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## LOGIC IN JUDICIAL REASONING

THOMAS HALPERT†

It has become almost platitudinous to complain that the law is sometimes too logical. Logic, it is said, speaks less as a language than as a code, and is too rigid and inflexible to deal with the complex and dynamic problems that constitute the law's chief concern. Thus, "The life of the law has not been logic: it has been experience."<sup>1</sup> "Every lawyer must acknowledge that the law is not always logical at all."<sup>2</sup> "In any contact between life and logic, it is not logic that is successful."<sup>3</sup> A "page of history is worth a volume of logic."<sup>4</sup> "There is a danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."<sup>5</sup> Such assertions indicate the dislike that most lawyers quite properly feel toward any type of legal reasoning that would drown out their voices in the clanging gears of mechanistic determinism.<sup>6</sup>

This general distrust of logic derives from five typical situations in which the process by which a result is reached is termed "logic." First, a court sometimes takes a short-cut to a decision by taking a word in its literal sense, ignoring its context or the purpose of the rule in question.<sup>7</sup> Here, "logic" is mistaken for a belligerent precisionism, for an excessive adherence to the literal or settled meaning of a word, for what Cardozo called "the bark of a hard and narrow verbalism."<sup>8</sup>

Second, a court may indulge its ingenuity with the result "not interpretation, but perversion."<sup>9</sup> But the disingenuous does not become logical

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The author is grateful to Dean Robert Birkby of Vanderbilt University for his helpful suggestions. This article received its impetus from A. G. Guest's well-known essay, *Logic in the Law*, in *OXFORD ESSAYS IN JURISPRUDENCE* 176 (Guest ed. 1961).

1. O. HOLMES, *THE COMMON LAW* 1 (1881).

2. *Quinn v. Leatham* [1901] A.C. 495, 506 (Halsbury, J.).

3. H. LASKI, *STUDIES IN THE PROBLEM OF SOVEREIGNTY* 201 (1917).

4. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

5. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1948) (Jackson, J., dissenting).

6. Pound, *Mechanical Jurisprudence*, 8 *COLUM. L. REV.* 605 (1908); Cohen *On Absolutisms in Legal Thought*, 84 *U. PA. L. REV.* 681 (1936).

7. This approach has been advocated by a surprising number of authorities. See, e.g., P. VINOGRADOFF, *COMMON-SENSE IN LAW* 121 (1913).

8. *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113, 129 (1935) (Cardozo, J., dissenting).

9. *Davis v. Pringle*, 268 U.S. 315, 318 (1925) (Holmes, J.). A famous example of this is the income tax case, *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895). In an earlier case, *Springer v. United States*, 102 U.S. 586 (1880), the Supreme Court had upheld the constitutionality of an income tax law, stating that an income tax was by nature an "excise or duty" rather than a "direct tax" which Article I,

by being swathed in syllogisms and delicate inferences.

Third, a court is often faced with rules of law which are seemingly inconsistent when in reality the principle underlying one does not encompass the other.<sup>10</sup> Suppose, for example, that in real property things attached to the land are deemed part of the land. In certain aspects of New York tort law, however, the principle and its justification have no application.<sup>11</sup> Thus, one cannot say, "If *p*, then *q*," but merely, "If *p*, usually *q*." Of course, it is typically queried why *q* is produced in *this* case and not in *that* case, if *p* is operating in each instance? "Logic" here stands, first, for the view that all rules in the law should apply throughout the law, or in an extreme form, that *elegantia juris* demands that the detailed rules should all be deducible from a few basic principles. And, second, "logic" represents the simplistic conviction that *p* alone sufficiently predetermines *q*. In either case, the detractors ultimately are forced to argue not that legal reasoning is too logical, but that it is not logical enough.

Fourth, courts sometimes deliberately maintain contradictions: they occasionally adopt a principle which entails the negation of a pre-existing contrary principle, either explicitly or sub silentio,<sup>12</sup> while simultaneously protesting their concern for consistency and reason.<sup>13</sup> Nonetheless, rhe-

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Sections 2 and 9 of the Constitution require to be apportioned among the states in proportion to their respective populations. The Court said in that case that only real estate and capitation taxes are direct taxes. In *Pollock* the Court held, without overruling *Springer*, that a tax on income was really a tax on the source of income and, therefore, a direct tax upon lands from which rents were derived.

10. It has often been observed that the Constitution does not require, in the words of Justice Douglas, that "all evils of the same genus be eradicated or none at all." *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949). See also, *e.g.*, *Dominion Hotel v. Arizona*, 249 U.S. 265, 268 (1919) (Holmes J.); *Nobel State Bank v. Haskell*, 219 U.S. 104, 112 (1911); *Buck v. Bell*, 274 U.S. 200, 208 (1927).

11. *Hynes v. New York Cent. R.R.*, 231 N.Y. 229, 131 N.E. 898 (1921). A boy swimming in a navigable stream was held to be in the enjoyment of a public highway entitled to reasonable protection and not to be a trespasser although he had climbed on a springboard one end of which was affixed to and extended over the defendant's property. The boy was electrocuted by one of defendant's high tension wires whose fall was not caused by the boy's position on the board.

