation is a scientific or professional task. This is a point recently made by Merleau-Ponty when he said that

Our relationship to the world, as it is untiringly enunciated within us, is not a thing which can be any further clarified by analysis; philosophy can only place it once more before our eyes and present it for our ratification. . . . Whether we are concerned with the thing perceived, a historical event or a doctrine, to “understand” is to take in the total intention . . . the unique mode of existing . . . in all the events of a revolution. . . [a] certain way of patterning the world which the historian should be capable of seizing upon and making his own.<sup>28</sup>

Needless to say, the same applies to the lawyer’s patterning of the “given” fact-situation.

We have already referred to Judge Hutcheson’s “judicial hunch.” Although the term seems upsetting at first sight, investigation will show that it is the prevailing mode of perception in all *great* intellectual enterprise whether it be in law, medicine, or statesmanship.<sup>29</sup> Intuition *qua* perception is nothing else but quick identification, clear understanding and a quick ability to interpret.

A scientific hunch is a unifying or clarifying idea which springs into consciousness suddenly as a solution to a problem in which we are intensely interested. In typical cases, it follows a long study but comes into consciousness at a time when we are not consciously working on the problem. A hunch springs from a wide knowledge of facts but is essentially a leap of the imagination in that it goes beyond a mere necessary conclusion which any reasonable man must draw from the data at hand. It is a process of creative thought.<sup>30</sup>

<sup>27</sup> DABIN, *op. cit. supra* note 1, at 319, 342.

<sup>28</sup> MERLEAU-PONTY, *Phenomenology of Perception* xviii (1962).

<sup>29</sup> Cf. Cardozo’s reference to Sir Austin Chamberlain’s statement that “. . . the hunch has been for centuries the driving force for British statesmen in international diplomacy.” CARDOZO, *Jurisprudence*, *op. cit. supra* note 6, at 27.

<sup>30</sup> Platt and Baker, *The Relation of the Scientific “Hunch” to Research*, VIII JOUR. OF CHEM. EDUC. 1969 (1931).

Intuition, then, provides a synthesis and not only a rearrangement.<sup>31</sup> This is exactly Gény's point as accepted by Cardozo when he approvingly quoted the former as saying that it was "a procedure extremely complex, and full of delicate nuances, all penetrated with casuistry and dialectics, a constant mixture of analysis and *synthesis* [emphasis added] in which the *a posteriori* processes which furnish adequate solutions presuppose directions *a priori*, proposed by reason and by will."<sup>32</sup>

It has already been indicated that the selection of the structuring principle depends on another type of intuition: philosophical and/or ethical insight. This type of intuition is based on tradition, observation, thinking and continuous practice. Bunge refers to it as *phronesis* and says that "... it would appear to be telling us in a faint voice which alternative is the most 'reasonable' or the most viable" one.<sup>33</sup> This, in fact, is nothing else but one of the essential aspects of prudence as understood by St. Thomas Aquinas. The directive received from prudence is a *cognitio dirigens*; it is, as Caietanus said, "activated knowledge." Prudence applies the cognition of an order of things—general or professional—to the concrete fact-situation (cf. "juris-prudence").<sup>34</sup>

The professional order of things and its principles are linked to a general order of things and the principles governing that order.

The variety and diversity of the term natural law has tended to obscure the central idea which underlies them all, that of an ultimate principle of fitness with regard to the nature of man as a rational and social being, which is, or ought to be the justification of every form of positive law. Such a principle under the name of reason, reasonableness, or sometimes natural justice, is fully recognized in our own system but the difference in terminology has tended to conceal the similarity from English lawyers during the last century or more.<sup>35</sup>

And providing the link to this country, it was John Adams who wrote in 1763:

It is my settled opinion that the liberty, . . . honor and dignity of human nature, the grandeur and glory of the public . . . were never so skillfully and successfully consulted as in that most excellent monument of human art, the common law of England.

Great professionals have always assumed the existence of a body of principles which serve as the foundation of their professional activity as well as of the scientific knowledge on which the profession is based.

<sup>31</sup> BUNGE, INTUITION AND SCIENCE 95 (1962).

<sup>32</sup> CARDOZO, *Growth of the Law*, *op. cit. supra* note 6, at 226.

<sup>33</sup> BUNGE, *op. cit. supra* note 31, at 102.

<sup>34</sup> Pieper, *op. cit. supra* note 14, at 76-77. Cf. "*Prudentia applicat universalem cognitionem ad particularia.*" AQUINAS, *SUMMA THEOLOGICA*, II-II, 49, 1 ad 1.

