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JUDICIAL DECISION AS PARADIGM: CASE STUDIES OF MORALITY AND LAW IN INTERACTION*

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I wish further to acknowledge the encouragement of the late Professor Lon L. Fuller of Harvard Law School who responded favorably to some of the basic ideas advanced in this Article when he commented on a larger manuscript in 1972. Finally, I should advise the reader that a number of revisions in my normal writing style have been made to conform to that of the *University of Florida Law Review*.

Since the time when this Article was initially accepted for publication, two of the great figures of jurisprudence have passed from our scene. I find it appropriate, therefore, to dedicate this Article to the memories of my teacher the late Professor Julius Stone of the University of New South Wales and of the late Professor Chaim Perelman of the Free University of Brussels.

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I. An Introduction to Legal Conceptualism: The Case of the Clever Car Thief

Jimmy Myers came up with an interesting little racket. He bought wrecked cars and then found similar ones to steal. He removed the engine and chassis numbers from the wrecked cars and attached them to the stolen cars. He then sold the stolen cars with the legal papers of the wrecked ones. A small flaw, however, developed in his scheme. The cylinder block number had been indelibly stamped on the engine and could not be removed. Hence, when Myers was caught and brought to trial, the prosecution introduced in evidence the records of the car manufacturer to show that the cylinder block numbers of the stolen cars did not match the engine and chassis numbers that had been fraudulently transferred from the wrecked cars.

Myers objected to that evidence. The person testifying as to the contents of the manufacturer's records had not personally entered the cylinder block number. Admission of the records would therefore constitute hearsay. The prosecution could not use that evidence unless it could show the evidence qualified under an established exception to the rule prohibiting the admission of hearsay.[1] For example, the records would be admissible if the prosecution could show the persons who made the entries were dead.[2] Unfortunately, no one knew who made the entries, and it was impossible to know whether any of those persons were alive. Likewise, had the records been public, they would have qualified under an established exception.[3] The records, however, were privately maintained by the car manufacturer and fell within no recognized exception to the hearsay rule.[4]

The prosecution's only prospect was to argue that the rationale of the hearsay rule justified the recognition of an exception in circumstances such as those of the present case. The Solicitor-General must have been very pleased indeed when the Court of Criminal Appeal concluded: "In our view the admission of such evidence does not infringe the hearsay rule, because its probative value does not depend on the credit of an unidentified person but rather on the circumstances in which the record is maintained and the inherent probability that it will be correct rather than incorrect."[5] When judgment on the appeal was given in the House of Lords, the Solicitor-General must again have smiled upon hearing Lord Reid comment on the view of the Court of Criminal Appeal: "That if I may say so is undeniable as a matter of common sense." The General's face must have fallen, however, when he heard the end of the sentence: "[B]ut can it be reconciled with the existing law?"[6] Lord Reid found that it could not, no matter how much sense it might make. Unfortunately for the General, the majority took the view that courts must no longer engage in

1. Myers v. Director of Pub. Prosecutions, [1964] 2 All E.R. 881 (H.L.).
2. *Id.* at 889; Andrews, *The Shackles of Rigidity and Formalism*, 27 Mod. L. Rev. 606, 607 (1964).
3. [1964] 2 All E.R. at 887, 892; Andrews, *supra* note 2, at 608.
4. [1964] 2 All E.R. at 890.
5. R. v. Myers, [1964] 1 All E.R. 877, 881 (Crim. App.).
6. [1964] 2 All E.R. at 887.

development of the law as they had during the evolution of the exceptions to the hearsay rule. On that era, Reid commented:

> One might hazard a surmise that when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently far to meet that case, and without regard to any question of principle. This kind of judicial legislation, however, became less and less acceptable and well over a century ago the patchwork which then existed seems to have become stereotyped.[7]

Judicial legislation would now be unthinkable.[8]

Lord Morris of Borth-y-Gest was of similar opinion.[9] He noted that "for years past it has been recognized that legislation is needed in order to modify the created edifice of the law of evidence."[10] Regrettably, however, that modification would, in his view, require legislative action.[11] His sentiment was shared with equal conviction by Lord Hodson, who condemned the proposed modification as blatant judicial intervention.[12]

Because those three Lords constituted a majority of the panel, adaptation of the law of evidence was left to the Parliament. Effective action by the legislative body would be problematical, given the difficult nature of the task.[13] Even more insurmountable would be the legislature's burden if it wished to instruct the courts to allow the rules to evolve in a commonsense fashion and

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7. *Id.* at 884.

8. Lord Reid thought the Lords must not interfere with the province of the legislature because:

> [I]f we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty. If we disregard technicalities in this case and seek to apply principle and common sense, there are a number of other parts of the existing law of hearsay susceptible of similar treatment, and we shall probably have a series of appeals in cases where the existing technical limitations produce an unjust result.

Id. at 885. On that reason, Goodhart commented that it amounted to saying "that you ought not to do a just thing today for fear that you might have to do a juster thing tomorrow." Goodhart, *Exceptions To The Hearsay Rule*, 80 L.Q. REV. 457, 461 (1964) (citing F. CORNFORD, MICROCOSMOGRAPHIA ACADEMICA 15 (4th ed. 1949)).

9. After canvassing the absence of justification for refusing to hear this evidence, he commented:

> All this may suggest that some modification of the law could without dangerous consequences and with advantage be made. The existing exception to the hearsay rule which admits evidence of declarations in the course of duty is, however, subject to the firmly established condition that the death of the declarant must be shown. It would be a positive alteration of the law to say that the condition need no longer be satisfied.

[1964] 2 All E.R. at 889.

10. *Id.* at 890.

11. *Id.*

12. "[T]his surely would be judicial legislation with a vengeance in an attempt to introduce reform of the law of evidence which, if needed, can properly be dealt with only by the legislature." *Id.* at 893.

13. "The snag of Lord Reid's view that it is for the legislature to bring in a reform is the slowness of the legislature itself to react to the needs of law reform and adaption. He himself admits that it is long overdue in this field." Andrews, *supra* note 2, at 610.

save Parliament the trouble of attempting to solve every little problem that happened to come along.[14] Because of its stubborn insistence on sticking to the letter of the law, *Myers v. Director of Public Prosecutions* is a prime example of modern English formalism,[15] an approach to law often known as conceptualism.[16] The formalistic rigidity of *Myers* also earned the decision strong condemnation.[17]

The most distinguished critic of the decision was the American-born Editor of the noted *Law Quarterly Review,* Sir Arthur L. Goodhart, Q.C., Master of University College and previous incumbent of the Chair of Jurisprudence at Oxford.[18] Goodhart was certainly not known for unconventional jurisprudential views, but his criticism of the decision is unflinching. Interestingly enough, in the very same issue that his criticism appeared, Goodhart penned a memorial to Dean Roscoe Pound, praising him for his fundamental contributions to jurisprudence, especially the notion that law "is an essential part of our civilisation as a whole."[19] The convergence of *Myers'* blatant reaffirmation of rigidity with the close of Pound's illustrious career is intriguing because Pound had devoted a major portion of his academic energies to the struggle against the formalism of conceptualism.

II. The Controversial Nature of Judicial Decision

The conceptualist approach of the *Myers* majority demonstrates clearly that Pound's life-long campaign was not successful, especially in England. Why would conceptualism remain so potent a force in thinking about law? The judgments in *Myers* indicate the basic concern was legal certainty. To the conceptualists, Pound's campaign against conceptualism was an attack on law itself, a flirtation with the yawning chasm of skepticism. The result of such an attack would be no law at all, anarchy. That anguish provides insight into the ongoing controversy regarding judicial decision. Is it simply a matter of applying the law? Or is the idea of law an illusion, a spectre that vanishes in the clear sight of skepticism? Any critic who dared to refuse that drastic choice would be caught, as was Pound, between conceptualism and skepticism.

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14. Goodhart comments: "There is much to be said for the judicial adjustment of the common law because it leaves the law more flexible. A mixture of statutory and of judge-made law is rarely a happy one." Goodhart, *supra* note 8, at 463.

15. Andrews, *supra* note 2, at 606, borrows the words of one of the dissenting judges as the title for his review: "The Shackles of Rigidity and Formalism." *Cf.* Goodhart, *supra* note 8, at 463 (questioning the extent to which judicial development of the law is still possible after *Myers*).

16. Though it is possible to offer fine distinctions between formalism and conceptualism, so far as suggesting a rigid or mechanical quality in law, the two are normally taken as synonymous and will so serve for purposes of this article. *See* H. Hart, The Concept of Law 126, 249 (1961) (employing the terms interchangeably, while recognizing a degree of imprecision in their general usage). For a more recent comprehensive statement of formalism, *see* Moore, *The Semantics of Judging,* 54 S. Cal. L. Rev. 151, 157-67 (1981).

17. Andrews, *supra* note 2, at 610, also condemns the decision because "it will certainly hamper the work of the police" since "in many cases of this type it is not easy to get alternative conclusive evidence."

18. *See generally* Goodhart, *supra* note 8.

19. Goodhart, *Professor Roscoe Pound, 1870-1964,* 80 L.Q. Rev. 482, 485 (1964).

A. *Between Conceptualism and Skepticism*

Pound's most famous condemnation of conceptualism is found in his classic 1908 article excoriating mechanical jurisprudence.[20] Pound's approach was always characterized by his look at the larger view, seeing law in both historical and societal perspective. Hence, he found that formalism in law was characterized by "periods in which science degenerates, in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence."[21] Pound thought the time had come for an end to the formalism of conceptualism in law:

> Jurisprudence is last in the march of the sciences away from the method of deduction from predetermined conceptions. On the continent of Europe, both the historical school of jurists and the philosophical school, which were dominant until at least the last quarter of the nineteenth century, proceeded in this way. The difference between them lay in the manner in which they arrived at their fundamental conceptions. The former derived them from the history of juristic speculation and the historical development of the Roman sources. The latter, through metaphysical inquiries, arrived at certain propositions as to human nature, and deduced a system from them. This was the philosophical theory behind the eighteenth-century movement for codification. Ihering was the pioneer in the work of superseding this jurisprudence of conceptions (*Begriffsjurisprudenz*) by a jurisprudence of results (*Wirklichkeitsjurisprudenz*). He insisted that we should begin at the other end; that the first question should be, how will a rule or a decision operate in practice?[22]

Pound undoubtedly had in mind the kind of "rigid scheme of deductions from *a priori* conceptions"[23] found in the remarkable and almost interminable 1918 diatribe of John M. Zane against German legal philosophy.[24] As World War I ground tediously to a close, Zane endeavored to expose the necessarily totalitarian character of German legal thinking. Incredibly, the primary targets

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20. Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

21. *Id.* at 607. Pound offers an illustration of such a period:

> Roman law in its decadence furnishes a striking example. The Valentinian "law of citations" made a selection of jurisconsults of the past and allowed their writings only to be cited. It declared them, with the exception of Papinian, equal in authority. It confined the judge, when questions of law were in issue, to the purely mechanical task of counting and of determining the numerical preponderance of authority. Principles were no longer resorted to in order to make rules to fit cases. The rules were at hand in a fixed and final form, and cases were to be fitted to the rules. The classical jurisprudence of principles had developed, by the very weight of its authority, a jurisprudence of rules; and it is in the nature of rules to operate mechanically.

Id.

22. *Id.* at 610 (emphasis in original). Pound further states: "The idea of science as a system of deductions has become obsolete, and the revolution which has taken place in other sciences in this regard must take place and is taking place in jurisprudence also." *Id.* at 608.

23. *Id.* at 608.

24. Zane, *German Legal Philosophy*, 16 MICH. L. REV. 287 (1918).

of Zane's wrath were Pound's heroes Rudolph von Ihering and Josef Kohler[25] who had struggled so mightily to break the formalistic bonds of German conceptualism. The obvious reason for this surprising irony was Zane's personal dedication to conceptualism:

> The theory that courts make law is the thesis maintained in Gray's Nature and Sources of Law, but the very instances he cites prove that courts do not make law, for the simple reason that the cases he cites are all based on pre-existing rules. Any opinion can be read and the decision will be seen to be a deduction from a more general rule. An application of a rule to a new case does not make a new rule.[26]

Despite Zane's extensive discussion of Ihering and Kohler, almost no reference is made to Pound's pathbreaking work bringing those ideas to Anglo-American attention.[27] Zane dismisses "the Sociological School of jurists"[28] and makes clear his disdain for Pound's campaign against conceptualism.[29]

Zane was clearly irked by Pound's manifesto for sociological jurists (1) as advocating concern with the working of the law rather than its abstract content and (2) as urging that legal precepts "be regarded more as guides to results which are socially just and less as inflexible molds."[30] Nor could Zane have been pleased by statements such as: "Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from

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25. *See id.* at 360-74.

26. *Id.* at 346. Zane continues:

> It happens that we as well as all civilized countries have judicial tribunals. These judicial tribunals ascertain as best they can what are the general rules of law. They do not consciously invent rules for they all recognize that any judgment which they give is founded upon a major premise which must be an existing rule of law. If they do not do this, they are not performing a judicial act....
>
> ... Law is a concept, a generalized abstraction attained by mental processes. Generalized concepts such as horse are type ideas which result from observation, but a generalized concept like law is itself a higher abstraction from other abstract notions, which exist only in the mind. The various rules of law are themselves abstract generalizations. The attempt to define law is simply the attempt to find what the various abstract rules have in common. It is not coercion by state power because that element is no part of the abstract rules. It is not the fact that it is laid down by a superior power because the rules have not that element in common. It is not the fact that the rules are stated by courts, for that fact is not a common element. Nor do any of these facts enter into the abstraction.... [T]he laws of thinking, ... the truths of history and ... the demands of justice, ... all require a rule of law antecedent to a judicial decision.

