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A Response to Perry: Judicial Method and the Concept of Reasoning

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A RESPONSE TO PERRY: JUDICIAL METHOD AND THE CONCEPT OF REASONING

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In response to ridicule from the segments of society that retain a sense of smell for intellectual quicksand . . . .

Davis, *The Case of the Real Taxpayer*, 36 U. CHI. L. REV. 375 (1969).

ANY thoughtful observer of our legal system must share Professor Perry's concern about the intellectual status or rational responsibility of the judicial decision-making process. With so many aspects of our society under attack, the legitimacy of our judicial institutions is indeed a matter for serious concern. Because the normal methods of assuring responsibility and correcting abuses by official wielders of governmental power do not operate significantly with respect to judges, one important condition for maintaining the legitimacy of the judicial institutions is to establish that the process of judicial decision is one which involves the restraining power of reason and has explainable modes of justification.

In the creative period of American law, the late eighteenth and first half of the nineteenth centuries, there was an enormous amount of judicial law-making which marched along behind the bulldozer rhetoric of the age of reason. People generally seemed to accept the confident assertion by the opinion writers that their progress from premise to conclusion was indeed ineluctable.[1] For reasons which I will not try to explore here, that confidence began to shrink toward the end of the nineteenth century and the early twentieth, as evidenced by the growth of what has been called mechanical jurisprudence. The trend was probably fostered in the Anglo-American system by the proliferation of reported decisions; this made it possible in most new cases to find some precedent which could be made to serve as a plausible starting point for the simple subsumptive syllogism (All A is B; X is A; $\therefore$ X is B.).

As early as the 1880's O. W. Holmes, Jr. pointed out that, while the form of judicial opinions was logical, the result was not intellectually compelled. But the myth that it was proved to be very sturdy. Thomas Reed Powell, political scientist and lawyer, carried the iconoclastic message to the American Political Science Association in 1918, in a paper entitled *The Logic and Rhetoric of Constitutional Law*.[2] In typical Powellian rhetoric, he explained: "Man is a

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1. A good example is *Farwell v. Boston & Worcester R.R.*, 45 Mass. (4 Met.) 49 (1842) which established for American law the leading doctrines of employer liability for work-connected injuries, dominant for about 50 years. If Chief Justice Shaw's opinion is read in the light of the standards of analysis and argumentation which current critics demand of the Supreme Court, it does not fare well.

2. 15 J. OF PHIL., PSYCH. AND SCIENTIFIC METHOD 654 (1918); ESSAYS IN CONSTITUTIONAL LAW 85 (R. McClosky ed. 1957).

rhetorical animal. But his rhetoric is used to market his notions, not to make them. So it is the factory and not the salesroom that I invite you to explore. It is to the logic behind the rhetoric of constitutional law that I wish to direct your attention."[3] His thesis? "The logic of constitutional law is the common sense of the Supreme Court of the United States."[4] The task of the Court in interpreting the Constitution is "to a very large extent the weighing of competing practical considerations and forming a practical judgment."[5] More generally, and appealing to the authority of Holmes, Powell observed: "If we take a long-time view of the growth and modification of judicial doctrines, we cannot escape the realization that beneath the surface the moving forces are the practical judgments of the human beings who wield judicial power."[6] Professor Robert G. McCloskey assured us that "Professor Powell's essay was an important incident in this general offensive."[7]

Judge Benjamin Cardozo's lectures on *The Nature of the Judicial Process*, published in 1921, seem to have contributed greatly and to have marked the turn toward general acceptance of the newer attitude. Judge Learned Hand's review in 1922 of the book containing the lectures both supports this impression and highlights the grounds for concern:

> [T]he pretension of . . . [an English speaking judge] is, or at least it has been, that he declares pre-existing law, of which he is only the mouthpiece; his judgment is the conclusion of a syllogism in which the major is to be found among fixed and ascertainable rules. . . . Yet the whole structure of the common law is an obvious denial of this theory; it stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work. . . . The masters assure us that ours is a time of change in the law, when it is to be recast; one of those periods when the bud is bursting its sheath and the flower unfolding. If they are right—and who are we to question them?—the development will be self-conscious as never before. How Demos will accept it is another matter. Hitherto he has been lulled to rest by unctuous protests of docility from his judges. Will he awaken in a rage when they admit that they are not all "mind," but entertain a "will" as well? Perhaps not; most judges are more pious than Judge Cardozo—and less sincere . . . . However, after making all allowances, there will be excellent people who cannot help feeling that the voice of this book is in a way the voice of heresy. It will disquiet them even more to know that it emanates from a judge who by the common consent of the bench and bar of his state has no equal within its borders; from one who by the gentleness and purity of his character, the acuteness and suppleness of his mind, by his learning, his