<sup>35</sup> POLLOCK, *The History of the Law of Nature* as reprinted in *JURISPRUDENCE AND LEGAL ESSAYS* 124 (1961).



... In greater or less degree, whatever austere critics may say, practice shows it [the system of principles] to be inseparable from any efficient administration of justice.<sup>36</sup>

It is this body of principles to which Lord Coke referred when he said that they "... are the fundamental points of common law and, in truth, are the main pillars of the Commonwealth." And again in *Calvin's case* he referred to these principles as "the very substance of the peculiar science of the judges." Equally, Lord Mansfield could state in *Jones v. Randall* (1774) that "the law of England depends on principles and these principles run through all cases."<sup>37</sup>

This mode of thinking, *i.e.*, that the professional order of things is linked to the order of nature, is found in *all* professions and is "... a result of habitual application of the rules of an art until they are taken for granted."<sup>38</sup>

### III

The structuring of a fact-situation with which professionals—and particularly lawyers—are confronted demands techniques which are based on the fact that they are called on to deal with practical problems rather than with the elaboration of systems of thought. However, system-thinking and problem-thinking need different techniques.<sup>39</sup> This does not imply that problem-thinking is unsystematic. On the contrary, as we have pointed out, it assumes the existence of a system; however, in the structuring of facts preceding the attempted solution of the problem, it does not introduce all ramifications of the system, but selects only those principles which seem to offer the best tools for achieving the desired result.<sup>40</sup>

Aristotle and Cicero have developed complete catalogues of what they called "topics" applicable to all different kinds of problems: literary, musical, historico-political, legal, etc.<sup>41</sup> Cicero referred to these "topics" as *ars inveniendi* to be followed by the *ars iudicandi*.<sup>42</sup> In other words, the "topics" structured the "given" situation and thus presented the premises for elaboration and logical conclusions. Catalogues of topics have, as Viehweg pointed out,<sup>43</sup> the principal importance of directing attention to the essential questions and thus of divorcing the material from the immaterial. He then exem-

<sup>36</sup> ALLEN, *LAW IN THE MAKING* 159 (1958).

<sup>37</sup> Cf. LORD MANSFIELD in *Rush v. Cooper* (1777).

<sup>38</sup> POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 156 (1959).

<sup>39</sup> HARTMANN, *Systematische Selbstdarstellung* in I KLEINERE SCHRIFTEN 1-51 *passim* (1955).

<sup>40</sup> *Id.* at 2.

<sup>41</sup> VIEHWEG, *TOPIK UND JURISPRUDENZ* 18, 20 (1953).

<sup>42</sup> *Id.* at 22.

<sup>43</sup> *Id.* at 23.

plified this by referring to the earlier Roman case law system and finally quoted Savigny as saying that it had been the particular attraction of Roman jurisprudence to view each case as a point from which an entirely new branch of knowledge was going to be discovered.<sup>44</sup>

#### IV

One of the most important and most neglected of these jurisprudential *topoi* is "the nature of things," *rerum natura* or—differently expressed—*res ipsa*. For the legal positivist, the legal order is and can only be the result of legislative will. On the other hand, the jurisprudential meaning of *res ipsa* (this term and *rerum natura* will be promiscuously used) maintains that any type and kind of human relations carries an inherent meaning already with it. The topic *res ipsa* calls, therefore, first for the recognition of the inner structure of a fact-situation, and then, normatively, for a legal principle, rule or norm responsive to that structure.<sup>45</sup> The objective end or purpose inherent in the fact-situation, in turn, implies that we are not free to interpret such a situation solely on the basis of subjective elements—though they will play an important part—but on our acceptance of the fact-situation itself as something historically "given," *i.e.*, something beyond the reach of our ability to change it retroactively. However, the "objectivity" of the fact-situation, as we shall see, implies also that it cannot be viewed entirely in and by itself, but only as part of a wider order of things. This is essentially the point made by Pound when he referred to ". . . the professional feeling that the common law is the legal order of nature, that its doctrines in an idealized form are natural law, and that its actual rules are declaratory of natural law."<sup>46</sup>

An ontological approach to law will always show a tendency to base any legal order ultimately on the very meaning of human nature; this, however, implies that *res ipsa* must not only not be ignored but that it becomes the very foundation of positive law. The latter, then, will be nothing else but an elaboration of the structure of *res ipsa* as it reveals itself in different sets of concrete circumstances and conditions.<sup>47</sup> And, continues Larenz correctly, if and when the positive law does not measure up to *res ipsa*, it will be up to legal science and the courts to direct the legislator prudently toward the desired and desirable positive regulation. Bodenheimer recently referred to this when he said:

<sup>44</sup> *Id.* at 31.