12. A recent study reports ninety reversals of precedent by the Supreme Court, seventy explicitly and twenty *sub silentio*. Sixty of the ninety dealt with questions of constitutional law. Blaustein and Field, *Overruling Opinions in the Supreme Court*, 57 MICH. L. REV. 152 (1958).

13. Note, *Precedents—Sub Silentio: The Lurking Problem*, 29 N.Y.U.L.Q. REV. 1122 (1954). "The growth of indirect overruling," it has been argued, "has destroyed much of the law's lucidity, resoluteness and candor; in its final effect it transfers the task of interpreting the law from the courts to the legal public." Heimanson, *Overruling—An Instrument of Social Change?* 7 N.Y.L.F. 167, 170 (1961). A recent example of this arose in the federal court of the southern district of New York concerning the long neglected *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927). In the words of Judge Kaufman, "we would be abdicating our judicial responsibility if we waited for the Supreme Court to use the express words, 'We hereby overrule *Tyson*' . . . before

torical hypodermics can keep a dying principle alive only so long, and it is the hand that holds the needle that is at fault and not the serum.

Finally, the oracular tradition in which the American judge operates often compels him to appear "a mere rabbinical automaton with no more give and take in his mind than you will find of a terrier watching a rat-hole."<sup>14</sup> An outstanding example of this was supplied by Justice Roberts in *United States v. Butler* :

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty,—to lay the article of the Constitution invoked beside the statute which is challenged and to decide whether the latter squares with the former.<sup>15</sup>

The net effect of this approach is often that of a Pontius Pilate, who constantly lets execution proceed, while exculpating himself from moral or social considerations with a simplistic doctrine of legal reasoning. Critics of this view, which Morris Cohen has aptly termed "phonograph theory" of legal reasoning, are prone to equate "logic" with the bare mechanics involved in operationalizing a fiction.

Allusion to these concepts as "logic" leads one to ask, with Alice, "whether you can make words mean so many different things." Evidently, the detractors of logic agree with Humpty Dumpty's reply, "The question is, which is to be master—that's all."<sup>17</sup>

This broad distaste for logic has been made most articulate by the realists, especially the "rule-skeptics."<sup>18</sup> Rule skeptics argue that decisions

recognizing that the case is no longer binding precedent but simply a relic for the constitutional historians." *Gold v. DiCarlo*, 235 F. Supp. 817, 819 (S.D.N.Y. 1964).

14. Mencken, *The Library: The Great Holmes Mystery*, 26 AM. MERCURY 123, 125 (1932).

15. 297 U.S. 1, 62 (1936). Cf. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 396 (9th ed. 1793).

16. Cohen, *Positivism and the Limits of Idealism in the Law*, 27 COLUM. L. REV. 237, 238 (1927).

17. L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS 247 (1924).

18. Clear formulations of this view may be found in B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962), which contains nine reprinted articles on legal realism; Cohen, *Rules vs. Discretion*, 11 J. PHILOSOPHY 208 (1914) and *The Process of Judicial Legislation*, 8 AM. L. REV. 161 (1914); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Lloyd, *Reason and Logic in the Common Law*, 64 L.Q. REV. 468 (1948), where it is argued that legal rules are so vague and elastic that they do not lend themselves to inferential reasoning. See also M. GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA ch. 6 (1955), where it is suggested that the very vagueness of legal criteria performs a beneficial and indispensable social function in affording

do not result through an inevitable process of deduction from existing legal rules, that legal principles are too vague and discretionary to permit the operation of logical processes, that a legal system does not wholly or even primarily consist of rules, and that the entire notion of law as a self-contained, logically consistent structure persists in defiance of facts and possibilities. The position of the rule skeptic is that "rules are important so far as they help you to predict what judges will do. That is all their importance except as pretty playthings."<sup>19</sup> The rationale of the rule skeptic's view of logic has been outlined by H. L. A. Hart. Rule skepticism, he writes,

amounts to the contention that, so far as the courts are concerned, there is nothing to circumscribe the area of open texture: so that it is false, if not senseless, to regard judges as themselves subject to rules or "bound" to decide cases as they do. They may act with sufficient predictive regularity and uniformity to enable others, over long periods, to live by courts' decisions as rules. Judges may even experience feelings of compulsion when they decide cases as they do, and these feelings may be predictable too; but beyond this there is nothing which can be characterized as a rule which they observe. There is nothing which courts treat as standards of correct judicial behavior, and so nothing in that behavior which manifests the internal point of view characteristic of the acceptance of rules.<sup>20</sup>

Regardless of one's skepticism toward legal rules, it is plain that decision-making is not simply a matter of deduction, and that consequently what logically may be required is not ipso facto legally demanded. That a body of rules exists, even in the form of a written constitution, does not abolish judicial discretion, since the judge might not apply them, nor does it prevent the decisive influence of nonlegal considerations, such as the community's collective conscience<sup>21</sup> or Mr. Herbert Spencer's *Social Statics*.<sup>22</sup> Issues and values frequently form a legal Gordian Knot; and whether the judge chooses the Alexandrian solution or prefers to try his

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courts a measure of flexibility in dealing with new situations. This conclusion is supported by Schapera, *The Sources of Law in Tswana Tribal Courts: Legislation and Precedent*, 1 J. AFR. L. 150 (1957).