3. T. R. Powell, *The Logic and Rhetoric of Constitutional Law* in ESSAYS IN CONSTITUTIONAL LAW 89 (R. McClosky ed. 1957).
4. *Id.* at 87.
5. *Id.* at 90.
6. *Id.* at 96.
7. *Id.* at 83.

> moderation, and his sympathetic understanding of his time, has won an unrivaled esteem wherever else he is known. They will be troubled at learning all this; and they will be right to be troubled. When Brutus strikes, we had best fold our togas over our heads and resign our spirits to the darkness.[8]

There was to be a time of change in the thirties, a decade after Judge Hand wrote, but the judicial role then was largely concentrated at the constitutional level. Following World War II, there has been another period of change. But this time the judicial role at the constitutional level is being matched by vigorous judicial activity and innovation in the realms of the common law.[9]

Public criticism of this judicial activism has not been extensive, however, except in the constitutional law field. There, waves of lay protest have revealed a strong negative reaction by segments of the public to lines of decision affecting procedure in criminal matters, equal protection of the law in racial matters, religion in the public schools, and control of obscenity. While the professional criticism of much of the Court's work in these areas has been both on grounds of craftsmanship and on grounds of the Court's reaching beyond its appropriate limitations under our constitutional scheme, the public criticism has largely been on the latter ground; *i.e.*, that the courts have been imposing their own ideas about policy instead of "merely" applying the Constitution.[10]

As we have seen, the Holmes-Powell position asserts that this is exactly what judges have done and, to some degree at least, must do. This means that they cannot honestly purport to be governed by the impersonal, irresistible, and definitive operations of formal logic. But their being so governed was the justification for leaving judges free of the controls which, in one form or another, are imposed by a democratic society upon all of those whom it vests with some part of its power. Hence the traditional syllogistic form of the judicial opinion. If that does not control the decision, is there any other mode of control available which can function well enough to legitimize the power of the judges to decide cases? This effort to find a more or less objective basis for justifying the judicial

8. 35 HARV. L. REV. 479-81 (1922); JURISPRUDENCE IN ACTION, 235-38 (1953).

9. *See* Hyman and Newhouse, *Standards of Preferred Freedoms: Beyond the First*, 60 NW. U.L. REV. 1, 30-35 (1965). The recent rapid expansion of the liability of manufacturers of products for consumer use is another striking example. Pushed by case developments, the broadening liability was incorporated in the Uniform Commercial Code. These developments were sparked by the persistent efforts of able, well informed plaintiffs' attorneys whose compensation was assured under the contingent fee system of compensation by increasingly generous standards governing the amount of damages recoverable. In recent years a somewhat similar pressure for change in the substance of law is being exerted upon the common law courts by lawyers who, largely through governmental financial support, have been available to represent interests which have heretofore in our system been unable to pay the necessary compensation for effective, continuous legal representation. *See* Symposium, *The Availability of Counsel and Group Legal Services*, 12 U.C.L.A. L. REV. 279 (1965); Sax and Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967); Blum and Dunham, *A Dissenting View*, 66 MICH. L. REV. 451 (1968); Note, *Group Legal Services*, 79 HARV. L. REV. 416 (1965).

10. Some of the most important professional critiques are cited in Hyman, *Concerning the Responsibility and Craftsmanship of the Judge*, 14 BUFFALO L. REV. 347, 358, n.73 (1964).

decision, in the absence of control by formal logic, is one of the major concerns of those addressing themselves to jurisprudential problems today. But I would like to suggest that far too few of our scholarly legal resources are being devoted to this most urgent problem.

If we look for guidance to those who undermined the assumptions about the controlling voice of deductive logic, we get very little help. Thomas Reed Powell ventured that, at bottom, "[t]he logic of constitutional law is the common sense of the Supreme Court of the United States. That common sense may agree with ours, or it may not."[11] He was not prepared to concede that "In thus emphasizing the common sense element in the development of the law that is made by judges," he was "grossly overstating" his case.[12] But however much confidence we as laymen may have in the self-evident soundness of our own common sense, we hesitate to accept this thesis as a sufficient standard of reference for the judges and the courts. It still remains incumbent upon those who believe in the system to articulate standards which will provide some reasonably objective basis for distinguishing between various degrees of soundness in the process of arriving at judgments which we summarily categorize as "common sense."