<sup>45</sup> LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 309 (1960). See also ESSER, *GRUNDSATZ UND NORM*, 6, 346-47 (1956).

<sup>46</sup> "There are times when principles and rules and concepts must be accommodated to ends, yet there must always be remembrance of the truth that of the ends to be achieved definiteness and order are themselves among the greatest and most obvious." CARDOZO, *Jurisprudence*, *op. cit. supra* note 6, at 30.

<sup>47</sup> *Cf.* LARENZ, *op. cit. supra* note 45, at 310.

The German jurist Heinrich Dernburg once made the following observation, "The relations of life, to a greater or less degree, contain in themselves their own measure and their own intrinsic order. This order immanent in such relations is called the 'nature of things.' The thinking jurist must have recourse to this concept in cases where a positive norm is lacking, or where the norm is incomplete or unclear."<sup>48</sup>

Even neo-Kantian jurists have admitted the importance of *res ipsa*—though from a different viewpoint. They have recently maintained that jurisprudentially *res ipsa* has no being (reality) of its own, but that it is only tied to reality; they considered *res ipsa* solely as the meaning of a fact-situation in the light of—however subjectively conceived—a legal idea injected into the situation. *Res ipsa* to them is, therefore, only the *ultima ratio* of legal interpretation and construction; moreover, it can be applied only if the legal idea injected is in keeping with the already established patterns of positive law.<sup>49</sup> What this approach, then, amounts to is nothing else but legal positivism once removed.

Similarly, Cardozo in his teachings on the patterning of fact-situations—however methodologically helpful—relied nearly exclusively on what will reveal itself as purely subjective factors. Basically, he maintained that "... the juristic philosophy of the common law is at bottom the philosophy of pragmatism."<sup>50</sup> This approach is in keeping with Cardozo's acceptance of John Dewey's basic philosophy. He quoted Dewey as saying that

... its [philosophy's] attention upon clearing up the causes and exact nature of these evils and upon developing a clear idea of better social possibilities; in short, upon projecting an idea or ideal which, instead of expressing the notion of another world, or some far-away unrealizable goal, would be used as a method of understanding and rectifying specific social ills.

To this Cardozo remarked:

What is this but to say that the sociological method, which is making itself felt in law, is at work in other fields, and even on those exalted planes which philosophy has reserved as her own peculiar province?<sup>51</sup>

Cardozo was aware of the fact that it had been a debate of long standing

<sup>48</sup> BODENHEIMER, JURISPRUDENCE 308 (1962). Cf. GENY, II METHODE D'INTERPRETATION 82-93 (1932), as partly translated in THE SCIENCE OF LEGAL METHOD 11-15 (1917).

<sup>49</sup> Cf. RADBRUCH, *op. cit. supra* note 4, at 15, for an elaboration of the neo-Kantian approach to *res ipsa*.

<sup>50</sup> CARDOZO, *The Nature of the Judicial Process*, *op. cit. supra* note 6, at 149. Cf. HARPER, *Some Implications of Juristic Pragmatism*, 39 INTERNATIONAL JOURNAL OF ETHICS 28 (1929): "Pragmatically viewed, however, justice, as we meet it in the courts, assumes the appearance of a concept open at both ends with a membership list of rights and pressures that is constantly changing."

<sup>51</sup> CARDOZO, *Growth of the Law*, *op. cit. supra* note 6, at 244.

"... whether the norms of right and useful conduct, the patterns of social welfare, are to be found by the judge in conformity with an objective or a subjective standard."<sup>52</sup> The conclusion at which he arrived was that "so far as the distinction has practical significance, the traditions of our jurisprudence commit us to the objective standard."<sup>53</sup> However, for Cardozo the "objective standard" was nothing else but the "... customary morality of right minded men and women. . . ."<sup>54</sup>

Needless to say, questions as to the nature of the "right-minded man" may be raised. Supposedly, he is the average individual who abides by "... the dominant standard of right conduct. . . . My own notion is that he would be under a duty to conform to the accepted standards of the community, the *mores* of the times."<sup>55</sup> This objective standard is for Cardozo a manifestation of "objective or general conscience" which, however, in the practical administration of justice "takes the color of the subjective mind," or, as he said again, "The personal and general mind and will are inseparably united."<sup>56</sup> The latter approach, however, as Cardozo himself admitted, seemed to lead to "a jurisprudence of mere sentiment or feeling."<sup>57</sup>