19. K. LLEWELLYN, *BRAMBLE BUSH* 9 (2d ed. 1951).

20. H. HART, *THE CONCEPT OF LAW* 135 (1961). *But see* Dunlop, *Developments in English Jurisprudence—1953-1963*, 3 ALBERTA L. REV. 63, 74 (1963).

21. *Adamson v. California*, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring) and *Rochin v. California*, 342 U.S. 165, 173 (1952); *Leyra v. Denno*, 347 U.S. 556 (1954) (Black, J.). These fundamental ethical considerations are given brilliant articulation in I. BERLIN, *TWO CONCEPTS OF LIBERTY* 50-51 (1958).

22. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), and *Holmes, supra* note 18, at 466.

hand at patient disentanglement will not be dictated by existing rules.<sup>23</sup> Yet once this choice has been made, the judge still must apply the proposition selected and consider the implications it appears to entail. And in this testing procedure, deductive reasoning is often useful in revealing latent potentials.<sup>24</sup> Moreover, judges are in varying degrees concerned with the effect of a particular decision upon the general structure of the law, and that structure, of course, is most often conceived in logical terms.

Legal principles, then, are not constructed, like theorems of Euclidean geometry, upon settled axioms free from all temporal dross;<sup>25</sup> instead, seemingly immutable propositions are functions of the moment in which they were acquired. The law student, who, in the manner of a myopic caterpillar, meticulously scrutinizes every judicial utterance as he tediously devours one case after another, will not dissent from Cardozo's dictum, "Cases do not unfold their principles for the asking."<sup>26</sup> Nor does the presence of statutes obliterate all doubt, for behind abstract regulations there is ordinarily the domination (and distortion) of familiar examples; and, frequently, statutory obscurantism conceals what the draftsman otherwise would have revealed. No statutes are so plain and unambiguous that they do not require interpretation to relate them to a context of language or circumstances;<sup>27</sup> much of the judge's work consists in coloring transparent abstract terms with the rich lacquer of experience:

No word has an absolute meaning, for no word can be defined *in vacuo* or without reference to some other context . . . . The practical work of the courts is very largely a matter of ascertaining the meaning of words, and their function, therefore, becomes the study of contexts. Since the number and variety of contexts is only limited by the possibilities of human experience, it follows that no rules of experience can be regarded as absolute.<sup>28</sup>

Hence, the life of the law contradicts logical symmetry and coherence; flux softens the stark outlines of legal propositions.

A further objection to the use of logic in the law is what A. G. Guest

23. *But see* Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 381 (1946).

24. J. WIGMORE, *PROBLEMS OF LAW* 70 (1920), and Pollock, *Justice According to Law*, 9 HARV. L. REV. 295, 300 (1895).

25. *Dennis v. United States*, 341 U.S. 494, 524 (1951) (Frankfurter, J., concurring).

26. B. CARDOZO, *supra* note 18, at 29.

27. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

28. Smith, *Interpretation in English and Continental Law*, 9 J. COMP. LEG. & INT'L L. 153, 153-54 (1927).

has called the "judicial hunch."<sup>29</sup> Legal reasoning, it is said,<sup>30</sup> may be put in logical form, but this is merely a verbalization of an emotional conclusion, a rationalization of a "judicial hunch." It is not the disciplined opinion that is important in understanding how a decision was reached; indeed, the opinion is relevant only insofar as it reveals the chaos of feeling, prejudice, and training which determined that ruling even before the writing of the opinion was begun. In this view, the "function of juristic logic . . . seems to be . . . to describe the event which has already transpired."<sup>31</sup> More cynical supporters of the judicial hunch might conclude that judges write opinions in order to conceal the actual route by which they arrived at their decision. This is reminiscent of one of the White Knight's schemes:

But I was thinking of a plan  
 To dye one's Whiskers green,  
 And always use so large a fan  
 That they could not be seen.<sup>32</sup>

The judge, then, emerges as a magician and the law turns out to be a box of tricks.

Undoubtedly, in some cases reasoning follows the decision, and certainly no one supposes that opinions, by themselves, reveal *how* a choice was reached; an opinion obviously is a defense of a legal position, and not an exercise in psychological self-analysis. To acknowledge the importance of the judicial hunch, however, is not to deprecate the role of logic; for this may only mean that "a judge who is steeped in the law can often discern the principle which governs the situation before he can cite the exact authority which supports it . . . and there is nothing at all remarkable in the fact that he can see the picture before he has filled in all the details."<sup>33</sup> To call this process "hunch" or "intuition" is simply to call it *je ne sais*

29. Guest, *Logic in the Law*, in OXFORD ESSAYS IN JURISPRUDENCE 187 (Guest ed. 1961).

30. O. JENSEN, *THE NATURE OF LEGAL ARGUMENT* 17 (1957); Cohen, *The Place of Logic in Law*, 29 HARV. L. REV. 622, 628 (1916); Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); Schroeder, *The Psychologic Study of Judicial Opinions*, 6 CALIF. L. REV. 89 (1918); and especially the works of Jerome Frank, e.g., J. FRANK, *LAW AND THE MODERN MIND* ch. 12 (1930), J. FRANK, *COURTS ON TRIAL* ch. 12 (1949), Frank, *Works and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 125 (1947), Frank, *Say It With Music*, 61 HARV. L. REV. 921 (1948), Frank, "Short of Sickness and Death": *A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U.L.Q. REV. 545 (1951).

31. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 480 (1928).

32. L. CARROLL, *supra* note 17, at 282-83.

33. C. ALLEN, *LAW IN THE MAKING* 334 (6th ed. 1958).

*quod*.<sup>34</sup>

While granting the force of these contentions, it may properly be asked whether they are relevant to discussions of the role of logic in law.<sup>35</sup> The objections to the use of logic seem to dart and flit about the basic issues without any intention of lighting on the mark. More to the point are Holmes' comments on the forms of thought:

Whatever the value of the notion of forms, the only use of the forms is to present their contents, just as the only use of a pint pot is to present the beer (or whatever lawful liquid it may contain), and infinite meditation upon the pot will never give you the beer.<sup>36</sup>

Nor does the quality of the pot bear any connection with that of the beer. To damn logic for substantive errors is to miss the point. For logic is indifferent to empirical considerations; no pretense may be made that logic can determine that the propositions with which it works are wise or foolish, important or trivial, right or wrong; it cannot compel a judge to choose one path of argument over another; it does not offer a systematic, autonomous, and consistent schema;<sup>37</sup> it is impotent even to demonstrate that its premises are true, false, or probable.<sup>38</sup> Logic is concerned not with content but merely with form; and so the validity of an inference, deductive or inductive, is entirely independent of questions of observable reality: a correct deduction may follow from a false premise and a probable inference may proceed from a mistakenly recorded event.

As a consequence, when we are supposedly faced with a conflict between "logic" and "experience" or "logic" and "life," the question arises as to whether it is in fact logic that we are being told to reject or merely some ill-advised tendency, which has been mislabelled "logic." Consider, for example, *Di Santo v. Pennsylvania*.<sup>39</sup> A Pennsylvania statute required all persons selling steamship tickets to or from foreign countries (except

34. This was suggested by Collingwood, *Plato's Philosophy of Art*, 34 MIND (n.s.) 154, 165 (1925).

35. O. JENSEN, *supra* note 30; Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 610 (1958).

36. Letter from Justice Holmes to John C. H. Wu, Sept. 20, 1923, in JUSTICE HOLMES TO DR. WU 16 (1947).

37. This in any event, has been shown to be impossible by Gödel's Theorem, which states that "the consistency of a logico-mathematical system can never be demonstrated by the methods of this system. . . ." F. WAISMANN, INTRODUCTION TO MATHEMATICAL THINKING 101 (1951). P. W. Bridgman, Nobel laureate in physics, has generalized from this that "whenever we have a system dealing with itself we may expect to encounter maladjustments and infelicities, if not downright paradox." P. BRIDGMAN, THE WAY THINGS ARE 7 (1961).

38. Algren, *Nelson Algren Interviewed: The Writer as Child, Youth and Privateer* by H. E. F. Donohue, 4 CARLTON MISCELLANY 3, 5-6 (1963).

39. 273 U. S. 34 (1926).



the steamship companies themselves) to obtain a license as a means of preventing ignorant immigrants from being defrauded. Speaking for the Court, Justice Butler argued:

State statutes burdening foreign commerce are unconstitutional.  
The Pennsylvania statute burdens foreign commerce.  
Therefore, the statute is unconstitutional.<sup>40</sup>

Justice Brandeis, in a ringing dissent, declared that "the logic of words should yield to the logic of realities."<sup>41</sup> But although he rejected Butler's unassailable syllogism, Brandeis' objection did not relate to logic at all. For he rejected not the form of the argument but the content of the minor premise, *i.e.*, the assertion that the statute burdened foreign commerce.<sup>42</sup> "Logic" was used to refer to the unwise following of precedents.<sup>43</sup> Not only was Brandeis actually unopposed to deduction; it can easily be shown that his argument, too, sought its justification in the syllogism:

The Constitution permits a state to act to prevent its citizens from being defrauded.  
The Pennsylvania statute seeks that end.  
Therefore, the statute is constitutional.<sup>44</sup>

What disturbed Brandeis, then, was not that the majority relied on logic but that it chose premises different from his. Many other decisions which, in a like manner, have been said to disclose confrontations between "logic" and "realities" can be demonstrated to entail no such imperative choice.

If we grant there is logic to at least some legal reasoning and that logic is not properly an alternative but a complement to experience, we still must ask what is meant by "logic." Too often criticisms of logic have been based solely upon the inadequacies of the Aristotelian syllogism,<sup>45</sup> as if logic were identical with elementary deduction. However, it is not meant here to destroy straw men, but first to determine the type of logic the courts use in their reasoning.

A great deal of the law is not codified. Judges, it is therefore contended, rather than "starting with a general rule . . . must turn to the relevant cases, discover the general principle implicit in them, and then deduce from it the rule applicable to the case at hand."<sup>46</sup> And it is com-

40. *Id.* at 37.