Id. at 346-48.

27. Pound is named once in the text, *id.* at 352, and in only one footnote, *id.* at 325 n.58. He is discussed, without mentioning his name, *id.* at 351-52 & 351 n.85. At n.85, Zane refers to two of Pound's three-part articles by volume number only, omitting author, title, page, and year. Moreover, he is completely wrong as to two of the four volume numbers! Needless to say, all of the references are contemptuous and vitriolic.

28. *Id.* at 352.

29. *Id.* at 350-52.

30. Pound, *The Scope and Purpose of Sociological Jurisprudence* [concluded], 25 HARV. L. REV. 489, 516 (1912). This is one of the articles so incompletely cited by Zane, *supra* note 24, at 351 n.85.

them. Principles cease to have importance. The law becomes a body of rules. This is the condition against which sociologists now protest, and protest rightly."[31] Zane probably felt a substantial degree of vindication, however, at the subsequent fate of Pound's campaign for attention to the consequences of law. As quoted above, Pound was excited by Ihering's campaign to replace the jurisprudence of conceptions with "a jurisprudence of results."[32] However, *Wirklichkeitsjurisprudenz* is more accurately translated as a jurisprudence of realities or actualities than of results.[33]

This concern for "reality" superseded Pound's own campaign for sociological jurisprudence in the loyalties of many American lawyers. Pound's student Karl Llewellyn found sociological jurisprudence not sufficiently realistic and in 1930 announced the time had come for greater realism.[34] Zane undoubtedly took delight in the predicament of Pound arguing with Llewellyn over who was sufficiently realistic.[35] Zane's vindication, however, must have resided primarily in his prevision that abandoning the certainty of conceptions would lead to the utter chaos of legal realism. Such a degradation would be inevitable, in Zane's view, once Pound stepped onto the slippery slope that denied the immutability of conceptions.[36]

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31. Pound, *supra* note 20, at 612.

32. *Id.* at 610.

33. Pound himself subsequently revised his interpretation.

> It was a distinct advance when Ihering's demand for a jurisprudence of actualities led to looking at legal precepts and doctrines and institutions with reference to how they work or fail to work, and why. In keeping to this attitude the new realists are carrying on the best tradition of the last generation.

Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 706 (1931).

34. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 431 *passim* (1930).

35. Pound responded to Llewellyn as follows:

> There is not and cannot be the perfect uniformity and mechanical certainty of result which the last century believed in. The dogma of a complete body of rules to be applied mechanically was quite out of line with reality. It is just as unreal and unjustifiably dogmatic to refuse to recognize the function of the quest for certainty as contributing to the general security. It is just as dogmatic and unreal to be blind to the extent to which the administration of justice attains certainty through rule and form and the extent to which the economic order rests thereon. It is just as unreal to refuse to see the extent to which legal technique, with all its faults, applied to authoritative legal materials, with all their defects, keeps down the alogical or unrational element or holds it to tolerable limits in practice.

Pound, *supra* note 33, at 706-07.

36. Zane refrained from direct comment on either Pound or his younger adversary, at least after 1925. He did, however, reiterate his dark opinions of Kohler and Ihering. Zane, Book Review, 35 YALE L.J. 1026 (1926) (reviewing P. VINOGRADOFF, CUSTOM AND RIGHT (1925)). He also took occasion to reaffirm his conceptualism in the course of a tribute to Dean Wigmore's work in comparative law.

> [A]mong all races who have reached the stage of what is called civilization, the most general principles of law are practically the same. The essentials of the human mind and its social actions in, and reactions to, the varying governmental institutions under which a system of law exists continue the same. The forms of institutions and governments may vary, but in the application of law to the ordinary civil relations in any social organization, the development of the rules has been practically the same as civilization has advanced.

Zane, *A Pioneer in Comparative Law*, 29 ILL. L. REV. 456, 456-57 (1934).

Llewellyn more than fulfilled the direst expectations Zane could possibly have entertained. Where is the certainty of legal rules when it is possible to say:

> Do I suggest that (to cut in at one crucial point) the "accepted rules," the rules the judges say that they apply, are without influence upon their actual behavior? I do not. I do not even say that, *sometimes*, these "accepted rules" may not be a very accurate description of the judges' actual behavior. What I say is that such accuracy of description is rare.[37]

But that dose of realism, it turned out, was only the beginning. Once he warmed to the crusade, his evangelical ardor blossomed into the most memorable statement of the realist creed:

> [F]inding out what the judges *say* is but the beginning of your task. You will have to take what they say and compare it with what they *do*....And *rules* in all of this, are important to you so far as they help you see or predict what the judges will do or so far as they help you get judges to do something. That is their importance. That is all their importance except as pretty playthings.[38]

Such notorious statements are deservedly famous and were powerfully influential, despite the fact that Llewellyn subsequently qualified them sharply.[39] The die was cast and American legal thinking would never again be the same. A few years later a young Lon Fuller, engaged in amiable criticism, would coin the name "American Legal Realism" to distinguish Continental versions.[40] A "school" of legal philosophy had been born;[41] the spectre of skepticism would haunt subsequent American legal thinking. Generations of lawyers would find the very idea of conceptualism ludicrous and grotesque.

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37. Llewellyn, *supra* note 34, at 444 (emphasis in original). The revival of skepticism in legal theory in the context of a much more elaborate theoretical setting than realism is one artifact of the Critical Legal Studies movement. *See* Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

38. K. LLEWELLYN, THE BRAMBLE BUSH 14 (reprinted 1960) (emphasis in original) (originally published 1930).

39. *See id.* at 8-10 (Foreword to lectures). No doubt, some of the hyperbole can be attributed to Llewellyn's flamboyant personality as well as to his desire to hold the attention of the entering law students he was addressing. Nonetheless, these words have also been taken up as banners in the front lines of the cause, at least in the eyes of many would-be followers. They have had a profound influence, whether Llewellyn, in retrospect, wished they had or not.

See also K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960), in which Llewellyn states:

> It is true that there were a few misguided souls who, having observed with accuracy that often neither the established and accepted generalizations ("rules" of law) nor the ones a court in trouble was swinging around at the moment would fit into any comfortable simple pattern of prediction or of guidance, arrived at the strange conclusion that no generalizations in law got anywhere or meant anything. . . .In my own case. . .this lone lorn sentence became, internationally, *the* cited goblin-painting of realism.

Id. at 510-11 (emphasis in original)

40. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 438 (1934).

41. *See id.* at 430 & n.6 ("As the realists themselves insist, there is no realist 'school'.").

B. *Mechanical Jurisprudence Revived: Hart's Compromise Proposal*

It is important to note, however, that this skepticism is an artifact of *American* legal culture. English legal thinking remained relatively undisturbed in its conceptualistic tradition, having taken scant notice of the innovations of either sociological or realistic jurisprudence. Hence, when H.L.A. Hart, Goodhart's successor in the Chair of Jurisprudence at Oxford, crossed the Atlantic to address an American audience,[42] he found it necessary to cope with the pervasive skepticism of the American legal community. Hart's response was a compromise proposal: The truth about legal rules is that the conceptualists are partly right and the skeptics are partly right. Rules have "a core of settled meaning [the insight of conceptualism], but there will be, as well, a penumbra of debatable cases."[43] The latter is the realist contribution, and Hart explicitly recognized it as such.[44] The realists argued that the decision maker must exercise discretion, which Hart sees as applicable in the penumbra.[45] To such "problems of the penumbra," Hart conceded specifically that conceptualism could not apply. Applying legal rules "to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning...cannot serve as a model for what judges...should do."[46]

Hart's concession to the Realist skepticism of rules was an empty gesture, however, for he incorporated that "penumbral" skepticism into his positivist model.[47] The "penumbra," he says, is not really a Realist contribution, for John Austin had been highly sensitive to the necessity of judicial legislation in

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42. Hart delivered the Oliver Wendell Holmes Lecture at Harvard Law School in April 1957. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

43. *Id.* at 607.

44. The most skeptical of these critics—the loosely named "Realists" of the 1930's—perhaps too naively accepted the conceptual framework of the natural sciences as adequate for the characterization of law and for the analysis of rule-guided action of which a living system of law at least partly consists. But they opened men's eyes to what actually goes on when courts decide cases, and the contrast they drew between the actual facts of judicial decision and the traditional terminology for describing it as if it were a wholly logical operation was usually illuminating; for in spite of some exaggeration the "Realists" made us acutely conscious of one cardinal feature of human language and human thought, emphasis on which is vital not only for the understanding of law but in areas of philosophy far beyond the confines of jurisprudence.

Id. at 606-07. The "one cardinal feature of human language" to which Hart refers is the vagueness of the penumbra.

45. [I]f we are to say that these ranges of facts do or do not fall under existing rules, then the classifier must make a decision which is not dictated to him....Fact situations do not await us neatly labeled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision.

Id. at 607.

46. *Id.* at 607-08.

47. "[W]hen [legal rules] fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives." *Id.* at 612. In H. HART, *supra* note 16, at 124, Hart states "[i]f in such cases doubts are to be resolved, something in the nature of a choice between open alternatives must be made by whoever is to resolve them." *See also id.* at 125.

the penumbra.[48] In Hart's mind, only two real challenges remain. First, English conceptualists must be reminded of Austin's tolerance for judicial legislation,[49] an aspect of positivism never popular there even before the Law Lords in *London Tramways Co. v. London County Council* ruled that they were bound by their own previous decisions.[50] Second, American skeptics must learn that law does exist in the settled area of "central meaning which rules have."[51]

Hart thus presents a stark choice. Law consists only of rules narrowly understood. Anything else is legislation, a discretionary choice of the judge acting as legislator.[52] Does an alternative exist? Hart recognizes that one could "include in the 'rule' the various aims and policies in the light of which its penumbral cases are decided on the ground that these aims have, because of their importance, as much right to be called law as the core of legal rules whose meaning is settled."[53] In fact, such a view of the nature of rules has been popular among American legal thinkers who reject the extremes of Realism and conceptualism in favor of Pound's middle-of-the-road view. Pound himself said:

> One of the conspicuous actualities of the legal order is the impossibility of divorcing what they do from the question what they ought to do or what they feel they ought to do. For by and large they are trying to do what they ought to do. Their picture of what they ought to do is often decisive in determining what they do. Such pictures are actualities quite as much as the materials of legal precepts or doctrines upon which or with which they work.[54]

Hart finds that view unappealing, preferring to "decide the penumbral cases rationally by reference to social aims."[55] Apparently, Hart wishes to leave un-

48. *Id.* at 609 & 609-10 nn. 33-35.

49. Actually, Hart blames Blackstone for English conceptualism, on the basis that it derives from Blackstone's view that judges ' find" rather than "make" law. Hart, *supra* note 42, at 610. Hart's proposition is rather disingenuous from the standpoint of the intellectual history of Anglo-American law. While it is true that the origins of English rigidity antedated Austin, there is ample evidence that his influence strengthened that tendency by providing a more explicit justification for judicial temerity. So far as Blackstone is concerned, it is clear that his influence on nineteenth century American judicial thinking was quite the opposite of rigidity. *See* McKnight, *Blackstone, Quasi-Jurisprudent*, 13 Sw. L.J. 399, 401 (1959). A. LOCKMILLER, SIR WILLIAM BLACKSTONE 181 (1958), reports that Blackstone's *Commentaries* were cited ten thousand times in American cases prior to 1915. As Llewellyn's investigation shows, the style of the American Grand Tradition was definitely not rigid. K. LLEWELLYN, *supra* note 39, at 64-72.

50. [1898] A.C. 375. Almost sixty years later, the principle was finally partially relaxed in a practice statement. [1966] 1 W.L.R. 1234 (H.L.).

51. *See* Hart, *supra* note 42, at 614. Hart continues

> Of course we might abandon the notion that rules have authority; we might cease to attach force or even meaning to an argument that a case falls clearly within a rule and the scope of a precedent. We might call all such reasoning "automatic" or "mechanical," which is already the routine invective of the courts. But until we decide that this *is* what we want, we should not encourage it by obliterating the Utilitarian distinction [between the law that *is*, the core of the rule, and the law that *ought* to be, the rationale of the rule].

Id.

52. H. HART, *supra* note 16, at 128. Hart considers it "clear that the rule-making authority must exercise a discretion." *Id.*

53. Hart, *supra* note 43, at 614.

54. Pound, *supra* note 33, at 700.

55. Hart, *supra* note 43, at 614.

restricted the judge's discretion to maximize utility in solutions to penumbral questions.[56] In that sentiment, he echoes Llewellyn's earlier challenge to conceptualism:

> If deduction does not solve cases, but only shows the effect of a given premise; and if there is available a competing but equally authoritative premise that leads to a different conclusion—then there is a choice in the case; a choice to be justified; a choice which *can* be justified only as a question of policy—for the authoritative tradition speaks with a forked tongue.[57]

Moreover, to include the rationale as part of the rule threatens, in Hart's mind, the distinctly legal quality of the "hard core of settled meaning."[58] The real danger, as he sees it, is the standard conceptualist fear of uncertainty. Merging the rationale with the rule would render "senseless" the idea that rules control judicial decisions.[59]

Such fears also seemed to motivate the majority in *Myers*. Common sense would dictate that the rationale of the exception to the hearsay rule should be applied to admit the register of cylinder block numbers. The court, however, asked "can [such an approach] be reconciled with existing law?"[60] In powerful testimony to Hart's core conception of a rule, the majority found that judicial legislation would be required to admit the proferred private records, no matter how much sense such action would make in light of the *purpose* of the rule excluding hearsay evidence. Should the court exercise such discretion? Hart concedes that to be a legislative task. Indeed, he states that many rules established by precedent "can now only be altered by statute, as the courts themselves often declare in cases where the 'merits' seem to run counter to the requirements of the established precedents."[61] How can the Lords be faulted for finding it appropriate to leave such legislation to the legislature? Yet, ironically, the Lords are criticized merely for following the law as Hart has defined it. It seems a rank injustice to denounce the judges for doing their best to preserve legal certainty by adhering strictly to the core meaning of the rule.