The essential characteristic of what Cardozo considered to be the objective approach was that it was "constantly brought into relation to objective or external standards. . . ."<sup>58</sup> The "objective," then, meant "external." And what is this "external" standard—tempered by the predilections or the "philosophy" of the judge? It is the method of sociology—the development of the law "... along the lines of justice, morals and social welfare, the *mores* of the day. . . ."<sup>59</sup> And this method of sociology was supposed to give the judge the power to fill in the gaps by putting "emphasis on the social welfare."<sup>60</sup> However, in the next paragraph Cardozo avoids being tied down to an explanation of his terminology by giving it so wide a meaning that he himself admitted it to be "indefinable" and by referring to it as "Kultur."<sup>61</sup> Since Cardozo admitted to have borrowed this term from Kohler, we shall have to turn to the latter to find out what Cardozo actually meant by it introducing this term. He meant the greatest possible development of human knowledge and of human control over nature.<sup>62</sup>

<sup>52</sup> CARDOZO, *Nature of the Judicial Process*, *op. cit. supra* note 6 at 151.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Id.* at 152.

<sup>56</sup> *Id.* at 153.

<sup>57</sup> *Id.* at 151.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Id.* at 117.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Id.* at 135.

<sup>62</sup> KOHLER, *PHILOSOPHY OF LAW* 22 (1921).

Mankind constantly progresses in culture in the sense that permanent and cultural values are produced; and that man becomes more and more god-like in knowledge and mastery of the earth. Only when based on this foundation can the requirements of the law be recognized as the requirements of the advancing culture which the law is to serve; and only in this way can the true aim of the law be known for what it is.<sup>63</sup>

To this statement Allen remarks:

But in this Hegelian conception there certainly resides a supreme law in the principle of evolution, progress, or culture; though jesting Pilate may well ask, "What is culture?" And may well question whether man's knowledge and mastery of the earth have necessarily made him "god-like." Social and moral history since 1914 hardly encourage that comfortable belief.<sup>64</sup>

And a German critique referred to the "... historical-cultural concept which, neutral as to values, embraces scientific truth and scientific error."<sup>65</sup> Kohler advocated the use of sociological interpretation in codified as well as in case law systems, *i.e.*, "as if they [statutes] were the products of the entire people of which the legislator was but the organ."<sup>66</sup> The "objective" standard of social welfare, as used by Kohler and Cardozo, reveals itself as a quasi-Hegelian objective spirit which manifests itself in the legal consciousness of the community. In other words, this means that the onward march of the objective spirit in time is bound to find expression in the general trends of judicial opinions handed down in the course of any given historical period.<sup>67</sup> However, it has been correctly pointed out that the collective consciousness on which Cardozo depended is nothing else but the consciousness of individuals; and this, as the observer remarked, is inadequate. What does this mean? It means that whatever presents itself as the *mores* of our times, social welfare, etc., is nothing else but the individual opinion of those who happen to make public policy.<sup>68</sup>

Cardozo, then—though to a lesser degree than the other advocates of the sociological school—reveals himself as a transcendental idealist who, together with Emerson and Whitman, accepted Kant, Fichte, Schelling and Hegel as "the illustrious four." The superficial realist, as which Cardozo now appears, is, therefore, nothing else but an idealist—an identification which applies to all neo-realists in the philosophico-social sciences, including jurisprudence.

<sup>63</sup> KOHLER, as quoted by ALLEN, *op. cit. supra* note 36, at 25.

<sup>64</sup> ALLEN, *op. cit. supra* note 36, at 25.

<sup>65</sup> RADBRUCH, *op. cit. supra* note 4, at 203.

<sup>66</sup> KOHLER, *Judicial Interpretation of Enacted Law* in THE SCIENCE OF LEGAL METHOD 189 (1917).

<sup>67</sup> Cf. LARENZ, *op. cit. supra* note 45, at 193.

<sup>68</sup> HARTMANN, *op. cit. supra* note 39, at 33-34.

And being an idealist, Cardozo's "objective" standards do not stand up to severe analytical tests. They reveal themselves as being tainted by the philosophical and political preferences of the observer.

Harlan Fiske Stone, on the other hand, pointed out that sociological jurisprudence and the common law approach were mutually exclusive of each other when he held that:

As a principle of judicial decision consciously adopted and applied, certainly nothing can be more foreign to the spirit of the common law and certainly nothing could be more destructive of its essential qualities. Social jurisprudence, as thus defined, is really a theory of legislation . . . based upon his [the legislator's] observation of what social conditions will be in the future and his particular theories for improving them. It is not the function of the judge to listen to the newest thing in social welfare. . . .<sup>69</sup>

Positively, Stone had this to say:

The judge . . . is guided by the principles of common law. In determining those principles by the method which we have described, the duty of the judge should be that of the patient investigator and seeker for scientific truth. To that extent, at any rate, he is a discoverer, and the rule which he discovers is a rule which is profoundly influenced, if not controlled . . . by *established principles of law*. [emphasis added].<sup>70</sup>

On another occasion Stone pointed out that "the old sense of certainty has gone, and judicial decisions take on the experiential quality of life itself."<sup>71</sup>

## V

Depending on whether we are confronted with the task of perceiving or changing the "given," its "field" will be de-limited and structured by the intentions, ends or purposes chosen as the most desirable ones. However, what are the standards by which this desirability is measured?