41. *Id.* at 43.

42. *Id.* at 41.

43. *Id.* at 42.

44. *Id.* at 37-39.

45. B. CARDOZO, *supra* note 18, at 22-23; M. RADIN, *LAW AS LOGIC AND EXPERIENCE* 112-13 (1940).

46. G. PATON, *TEXTBOOK OF JURISPRUDENCE* 152 (2d ed. 1951); Walton, *Delictual Responsibility in Modern Civil Law*, 49 L.Q. REV. 70, 73 (1933). There are, of course,

monly asserted that this "discovery" process involves the use of induction.<sup>47</sup> Sir Carlton Kemp Allen, for example, argues that because "induction works from the particular to the general, [the judge] has to search for [the legal rule] in the learning and dialectic which has been applied to particular facts." Thus, concludes Professor Allen, "he is always reasoning inductively . . . . [A]ntecedent conditions . . . are the very soil from which the general propositions must be mined."<sup>48</sup> Yet this "mining" may be a dirty and unprofitable business. For beneath the words of Allen and the others lie buried rather fundamental unanswered questions: how to discover which "antecedent" conditions are relevant, and, further, which "general principle" is "implicit" in them.

Consider, for instance, the crucial matter of determining the *ratio decidendi* of a case. It is ironic, though not infrequent, that while recognizing that "the whole doctrine of precedent depends upon the conception of the *ratio decidendi*,"<sup>49</sup> lawyers find the *ratio* so difficult to disentangle from the mass of *dicta* that prophecy becomes treacherous. It has even been suggested that "the division between *ratio* and *dicta* is in fact mainly a device employed by subsequent courts for the adoption or rejection of doctrine expressed in previous cases, according to the inclinations of the subsequent court."<sup>50</sup> One need not subscribe wholly to such a view to note that the *ratio* is rarely formulated with the exactness of a rule of law in a statute. Indeed, judges are not expected to make their formulations any more exhaustive or precise than the immediate context demands, so as to permit later courts to introduce their own modifications.<sup>51</sup> Thus, the "general propositions" of the "antecedent decision" are often quite vague.

With regard to the judicial "mining" of "general propositions," a story concerning Mr. Justice Holmes may be instructive:

[The tale] concerns a tiresome lawyer who, after citing an almost infinite number of cases for a proposition, turned to the Court and declared that the Court would either have to decide

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differences in the British and American approaches. See Goodhart, *Case Law in England and America*, 15 CORNELL L.Q. 173 (1930).

47. B. CARDOZO, *supra* note 18, at 22-23; R. POUND, *THE SPIRIT OF THE COMMON LAW* 182-83 (1921); Lucas, *Logic and Law*, 3 MARQ. L. REV. 203 (1919); Walton, *supra* note 46, at 77. *But cf.* Marsh, *Deduction and Induction in the Law of Torts: A Comparative Approach*, 23 J. COMP. LEG. & INT'L L. 59, 64-68 (1950).

48. C. ALLEN, *LAW IN THE MAKING* 152 (4th ed. 1946); Palley, *Stare Decisis and the Federal Supreme Court*, 1961 RHODESIA & NYASALAND L.J. 126, 131 (1961).

49. Simpson, *The Ratio Decidendi of a Case and The Doctrine of Binding Precedent*, in OXFORD ESSAYS IN JURISPRUDENCE 159 (Guest ed. 1961).

50. G. HUGHES, *JURISPRUDENCE* 236 (1955); G. HUGHES AND R. DIAS, *JURISPRUDENCE* 81 (1958).

51. Simpson, *supra* note 49, at 166.

the case in favor of the plaintiff or reverse the line of decisions he had just cited. This aroused Justice Holmes who . . . pointed his finger at the menacing attorney and said: "Young man, if this Court so desires, it will decide neither in favor of the plaintiff nor reverse a long line of decisions, and it shall find appropriate language in which to do so."<sup>52</sup>

Hence, the inadequacy of the statement, "logic has an important part to play at a stage when a suggested rule has to be tested in order to discover whether or not its adoption will involve the contradiction of already existing legal principles."<sup>53</sup> This assertion is true enough, but the real question is, what *is* logic's part in the actual adoption? Numerous examples can be produced to show its part to be quite small. Thus, in *Saia v. New York*<sup>54</sup> the Court struck down a municipal ordinance prohibiting the use of loudspeakers, except with the permission of the police chief; *Kovacs v. Cooper*,<sup>55</sup> decided the following year, saw *Saia* reaffirmed, with the proviso that it did not extend to "loud and raucous" loudspeakers. But of what value is a loudspeaker that is neither loud nor raucous? Plainly, to explain the adoption of the *Kovacs* rule, which evades contradiction only through the sheerest sophistries of narrow construction, as dependent wholly or primarily on induction is clearly absurd.<sup>56</sup> In fact, since the inductive leap from known to unknown cannot itself be logically justified, induction is impotent to dictate conclusions even in the limited syllogistic sense.