Judge Cardozo did try to help. In the lectures which called forth Judge Learned Hand's worried comments, Judge Cardozo identified and examined those factors which he saw as the principal ones entering into the judge's reasoning process in arriving at his decisions. And Thomas Reed Powell did in fact go a little bit further than the above quotations indicate. He acknowledged that "the authority of the Supreme Court to interpret the Constitution is by no means an absolute authority."[13] But the restraints to which he pointed are neither very sharp in their impact nor, seemingly, very powerful: "It is limited in part by the law of the Constitution, in part by prevailing sentiments and by existing conditions."[14] Elsewhere in the paper he made brief reference to a more promising factor, when he pointed out that constitutional law has a history and that: "It seeks a consistency and a continuity that you and I are free to go without."[15] Thomas Reed Powell's practice as a penetrating critic of the work of the Court for many decades offers a substantial elucidation of the meaning of that cryptic statement.[16]

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11. Powell, *supra* note 3, at 87.
12. *Id.* at 95.
13. *Id.* at 93.
14. *Id.*
15. *Id.* at 98.
16. His monumental critique of the Supreme Court's historic invalidation in 1935 of the Railroad Retirement Act and the National Industrial Recovery Act concludes with the somewhat rueful observation that in the discussion: "Surely all the important things have been left unsaid. They have been left unsaid by the opinion and the comment thereon. Both opinion and comment reek with aridity and emptiness." Powell, *Commerce, Pensions, and Codes*, 49 HARV. L. REV. 1, 237 (1935). Yet he had a fierce pride that precision and intellectual honesty should control the legal profession's use of the formal tools of its craft. "Granted that in dealing with novel issues there are more open spaces in constitutional law than in the more tightly articulated private law, there is still appropriate in public law

The Supreme Court, like Anglo-American courts generally, is obligated to build its decisions upon intellectual threads which tie the old cases to the present case and which are capable of being tied to future cases. Hence the logical fit with other cases of the rules announced by the Court as its grounds of decision can be examined by lawyers and commentators; lapses can be revealed and criticized. And the largest part of the criticism of legal scholars has been just that kind of careful analysis of the Court's work. Indeed, at times it seems to become a game of matching wits with the Court, awarding it a sharply stated demerit if the commentator can detect a flaw in the Court's formulation of its ground of decision, or hypothesize a case which seems to fit within that formulation but which the Court would seem unlikely to decide that way.

This type of critique leans very strongly in the direction of imposing a requirement which approaches as close to that of deductive logic as the circumstances allow. If the courts are tied to rules, if they must plainly, unequivocally state clear rules which are logically supportable by prior cases or are declared to be the operative rules of decision in prior cases, and if they point unswervingly to the decision of future cases, then the controls so eagerly sought will be substantially present and the process will retain its legitimacy.

It is no accident that the focus is upon the rules, upon emphasizing the basic element in the role of the judge as typically and normally involving the application of the right rule selected or fashioned from a storehouse of rules duly accredited for judicial use. So conceived and presented, the system need not fear the challenge that it provides an opportunity for the exercise of uncontrolled power by individual judges in the decision-making process.

Accordingly, the focus of much recent writing concerned with the justification of judicial decision making, like the positivist tradition in jurisprudence generally, has sought to find anchorage by giving a dominant role to rules. Professor H. L. A. Hart's, *The Concept of Law* (1961), which, because of its lucidity, learning, and precise analysis of the central problems must be the starting point for the development of a modern theory of legal justification, makes rules the focal consideration. It distinguishes between primary rules, which impose obligations, and secondary rules, which govern the development

an instinct of lawyership which the experts of a high profession should strive to respect and to possess." Powell, *Insurance as Commerce in Constitution and Statute*, 57 HARV. L. REV. 937, 988 (1944). Two of the lapses which he was always alert to are indicated in the following comment from the same article (at 982): "Some follower of Supreme Court doings has said that Mr. Justice Black sets before himself the idea of writing judicial opinions so that they can be understood by intelligent laymen. Whether this rumor derives from avowal or from observation and analysis, it is in one sense justified by the product. Mr. Justice Black's sentences have a verbal directness and lucidity that exemplify great skill in the practice of the persuader's art. Nevertheless, what may be completely clear so far as the words go, may not give to the previously untutored layman a full realization of all that lies behind the words. A word is not a crystal, we have been told. Some words have acquired a technical meaning that is tighter than their possible colloquial connotations. So also, many statements that are undeniably true may be irrelevant to the problem in hand."