Several types of such standards have been developed in the course of Western thought: (a) the physical, biological, psychological, or social determinism or quasi-determinism which prevails in the jurisprudence of interests and in sociological jurisprudence; (b) subjective idealism or goal purposefulness which either avowedly or unavowedly denies the existence or the practical importance of a reality and value structure transcending the sub-human and humanly construed "given"; (c) the types of purportedly

<sup>69</sup> STONE, *LAW AND ITS ADMINISTRATION* 46 (1915).

<sup>70</sup> *Id.* at 23.

<sup>71</sup> MASON, *HARLAN FISKE STONE* 778-779 (1956).

objective realism which, however, maintain that the structure of ultimate reality and the structure of ultimate values do not necessarily coincide; in other words, that ultimate values are to be found on a different ontic layer from that of ultimate reality. Here the structure of final reality and final values, though transcending the human situation, do not necessarily coincide. And finally, (d) objective realism which maintains that the structure of ultimate reality and ultimate values coincide with each other (*ens et bonum convertuntur*).

The first two types are nominalistic in structure, *i.e.*, they deny the reality of universals. The third type, though admitting their reality, still introduces a degree of ultimate relativity by divorcing the *ens* from the *bonum*. It is only the fourth type which provides a truly objective foundation for evaluation and for the establishment of ends and purposes. It has been maintained that the third, and certainly the fourth, approach lead back to metaphysics which, nominalism and relativistic realism maintain, seemed to have been definitely and finally buried.

*Res* is the *ob-iectum*, that with which man is con-fronted, the reality which for him is the "given." *Res ex- (s) ists*; it is, as Heidegger has shown, the truth ( $\alpha\text{-}\lambda\eta\theta\epsilon\iota\alpha$ ) which uncovers itself by stepping out of the shadows into the limelight of reason.<sup>72</sup> Thus, he arrives at the conclusion that truth is the *adaequatio intellectus et rei*.<sup>73</sup> This, in other words, is a restatement of St. Augustine's insight that "truth is what demonstrates that is."<sup>74</sup> *Res*, the *ob-iectum*—existing independently of man's will and thought—is the essential "given" from which he has to proceed.

In applying these basic ideas to jurisprudential thought, Géný pointed out that:

It is not enough merely to consider and analyze in detail all the facts of the life of our society, to observe the mutual relations, to discern how they reciprocally react upon each other. We must also boldly rely upon our moral consciousness and our reasoning powers, and by use of these faculties trace the laws which govern these phenomena.<sup>75</sup>

This is squarely in keeping with the idea of professionalism as expressed by Pound.<sup>76</sup>

As far as legal categories are concerned, however, what actually is the nature of *res*? Its history as a legal category started with Cicero's attempt to

<sup>72</sup> HEIDEGGER, *PLATONS LEHRE VON DER WARHEIT* 32 (1954).

<sup>73</sup> *Id.* at 26.

<sup>74</sup> ST. AUGUSTINE, *DE VERA RELIGIONE* 36.

<sup>75</sup> GENÝ, *JUDICIAL FREEDOM OF DECISION IN THE SCIENCE OF LEGAL METHOD* 14 (1917).

<sup>76</sup> *Supra* at 99.

adapt Lucretius' *rerum natura* to juristic thought. By way of Justinian's *Digests* and Aquinas' teachings, the legal concept of *res* reached Montesquieu. Radbruch pointed out that the term *rerum natura* had been used in modern legal science by all major jurisprudential schools, specifically in Catholic legal theory with its insistence on the fact that human actions are regulated by the rational norm which can be deduced from the nature of things.<sup>77</sup>

It is, then, the avowedly or unavowedly accepted standards of the ontological and value structure which are the principal instruments in evaluating and shaping a situation—and thus in de-limiting and structuring the “field” of the fact-situation.