The truth, of course, is that legal reasoning is rarely a simple matter of induction or deduction. There is, in Guest's words, "a natural tendency to short-circuit the process of abstraction and application and, while working within the freedom of a general rule, to argue more empirically from case to case."<sup>57</sup> Much of legal reasoning reveals this proclivity for abridgment, and is by example and resemblance. This form is analogical. It involves not induction or deduction, but a "process . . . in which the classification changes as the classification is made."<sup>58</sup> This quicksilver aspect is constantly undercutting *stare decisis* and all the other forces for stability. Competing examples, ordinarily in the form of previous decis-

52. R. HARRIS, *THE JUDICIAL POWER OF THE UNITED STATES* vii (1940).

53. Guest, *supra* note 29, at 195.

54. 334 U.S. 558 (1948).

55. 336 U.S. 77 (1949).

56. Interesting examinations of the euphemistic practice of "distinction" may be found in W. FRIEDMANN, *LEGAL THEORY* 435-50 (4th ed. 1960) and J. STONE, *THE PROVINCE AND FUNCTION OF LAW* 171-91 (1946).

57. Guest, *supra* note 29, at 190.

58. E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 3 (1949). *But cf.*, Dickinson, *Legal Rules: Their Application and Elaboration*, 79 U. PA. L. REV. 1052 (1931).

ions, are presented to the court, and the court chooses which one it will apply. But each new decision, by adding something, reshapes the rule:

[A] "rule" or "principle" as it emerges from a precedent case is subject in its further elaboration to continual review, in the light of analogies and differences, not merely in the logical relations between legal concepts and propositions; not merely in the relations between fact situations, and the problems springing from these; but also in the light of the import of these analogies and differences for what is thought by the later court to yield a tolerably acceptable result in terms of "policy," "ethics," "justice," "expediency" or whatever other norms of desirability the law may be thought to subserve.<sup>59</sup>

Given this natural oscillation between values, it is quite true that rules are uncertain, at least to the extent that "the certainty of the law is based on *general opinions* as to similarity and difference."<sup>60</sup> Because the categories "move" and new "rules" or "principles" emerge, one cannot identify with absolute certainty the precise proposition upon which some future analogy will be built. However, this aspect is easily overstated, for the choice of propositions is not entirely unpredictable, either. Obviously, they are not selected at random, but in conformance with certain fairly well-defined practices. These practices consist largely of custom and judicial experience, yet their force is such that it is not wholly true to say that "the Constitution is what the judges say it is . . . ."<sup>61</sup> Even when a ninety-six year old precedent is overruled,<sup>62</sup> the Supreme Court does not evidence absolute freedom of action; for judges are men, too, and considerations of strategy are never entirely absent.<sup>63</sup> Because relevance is inevitably a matter of degree, the "line cannot be drawn by magic of word or formula."<sup>64</sup> Dean Levi has crystallized the analogical issue:

When will it be just to treat different cases as though they were the same? A working legal system must . . . be willing to pick out key similarities and to reason from them to the justice of applying a common classification. The existence of some facts in

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59. Stone, *The Ratio of the Ratio Decidendi*, 22 MODERN L. REV. 597, 618 (1959). The interesting point in this process is that the "rule" or "principle" is produced by the simple comparison of instances. *Supra* note 24.

60. Levi, *The Natural Law, Precedent, and Thurman Arnold*, 24 VA. L. REV. 587, 604 (1938). (Emphasis added.)

61. Hughes, quoted in 1 M. PUSEY, CHARLES EVANS HUGHES 204 (1952).

62. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), *rev'g* *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

63. W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).

64. *Christie v. Callahan*, 124 F.2d 825, 827 (D.C. Cir. 1941) (Rutledge, J.).

common brings into play the general rule.<sup>65</sup>

The problem, in short, is, how much is enough? Clearly, men will differ in their determination, and feel bound by no generalizations prescribing in detail the nature of a valid analogy. In this sense, it is difficult to dispute T. R. Powell's thesis that "the logic of constitutional law is the common sense of the Supreme Court of the United States."<sup>66</sup> Still, even "common sense" has only limited elasticity, and certain analogies are plainly inadequate.

Consider, for example, the case of *Beauharnais v. Illinois*,<sup>67</sup> in which the Court, through Mr. Justice Frankfurter, upheld a group libel statute by analogizing it to the admittedly valid concept of individual criminal libel. The bridge connecting the two parallel statutes and thereby permitting analogy was the reasonable relation of each statute to its plain intent:

[I]f an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State.<sup>68</sup>

The three central elements in libel are the libeler, the libel itself, and the libeled party. Granting that the first two are substantially unrelated to the shift from individual to group libel, we turn to the third. While it is true that criminal libel is punishable without regard to its effects, it is equally true that the rationale behind the punishment is not to silence the would-be writer or publisher but to protect the person who is the object of their words from defamation.<sup>69</sup> Libel, therefore, requires a specific victim and while the victim need not be a single individual, the question arises as to what degree the concept of specification can be compromised and yet retain sufficient validity to save the analogy. Evidently, Frankfurter felt that though the victims numbered about half a million persons—the entire Negro population of Illinois in 1952—the critical point had not yet been reached.<sup>70</sup>

65. E. LEVI, *supra* note 58.

66. Powell, *The Logic and Rhetoric of Constitutional Law*, in *ESSAYS IN CONSTITUTIONAL LAW* 87 (McClosky ed. 1957).

67. 343 U.S. 250 (1952).