C. *The Nature of Certainty: Reality or Illusion?*

If even the majority judges concede that the decision in *Myers* flies in the face of common sense, can they at least claim that the decision enhanced the primary object of conceptualism: Legal certainty. Will strict adherence to the

56. "When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best *satisfies* us." H. HART, *supra* note 16, at 126 (emphasis added).

57. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1252 (1931) (emphasis in original). Llewellyn proceeds to make the point that the same reasoning applies to both expansive and restrictive interpretations of precedent. *Id.* at 1252-53. Hart explicitly categorizes such narrowing or broadening applications of precedent as "creative or legislative activity." H. HART, *supra* note 16, at 131.

58. Hart, *supra* note 42, at 614.

59. *Id.*

60. Myers v. Director of Pub. Prosecutions, [1964] 2 All E.R. 881, 887 (H.L.).

61. H. HART, *supra* note 16, at 132.

core of Hart's rules promote certainty in the law? Despite his recognition of the penumbral "open texture" of law, certainty is unquestionably Hart's central concern.[62] What, however, is the nature of that certainty? How are officials able to know what is determined by the rule? Some cases will present little difficulty. Such cases will be ones "where there is general agreement in judgments as to the applicability of the classifying terms."[63]

The best indication of Hart's thinking process, however, may lie in his explanation of why general standards are not completely determinate:

> The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim. If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a world fit for "mechanical" jurisprudence.[64]

Certainty for Hart is thus based on providing the same treatment for any case that shares a sufficient number of instances of similarity to the standard case. The key is whether "the present case resembles the plain case 'sufficiently' in 'relevant' respects."[65] The determinancy of the plain case appears to be entirely independent of the rationale for treating it in a particular way. Hence, the fact that the rationale of the hearsay rule would justify admission of the records in *Myers* makes no difference. Indeed, to accept that reason would reduce certainty for Hart, because it ignores the fact that the new situation is not literally within the existing rule. By setting law and judicial creativity (stigmatized as legislation)[66] in opposition to one another, Hart revives the spirit of Zane's conceptualism and its dedication to rigid application of the rules.

Despite the conceptualists' focus on legal certainty, they are not the only ones concerned with it. For example, American legal thinking from Holmes to the Realists was preeminently concerned with predictability of judicial decision as a means to legal certainty. Moreover, Llewellyn added a further degree of sophistication to such analysis by focusing on what was essential to assure legal certainty for the citizenry in general. He concluded, as translated by Lon Fuller, that:

> Legal certainty for the layman is not predictability of judicial decision, it is *congruence between legal rules and the ways of life*. Furthermore, this kind of certainty cannot be achieved unless legal rules *change*. Congruence

62. "[T]he life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them a fresh judgment from case to case." *Id.* (emphasis in original).

63. Hart, *supra* note 42, at 123.

64. *Id.* at 125.

65. *Id.* at 124.

66. *Id.* at 131.

> with lay ways demands a constant reshaping of legal rules, since social norms are continually changing.[67]

Obviously, that kind of certainty contrasts diametrically with the certainty of Hart's standard case. By focusing on standard features, the certainty in Hart's method is necessarily mechanical. Such an approach will not satisfy the ordinary citizen, because the lay person expects common sense. Suppose the person whose car is stolen is told that the thief cannot be prosecuted because the cylinder block register is inadmissible in evidence. The response of the outraged citizen to such a senseless technicality is likely to echo Mr. Bumble's riposte that "the law is a ass—a idiot."[68] The normal anticipation that the law should make sense requires that rules be applied in light of the purposes they are meant to serve. A literal or mechanical approach is incapable of fulfilling that objective.

Citizens are not unfamiliar with the literal application of rules. They expect precisely that from the most intractable bureaucracies. But they associate the practice only with the Pickwickian "certainty" of frustration of reasonable expectations. In modern life, many also encounter literalism in the maddening device of some labor unions known as the "work to rule." Although it is uncommon in the United States, it is a popular device in many industrialized countries with powerful union movements. Public employees who are forbidden by law to strike often find they can exert all the pressure they wish by working to rule. They carry out each task with extreme thoroughness; everything is strictly by the book. In a number of countries, post office employees have found they can back up the mail almost instantly simply by applying every rule literally.

The proper characterization of such an abuse of rules is reflected in a comment that Lon Fuller, following in Pound's middle-of-the-road tradition, incorporated into the opinion of Mr. Justice Foster in his hypothetical *Case of the Contract Signed on Book Day*. He laments the future of the law if judges were pressured to "follow mechanically the demands of abstract verbal symbols — like an unintelligent cook measuring out the misprints of a recipe."[69] That is the precise purpose of the union members. Their scheme is to mimic unintelligent cooks measuring out the misprints of a recipe, because their desire in following the rules literally *is* to defeat the purpose of the rules. From that instance, the lesson to be learned seems obvious: If the rules are to work, they must be understood and applied in a way which focuses on the purposes they are meant to serve.

That view, however, is directly contrary to Hart's contention that following a rule means applying it mechanically. There is no need to resort to purpose

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67. Fuller, *supra* note 40, at 432-33 (emphasis in original) (paraphrasing his own translation of K. LLEWELLYN, PRAJUDIZIENRECHT UND RECHTSPRECHUNG IN AMERIKA, EINE SPRUCHAUSWAHL MIT BESPRECHUNG 83 (1933)). Llewellyn calls the article "Fuller's caustic but not unsympathetic full critique, [but complains that] despite its own title, accessibility, and insight, has been little used." K. LLEWELLYN, *supra* note 39, at 509 n.1.

68. C. DICKENS, OLIVER TWIST 387 (reprinted 1925) (originally published 1837). *See* Moore, *supra* note 16, at 277-78 (the popular demand that law avoid absurd results).

69. L. FULLER, THE PROBLEMS OF JURISPRUDENCE 85 (temp. ed. 1949).

if the situation falls within the core meaning of the rule. Fuller, speaking through Mr. Justice Foster, disagreed: "Every rule of law represents the projection of a purpose."[70] Such a view avoids the fate of the literalistic cook measuring out the misprints. When the unions work to rule, they are purposefully using the rules literalistically in order to defeat the purpose of the rules.

A sharp contrast therefore emerges between Hart's view of rules as mechanically governing cases and Fuller's notion of rules as expressing "a purpose that changes imperceptibly with experience and increased insight."[71] Moreover, the mechanical certainty provided by Hart's approach assumes that constant meanings of the literal rules will be maintained. Fuller, on the other hand, seeks certainty in the continual change of the meaning of a rule in light of the evolving purpose(s) of the rule. The rule in its content and application will change as the social purposes change. As Fuller states:

> Often we can trace the history of a rule across time, marking how this decision restricted it, this line of authorities extended it, this economic development gave it a new direction, this scholarly article placed it in a larger context where it acquired a new significance. Throughout this development no one could deny two plain facts: 1) the rule never has at any point of time exactly fixed boundaries; 2) the rule changes in response to many forces. Some of these are "official," like statutes and decisions; others are not, like the views of scholarly commentators.[72]

Such sentiments directly contradict Hart because they deny that a definable core ever exists. Law, conceived as a process, views rules as constantly responding to new stimuli, thereby bringing them to life.[73] Predictably, Fuller chose the phrase of another middle-of-the-roader, Benjamin Cardozo, to emphasize that law was always in a process of becoming: "The law never *is*, but is always about to be."[74]

The foregoing point suggests another fundamental contrast between these views of the nature of rules: Do they provide a static or a dynamic perspective? Hart's core changes, either expanding or contracting, only by legislative choice exercised by judges. Alternatively, in the dynamic view of Cardozo and Fuller, the law is constantly responding to a multiplicity of factors, and the precise boundaries of the rule are never permanently defined because they are always in a state of flux. Although the process of change is constant, the dynamic view of rules differs from the realist denial that rules have meaning.[75] In a

70. *Id.* at 89.

71. L. FULLER, *supra* note 69, at 89.

72. *Id.* at 89.

73. *Id.* at 82. Dean Levi comments in similar vein: "The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas." E. LEVI, AN INTRODUCTION TO LEGAL REASONING 4 (1948).

74. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 126 (1921). It is interesting to note that the phrase is used by Cardozo to express the legal nihilism consequent on John Chipman Gray's view that law is only what the judges say it is. *See generally* J. GRAY, THE NATURE AND SOURCES OF THE LAW (1909). Gray's views were also criticized by Zane. *See supra* text accompanying note 26.

75. Levi expresses the point as follows: "[C]hange in the rules is the indispensable dynamic quality of law." E. LEVI, *supra* note 73, at 2.

sense, the dynamic view takes rules even more seriously by seeing them as living instruments. In contrast, Hart's "compromise" proposal actually sees rules *only* as static concepts.

In summary, three sharply varying views emerge of the nature of rules and of how judges should treat them. Hart's revived conceptualism promotes the wooden certainty of literalism. Realist skepticism serves up the certainty of the abyss while promising choice based on sound public policy or whatever other preferences happen to appeal to the powerholders. The Pound-Cardozo-Fuller tradition seeks a tentative certainty in social norms and purposes amidst the dynamic of change. In the American legal experience, the controversial nature of judicial decision is encapsulated in those three positions. How is it possible to choose among such perspectives? Is the quest for some certainty in law an illusion? Exploring such questions requires a more detailed study of how judicial decisions are made. More importantly, the controversy invites rethinking the subject altogether.

III. Rethinking Judicial Decisionmaking

To answer the question how judges should decide cases, inquiry into the available alternatives is necessary. For conceptualists and others devoted to mechanical approaches, the judge's instrument of operation is deductive logic, a point that is explicit in Zane and implicit in Hart's core. The Realists and other skeptics deny any role for logic, at least in their more iconoclastic moments. Unfettered choice is the burden of the judge in their view, a predicament shared by the judge confronted with decisions in Hart's penumbra. How can the judge avoid such harsh alternatives? What option is available other than formal logic or unfettered discretion? How is the judge in the middle view supposed to make decisions that are not shackled by formal logic and yet are constrained, and therefore reasonably predictable? Pound's balancing of competing interests provides a general idea[76] but few clear details.[77] Even when the judge is exhorted to apply the law with reference to its purpose, as Fuller did, the mechanisms to be used in following that injunction are unspecified.[78] Such information is, however, available in an extensive literature on judicial decisionmaking,[79] much of it spawned in reaction to the Realist' challenge. One

76. *E.g.*, R. Pound, An Introduction to the Philosophy of Law 42-47 (rev. ed. 1954). *See also* J. Stone, Social Dimensions of Law and Justice 164-82 (1966).

77. In general the sociological jurists stand for what has been called equitable application of the law; that is, they conceive of the legal rule as a general guide to the judge, leading him toward the just result, but insist that within wide limits he should be free to deal with the individual case, so as to meet the demands of justice between the parties and accord with the general reason of ordinary men.

Pound, *supra* note 30, at 515.

78. *But cf.* Fuller, *Reason and Fiat in Case Law*, 59 Harv. L. Rev. 376 (1946) (sketching a theory of adjudication).

79. *See, e.g.*, H. Hart & A. Sacks, The Legal Process (tent. ed. 1958); E. Levi, *supra* note 73; J. Stone, Legal System and Lawyers' Reasonings 235-337 (1964) (successor ed. to The Province and Function of Law ch. 7 (1946)). *Cf.* K. Llewellyn, *supra* note 39 (advocating the Grand Tradition as a model of judicial decision); B. Cardozo, The Nature of the Judicial Process (1921) (urging an eclectic approach to judicial reasoning).

of the most important of the more recent contributions is the exploration of the use of non-formal or inductive reasoning in legal argument by Professor Chaim Perelman of the Free University of Brussels.[80] Perelman's proposal for a revival of the art of rhetoric provides a useful starting point for rethinking judicial decisionmaking.

A. The New Rhetorics

Hart's contrast between core and penumbra is an expression of his compromise between skepticism and conceptualism or formalism. Perelman similarly contrasts formalism and skepticism. Because he is working in the Continental tradition, however, Perelman chooses as his archetype of skepticism the Legal Existentialism of Georg Cohn[81] in place of Hart's choice of American Legal Realism. In Legal Existentialism, Perelman writes, "decisions are not made on the basis of general rules, but it is the consideration of every concrete case, with all its attending particular circumstances, which allows the applicable rules to be ascertained."[82] Perelman rejects that view, just as he rejects formalism. Formalism, like existentialism, represents an exaggeration. But Perelman responds to the dichotomy of conceptualism and skepticism differently than Hart. Instead of attempting to combine the two in a core/penumbra model, Perelman rejects the notion that the true picture of law is half formalism and half skepticism. Perelman rejects formalism because, in the fashion of Zane, it misunderstands the nature of law as *de*ductive reasoning. Perelman's insight is that the logic of law is *in*ductive. But it *is* a logic, and the mistake of the existentialists is to ignore that fact.