A careful study of Professor Powell's critiques would provide useful material for a catalog of rules of correct legal reasoning.

and application of primary rules. Professor Richard Wasserstrom in his re-examination of *The Judicial Decision* (1961) offers a two level theory of justification in which a refined version of utilitarianism is employed to establish the grounds for selecting the rule to be applied in the particular case. Similarly Professor Herbert Wechsler's much debated attack upon the Supreme Court for its failure to articulate neutral grounds of decision in constitutional cases appears in large part to be a demand that constitutional limitations be invoked by the Court to invalidate state or Congressional action in a given case only if a rule capable of clear future application can be formulated as the ground of decision.[17]

This preoccupation with law as a system of rules has, along with the pragmatic growth of the Anglo-American legal system, severely discouraged the development of a modern, generally acceptable logic of legal justification which might serve as a basis both to facilitate the training of lawyers and to develop communicable standards for evaluating judicial performance. As stated above, the most common form of highly regarded legal scholarship is primarily a sort of oneupmanship with rule analysis; that is, the ground of decision advanced by a court is examined under the microscope of the most acute, subtle, and imaginative legal minds. The predominant logical analysis takes essentially three forms: the deductive rigor of the reasoning from the given premises, a meticulous re-examination of the facts in the prior cases and in the instant case as a basis for challenging the extent of significant over-all likeness or difference; and a sophisticated kind of reductio ad absurdum—the extraction of implications from the stated grounds of decision which the Court would presumably refuse to apply in hypothesized future cases. The slashing academic criticism of the Supreme Court in the last ten years is largely of this character.

Such criticism is clearly an appropriate part of the scholarly enterprise, especially when it is accompanied by efforts to reformulate the rule in a way which reduces the force of the objections. But, however brilliant, it can become a rather arid intellectual game, in which the writers preen themselves, however genteelly, in discovering fine points that no one else has perceived. And it keeps the criticism largely on an ad hoc level, presumably with the justification that if the judges are lectured and scolded often enough for their performance in individual cases, their level of performance will gradually improve.

Readers who have been exposed to American legal education will recognize the foregoing description as equally applicable to the traditional large American law school classroom with its so-called Socratic method. The professor picks students apart for the deficiencies in their effort to criticize the rules stated in the opinions in the cases under discussion and to formulate better rules. Anglo-American lawyers have been taught this way for some 800 years. Hence the method has a certain historical sanctity as well as a pragmatic efficacy, at least

17. *See* Mueller and Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A. L. REV. 571 (1960).

insofar as the best students are concerned, attested by the persistent eagerness of large law offices to hire the high ranking graduates of the law schools. But the efficiency of this method, and particularly its efficacy for the average student, are fairly debatable. And such debate would seem to be especially appropriate now when professional legal education is undergoing a period of highly critical, even radical, self-evaluation, as well as an erosion of the rigorously mathematical ranking system which has for so long surgically separated the sheep from the goats among law students.

If we are to start working toward the development of a generally acceptable logic of legal analysis, we must, as stated before, escape from our habitual preoccupation with rules. Professor Ronald M. Dworkin has provided us with a firm point of departure in his brilliant examination of Professor Hart's reformulation of legal positivism: *Is Law a System of Rules?*[18] Professor Dworkin challenges the rule model partly because of its failure to take account of the large role played by principles in the actual working of our legal system. But he also attacks the rule model, as formulated by Professor Hart, because it appears to leave the judge with unfettered discretion when he must introduce new rules or change old ones; a discretion which Professor Hart appears to regard as broad as that of the legislature. Any such concession as to the scope of judicial freedom threatens the legitimacy of the judicial power. Hence the need to assure the continuing legitimacy of the judicial decision is an important reason for searching for limiting principles of a reasonably objective character beyond the area of rule manipulation. That need does not, of course, guarantee that such principles can or will be found. But the search need not be one undertaken wholly in desperation. It seems clear that by far the largest part of the legal profession believes that judges in fact operate under constraints, however unsatisfactory our progress may have been in articulating them. Furthermore, one may reasonably proceed on the assumption that there is some foundation for so persistent a conviction. Recent writing furnishes grounds for hope that the search can be fruitful. Professor Dworkin's analysis of the notion of discretion, for example, makes an exciting start toward harnessing a concept which has been absolutely indispensable to the functioning of the legal system, but which has been used about as freely as the deuces in a certain variety of poker game.