The concept of *rerum natura* is, therefore, equally meaningless in any of the first three types of standards. In the nominalistic approaches, the contours of the *res* will be so fluid that it will be well-nigh impossible to establish the limits of the situation, and therefore, a meaningful structure. The *res* as well as its *natura* will escape the observer and, to quote Goethe,

He who would study organic existence  
First drives out the soul by rigid persistence.  
Then the parts in his hand he may hold and class,  
But the spiritual link is lost, alas!

In relativistic realism, the basic difficulty will stem from the divorce of being and value, *i.e.*, the assumption that the structuring principles and the “given” are to be found on different ontic layers. Here, it still remains an open question to determine the standards which are to be applied to bring these two layers into conformity with each other. A lucky coincidence here and there is no evidence for the effectiveness of this approach. The various elements of relativistic realism can only merge if the individual is assumed to be primarily a creature of his physical or social environment. However, it is exactly this point which leads back to a glorified type of subjective idealism and, therefore, ultimately to a nominalistic-materialistic attitude, a development which, by the way, was exemplified by Max Scheler's life and writings.

If *rerum natura* is to be a meaningful concept, it can be such only within the framework of a philosophy of objective realism. To employ the concept outside of such a framework has and can only lead to confusion and misconceptions. However, at this point we are confronted with the problem of linking the cognitive and constructive task of the law-maker or jurist to the structure of ultimate reality.

The structure of final reality is characterized by the fact that *ens* (being) and *bonum* (value) are identical with each other. However, how does contingent

<sup>77</sup> RADBRUCH, DIE NATUR DER SACHE ALS JURISTISCHE DENKFORM 6 (1960).



reality emerge from this structure? Man himself, in his basic make-up, is part of ultimate reality, capable of understanding in various degrees its end and structure—and thereby also its hierarchy of values. However, part of man's make-up and, therefore, part of ultimate reality are also his passions, emotions, and will. He is, therefore, individually and collectively free to perceive, evaluate and structure contingent reality on the basis of any value system he sees fit to employ. (Man's responsibility for the choice of the correct ontological and value system is not part of this investigation.) And it is at this point that the attraction of the proximate and contingent, the attraction of immediate over long-range interests, the attraction of physically, biologically, or psychologically determining factors will in most cases outweigh the greater stability and security which can be derived from an attempt to establish a meaning of the fact-situation (*res ipsa*) within the framework of a wider objective order. These are the historico-psychological roots for using primarily values inherent in the proximate and material factors in de-limiting the "field"—as well as in evaluating and shaping the fact-situation. The average observer will always tend in the direction of shaping the "field" in the light of proximate and material, *i.e.*, essentially quantifiable considerations. He will tend to shrink from using a higher and wider order in which the principles for structuring *res ipsa* can be found. This will partly be due to the pressure of time, business, etc. which will not allow for more than the consideration of immediate material factors.

Part of the concrete fact-situation will always be the human "given," *i.e.*, a historical situation. Therefore, any concrete application of principles of traditional natural law will have to take the concrete historical situation into consideration.<sup>78</sup> It is in this connection that Utz refers to Aquinas' insistence on the fact that practical reason is differently structured from speculative reason since it is directed toward knowledge and understanding of a concrete situation. However, Utz continues, the concrete "ought" inherent in *res ipsa*, changes as historical conditions and circumstances vary. It is, therefore, he concludes with Aquinas, obvious that the *veritas practica* (the concrete "ought") is changeable and changing in accordance with prevailing conditions. However unchangeable the general principles of natural law are, there exists also, what Utz calls a changeable natural law, *i.e.*, human institutions and even positive law which can be considered to be directly derived from natural law as long as rational analysis proves that a human institution or norm conforms to *res ipsa*.<sup>79</sup>

It is, then, the cognitive rather than the normative aspect of traditional

<sup>78</sup> UTZ, *Wesen und Begründung des Rechts* in 8 FREIBURGER ZEITSCHRIFT FÜR PHILOSOPHIE UND THEOLOGIE 66 (1961).

<sup>79</sup> *Id.* at 67. Cf. DABIN, *op. cit. supra* note 1, at 422-423.

natural law, *i.e.* the individually and historically changing scope of man's participation in the general order of things (eternal law) which will provide the jurist as well as any other professional man with the only available tools to de-limit, shape, and structure a concrete fact-situation.<sup>80</sup>

Although objectively unjustified, such an opportunity will also seem to prevail at least temporarily whenever a general ontological order (as distinguished from an order based on process or "becoming") is assumed; provided, however, that it offers sufficient latitude in the scope of man's cognitive participation depending on variations of individual or collective (historical) capability.