68. *Id.* at 258.

69. Thus, Prosser in his discussion of civil libel emphasizes "the elements of personal disgrace necessary for defamation. . . ." W. PROSSER, *LAW OF TORTS* 757 (3d ed. 1964) (Emphasis added.).

70. In *Massachusetts v. Mellon*, 262 U.S. 447 (1923), a federal taxpayer's suit was denied on the ground that "[h]is interest in the moneys of the treasury . . . is shared with millions of others [and] is comparatively minute and indeterminable. . . ."

Even the great Holmes could on occasion be seduced by his own epigrams. For instance, as an acute critic of the Court has pointed out,<sup>71</sup> it is not at all clear that “[t]he principle which sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.”<sup>72</sup>

The analogy is incapable of supplying final validation, and, in fact, “properly speaking, [is] not so much a mode of attempting a proof, as a mode of attempting to dispense with the serious labour of proving.”<sup>73</sup> Therefore, its use ensures the primacy of value judgments in judicial decision: in accepting an analogy on the basis of relevance, the judge must decide whether the similarities are sufficiently important or numerous to warrant that acceptance. This decision, in turn, may be critically determined by the weight given to the possibility of error in judgment. To a Malthusian like Holmes, the consequences of incorrectly upholding Virginia’s right to sterilize Carrie Buck could not have seemed very severe. Conversely, the perceived gravity of possible mistakes supplied the basis of the dissents in *Beauharnais*. In fact, the entire position of those advocating a preferred position for first amendment rights is at bottom an elaboration on this theme, and it is a theme of some force.

Nonetheless, that the analogy can deal solely with probabilities, far from being a weakness, is both its greatest strength and most powerful attraction. For the concern of law is precisely with probabilities—not with certainties. In this setting, the analogy serves the great function of simplification: the unfamiliar and the different is sutured to the familiar and the known by threads of corresponding similar elements; and by this process of association, the new is simplified and understood. If left relatively undisturbed the threads will disintegrate, and the parts will grow together and eventually become aspects of the same principle. Moreover, the analogy “can be used to increase the probability of one of a set of initially unlikely hypotheses.”<sup>74</sup> The danger lies in confusing analogy with identity, and what is most essential is to moderate the sense of resemblance with a sense of vital difference.

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(at 487). While conceding that state taxpayers’ suits are permitted, it may be suggested that the principle of *Mellon*—that a relationship, can become so indirect as to be practically specious—might be applicable to *Beauharnais*.

71. Berns, *Buck v. Bell: Due Process of Law?* 6 W. POL. Q. 762 (1953).

72. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (Holmes, J.). The comparison with compulsory vaccination refers to *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Such analogical disputations often have had considerable effect upon the growth of the law. In fact, an eminent legal philosopher has said, “The justification of juristic logic and technique in terms of principle is that they help us to make the analogy explicit and thus make possible the criticism necessary to make a legal system liberal and progressive.” Cohen, Book Review, 44 HARV. L. REV. 1149, 1153 (1931).

73. H. SIDGWICK, FALLACIES 232 (1884).

74. Wilson, *On the Argument by Analogy*, 31 PHIL. OF SCI. 34, 34-35 (1964).

The utility of logic in legal reasoning is mitigated by the frequent imprecision in expression of *rationes* and statutory provisions.<sup>75</sup> One English observer has remarked, in fact, that "by far the most important task of the judge is to determine, clarify, and define the concepts involved."<sup>76</sup> Some concepts seem to owe their continued existence to an amoeboid flexibility, which allows the judge to admit or exclude particular cases with almost no consideration for overall conceptual rationality. Examples at common law would include, among others, "remoteness of damage," and the distinctions between "preparation" and "attempt." Thus, the South African, O. C. Jensen, in his stimulating *Nature of Legal Argument*<sup>77</sup> concludes that these terms are vacuous, and, therefore, that judges who claim to decide cases from these ideas actually must be deciding them on other grounds. Jensen's primary reason appears to be that the concepts in question lack the intellectual hard-edge, which he feels is necessary to distinguish them from other concepts. This recalls the earlier argument of the realists: Any class of words from which no clear and common quality can be extracted to set it off from other words is not properly a class at all; consequently, judges who attempt to categorize cases on the basis of such a conceptual mirage are naive and mistaken.

It would seem, however, that this view confuses legal reasoning with scientific reasoning. It is true, of course, that both approaches aim at producing generalizations which not only summarize present conditions but anticipate future situations. However, the scientific concern is descriptive; even its predictive function can be thought of as directed toward descriptions preceding the event. Consequently, the need for explicitness and precision becomes paramount, and concepts are defined as "synonymous with the corresponding set of operations."<sup>78</sup>

To avoid ambiguity, every scientific term should be defined by means of one unique operational criterion [to ensure] the possibility of an objective test for the hypotheses formulated by means of those terms . . . . [Q]uestions involving untestable formulations are rejected as meaningless.<sup>79</sup>

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75. On the vagueness of technical legal terms, see Fullagar, *Legal Terminology*, 1 MELBOURNE U.L. REV. 1 (1957). For a specific example, see Levin, *The Varying Meaning and Legal Effect of the Word "Void,"* 32 MICH. L. REV. 1088 (1934). Ordinary terminology may also raise legal problems of meaning, e.g., Note, *When Is A Vanette a Motor Car?*, 1961 RHODESIA & NYASALAND L.J. 10.