Perelman's major contribution to legal thought is the notion that legal reasoning requires the use of persuasive argument. Hence, Perelman has renewed Aristotle's study of the techniques of persuasive argument. The purpose of Perelman's "New Rhetorics" is to explore the techniques of persuasion that lawyers typically use in legal argument.[83] Unlike the product of a formal deductive syllogism, the result of legal argumentation is not a conclusion. Instead, Perelman says, it is "a decision which the judge justifies on stated grounds."[84] The stated grounds are the reasons given by the judge for finding the arguments of one side more persuasive than those of the other side.

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80. *See* C. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT (1963); C. PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC (Wilkinson & Weaver transl. 1969); Perelman, *What is Legal Logic?*, 3 ISRAEL L. REV. 1 (1968) [hereinafter cited as *Legal Logic?*]; Perelman, *Judicial Reasoning*, 1 ISRAEL L. REV. 373 (1966).

81. *E.g.*, G. COHN, EXISTENTIALISM AND LEGAL SCIENCE (G. Dendal transl. 1967).

82. *See Legal Logic?*, *supra* note 80, at 5 (citing G. COHN, *supra* note 81, at 115-20).

83. "What is specific in legal logic is that it is not a logic of formal demonstration [*i.e.*, of deductive processes,] but a logic of *argumentation* which uses, instead of analytical proofs which are compelling, dialectical proofs which aim at convincing or persuading the audience (in this case the judge)." *Id.* at 3 (emphasis in original).

84. *Id.*

1. The Ambiguity of Rules

Legal reasoning consists of arguments which, Perelman says, do not lead to a necessary conclusion.[85] Nonetheless, Perelman's rejection of existentialism is based on the residual assumption that the rhetorical process in any particular case will produce a rule. However, the process seems not to be required in applying rules. Rather, the points at which the process of persuasive reasoning will be called for are "where the choice of the rule poses a legal problem because of the existence of a number of competing rules, or by reason of lacunae in the law or when the law requires interpretation to determine the scope of its application."[86] Interestingly, such statements suggest that interpretation of rules will not normally be necessary in applying them. Indeed, Perelman seems to embrace a degree of formalism by assuming the rule could apply itself to subsequent cases without need for some intervening act of judgment which would be illuminated by the persuasive process.

This assumption is troublesome. Perelman's promising beginning seems incomplete. He has rejected the formal quality of self-applying concepts of the earlier age of conceptu "sm. He has also, on the other hand, rejected the skepticism of existentialism and, inferentially, of American Legal Realism by interposing persuasive argumentation. But, like Hart, he seems willing to settle for the lesser formalism of rules. Perhaps, like Hart, he sees the necessity of such a bulwark in order to preserve some vestige of certainty in the law. More likely, rules seem to be a necessary consequence of the persuasive process. After all, if the outcome of the persuasive process is only the decision of a particular case, then how is one to distinguish such a result from legal existentialism? Thus, Perelman seems to find meaning in the rules that are the product of the persuasive process. When we have to *choose* one rule over another, "an appreciation of the consequences will urge that one rule may be preferred to another."[87]

Nonetheless, his apparent assumption of self-applying rules is inconsistent with his perception of the operation of the process of argumentation. Rules *must* have consequences for Perelman, since "numerous theories and judicial constructions have been elaborated for the sole purpose of avoiding the application of legal rules in cases where they would lead to unacceptable consequences."[88] Such statements, however, evince an ambivalence toward rules, because Perelman appears to approve the process of argumentation being used to overrule rules. Is such an act a matter of judicial legislation? Or is overruling on the basis of argumentation an appropriate judicial act? Clearly, Perelman sees that some rules require overruling:

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85. The arguments "may be strong or weak, but in no case will they provide a formally correct process of reasoning whose conclusion forcibly imposes itself." *Id.* at 5.

86. *Id.* at 4. Perelman also indicates "in the case of antinomies, lacunae, conflicts of rules of law and incompatibility between rules applied to the solution of antinomies" resort to legal logic will be necessary. *Id.* at 5.

87. *Id.* at 5.

88. *Id.*

> Only when it becomes necessary to determine how far a case is essentially similar to recognized precedents must we have recourse to juridical "topics," *i.e.*, to all the considerations usually taken into account when interpreting and applying the law. These will consist of grounds whose pertinence and importance have not been neglected by former judges,...and which may not be ignored except for reasons which appear more important and justify a reversal of case law.[89]

Two ideas in the foregoing passage merit attention. First, the idea is reiterated that some rules can be overruled, if the judges are persuaded by the reasons offered. Second, the question is raised as to how meaningful rules are, because both "interpreting and *applying* the law" are included now as requiring the application of persuasive reasoning. Similarly, Perelman states that, once the judgment is rendered, it becomes binding precedent and the person seeking to upset the established principle must advance persuasive reasons.[90] Again, apparently, the rule is established by argumentation. But, as with the Lord, what argumentation giveth, it may take away, for it may provide a basis for overruling an undesirable rule. Rules appear to possess an ambiguous nature for Perelman, oscillating between firmness and flexibility.

2. The Nature of Argumentation

Confusion clearly exists concerning the status of rules and their meaning under the approach of the "New Rhetorics." These apparent problems can be solved by pursuing Perelman's approach consistently. A consistent view of legal reasoning would include a place for rules that avoids the ambiguities that seem to bedevil Perelman's exposition. Consistency is the key element in carrying through the consequences of argumentation not only for judicial reasoning but to a comprehensive view of the function of judicial decisionmaking in the judicial process at large. To demonstrate this concept, Perelman's approach must be restated. The starting point of rhetorics is the truth that persuasive or inductive reasoning is not demonstrative but dialectical. It never produces an absolute conclusion. It is characterized, for example, by arguments by analogy,[91] arguments *ad absurdum*, and an array of other techniques of inductive argument.

To illustrate, imagine the following two cases. The first case has facts a, b, c, d, e, f, and g with result x. The rule states that when these factors are present, x is the result. The next case presents factors a, b, c, d, e, f, no g, but h. Perelman says that persuasive reasoning is based on a fundamental

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89. *Id.* at 5-6.

90. [The judgment] together with its ratio decidendi—is now binding as law and takes its place in the legal order to the elaboration of which it contributes. It will be sufficient, thereafter, to refer to the precedent in order to support a decision, any person who seeks to upset case law having to advance the grounds which...should prevail over those previously accepted.

Id. at 6.

91. Levi is noted for his claim that the "basic pattern of legal reasoning is reasoning by example." E. LEVI, *supra* note 73, at 1. It is clear that he means argument by analogy. His work provides a number of fine examples of the development of case law utilizing that technique of argumentation. *Cf. Legal Logic?*, *supra* note 80, at 1-2 (commenting on Levi's approach).

principle of justice: The notion that like cases should be treated alike.[92] How then should the new case be approached? One solution would be that, because it is highly similar to the previous case, as a matter of justice, the same result ought to apply. But no one is comfortable trying to make such a judgment in the abstract.[93] Only when g and h are known is it possible to decide intelligently. Those factors may be inconsequential or, alternatively, they may be highly relevant and provide the basis for a crucial distinction.

How is that judgment of relevance made? Hart's test is whether the cases are "sufficiently" similar. But that formula begs the question. In the normal situation, the basis will be the rationale of the previous case. The rationale of the previous case, however, may not cover the new situation. That rationale may need to be elaborated in the light of other legal principles. Elaboration may also be required in terms of moral arguments that do not have a specific formal legal standing. All this (and more) may be required in order to arrive at a judgment which is acceptable in explaining why the second situation should or should not be treated the same as the previous case. Regardless of the conclusion, the judgment will be the result of the process of persuasive reasoning that Perelman advocates.

That process of persuasive reasoning is built on starting points that are fundamental value assumptions. Perelman has a term for these, also borrowed from the Greek, *topoi*, the plural of *topos*.[94] A literal translation is topic, but its meaning is the place or seat of argument, the starting point of discussion. In other words, it represents the fundamental value assumptions one makes. Those assumptions define the place or topic of the argument. For persuasive argumentation to take place, some shared beginning point is necessary. Suppose an anti-abortionist asks, "Don't you oppose the taking of innocent human life?" If the answer is "No," he will be frustrated, because the starting point of his argument has been denied. Suppose though that, after he recovers from his shock, he tries again by saying, "That's terrible; don't you value the sanctity of life?" If at that point, the answer is again "No," he will be completely frustrated, because the fundamental value premise of his argument has been rejected.

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92. "[T]he *rule of justice* . . . ordains that essentially similar cases should be dealt with in similar manner." *Legal Logic?*, *supra* note 80, at 4 (emphasis in original). Levi puts the point thus "[t]he problem for the law is: When will it be just to treat different cases as though they were the same? A working legal system must therefore be willing to pick out key similarities and to reason from them to the justice of applying a common classification." E. LEVI, *supra* note 73, at 1. *Cf.* R. DWORKIN, TAKING RIGHTS SERIOUSLY 113 (1978) ("The gravitational force of a precedent may be explained by appeal . . . to the fairness of treating like cases alike."). *Contra* Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1 (1974) (criticizing both Perelman, *id.* at 5-9, 20-22, the idea of like treatment as a moral principle, *id.* at 9-20, and the ideal of equal treatment as a principle of logic, *id.* at 21-35).

93. Precisely that point regarding the meaning of the terminology of legal analysis is made tellingly in Fuller's hypothetical Case of the Interrupted Whambler. L. FULLER, *supra* note 69, at 628-38. He offers a rather effective demonstration that our view as to the proper result in the case will depend upon the nature of the "undefined activity, 'whambling'." *See id.* at 637 (Question 4).

94. *Legal Logic?*, *supra* note 80, at 3. *See* T. VIEHWEG, TOPIK UND JURISPRUDENZ (1953). *See also* J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 330-32 (1964).

Once a starting point is established, an argument may be constructed. Suppose in the imaginary case set forth above the lawyer on one side argues, "Listen, g and h are both unimportant. Neither is significant. These cases are essentially similar and should be treated identically." That technique would be a form of argument by analogy. The lawyer on the other side might argue, "No, g is significant, and the difference that h involves provides a basis for distinguishing the cases. What is more, the reason for drawing the line is that if you admit h this time, then you have no reason to refuse to admit i, j, k, or l in future cases. Who can possibly imagine applying this rule to l? That would be absurd." This tactic is an example of *ad absurdum*, another sort of legal argument. Of course, the challenge made by the argument *ad absurdum* is to discover some sensible distinction which cuts the extension of the rule off at h and avoids reaching the absurd l. As Ronald Dworkin has argued more recently, one of the fundamental characteristics of argument is the demand for consistency.[95] This demand explains the opposing side's compulsion to respond to the slippery slope *ad absurdum* argument. Suppose the opposing side says, "We just want h this time. There is no need to worry about the rest of those possibilities for the future; we would never extend it to l." They are faced with a problem of inconsistency, because they have not offered a reason for treating h in one way and l in a different way. Consistency demands they do so, because the plaintiff's argument is, after all, that h is sufficiently like g that the cases ought to be treated the same. The defense says, "What about i, j, k, and l?" The plaintiff must then provide a plausible reason that distinguishes between h and the rest of those cases.[96] Moreover, the reason must ordinarily be plausibly consistent with the rationale of the previous case or line of cases.

B. The Nature of Rules Revisited

One of the consequences of thinking about the nature of legal reasoning as argumentation is that rules appear in a different light. Consider the two cases again. Suppose that g and h turn out to be only the times at which the cases arose. Is that a relevant or an irrelevant difference? A conceptualist would say it must be irrelevant. The legal existentialists would disagree. Each case is unique, at least in time. Perelman rejects the uniqueness argument, because our best judgment may be that they should be treated the same. It is not really possible to say whether time matters without further facts to put the situation in context. Occasionally, time will make a difference. In many cases, it will

95. R. DWORKIN, *supra* note 92, at 88 ("articulate consistency"). "An argument of principle can supply a justification for a particular decision, under the doctrine of responsibility, only if the principle cited can be shown to be *consistent* with earlier decisions not recanted, and with decisions that the institution is prepared to make in the hypothetical circumstances." *Id.* (emphasis added). *See also id.* at 115-23.

96. The necessity of offering a reason runs throughout Judge Ginsburg's address, published elsewhere in this issue. Ginsburg, *The Obligation to Reason Why*, 37 U. FLA. L. REV. 205 (1985). Judge Ginsburg, notes that at the post-oral argument conference, "[e]ach judge reports how he or she is inclined to rule and why." *Id.* at 211. On the *ad absurdam* argument, *see generally* Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

be utterly irrelevant. The two cases will also normally differ in the parties involved, a difference which will usually be irrelevant. Most of the time, the cases will present a considerable number of further factual distinctions.[97]

The mere fact that the parties or the times are different would seldom disturb the "application of the rule." The existentialist point is that, in any second situation, some potential factual grounds will always be available to distinguish the situations, at least as a technical matter.[98] Hence, as a matter of principle, an *automatic* application of the previous rule is impossible. At the least, the quick judgment must be made that the minor differences are unimportant. The only way that can be done, however, is by applying the rationale of the rule.[99] That application in turn requires the process of argumentation, despite the fact that many situations can be determined quickly and easily. The rule is simply "applied" to the situation.[100] That easy judgment may be what Perelman has in mind when speaking of rules in the seemingly concrete manner that he does. If so, that apparent ambiguity should be clarified by reconstructing the function of rules in the process of argumentation.