## VI

The professional perception and the structuring of the "field" of fact-situations has to be accomplished in a spatio-temporal framework of contingencies. Modern thought, *i.e.*, certain selected aspects of phenomenology, have furnished us with great insights into the nature of the processes involved as well as with invaluable new techniques. The applicability of either to our problems has remained widely, if not completely, unnoticed. Equally, the professional application of these phenomenological aspects to fact-situations in the psychotherapeutic field has so far hardly received the attention it deserves. It has recently been remarked that: "... phenomenology can be practised and identified as a manner or style of thinking, that it existed as a movement before arriving at complete awareness of itself as a philosophy."<sup>81</sup>

The aspects of phenomenology of interest to our investigation have been clearly established by Merleau-Ponty. They are: (1) "That it [phenomenology] is a matter of describing, not of explaining or analysing"; (2) that it is a "return to the 'things themselves,'" *i.e.*, to *res ipsa*. Merleau-Ponty puts it this way:

I cannot conceive of myself as nothing but a bit of the world, a mere object of biological, psychological, or sociological investigation. . . . All my knowledge of the world, even my scientific knowledge, is gained from my own particular point of view, or from some experience of the world without which the symbols of science would be meaningless. The whole universe of science is built upon the world as directly experienced, and if we want to subject science itself to rigorous scrutiny and arrive at a precise assessment of its meaning and scope, we must begin by reawakening the basic experience of the world of which science is the second-order expression. Science has not and never will have, by its nature, the

<sup>80</sup> MERLEAU-PONTY, *op. cit. supra* note 28, at viii.

<sup>81</sup> *Id.* at viii-xiv *passim*. Cf. Savigny, *Vom Beruf Unserer Zeit für Gesetzgebung und Rechtswissenschaft* 89 (1914) regarding the view of earlier Roman jurists whose greatness, as that of early common law jurists, lay in their phenomenological approach.

same significance *qua* form of being as the world which we perceive, for the simple reason that it is a rationale or explanation of the world. (viii)

[3] To return to things themselves is to return to that world which precedes knowledge, of which knowledge always *speaks*, and in relation to which every scientific schematization is an abstract and derivative sign-language. . . . (ix)

[4] The world is there before any possible analysis of mine, and it would be artificial to make it the outcome of a series of syntheses which link, in the first place sensations, then aspects of the objects corresponding to different perspectives, when both are nothing but products of analysis, with no sort of prior reality. (x)

[5] The real has to be described, not construed or formed. Which means that I cannot put perception in the same category as the syntheses represented by judgments, acts, or predications. (x)

[6] The real is a closely woven fabric. It does not await our judgment before incorporating the most surprising phenomena. . . . Perception is not a science of the world, it is not even an act, the deliberate taking up of a position; it is the background from which all acts stand out, and is presupposed by them. The world . . . is the natural setting of, and field for, all my thoughts and all my explicit perceptions. (x, xi)

[7] It is because we are through and through compounded of relationships with the world that for us the only way to become aware of the fact is to suspend the resultant activity, to refuse it our complicity. . . . Not because we reject the certainties of common sense and a natural attitude to things . . . but because . . . they are taken for granted, and go unnoticed, and because in order to arouse them and bring them to view, we have to suspend for a moment our recognition of them. (xiii)

[8] The philosopher . . . is a perpetual beginner, which means that he takes for granted nothing that men, learned or otherwise, believe they know. (xiv)  
[Paragraphing added.]<sup>82</sup>

Probably the most important aspect of phenomenology which is of interest to this investigation is that of "intention." This concept which to a certain degree seems to replace value and topic as the cognitive and structuring element maintains that fact-situations are perceived *qua* situations only if our consciousness—deliberately or not—is directed toward them. In other words, consciousness—in the widest meaning of this term—defines the "field"—fuzzy at the edges and ever clearer as we move toward the center. However, consciousness is not a freewheeling agent, but it is influenced by intention, *i.e.*, by assigning the center of the stage of consciousness at a certain moment in time and in a given situation to "something" the observer considers important (value element). The assignment of intentions in the concrete case is not an isolated instance but is deeply embedded in the observer's life history (in-

<sup>82</sup> SZILASI, EINFÜHRUNG IN DIE PHÄNOMENOLOGIE EDMUND HUSSERLS 14-24 (1959).

dividual and/or collective). It is, then, part of his individual and collective past, of the present situation he finds himself confronted with, and also of the hope and expectations he holds (individually or collectively) of the future.<sup>83</sup>