If we cannot take a stance on law as a system of rules, we must look for another starting point from which to build a logic of legal reasoning. In undertaking this task, it will obviously be desirable to begin with some explicit notion of the kinds of pressures to which such a logic will serve as a counterweight in order to design it more effectively. The persistence across the centuries of the contrast between "will" and "law" suggests that it may be useful in this regard.

Professor Paul Freund, although one of the outstanding critics of judicial performance in the traditional manner, has, unlike many of them, made a rather

18. 35 U. CHI. L. REV. 14 (1967); *reprinted in* ESSAYS IN LEGAL PHILOSOPHY (Summers ed. 1968).

softly spoken effort to identify the characteristics of legal logic in his paper on *Rationality in Judicial Decisions*.[19] Although asserting that he is less concerned with essaying a definition than examining a process in operation, he suggests:

> Rationality is a term of commendation, though not of ultimate praise; a decision may be rational and yet not command approval as a necessary truth or even as right. It is set off against non-rational modes like will, or power, or caprice, or emotion, against irrational modes like recklessness of means or ends or their relation, against rapacity or opacity. It is a warrant not so much of the soundness of a decision as of the course pursued—that the course of inquiry has been kept open and operating in appropriate ways and within appropriate termini.[20]

After running through the four factors which Judge Cardozo asserted to be involved in judicial decision making (logic, philosophy, history, and social utility), Freund discusses the limitations imposed upon the judge both by the procedural framework within which cases come before him and by the need to embody the decision in a judgment appropriate to the judicial mode of action.[21] He mentions devices generated within the legal system for minimizing the occasion for the collision of root beliefs,[22] and offers some insightful observations on creativity and bias.[23]

For present purposes, it seems most relevant to emphasize his identification of rationality by contrasting it with those bases of human decision making in action which it is not. And of these, it appears to me that the ones most nearly contrary are those which he calls "the non-rational modes like will, or power, or caprice." Of these, "caprice" and "will" seem to be the most readily opposed to rationality; for power may be at the service of rationality or of will. The dictionary suggests as much, but this hardly settles the matter. Further light may be found in the way in which Professor Chaim Perelman uses the concept of "charity" in his penetrating examination of the meanings of justice.[24] He finds as a basic element of justice that it

> is in conformity with a chain of reasoning . . . . It is in this respect, indeed, that justice stands in contrast to the other virtues. These, with their greatest spontaneity, bear directly on the real, whereas justice postulates the insertion of the real into categories regarded as essential. Charity is the virtue most directly opposed to justice. It can be exercised spontaneously, without calculation or preliminary reflection. Its aim is to relieve suffering, whatever it may be, regardless of any other circumstances . . . . The ideal of charity is unconditional and constitutes a categorical imperative. It is universal and is limited neither by

19. In *Rational Decisions*, NOMOS VII (Friedrich ed. 1961); *reprinted in* the collection of Freund's legal papers entitled ON LAW AND JUSTICE (1968).
20. P. Freund, *Rationality in Legal Decisions* in ON LAW AND JUSTICE 64 (1968).
21. *Id.* at 71.
22. *Id.* at 77.
23. *Id.* at 72-73, 77-78.
24. *Concerning Justice*, which originally appeared in Belgium in 1945. It is the first essay in his book entitled THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT (1963).