That reconstruction will be assisted by once again comparing the rhetorical view of law with Hart's focus on the core. Hart assumes that cases falling within the core of the rule are governed by the rule automatically. What that assumption ignores is the act of judgment that is involved in deciding that they *do* fall within the rule. That judgment is that, because this case has sufficiently similar facts *and* its differences are sufficiently irrelevant, it should be treated as falling within the rule.[101] The point is that that judgment can *only* be made with reference to the rationale that is used to judge the importance of similarities and the relevance of differences.[102] This approach, however, may open up the

97. The issue of uniqueness was one of those aired in the Pound-Llewellyn debate. At that time, Pound commented:

> Undoubtedly single cases are in greater or less degree unique, and this uniqueness, often quite relative, may or may not be significant. Likewise there are common elements in cases, and these may or may not be significant for any particular problem or situation. The unique aspects of cases, the common aspects of them, and generalizations from the common aspects, may or may not be useful instruments according to the connection in which we look at them and the tasks to which we apply them.

Pound, *supra* note 33, at 707.

98. Judge Ginsburg opposes claims of uniqueness in noting that a court "may not rely on unarticulated intuition." Ginsburg, *supra* note 96, at 207. Moreover, "[t]he law we identify and apply is not cast for day and case alone. We cannot rely entirely on today's parties to define law that will touch tomorrow's controversies." *Id.* at 208.

99. It is because the rationale of the rule must be applied that it is a manner of concern whether cases "are in fact decided with sufficient care and hard thought." *Id.* at 214-15.

100. Levi recognizes that "the connotation of the word for a time has a limiting influence—so much so that the reasoning may even appear to be simply deductive." E. LEVI, *supra* note 73, at 8.

101. Levi suggests: "[T]he scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process." *Id.* at 2.

102. The importance of the elaboration of the rationale is illustrated in the criteria employed for selection of judicial opinions for publication. The principal question is "the precedential value of the disposition — does it involve any new or clarifying statement about the law?" Ginsburg, *supra* note 96, at 220.

objection that neither method makes any difference in result. In an easy case, the rhetorical method appears to arrive at the same conclusion as Hart's approach. Each would treat the case as falling within the rule. The advocate of persuasive argument must concede, as Perelman seems to, that the notion of a rule does serve as a convenient shorthand.

This insight can be illustrated by the experience of dealing with small children. Small children have a way of questioning and testing rules. They want to know if the fact that they must not pick up the ashtray on the coffee table in the living room means that they should also refrain from touching the vase on the side table in the den. Because the children's supervisor understands the rationale of the rule, that person finds the constant requestioning of the limits of the rule rather tiring. Why? Not because the rule is self-applying, but because the rule in fact serves as a great short-hand convenience for a judgment previously made that a particular purpose is served in a certain situation. It is a *judgment*, because all value questions concerning it have been momentarily answered. For the time being, the rule represents how the arguments of justice and policy are best resolved in producing a particular result in this kind of case. Having settled this, anyone applying rules finds it a bore to go through all those arguments again, each time a similar situation arises.[103] The desire is simply to apply the "rule" and get on to other matters that have not yet been worked out and therefore require greater attention.

Based on this explanation of normal thought processes, the point of theoretical importance regarding the core notion of the rule can now be readdressed. The problem with Hart's positivism is that it suggests that a rule is real, concrete, definite. That view is a far cry from the notion of a simple convenience for the generalizations people make. A useful parallel occurs in the concept of *gestalt* from German psychology. A *gestalt* is literally a form that is imposed on stimuli by the mind.[104] If a rule is thought of as a *gestalt*, it becomes a symbol for a whole set of judgments. It is a neatly wrapped package of decisions made between competing arguments to settle the matter for the present time.[105] The significance of seeing a rule as a *gestalt* is to recognize that the decision which it represents is, theoretically, reviewable at any time. In a changing society, recognition of that truth regarding law is crucial, because value judgments, and consequently decisions as to which differences between two situations are significant, change over time. A temporal perspective, which views the law as it develops over a period of time, reveals that rules as *gestalts* grow, develop, endure for a time, and are typically replaced by a different rule later on.[106] An example will be useful in clarifying this picture of rules.

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103. E. LEVI, *supra* note 73, at 2.

104. *See generally* W. KOHLER, GESTALT PSYCHOLOGY (1929). The focus of the present exploration is the perception of rules by the legal community, including deciding judges. The special utility of the *gestalt* notion is in providing insight into the apparently *solid* nature of rules and their consequent "easy" application.

105. And, as precedent, it is perceived as both guiding and restraining. Ginsburg, *supra* note 96, at 206-07.

106. The first stage is the creation of the legal concept which is built up as cases are compared. The period is one in which the court fumbles for a phrase. Several phrases may

C. *The Rise and Fall of Rules: The Case of Equal but Separate*

One using Hart's approach would presumably say that *Plessy v. Ferguson*[107] in 1896 established the rule of "separate but equal." Hart calls that sort of decision a legislative act, because the judiciary is exercising full discretion in its interpretion. Because no established rule constrains the Court, it must make a legislative choice.

The subject of interpretation in *Plessy* was the equal protection clause of the fourteenth amendment, a fairly recent constitutional provision at that time. The fourteenth amendment had been adopted in 1868. One of its provisions prohibited any state from denying "to any person within its jurisdiction the equal protection of the laws."[108] In *Plessy*, the Supreme Court interpreted that phrase and found that Louisiana legislation requiring railways to "provide equal but separate accommodations for the white and colored races" did not conflict with the requirement of equal protection of the laws.[109] How accurate is it to characterize the Court's pronouncement, as Hart would, as a sudden act of judicial legislation? Previous cases construing the post-Civil War amendments indicate that *Plessy* was not so much of a surprise.[110] It certainly did not suddenly emerge full bloom from barren earth. Examination of the opinion shows the Court found grounds for its approach in a number of previous cases[111] as well as

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be tried out; the misuse or misunderstanding of words itself may have an effect. The concept sounds like another, and the jump to the second is made. The second stage is the period when the concept is more or less fixed, although reasoning by example continues to classify items inside and out of the concept. The third stage is the breakdown of the concept, as reasoning by example has moved so far ahead as to make it clear that the suggestive influence of the word is no longer desired.

E. LEVI, *supra* note 73, at 8-9.

107. 163 U.S. 537 (1896).

108. U.S. CONST. amend. XIV, § 1.

109. 163 U.S. at 540.

110. The *Plessy* opinion cited the Civil Rights Cases, 109 U.S. 3 (1883), the Slaughter-House Cases, 83 U.S. 36 (1879), and Strauder v. West Virginia, 100 U.S. 303 (1880). 163 U.S. at 542-43, 545-46. R. KLUGER, SIMPLE JUSTICE 77-81 (1976), is thoroughly scathing in his criticism of the Court's misuse of authority. The point of Kluger's complaint is that no previous Supreme Court decision stated any rule which would cover the *Plessy* situation. Undoubtedly, that is true. The opinion, however, expressed adherence to the distinction between civil/political and social rights that it perceived in the earlier cases. 163 U.S. at 543-46. A central issue was whether the state could regulate intrastate commerce without infringing on the congressional prerogative to regulate interstate commerce. *Id.* at 546-48. The Court also devoted substantial attention to its concern with interference with "subjects that are within the domain of state legislation." *Id.* at 546-47. That topic now seems quaint but was then a central issue in many cases in an era when federalism was taken much more seriously than we are presently able to imagine. Moreover, the Court reflected accurately the emerging social consensus, the "toxins of racism" poignantly described by Kluger. R. KLUGER, *supra* at 69-71, 84-91. The Court was responding to moral arguments, no matter how immoral that argument may now appear.

111. The Court, citing a number of state and federal cases, termed Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 209-10 (1850), the leading case in which the decision to require racial segregation of the schools was determined to be "founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment." *Plessy*, 163 U.S. at 544-45. *Roberts* earned its priority because it was such an early case, because it was authored by the noted Chief Justice Shaw, and because, the Court seemed pleased to note, separation had been "held to be a valid exercise of the legislative power even by courts of states where the political rights of the

congressional actions contemporaneous with the adoption of the fourteenth amendment.[112] "Judicial legislation" is a rather brutal description for the culmination of the developmental process involved. It is, however, easier to apply such an epithet to decisions one finds morally distasteful.

Consider next the judicial situation once *Plessy* was handed down. In strict terms, *Plessy* addressed public transportation only; in that sphere, "enforced separation of the races" did not deny "the equal protection of the laws."[113] But education,[114] integrated private institutions,[115] and housing area restrictions[116]

colored race have been longest and most earnestly enforced." *Id.* at 544. A good indication of the general view of racial segregation prior to *Plessy* is provided by J. Harper, who states:

> The weight of authority accords with the view...that [the equal protection clause] still leaves it within the discretion of the legislatures of the several states to provide separate schools for colored children....But all these decisions hold that the advantages afforded by such schools must be, in all respects, substantially equal to those furnished by the schools for white pupils [citing a federal case and cases from five states] . . . .
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> . . . .
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> Opposed to this view stands...[t]he opinion...against a caste classification,...an excellent example of the advanced and progressive spirit of our western states [citing cases from Kansas, Iowa, and Michigan].

Note to United States v. Buntin, 10 F. 730, 736 (1882) (J. Harper, reporting).

112. The Court also cited congressional legislation requiring school segregation in the District of Columbia. 163 U.S. at 545. Kluger comments that the congressional law "did not require segregation of the schools but permitted local custom to dictate." R. KLUGER, *supra* note 110, at 76-77. The Court's characterization of the effect of the legislation seems more accurate. *See* REV. STAT. D.C. §§ 281-83, 310 & 319 (1875).

113. 163 U.S. at 548. The Court did not actually enunciate the standard of "separate but equal" in *Plessy*. The standard applied in *Plessy* could more accurately be termed "separate is reasonable." *Id.* at 550-52. *Contra* R. KLUGER, *supra* note 110, at 81.

114. The first education case arose three years later when black taxpayers in Richmond County, Georgia, sought to enjoin the board of education from operating a high school for white students. The black high school had been converted to primary education for blacks without further provision of high school education for blacks because of lack of funds. Cumming v. County Bd. of Educ., 95 U.S. 528 (1899). The Court found that the evidence did not permit it "to regard that decision as having been made with any desire or purpose on the part of the Board to discriminate against any of the colored school children of the county on account of their race." *Id.* at 544 The case was determined largely on the basis of the equity pleadings. Not only did it fail to elaborate the *Plessy* rule, it did not even cite the case. To the extent that the merits of the case were addressed, the focus appears to have been the reasonableness of the board of education's action under the circumstances of the case. Brown v. Board of Educ., 347 U.S. 483, 491 (1954) and R. KLUGER, *supra* note 110, at 83, classify the case as involving the separate but equal doctrine.

115. Berea College v. Kentucky, 211 U.S. 45 (1908), upheld state legislation prohibiting the simultaneous education of blacks and whites, even in private institutions. The Court ducked the constitutional questions by basing its decision on the narrow ground of the power of the state to alter the terms of the charter of a state-created institution. *Id.* at 56. Again *Plessy* was not cited.

116. Buchanan v. Warley, 245 U.S. 60 (1917), struck down a Louisville city ordinance that required housing to be racially segregated according to the majority population in each block. The Court grounded its action on the state's interference with the property right of freedom to contract which is protected from deprivation without due process of law under the fourteenth amendment. *Id.* at 82. Responding to the argument that the ordinance was justified on the basis of *Plessy*, the Court distinguished reasonable regulation from destruction of rights. *Id.* at 79-80. Private agreements to establish racially restrictive covenants were, however, upheld in Corrigan v. Buckley, 271 U.S. 323 (1926). The Court found that the private action involved failed to provide any basis for asserting federal jurisdiction. *Id.* Neither *Buchanan* nor *Plessy* was cited. The court below, however, reached the merits and found *Plessy* authoritative for the validity of racial segregation in general, "where the method adopted does not amount to the denial of fundamental constitutional rights." Corrigan

were not addressed. Did *Plessy* apply to them as well? Can one know the answer to such questions simply by knowing the "rule"? Or is it a matter of the Court making a legislative choice that includes these other categories with public transportation? In historical reality, the result was certainly not a matter of automatic application of any rule. Even the transportation cases that followed *Plessy* presented knotty problems for judicial resolution, not because of the equal protection issue, but because of the intersection of other issues.[117] Subsequent history is not always as straightforward as one might expect.

However, Hart might take comfort in reiterating his belief that, even if the "rule" did not always solve cases, all instances not decided by the rule are in the penumbra of the rule. Consequently, the courts must decide them as a matter of judicial legislation. But that description is farfetched, too. The potential significance of *Plessy* was not immediately apparent either to the Supreme Court or to the lower courts.[118] The case was infrequently cited in any setting,[119] and it was almost twenty years before the Court first stated that *Plessy* stood for the proposition "that it was not an infraction of the 14th Amendment for a state to require separate, but equal, accommodations for the two races."[120]

Interestingly, that first formulation of "separate but equal" occurred when

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v. Buckley, 299 F. 899, 901-02 (D.C. Cir. 1924).