The observer, in keeping with his life history (individual, collective, or professional), as well as with his philosophical make-up assigns the center of the stage to a group of facts which he deems most important when confronted with a situation. This is not a psychological act, but an act inherent in the total make-up (the constitution) of the individual or collective observer. The intention pre-dates and precedes, therefore, the psychological act of perception. Cardozo would probably have referred to it by repeating his *dictum* that the goal is the very beginning. It is, therefore, the constitutional make-up of the observer (physiological, biological, psychological, professional, philosophical and collective) as it has developed in his life-history up to the point of observation which predates intention.<sup>84</sup> However, if organic or other factors should have arrested the development of the make-up or telescoped it, intention will be centered either on by-gone or expected situations—leading respectively to melancholy or mania, individually or collectively. Or the faulty make-up may lead to an escape from reality (schizophrenia) in which an attempt will be made to build a new world corresponding to the make-up of the observer. Szilasi pointed out that secure human existence—we may add, individually as well as collectively—depended on unreflected, unproblematic and practically unobserved predictability.<sup>85</sup> Binswanger then came to the conclusion that, as far as the individual is concerned, a break in the chain of predictability—specifically because it becomes a matter of reflection, observation or becomes problematic—will lead to psychotic incidents—since the constitutive factors of the life-history of the patient will have been uprooted. The individual will find the future unpredictable and will react by retreating into the past, by denial of the possibility of a future or by taking flight into a reality of his own.

In the normal course of events the constitutional make-up of the collective (whether it be the nation, one of its territorial or functional, primarily professional, sub-groups, etc.) will be such that in a situation confronting the particular group, intentions will be similarly directed. This will lead to the perception of an identical or similar "field." This is, as Binswanger has pointed out, the phenomenological basis of inter-subjectivity (*i.e.*, the constitution of a world common to the group) which, in our opinion, is but the first step in the direction of an objective realism.<sup>86</sup>

<sup>83</sup> VII HUSSERL, *ERSTE PHILOSOPHIE* (1923/24) 256-261 (1956).

<sup>84</sup> BINSWANGER, *MELANCHOLIE UND MANIE* 136 (1960).

<sup>85</sup> *Id.* at 74.

<sup>86</sup> NEWMAN, *A GRAMMAR OF ASSENT* 86, 87 (1955).

If we attempt to pierce through the modern terminology of our authors, we arrive at observations which, in various ways, were already made by Plato, St. Augustine and Newman. It was Plato, and even before him Protagoras, who maintained that the *politike arete* was essentially the acceptance of a belief system which enabled the group to see (*theorein*), to understand and thereby to structure essential situations alike. The same point was repeatedly made by St. Augustine when he referred to the fact that it was necessary to believe in order to know (*credo ut intellegam*). Newman took a similar position when he said that

Real Assent, then, or Belief, as it may be called, . . . does not lead to action; but the images in which it lives, representing as they do the concrete, have the power of the concrete upon the affections and passions, and by means of these indirectly become operative. . . . However, on the whole, . . . we shall not . . . be very wrong in pronouncing that . . . acts of Belief, that is of Real Assent, do (not necessarily, but do) affect it [action].<sup>87</sup>

And again:

After all, man is *not* a reasoning animal; he is a seeing, feeling, contemplating, acting animal. . . . It is very well to freshen our impressions and convictions from physics, but to create them we must go elsewhere.<sup>88</sup>

Similarly, the great political thinkers of the nineteenth century—conservatives as well as socialists—maintained that every great political question was basically a question of belief.

It has already been established that the principal elements in de-lining the “field” of a fact-situation are those introduced without our being consciously aware of them. These elements are not found in the norms (legal or otherwise) themselves but in the principles standing behind these norms. The de-lining and structuring of a problem is, therefore, dependent on the principles prevailing in the collective and/or individual order within which the attempt takes place. Goodhart referred to this point when he said that “. . . the facts of a case are [not] a constant factor, that the judge’s conclusion is [not] based upon the fixed premise of a given set of facts. . . .”<sup>89</sup>

Facts are relative depending on the facts “we are talking about. . . . The judge, therefore, reaches a conclusion upon the facts as *he* [emphasis added] sees them.” In concluding his article, Goodhart, then, established that the “principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them.”

<sup>87</sup> *Id.* at 90.

<sup>88</sup> Goodhart, *Determining the Ratio Decidendi of a Case*, 40 *YALE L. J.* 161, 168, 169 (1930) .,

The essential problem of the cognitive process—specifically, the professional one—is, therefore, that of the nature of the structuring principles of the particular civilization, nation, profession, etc. The “field” and its delimitation will, therefore, be a different one depending on the purpose of the “field” (legal, political, etc.) and on the principles the observer can and will use in structuring it. It is, then, the available and applicable principles which are the principal tools in of perceiving and structuring a fact-situation.

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