> rules, nor by conditions, nor by words. Charity is instinctive, direct, not open to discussion . . . . It is a stranger not only to any conception of system, but even to any form of reasoning. It dispenses with any discursive element.[25]

Charity is the impulse to do good in a concrete situation; it is thus not equivalent to caprice, which may be directed toward doing ill or good. But the way Professor Perelman describes the manner in which charity operates appears to define by negatives that which rationally governed action is not. In contrasting justice to charity, he concludes: "The administration of justice postulates reflection, discernment, judgment, reasoning. In this sense judgment is a rational virtue, the manifestation of reason in action."[26]

This is a crude starting point, albeit an essential one. To define rationality in its positive aspects, to devise a systematic statement of its appropriate form in the judicial decision-making process will be no easy task. Apart from all other difficulties, the effort will encounter the understandable resistance of the scholar to accepting a framework for his thought prepared for him by others. This element alone will make long and arduous the task of establishing by substantial consensus a working logic of legal reasoning. But if we are to achieve a better one than that expressed by Professor Davis' fractured metaphor in the epigraph to this paper, we have no choice but to make the effort in the law, and perhaps also in other areas of inquiry outside the hard sciences. As we seek to develop a legal logic, we will have to exercise constant vigilance to avoid falling back into the common trap in legal discourse of equating "reasoning" with demonstrative logic.

The distorting tendency to identify reasoning in law with formal logic is one of the realities of jurisprudence which makes Professor Perry's paper so valuable; that, and his reminder, to be discussed later, than once we abandon formal logic as our measure, we must acknowledge an element of responsibility in the decision-maker, and must not only extend to him a measure of trust that he will exercise that responsibility honestly, but also explore methods for reinforcing his endeavor.

Professor Perry would characterize the legal process as "reasoning" by bringing it into a respectable relationship with the accepted authoritative modes of reasoning among philosophers: deduction and induction. His suggestion is most persuasive; if it survives the scrutiny of his philosophical colleagues, the law will doubly welcome this attestation of the rationality of its processes of decision-making. In any event, it furnishes a new set of analytical tools for an articulated mastery of those processes.

That scrutiny is part of the on-going process of philosophizing which, as Professor Perry suggests briefly at the end of his paper, we do not hesitate to characterize as reasoning, even though whatever decisions are made or judgments

25. *Id.* at 40-41.
26. *Id.*

arrived at do not result from the use of a pure deductive method, or a pure inductive one, if there be such a thing. The decision here involved may be stated to be whether the proposed redefinition of reasoning should be accepted in the conceptual armory on the basis of a process of inquiry which may be described as philosophical discourse.

The question which suggests itself is whether the standard for acceptance of a philosophical concept is the same as that which should apply to legal decisions. The issue is most similar to Professor Perry's third type of judicial decision, involving the revision of an existing standard. There are principles and policies of philosophical discourse which, although they function as guides rather than strict norms, should, if properly applied, indicate whether the proposed revision ought to be accepted. And the consensus of competent, disinterested philosophers would serve as a measure of the correctness of the result.

One large gap in the analogy between judicial decisions and the acceptance or rejection of a philosophical proposition is the absence of an identified group of philosophers charged with responsibility for making an authoritative and binding determination, in the manner of a supreme court for philosophical concepts. In deference to the legalistic aversion to purely advisory opinions, we might require that the issue be turned into an immediate controversy involving the claim of one philosopher that his interest in the validity of a threatened concept was being impaired. Even if this were done, as things stand, the advocate-philosopher is still presenting his case to the entire polis, not to an authorized tribunal, and no articulated decision is required.

At first glance, there would seem to be a further difference in that for the philosopher it is not an all-or-nothing matter as for the lawyer presenting a case before a court. The philosopher may lose, in that his proposal may not gain acceptance, and yet his credit with the philosophical community is not forfeited but may be enhanced. But however sad for the client, a lawyer's loss of a case does not necessarily destroy his professional standing. Why not? In both situations, the reason is that the advocate or proposer has followed well the standards, informally developed over centuries of experience, which guide, respectively, philosophical and legal discourse. They include deduction and induction, but are not confined to them. Various considerations are assessed for their relevance, and, if determined to be relevant, for the comparative weight to be accorded to them in the light of other relevant considerations.

These valuations reflect not only the purposes of the process, but also the general view of the world which prevails in the setting in which the discourse takes place. Too great a departure from the latter would discredit the argument because it would utilize assumptions which, in the prevailing state of knowledge of nature, man, and society we do not regard as "reasonable" working assumptions. At the outer limit of this requirement is that degree of disassociation from the realities of the external world which could lead to a judicial determina-

tion that the person lacked the mental competence necessary for safe functioning in society, and should therefore be committed to an institution.

Short of that outer limit there are among individuals degrees of mental competence manifested by varying abilities to grasp distinctions and to perceive novel relationships. To fail to heed a distinction which is perceived and which is pertinent under the standards, is, of course, a failure to reason correctly. But is it a failure of "reasoning" not to take account of unperceived distinctions or relationships?