117. In Chesapeake & O. Ry. v. Kentucky, 179 U.S. 388 (1900), the railway questioned whether the Kentucky law requiring racially separate coaches was an "infringement upon the exclusive power of Congress to regulate interstate commerce." *Id.* at 390. The Court cited *Plessy* as authority regarding the construction of a state statute so as not to interfere with interstate commerce. *Id.* at 395.

Chiles v. Chesapeake & O. Ry., 218 U.S. 71 (1910), raised the question whether an interstate passenger could be subjected to Kentucky's requirement of segregated carriages on the in-state portion of his journey. The Court characterized the railway's regulation as "the act of a private person" making "the distinction between state and interstate commerce...unimportant." *Id.* at 75. *Plessy* was then cited for the reasonableness of the regulation. "Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable." *Id.* at 77 (citing *Plessy*, 163 U.S. 540). *But cf.* Washington, B.& A. Elec. R.R. v. Waller, 289 F. 598, 601-03 (D.C. Cir. 1923) (lack of evidence that railroad had any properly promulgated regulation calling for in-state segregation of interstate passengers).

118. For example, *Plessy* was not even cited in the federal case upholding the requirement of segregated schooling for Chinese students in California. *See* Wong Him v. Callahan, 119 F. 381, 382 (C.C.N.D. Cal. 1902). "When the schools are conducted under the same general rules, and the course of study is the same in one school as in the other, it cannot be said that pupils in either are deprived of the equal protection of the law in the matter of receiving an education." *Id.* at 382.

119. During the forty-year period from its inception up to the beginning of its undermining in Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938), *Plessy* was cited by the Court in only eleven cases. The five cases in which *Plessy* was used substantively are discussed in notes 116 & 117 *supra* and in notes 120-21 & 123 *infra*. The balance of the cases involved no element of racial discrimination. The citations to *Plessy* were either for general propositions, such as reasonable state regulation is not violative of equal protection, or were merely for filler in long strings of cases to illustrate even more general propositions.

120. McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U.S. 151, 160 (1914). Although the statement purports to be a reiteration of the conclusions of the court below, the verbal formula of "separate, but equal" is nowhere to be found in either the majority or dissenting opinions of the Court of Appeals. McCabe v. Atchison, Topeka & Santa Fe Ry., 186 F. 966, 969-70 (8th Cir. 1911) (majority); *id.* at 980-81 (Sanborn, J., dissenting). Note that the dissent placed considerable emphasis on the necessity that the separate facilities be equal. *Id.*

the Court found that, since the separate facilities were *not* equal, the challenged regulation did not meet the equal protection standard.[121] Thus, subsequent cases are typically necessary to bring the rule to clearer statement. The *Plessy* rule had to be stated before it could be used. That statement is also part of the process of development of the case's rationale. Later cases were decided by applying and restating the rationale of *Plessy* in conjunction with other relevant constitutional standards.[122] As that rationale evolved, it eventually provided the basis for a seemingly automatic application of the rule of separate but equal. In that elaborated state, it was fit for application to broader realms. Finally, more than thirty years after *Plessy*, the rule was first applied in an education case, albeit in a manner which the Court presented as a foregone conclusion.[123] That nearly automatic application was possible because the details of the rationale had been worked out sufficiently that one might say overoptimistically that the *gestalt* was complete.

But what is the fate of the *Plessy gestalt*? In an oversimple view, *Plessy* was a rule for almost sixty years. Suddenly, it was overruled in 1954. In what Hart would describe as another legislative act, the Court in *Brown v. Board of Education* overruled *Plessy* in the field of pubic education.[124] The Supreme Court, however, had been ruling adversely to segregated education for almost twenty years prior to *Brown*.[125] In those cases, the Court purported to apply the "separate but equal" rule of *Plessy*, while ruling consistently for the plaintiff. The Court always found that governments were failing to provide equal facilities. As it happened, those cases dealt largely with legal education. The first cases presented the issue whether a state satisfied the separate but equal rule by providing out-of-state tuition scholarships for black students in the absence of facilities for blacks within

121. The challenged Oklahoma "separate coach law" permitted the railroads to omit providing any "luxury" facilities such as dining cars and sleeping cars for black patrons. Speaking for the Court, Mr. Justice Hughes stated:

> [I]f facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U.S. 151, 161-62 (1914).

122. In view of its modest beginnings, *Plessy* is treated as possessing amazing authority by Chief Justice Taft. *See* Gong Lum v. Rice, 275 U.S. 78, 86 (1927) (discussed *infra* note 123).

123. The case presented the challenge of a Chinese girl to exclusion from the white schools of Mississippi.

> Were this a new question, it would call for very full argument and consideration; but we think that it is the same question which has been many times decided to be within the constitutional power of the state Legislature to settle, without intervention of the federal courts under the federal Constitution.

Id. at 85-86. Taft went on to cite *Plessy*, calling its transportation issue "a more difficult question than this." *Id.*

124. "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

125. The beginning of the undermining of *Plessy* in Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938), came only eleven years after the first and *only* previous education case in which *Plessy* was cited.

the state.[126] To avoid such a ruling, the state of Texas built a beautiful new law school exclusively for blacks at what is now known as Texas Southern University in Houston. Texas claimed these facilities had to be considered equal. The Court, however, ruled that facilities pale in comparison to "those qualities which are incapable of objective measurement but which make for greatness in a law school."[127] The ambiance of a great law school was missing: "[T]he interplay of ideas and the exchange of views with which the law is concerned."[128]

The question arises, after almost twenty years of such rulings, whether *Plessy* should still be considered good law. Hart would say that *Plessy* continued to state the rule. Separate but equal was the established rule, and anything changing it would be an act of overruling. According to Hart, such an act would be judicial legislation. Even though the separate but equal rule may not be morally defensible, it would still be law. Does this reasoning, however, reflect the process by which judgments in law are made? For those working in the civil rights field, *Plessy*'s demise was simply a matter of time.[129] *Plessy* had not been applied in a way favorable to segregationist interests for a very long time. Suppose that someone claimed that segregationist interests would prevail in a given case, because the separate but equal rule validated the state's action. Any informed observer of the judicial development would respond that the persuasive force of *Plessy* had been vitiated by an accumulation of decisions adverse to its rationale.

Realistically, *Plessy* is no longer quite law, and *Brown* is trivialized by the epithet legislation. A more accurate understanding of how law operates is available in the picture of the decline of some rules and the rise of other rules to replace them in an ongoing evolutionary process of persuasive moral argument. That picture is fashioned with the materials of the middle-of-the-road positions of Pound, Cardozo, and Fuller.[130] Such advocacy of moral argument also characterizes the more recent contributions of Perelman and Dworkin.[131] The evolutionary picture provides an example of how judicial decisionmaking may be

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126. Missouri *ex rel.* Canada v. Gaines, 305 U.S. 337 (1938), celebrated *Plessy's* fortieth anniversary by relying heavily on *McCabe*, stating: "[T]he State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity." *Gaines*, 305 U.S. at 351. The case was followed in Sipuel v. Board of Regents, 332 U.S. 631 (1948) (per curiam).

127. Sweatt v. Painter, 339 U.S. 629, 634 (1950).

128. *Id.* at 634. The Court added that the petitioner had a right to "legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school." *Id.* at 635. In the companion case of McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950), a black graduate student was required to sit on a special row in the classroom, to study at a special table in the library, and to eat at a special table in the cafeteria. The Court commented, "[t]he result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." *Id.* at 641.

129. *Cf.* R. KLUGER, *supra* note 110, at 282-84.

130. *See supra* notes 62-75 and accompanying text.

131. *See generally* R DWORKIN, *supra* note 92, at 81-130, 248-53, 279-90.

rethought in such a way as to avoid both the abyss of skeptical uncertainty and the shackles of conceptualism.

IV. Judicial Decision as Paradigm

The process of rethinking, however, is incomplete. One might wish to rest content, hoping to avoid the twin traps of rigid rules and amoral anarchy. To the literalist the denial of the permanence of rules will be alarming. To the cynic the assertion of the normality of order will be foolhardy. For those unwilling to accede to either extreme, more exploration remains. The picture of the rise and fall of rules is satisfactory as far as it goes. Yet it is inadequate to convey the complexities of the relationship between major shifts from one rule to another and the routine contour adjustment within a rule that obviously occupies the major portion of judicial energies. The notion of paradigm may provide a helpful metaphor for that purpose. The use of the expression "paradigm case" has become a common one for the typical or standard instance of an idea.[132] That meaning of the term is not helpful in the search for metaphor. But Thomas Kuhn's notion of scientific paradigms does provide promise of illuminating how the structure of legal decision interrelates with the process of legal persuasion. Kuhn himself found inspiration in judicial reasoning. He stated "a paradigm,...like an accepted judicial decision in the common law, is an object for further articulation and specification under new or more stringent conditions."[133] An examination of paradigms may be useful, therefore, in increasing understanding of the judicial use of rules.

A. Viewing Rules as Paradigms

A paradigm is a particular set of assumptions with which to view the world. Like a *topos* in legal argument, it provides a context for argument. Once that set of assumptions is accepted, the starting place need not be reexamined. Instead, standard scientific investigation can be efficiently pursued within the confines of that paradigm. Scientists work within the governing paradigm of their disciplines to solve routine problems. Kuhn labels that process normal science.[134] As time goes on, however, problems accumulate that are insoluble within the parameters of the assumptions that constitute the reigning paradigm. Scientists try to ignore these problems. "Normal science," Kuhn says, "often suppresses fundamental novelties because they are necessarily subversive of its basic commitments."[135] Those fundamental novelties are of interest only in time

132. *E.g.*, H. Hart, *supra* note 16, at 125 ("[C]lear examples of what is certainly within its scope . . . are the paradigm, clear cases.").

133. T. Kuhn, The Structure of Scientific Revolutions 23 (2d ed. 1970).

134. The conduct of "normal science" in law is aptly illustrated by a proportion of undissented appellate opinions that would dismay any legal existentialist. Judge Ginsburg reports that, in 1983-84, "ninety-four percent of our 355 published opinions, issued initially without dissent " Ginsburg, *supra* note 96, at 212. A further illustration of the routine nature of much appellate judicial work is reflected in the fact that the circuits choose such a modest percentage of their opinions as worthy of publication. Last year's figure for the D.C. Circuit was 67%. *Id.* at 213.

135. T. Kuhn, *supra* note 133, at 5.

of breakup between paradigms. Breakup occurs when the tension caused by the accumulation of insoluble problems becomes sufficiently great to undermine the plausibility of the governing paradigm.

This period of scientific revolution is an interregnum in which participants are forced to question their basic assumptions. As a result, science is unsettled because no one agrees on the right way of looking at things. Kuhn offers as an example of the period between paradigms, when thinkers are searching for what Perelman would call a new *topos*, the field of physical optics before Newton. Common beliefs were not shared in the field of physical optics. Hence, each writer of that era started afresh from the beginning.[136] The result of such efforts was a considerable volume of basic theory. But little of the problem-solving work associated with normal science was produced. The reason for this failure is that each scientist was doing basic theorizing, endeavoring to formulate a plausible paradigm.[137]

The revolutionary period is a period of exploration of new possible paradigms. The alternatives compete for attention, and the more persuasive one will eventually succeed and become dominant. But surely, one may object, the winner would be determined by nature and logic. Kuhn, however, asserts that equally crucial is the kind of persuasive argumentation that is also involved in judicial decisionmaking.[138] Prevailing is a matter of persuasion.[139] The more persuasive paradigm will become dominant, and it will remain dominant as routine problems are solved within its confines.[140] In addition, when a paradigm emerges, scientists can "agree in their *identification* of a paradigm without agreeing on, or even attempting to produce, a full *interpretation* or *rationalization* of it. Lack of a standard interpretation or of an agreed reduction to rules will not prevent a paradigm from guiding research."[141] The paradigm still provides guidance because what is crucial is not the detail but the set of fundamental assumptions which provides a reasonably consistent way of viewing reality.

Those fundamental assumptions in fact constitute the paradigm. As with *topos* and argument, paradigm and persuasion are intimately linked. Indeed, Kuhn ascribes a central place to the role of persuasion.[142] Such arguments, in

136. *See id.* at 13.

137. *Id.*

138. Kuhn comments that "anyone examining a survey of physical optics before Newton might well conclude that, though the field's practitioners were scientists, the net result of their activity was something less than science." *Id.* at 94.

139. Persuasion requires the giving of reasons in judicial argument. *See* Ginsburg, *supra* note 96. Moreover, it is the process of argumentation that generates the necessity of "[r]etreat, accommodation, compromise." *Id.* at 212.

140. However, minority schools sometimes may continue to function alongside the dominant school.

141. T. KUHN, *supra* note 133, at 44 (emphasis in original).

142. To understand why science develops as it does, one need not unravel the details of biography and personality that lead each individual to a particular choice, though that topic has vast fascination. What one must understand, however, is the manner in which a particular set of shared values interacts with the particular experiences shared by a community of specialists to ensure that most members of the group will ultimately find

turn, depend upon the shared values (*topoi*) of the community. The consensus, however, cannot endure forever. The assumptions that constitute the paradigm are called into question. Eventually, the new paradigm reaches a point at which the accumulation of too many unsolvable problems causes tension. When such a paradigm begins to break down, it exhibits several signals:

> The proliferation of competing articulations, the willingness to try anything, the expression of explicit discontent, the recourse to philosophy and to debate over fundamentals, all these are symptoms of a transition from normal to extraordinary research. It is upon their existence, more than upon that of revolutions, that the notion of normal science depends.[143]

Kuhn's portrait of science provides a picture suggestive of the way that fundamental legal ideas come into being, live a life, and die out. But an accurate picture of that process is not available in terms as concrete as the core notion of rules. The core of the rule suggests a permanence that is unreal. The core does, however, provide a convenient shorthand, a paradigm, for treating certain kinds of situations in a particular sort of way. As long as satisfaction with the application of accepted values to the situation continues, the paradigm remains useful.[144] But when other factors introduce themselves, the persuasive power of the old paradigm begins to erode. The search for an alternative begins. Eventually, a new one must emerge. Many examples in law demonstrate such a paradigm process at work. The evolution first of *Plessy* and then of *Brown* are good instances. Because the previous discussion of that history may be readily reanalyzed in paradigm terms, consideration of other available examples provides opportunity for additional insight.