76. Guest, *supra* note 29, at 193. Yet, clearly the appellate judge's "most important task" is to decide.

77. O. JENSEN, *THE NATURE OF LEGAL ARGUMENT* (1957).

78. P. BRIDGMAN, *THE LOGIC OF MODERN PHYSICS* 5 (1927).

79. Hempel, *A Logical Appraisal of Operationism*, 79 SCIENTIFIC MONTHLY 215 (1954).

The relationship of legal terms to "testability" is of a quite different kind. Legal rules are not, as it has sometimes been advanced, mere "working hypotheses [to be] continually retested in those great laboratories of the law, the courts of justice."<sup>80</sup> For legal rules are not descriptive; they do not represent discoveries of order in nature. Laws are prescriptive; they are commands expressing "the existing balance of power between competing interests in a society."<sup>81</sup> Laws do not *describe* how men behave, but rather *prescribe* how the State demands that they behave. "Pretty much all law," as Holmes said, "consists in forbidding men to do some things that they want to do."<sup>82</sup> Courts, therefore, do not exist as an aid to prediction but to decision.

The judge does not employ the case before him as a means of testing the validity of the rules which he employs in reasoning toward his decision. The whole theory of decision according to law is that the rules are to govern the case, and not, like scientific law, to be governed by it.<sup>83</sup>

Scientific induction moves from known to unknown, proceeding under the assumption that "an event which occurred  $n$  times will occur at all following times."<sup>84</sup> Hence, if a number of like cases have been decided in a certain way, the appropriate inference would be the prediction that the present similar case will be decided in the same way. But judges do not *predict* how they will decide a case; they *decide* it.<sup>85</sup>

The common sense of the matter, and clearly the prevailing view, is that a concept which cannot be defined in this scientifically rigorous and final way may not be meaningless but only vague,<sup>86</sup> in which event elements may be noted, which will count, though not conclusively, for or against its use in a given case; or the concept may be clear enough in one context but have different (and perhaps more difficult and obscure) applications in another. This corona of uncertainty is most obvious on the higher levels of abstraction, where "a great principle of constitutional law is not

80. M. SMITH, JURISPRUDENCE 21 (1909), quoted with approval by B. CARDOZO, *supra* note 18, at 23.

81. Wade, *The Courts and the Administrative Process*, 63 L.Q. REV. 164 (1947).

82. *Adkins v. Children's Hosp.*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).

83. Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 861 (1931).

84. H. REICHENBACH, EXPERIENCE AND PREDICTION 341 (1938).

85. O. JENSEN, *supra* note 77, at 28-29; Guest, *supra* note 29, at 188-90; Goodhart, *Law and the State*, 47 L.Q. REV. 118, 138 (1931). A brief though exceedingly suggestive comparison of legal and scientific reasoning may be found in Wisdom, *Gods, in ESSAYS IN LOGIC AND LANGUAGE* 195 (1st ser. ed. Flew 1951).

86. Cunningham, *On the Meaningfulness of Vague Language*, 58 PHIL. R. 541 (1949).



susceptible of comprehensive statement in an adjective,"<sup>87</sup> or where a concept like ownership "is only a bundle of rights and privileges invested with a single name."<sup>88</sup> When confronted with such an amorphous concept

[t]he question of how to determine whether a rule applies to the case, or conversely the propriety of subsuming the case under the rule, is always the point of central difficulty. It may therefore be admitted that much of the traditional body of logic has little light to shed on one of the most pressing problems of legal thought.<sup>89</sup>

The answer to this difficulty is, of course, that "the art of thinking must not be confused with logic."<sup>90</sup>

Logic is sometimes oversold. But despite the rhetoric spewed out in articles and treatises, no salesman seriously expects it to bring on the millenium; it will not dissolve all legal problems. But logic is useful. There is a good deal of "reason" in legal reasoning, and some objections to this proposition are so ill-founded as to represent, in fact, objections to other things. Yet logic is neither the center nor the circumference of the judges' circle of decision.

And this, it may be supposed, is why finally we cannot assess the product of their work in terms of any less complex quality than that of wisdom.<sup>91</sup>

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87. *Carter v. Carter Coal Co.*, 298 U.S. 238, 327 (1936) (Cardozo, J., dissenting).

88. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 581 (1937) (Cardozo, J.).

89. Dickinson, *supra* note 58, at 1061; Hart, *supra* note 35.

90. M. COHEN AND E. NAGEL, *AN INTRODUCTION TO LOGIC* 18-20 (1934); L. STEBBING, *MODERN INTRODUCTION TO LOGIC* 493 (1930).

91. Stone, *supra* note 59.