It is not easy to tell whether a person who purports to be reasoning but who deviates from a course of reasoning which a trained consensus characterizes as correct does so because he refuses to follow the standards or because of limitations of comprehension. If the deviation suggests a lower level of competence than that which a person occupying the role would be expected to possess, we infer that he is not attempting to follow the standards, but is being influenced wholly or partially by a consideration which is not licit under the standards, such as caprice or a predetermination to reach that result (will). Professor Perry adverts to this when he observes that in some instances of Type One judicial decisions "there is hardly any way that he [the judge] can avoid the legally correct result without raising suspicions of dishonesty."[27]

The Anglo-American legal system has struggled with all of these problems for several hundred years, within the judicial system, in its attempts to articulate different standards of reviewability in the various stages of the judicial proceedings. This is generally not so with respect to the selection or application of the governing rule or standard; the reviewing authority makes its own determination, giving only such weight to the reasoning of the initial decision maker as it believes it to deserve. The forms to which I refer operate chiefly in the realm of fact-finding. Professor Perry gives only passing notice to that phase of judicial decision making, but it exemplifies some of the same problems of justification, reasoning, and rationality. When the jury is the fact finder two different standards are applied in reviewing the process of imperfect induction which it applies to the reconstruction of past events. If the court concludes that on the evidence no "reasoning mind"[28] could have found the facts to be as the plaintiff alleged them, the jury's verdict for the plaintiff is set aside and his case is dismissed. The implication is that the jury did not follow the prescribed rules and relied upon improper considerations. However, if the judge concludes that a verdict for the plaintiff is within the range of acceptable reasoning, but is against the weight of the evidence as he appraises it, he may set the verdict aside and order a new trial. This action probably reflects a doubt about whether the jury followed the rules; a second similar verdict by another jury generally is taken to resolve the doubt.

27. Perry, *supra* at 235.

28. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 596 (1965), suggests this illuminating phrase rather than the traditional "reasonable man."

There are numerous other instances of similar devices. Disqualification of judges and jurors for bias and interest is part of the picture. This device attempts to forestall extreme situations in which personal involvement in the outcome would be very likely to produce a breach of the rules. Also part of the picture are standards applied by courts in passing upon the constitutionality of legislation, standards which vary depending upon the weight of the interests being regulated.[29] It would seem that an intensive re-examination of these common law tests of rational decision making, developed empirically during centuries of judicial activity, would yield some additional propositions in a logic of legal reasoning.

At least one factor which might emerge is a requirement of some minimal level of competence in grapsping relevant considerations and in conducting the logical processes involved: Professor Freund's "opacity."[30] This would provide a very crude check upon whether or not the decision maker was subjectively attempting to conform to the standards of the process. Other standards might involve the identification of competing principles relevant to the case, of the weights accorded to them, and the reasons for the choice and the weighing.

Even if other standards of control can be found, it is likely that the most important check must be the integrity of the decision maker; the presence of a professional conscience to control his id.

I believe that Professor Perry goes to the heart of this matter when he concludes that traditional judicial justification can count as reasoning "if the judge lives up to the standards of his calling,"[31] involving in general a "judicial temperament" or a "judicial point of view."[32] This means in essence limiting to the unavoidable minimum what I have referred to above as the elements of caprice and will. This limitation involves at least two aspects. One is the stance taken by the decision maker. Does he, recognizing that his psycho-social self will influence his sense of relevance in selecting the governing principles and assigning their relative weight strive, in accordance with the standards of legal logic explicitly applied, to reach the one decision which for him is right? Or does he, as a self-conscious maker of policy, deliberately select that one of two or more rationally defensible decisions which he believes will best further his ideal of a good society? The line may be fine, but I suggest it reflects a meaningful difference in the attitude with which the task is approached and therefore will color its performance. Professor Perry's test of reasoning demands the

29. Some of the applications of traditional standards for judicial review are examined in Hyman and Newhouse, *supra* note 12, at 8-27, 44-50.

30. Freund's "opacity." *On Law and Justice*, *supra* note 20, at 64. Appellate courts on occasion, in order to sharpen the analysis of the lower courts as well as administrative agencies, require them to better articulate their grounds of decision; *e.g.*, *NLRB v. Metropolitan Life Insurance Company*, 380 U.S. 438 (1965); *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966).

31. Perry, *supra* at 234-35.

32. *Id.*

former approach. And if Demos is to pursue the matter this closely, I think this one would be better calculated to ease his fears.

Another aspect of this problem is the responsibility, shared by the judge, and by the legal institutions which both establish his standards and shape his sensitivity to them, to establish an awareness of the nature of biases and their mode of operation. As Professor Freund states it, all too briefly, "reason should not lightly assume that one's biases deserve the strength they have or that they would not be amenable to further scrutiny."[33] Despite the divergent theories of human personality which vie with each other both in academic halls and in the clinic, there is a sufficient core of agreement about the impact of the unconscious self to make it hard to defend the continuing neglect of a systematic application of that insight to the process of judicial decision making.[34]

The foregoing discussion, it is submitted, points to the need for a sustained, intensive and coordinated effort by legal scholarship. It must include broad participation in the critical screening of each step, a process which is far more common in the hard sciences than in the social or behavioral sciences. One major obstacle to the mobilization of such an effort is that both the effort and its purpose provoke the deep resistance of the contemplative scholar to constraints upon either the subjects of his inquiry or the forms within which his inquiry shall proceed. Furthermore, the effort demands collaboration with related disciplines, many of which suffer as much as jurisprudence from fundamental conflicts about basic premises, as well as about modes of inquiry. Unfortunately, there are in the social and behavioral sciences far too few of those landmarks of firm, almost unassailable knowledge, which set limits to the theoretical roaming of the theoreticians in the hard sciences when they are seeking solutions to new and difficult problems.[35] The effort also means maintaining an open-minded approach to newer movements in other disciplines despite the excessive zeal of many of their proponents.[36] And yet in making such approaches we must remain aware that certain aspects of the law's task may

33. *On Law and Justice*, *supra*, note 20, at 77.

34. Professor Harold D. Lasswell's *Afterthoughts* to the 1960 edition of his 1930 PSYCHOPATHOLOGY AND POLITICS, 269, 311 explain why he believes that developing techniques of social control may be able to further the aim of making "it possible for human beings to develop into adult personalities whose unconscious processes support rather than frustrate the achievement of a mature level of democratic participation." Without going that far, one may find it hard to escape the proposition that, given the impact of personality factors upon behavior, "[b]y the systematic study of intelligence and appraisal functions we can hope to devise methods that increase the realism of perception in the decision process." *Id.* at 315.

35. This is well illustrated in J. WATSON, THE DOUBLE HELIX (1968).

36. The Symposium on *Jurimetrics*, 28 LAW & CONTEMP. PROB. (Winter 1963), covers a wide range of approaches and of zeal in their presentation. Professor Reed Dickerson, who warns that we should remain wary of technological panaceas, nevertheless urges that the dialog with scientists, mathematicians, and engineers be continued "in hopes that sooner or later we can make clearer to them the nature of the legal process." *Id.* 53, 70. But we must first make it clearer to ourselves. The article in the same symposium by Professor Layman E. Allen and Mary Ellen Caldwell, *Modern Logic and Judicial Decision Making: A Sketch of One View*, offers a promising framework for holding the over-all legal process in focus while working more intensively on some aspects.

preclude the utilization of techniques which seem more precise and objective than those the law has been using. H. Thomas Austern pointed out in a recent lecture at Harvard that although "courts in the past have unconsciously used crude forms of probability in reaching their decisions, judges feel that statistics are not applicable to individual, unique cases; they feel that statistics must rely on large numbers for accuracy."[37]

Whatever the difficulties, it does not seem that we can forever rely upon "common sense" or "a sense of smell for intellectual quicksand." Materials of a high quality are available, both to provide starting points and guidance for a coordinated effort. In addition to Professor Perry's keystone contribution and the writings cited above, mention should be made of Professor Julius Stone's massive identification and illuminating discussion of relevant materials bearing upon the ideals of law and upon its interaction with the social sciences, as well as those bearing upon the modes of judicial thinking.[38]

37. Harvard Law Record, Dec. 12, 1968, at 3. *See* People v. Collins, 68 Cal. App. 2d 319, 66 Cal. Rptr. 497 (Sup. Ct. Cal. 1968), rejecting probability evidence in a criminal case.

38. J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS (1964); J. STONE, HUMAN LAW AND HUMAN JUSTICE (1965); and J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE (1965).