B. Normal Paradigms: The Case of the Smart Con

One of the clearest examples is the development by the Supreme Court of the right to appointed counsel. *Betts v. Brady*, decided in 1942, held the federal Constitution did not guarantee counsel in state felony cases unless special circumstances made the appointment of counsel necessary to assure the fundamental fairness of the trial.[145] Imagine a young lawyer, recently graduated from law school, who obtains a position with the Attorney General of Florida. The

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one set of arguments rather than another decisive. That process is persuasion.

Id. at 200.

143. *Id.* at 91.

144. The utility of the paradigm derives from its very constraining quality which in judicial explication of the law tends to encourage modest developments. Ginsburg, *supra* note 96, at (quoting Friendly, *Reactions of a Lawyer — Newly Become a Judge*, 71 YALE L.J. 218, 222-23 (1961)).

145. [T]he Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and rights, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.

Betts v. Brady, 326 U.S. 455, 473 (1942).

case he is assigned involves a crank named Gideon from Panama City. Gideon is incarcerated in the Florida State Prison and has filed a *pro se* habeas corpus petition. He claims that he is illegally imprisoned because the state denied him appointed counsel at his trial.

How does the young lawyer defend Florida in the Supreme Court? A rule governs the situation, and the rule seems clear. *Betts* has not been overruled; it should be good law. The young lawyer can therefore defend his case on the ground that Gideon, as demonstrated by his *pro se* petition, is a smart fellow and that no special circumstances trigger the *Betts* exception. Indeed, Gideon does not allege any special circumstances requiring counsel in his case. By his own admission, he falls within the rule of *Betts*. How then can Gideon hope to prevail? He ignores *Betts* entirely. Instead, he claims a right to counsel exists in every felony case without regard to the presence of special circumstances.

Gideon, however, is only the initial opponent. When the case is actually heard, Gideon will not personally argue the case against the young Florida lawyer. The Court will appoint counsel to argue for Gideon. In this case, appointed counsel will be Abe Fortas, one of the very best Washington lawyers.[146] But the young lawyer has the law on his side. The rule favors Florida. To overrule *Betts*, the Court would have to make a legislative choice. Surely, such precipitous action is unlikely. However, when the young lawyer begins to study the cases, he discovers that for the past thirteen years the Court has typically taken one or two right to counsel cases each term. Although the Court has never overruled *Betts v. Brady*, in every case for the past thirteen years it has found special circumstances.[147]

Imagine that the young lawyer in his worry consults Ronald Dworkin. Dworkin is after all the most noted current propounder of a theory of precedent. A central element of that theory is the distinction between the gravitational force of a precedent and its enactment force.[148] The gravitational force is the moral power of attractiveness a decision has for the decision of similar cases. The enactment force, on the other hand, is simply the strict authority a decision has for cases of the same facts: Cases the decision is said to govern. When the rationale of the case can be extended to other cases by analogy, only the gravitational force would so apply. The enactment force has no such extension. It is nothing more than the rule of the case. In Hart's language, the enactment force of a precedent is the core meaning of the rule stated by that case. The purpose of Dworkin's distinction is to show that when the persuasiveness of precedent is cut back, it is the gravitational force that is reduced. As it loses the weight it had previously commanded, its gravitational force diminishes until only the enactment force remains.[149]

How would Dworkin advise the worried young lawyer? He would likely remark that he very much regrets for the lawyer's sake that *Betts* appears to

146. A. LEWIS, GIDEON'S TRUMPET 48-56 (1964) (a delightful account of the entire proceedings in the *Gideon* case).

147. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 60 (5th ed. 1980) [hereinafter cited as Y. KAMISAR].

148. R. DWORKIN, *supra* note 92, at 110-15.

149. *Id.* at 111-13, 121-22.

have retained little gravitational force. The Supreme Court has not been sincerely impressed by the principle of *Betts*, since it has found special circumstances in every case. Dworkin can, however, offer some consolation to the young lawyer. Even though the gravitational force may have ebbed away entirely, *Betts* retains its enactment force as a rule until the Court overrules it. The young lawyer still has a rule to argue to the Court, a rule that governs the case. Its loss of gravitational force means only that *Betts* has no more persuasive power. Its rationale can no longer influence other cases.[150] Because it retains its enactment force, however, it keeps its legal standing as a valid rule.

The young lawyer finds, however, that Dworkin's consolation is of little avail. Though "special circumstances" still has technical standing as a rule, that is no inhibition to a unanimous Supreme Court which unceremoniously pronounces *Betts* dead on arrival. According to Dworkin, the enactment force of *Betts* is not cut off until the Justices act. Thus, a residual element in Dworkin's theory resembles Hart's core meaning of a rule. A rule is still a rule until it is overruled in an act of judicial legislation.[151]

Viewing law in this manner is unhelpful. A more realistic view would recognize the rule had lost its power before the court pronounced it dead. To claim that this rule had its enactment force up until the second before the Court signed its death certificate is naive.[152] Lawyers do not look at cases that way. Anyone advising the young lawyer about the state of the law at that point would say the chance of persuading the Court not to overrule *Betts* is virtually nonexistent. The Court will certainly not be swayed by the argument that *Betts* is the law, the enacted rule.[153] Under the circumstances, its rationale is so vitiated, so completely eaten away that even the shell of the rule may not remain.[154]

The young lawyer is therefore in the position that, in order to defend the case successfully, he cannot rely on the rule. He must reexamine the fundamental rationale and try to persuade the court that all those previous cases foreshadowing the rejection of *Betts* were mistaken. He must return to fundamental assumptions to mount persuasive arguments that the values behind *Betts* are worth preserving. Unless he does that, he will be unable to persuade the Court, because the Court has already been making up its collective mind.

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150. "[H]e does not deny its specific authority but he does deny its gravitational force, and he cannot consistently appeal to that force in other arguments." *Id.* at 121.

151. "If an earlier decision [had] no gravitational force, its value as a precedent would be limited to its enactment force, that is, to further cases captured by some particular words of the opinion." *Id.* at 113.

152. *See* Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 225, 269.

153. The loss of support for *Betts* is dramatized in the fact that only two states supported Florida's position. Twenty-two states implored the Court to overrule *Betts*. *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963). The amicus position of the Attorneys General against state rights was highly unusual. The campaign to do so was originated by the young Attorney General of Minnesota, Walter Mondale. *See* A. LEWIS, *supra* note 146, at 145-54. Lewis explains that a twenty-third state was inadvertently omitted and later added. *Id.* at 148.

154. Kamisar, LaFave & Israel ask rhetorically: "After *Chewning* [the last 'special circumstances' case prior to *Gideon*], what was left of *Betts* to overrule?" Y. KAMISAR, *supra* note 147, at 61.

At this point, very little, if any, persuasion is necessary to overrule *Betts*. The Court is ready to recognize the reality that it has already created. The special circumstances rule has no more vitality. Though it may appear to be the rule, it no longer has credibility. Indeed, if a lower court judge were to rely affirmatively on it at this point, that judge would likely be criticized for excessive legalism and ridiculed for lacking insight into the emerging constitutional standard. *Gideon v. Wainwright*[155] announced the *official* end of the *Betts* paradigm. At that point the *Gideon* paradigm officially began. What remains is the routine legal work of figuring out the details of the scope of the new "rule."[156]

C. *A Frozen Paradigm: The Case of the Addict with Status*

The picture of law portrayed by *Betts*' demise, however, merits an important qualification. Law does not always follow such a bell curve in its pattern of development. The downfall of *Betts* was so complete that the notion of its tenuous enactment force becomes comic. Other paradigms, however, may linger on indefinitely, in states of extremely frail health. In some cases, Dworkin's gravitational force may have oozed away entirely, while apparent enactment force remains. Some paradigms linger on for a long time, while others are cut off in their prime. In either case, the paradigm may be thought of as frozen in time. It is not dead, but its animation is definitely suspended.

Robinson v. California[157] is an interesting example. The Court there held that imprisoning a narcotics addict for the *status* of being an addict constituted cruel and unusual punishment. Many civil libertarians welcomed this powerful new weapon to convert the punishment of criminal offenses into the treatment of socio-medical problems.[158] In their eyes, *Robinson* established a fantastic new rule

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155. 372 U.S. 335. The Court considered its decision sufficiently obvious to be given full retrospective effect. *See* Linkletter v. Walker, 381 U.S. 618, 628 n.13, 639 n.20 (1965).

156. For materials on the scope of the right to appointed counsel and related assistance, see Y. KAMISAR, *supra* note 147, at 65-179. Those materials illustrate that working out the details of the scope of the rule is more complicated than the statement in the text would suggest. That complexity is due to the need to develop the new rule in the context of a number of other evolving rules, all of which interact in the process of elaboration.

157. Robinson v. California, 370 U.S. 660 (1962).

158. The decision was hailed by Neibel:

> The Court has set its face against those who are content to imprison the addict and not to cure the disease. In the long run, as congress and the legislatures intelligently diagnose the nature of this social illness the greatest implication of the decision will be realized: A modern, civil and successful treatment of this sad, sick segment of our people.

Niebel, *Implications of* Robinson v. California, 1 HOUS. L. REV. 1, 11 (1963). McMorris concluded that the addicts "must now be either let alone or, better, treated by physicians, psychiatrists, and social engineers for their sickness." McMorris, *The Decriminalization of Narcotics Addiction*, 3 AM. CRIM. L.Q. 84, 86 (1964). Logan interpreted *Robinson* as meaning that "[t]he punishment by criminal process of persons apprehended only because they are sick must cease in American courts." Logan, *May a Man Be Punished Because He Is Ill?*, 52 A.B.A. J. 932, 932 (1966). Asimow saw that "the addiction statute — without explicit provision for treatment—is now extinct." Asimow, *Punishment for Narcotic Addiction Held Cruel and Unusual*, 51 CALIF. L. REV. 219, 228 (1963).

to aid the therapeutic approach to a better life.[159] Within a few years, they brought *Powell v. Texas* to the Supreme Court.[160] Powell had been convicted for public drunkenness. His lawyers, however, claimed that Powell's conviction was unconstitutional, because he was in essence being punished for the *status* of being an alcoholic.[161] They argued that *Robinson* should apply, because the difference between the status of being an alcoholic and the status of being an addict is inconsequential.[162] *Robinson* should invalidate laws punishing such drunkenness.[163]

Four members of the Supreme Court were willing to accept that argument,[164] but five were not,[165] including some who had been members of the majority in *Robinson*.[166] They rethought the implications of *Robinson* and were persuaded

159. The Executive Director of the North American Judges Association perceived *Robinson* to mean that "American judges must set [the sick person] free from criminal prosecution." Logan, *supra* note 158, at 932. The case was based on the principle that it is "obviously unjust to punish a human being for the sole reason that he is already suffering." *Id.* The lawyer who represented Robinson in the Supreme Court, Samuel Carter McMorris, whose position of advocacy is nowhere disclosed in the Article nor in the Quarterly, saw Robinson's overdose death prior to entry of the decision of the Court as making

> him a martyr to the cause of justice for the unhappy class of which he was a part. Perhaps had he been able to come to the community for understanding, treatment, humanity, he would not have had to continue his resort to the underworld purveyors of the medicine his body cried out for, and he might be alive today.

McMorris, *supra* note 158, at 88. Another writer saw *Robinson* adopting the British therapeutic approach and concluded "[t]he impact of the decision should be to direct the states toward both a more effective and humanitarian treatment of drug addiction, and to serve as a general warning that no state may constitutionally ignore the findings of medical science in the construction of its criminal law." Bagalay, *Penal Sanctions Applied to Narcotics Addiction Are Unconstitutional as Cruel and Unusual Punishment*, 41 TEX. L. REV. 444, 448 (1963).

160. Powell v. Texas, 392 U.S. 514 (1968).

161. "Students of constitutional law immediately saw in *Robinson* the eventual application of this principle to other addicts, and particularly to the alcoholic." Logan, *supra* note 158, at 932. *See also id.* at 936-37. Martin reflected a common attitude toward the problem in stating "[a]lcoholism is a disease and it is impossible to believe that a rational person would voluntarily incur it." Martin, *Alcoholism as a Defense to a Charge of Public Drunkenness—Implications*, 4 HOUS. L. REV. 276, 278 (1966).

162. Asimow commented, "[t]he wind from Robinson could topple statutes in the area of alcoholism, which, considered as a disease, presents problems analogous to those of addiction." Asimow, *supra* note 158, at 227. Bagalay thought it likely that *Robinson* would lead to "a review of the application of criminal sanctions to such medically fertile fields as homosexuality and alcoholism." Bagalay, *supra* note 159, at 448. Martin considered it "obvious" that *Robinson* meant that the punishment of a chronic alcoholic would be unconstitutional. *Martin, supra* note 161, at 276.

163. Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966). Martin thought that "[t]he question of prosecution of the alcoholic for public drunkenness seems settled. The problem of prosecution for related compelled offenses must soon be faced." Martin, *supra* note 161, at 290. Logan found that "[t]he continued criminal incarceration of the alcoholic is a national disgrace." Logan, *supra* note 158, at 933. *Robinson* was the answer, because from now on a "citizen cannot be incarcerated by reason of being addicted to a drug (alcohol is a narcotic)." *Id.* at 935.

164. *Powell*, 392 U.S. at 554 (Fortas, Douglas, Brennan & Stewart, JJ., dissenting).

165. *Id.* at 514 (Marshall, Black, Harlan, J.J., & Warren, C.J.); *id.* at 537 (Black & Harlan, J.J., concurring); *id.* at 548 (White, J., concurring in result).

166. Justices Black and Harlan and Chief Justice Warren were members of the majority in *Robinson* who were also in the majority in *Powell*. Justices Stewart, Brennan and Douglas were the other members of the *Robinson* majority. Justices Fortas and Marshall joined the Court in the

by the *ad absurdum* argument. That argument challenges the judge to draw the line. If punishment for the status of being an addict were outlawed, criminal defendants could argue that their addictions compelled them to *buy* narcotics.[167] Laws forbidding purchase and sale cannot apply to the addict, because that would be indirect punishment of the status.[168] If the vice of status crimes is their involuntary character, the addict could claim exemption for the crimes committed to get the money to buy narcotics. His status compelled him to snatch the purse. Unless indirect punishment of the involuntary status is permissible, the addict must be allowed this defense.[169] The Court in *Powell* clearly decided the *ad absurdum* argument was indeed a slippery slope. As a result, it cut back to the bare bones of *Robinson* without overruling it.

In that regard, *Powell* is unlike both *Gideon* and *Brown*, in each of which one paradigm completely replaced another. *Robinson* was simply cut short. It may be considered frozen. It is preserved, as if encased in some futuristic cryogenics cylinder, for museum-like display to future generations. The difference is that frozen rules may occasionally be revived. A frozen rule remains, but it is so confined to its facts that it appears to retain no gravitational force. *Robinson* is an appropriate case in which to recognize enactment force as an accurate description of the present state of the law, since it appears to retain some limited authority. Moreover, the possibility remains that its gravitational force may thaw in the remote future, presumably when reprogramming has replaced punishment as the principal technique for coping with social problems.[170] In contrast, *Betts* retained little, if any, enactment force just before the guillotine fell.

One consequence of thinking of law as a dynamic process is that the status of a rule is never set until the courts have finished with it. The problem with enactment force, however, is that it seems to be a concession to Hart's notion

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interim between the cases. Justices White and Clark dissented in *Robinson*.

167. The constitutionality of this particular question [criminal sanctions for the "use" of narcotics] was not before the Court, but the rationale for what the Court did hold seems to apply with equal force to those laws which proscribe the act of using narcotics. If the constitutional ban on cruel and unusual punishment precludes treating the addict as a criminal, then it makes no sense to permit the states to treat as criminal the conduct of an addict which [is] only symptomatic of his disease.

Bagalay, *supra* note 159, at 446. *Accord*, Martin, *supra* note 161, at 284.

168. United States v. Moore, 486 F.2d 1139, 1257 (D.C. Cir. 1972) (Wright, J., dissenting). Martin argued that "[i]n discussing alcoholism as a defense one may not avoid the obvious analogy to drug addiction as a defense to prosecution for the illegal use of drugs." Martin, *supra* note 161, at 279. McMorris thought that "[n]arcotics use in clinics, under state supervision, may be what we ultimately need to enforce the spirit of *Robinson*." McMorris, *supra* note 158, at 88. *See also* Amsterdam, *Criminal Law Today and Tomorrow*, 9 HAWAII B.J. 31, 35, 38 (1972).

169. United States v. Moore, 486 F.2d 1139, 1260 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part). *Cf.* Martin, *supra* note 161, at 291 (If "the offense was compelled, no criminal liability should attach.").

170. Martin captures the ideal well. "Society and the individual alcoholic will benefit most from a dynamic civil commitment program the objective of which is treatment and rehabilitation of all alcoholics who come before the court." Martin, *supra* note 161, at 291. Asimow saw *Robinson* as compelling "a state that wants to deal with addiction to do so by treatment." Asimow, *supra* note 158, at 225. *See Criminals Should be Cured, Not Caged*, 6 AM. CRIM. L.Q. 133, 138 (1968) ("genuine rehabilitation").

of the core meaning. Such concretizing of the rule is disturbing, because it is inconsistent with the middle-view of law as a process of moral argument. Its intent seems to be to hide the metaphorical quality of rule or enactment force. Organic (and, therefore, dynamic) metaphors are less likely to deceive. Hence, the safest manner in which to speak of rules is in such terms as healthy, sick, dying, or dead. Dworkin defines enactment force as the core of the rule that is left after all of the gravitational force is gone. At that point, resuscitation is required for the rule to become viable again. The process of argumentation would be needed to breathe new life into its rationale.

That qualification does not imply that, properly understood within the structure of moral argumentation, the notion of enactment force does not have its uses. As in *Robinson*, a state of suspended animation is possible in which the rule remains confined to its particular facts for perhaps an indefinite period of time. It remains in that limbo because no other technique of handling that particular problem seems appealing at the moment. At the same time, it is a true case of enactment force, for the rule is not seen as a suitable source from which to draw inspiration to solve similar problems. Indeed, determining which problems are similar when a rule is so disfavored is difficult. That difficulty arises from the attempt to separate the rule from its rationale. But it is precisely this separation of the rationale, *i.e.*, Dworkin's gravitational force, from the core or enactment force of the rule that creates the illusion that a rule's enactment force is merely a matter of automatic application. The misfortune of that suggestion is the notion that the legal task can be performed without examination of the rationale of the rule in order to know whether a particular situation falls within it. If the lifeblood of legal development is moral argument, the assertion of an unqualified notion of enactment force represents a significant case of arteriosclerosis.

D. An Aborted Paradigm: The Case of the Death Penalty That Could not Die

The frozen paradigm is not the only available category of non-normal paradigm. Another sort could be called the aborted or truncated paradigm, a good example of which is provided by the death penalty cases. Those cases constitute the culmination of numerous assaults on the death penalty.[171] Over the years, some of those attacks were partially successful;[172] others were not.[173] Eventually, however, the crusade culminated in the apparent success[174] of *Furman v. Geor-*

171. For a survey of the history of the challenge to capital punishment, see Caswell, *Capital Punishment: Cementing A Fragile Victory*, TRIAL May-June 1974, at 47.

172. *E.g.*, Witherspoon v. Illinois, 391 U.S. 510 (1968) (death sentence is invalid if imposed by "death qualified" jury).

173. *E.g.*, McGautha v. California, 402 U.S. 183 (1971) (lack of standards to guide jury discretion in imposing death sentence is not unconstitutional).

174. To the movement to abolish capital punishment, its victory at the Supreme Court in

> June 1972 was the culmination of a nine-year legal battle. Engineered by the NAACP Legal Defense Fund, the protracted struggle was hailed by Fund literature as "the closest thing to a full-scale military operation that US courts are likely to see."

Caswell, *supra* note 171, at 47.

gia.[175] At that point, the crusaders thought they had won.[176] At the same time, however, a backlash against crime led to a sudden surge of support for capital punishment.[177] This grassroots swell led a number of jurisdictions to enact new death penalty statutes in an attempt to meet the rigorous procedural requirements of *Furman.*[178]

A majority of the Court in *Furman* probably thought those procedural standards had made the death penalty too difficult and that *Furman* would therefore effectively end capital punishment.[179] Instead, the Court faced the capital punishment issue again in *Gregg v. Georgia.*[180] This time, however, the issue was

175. Furman v. Georgia, 408 U.S. 238 (1972).

176. Former Supreme Court Justice Arthur Goldberg hailed *Furman* as "a great step forward in the Court's and our country's history." Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355, 366 (1973). Another writer said the time had come to accept "the apparently inevitable end of capital punishment as a feature of our legal system . . . [for] all signs point to the impending death of capital punishment." Cobb, *Bastard or Legitimate Child of* Furman? *An Analysis of Wyoming's New Capital Punishment Law*, 9 LAND & WATER L. REV. 209, 235-36 (1974). Professor Harold Levinson, writing with several associates, considered it "unlikely that a constitutional capital punishment statute can be enacted" because *Furman* "strongly implies that capital punishment in the United States is a thing of the past." Ehrhardt, Hubbart, Levinson, Smiley & Wills, *The Future of Capital Punishment in Florida: Analysis and Recommendations*, 64 J. CRIM. L. & C. 2, 6-7 (1973) [hereinafter cited as Ehrhardt]. McDonald stated:

> The decision was at once unprecedented yet the result of a clear abolitionist trend at almost every level of the system of criminal justice of the United States. The decision was surprising, unexpected, an apparently radical break with our history, but it was also a decision whose time was irresistably (sic) at hand.

McDonald, *Capital Punishment in South Carolina: The End of an Era*, 24 S.C.L. REV. 762 (1972).

177. Comment, *Capital Punishment After* Furman, 64 J. CRIM. L. & C. 281, 288 n.98 (1973), noted an increase in approval of capital punishment as reflected in public opinion polls: 1966, 42%; 1969, 51%; 1972, 66%. That development would have been appreciated by Levi who stated: "The process is one in which the ideas of the community and of the social sciences, whether correct or not, as they win acceptance in the community, control legal decisions. Erroneous ideas, of course, have played an enormous part in shaping the law." E. LEVI, *supra* note 73, at 6. *See also* Bennett, *Rehabilitation in Check*, TRIAL, Mar. 1976, at 12.

> No doubt one reason for the sudden popularity of the retribution rationale is the growing fear of crime on the streets. Along with this is the belief, long held by many, that we have been too soft on criminals. This has been the cry of hard-liner conservatives for a long time. Today many liberals find themselves leaning, if not moving, in that direction.

Id. at 12.

178. Goldberg details some of the backlash in both public opinion and state legislative responses. *See* Goldberg, *supra* note 176, at 367. A critique of the Florida legislative response is provided by Ehrhardt & Levinson, *Florida's Legislative Response: An Exercise in Futility?*, 64 J. CRIM. L. & C. 10 (1973). *See generally* Ehrhardt, *supra* note 176. Cobb stated: "[T]he states believe their citizens want the death penalty. At one time, this was enough to justify any reasonable death penalty statute. But *Furman* leaves no doubt that, constitutionally, it will not be enough in the future." Cobb, *supra* note 176, at 235.

179. Goldberg indicated that he had considered it "extremely doubtful that the death penalty would be legislatively reviewed on the mandatory and even-handed basis which might meet the [constitutional] objections." Goldberg, *supra* note 176, at 366. McDonald stated: "The time has now come for the State frankly to acknowledge that the death penalty has been relegated to our history." McDonald, *supra* note 176, at 794. Another writer opined: "This reevaluation will *undoubtedly* result in the repeal of even those mandatory death penalty statutes presently employed by many jurisdictions." Comment, Furman v. Georgia—*Deathknell for Capital Punishment?*, 47 ST. JOHN'S L. REV. 107, 147 (1972) (emphasis added).

180. Gregg v. Georgia, 428 U.S. 153 (1976).

more difficult, because the Court had to decide whether the new statutes framed specifically to meet the *Furman* criteria would pass constitutional muster.

Confronted directly with the issue in the context of a popular outcry, a majority of the Court backed off from the stronger stance of *Furman*. As a result, the Court found itself approving the state statutes, for the most part, as meeting the requirements that had been established in *Furman*. Ironically, the Court found itself endorsing the death penalty as constitutional after all. The apparent beginning of a new paradigm in *Furman* was sharply truncated into a relatively modest set of procedural requirements specified in *Gregg*. All that remains of *Furman*'s promise is the nostalgic reminder of that era found in the routine dissents by Justices Brennan and Marshall in all death penalty cases. They continually adhere to their dissents in *Gregg*, reiterating "the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments."[181]

The position now, of course, looks much different than it did at the time of *Furman*. Death penalty opponents then felt they had a new paradigm emerging on the subject.[182] They no doubt hoped that it would have a long and healthy life, and they waited impatiently for the Court to pronounce the final sentence on the death penalty.[183]

Furman's proponents were, however, disappointed by *Gregg*. Although the new paradigm sometimes prospers, in other cases it does not. Argumentation makes legal development an experimental process in which a rule is tried out along with an assessment of the arguments composing its rationale.[184] Sometimes

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181. *E.g.*, De La Rosa v. Procunier, 105 S. Ct. 2353, 2353 (1985) (Brennan & Marshall, JJ., dissenting to the denial of application for stay of execution).

182. *E.g.*, Junker, *The Death Penalty Cases: A Preliminary Comment*, 48 WASH. L. REV. 95, 95 (1972) ("The next to last step down the long road to total abolition of capital punishment consists of a period during which the death penalty is retained as an official symbol but repealed in practice."). Junker went on to remark that, as a result of *Furman*, "the hanging tree" is "already dead." *Id.* Comment, Furman v. Georgia: *Will The Death of Capital Punishment Mean a New Life For Bail?*, 2 HOFSTRA L. REV. 432, 432-33 (1974), said that *Furman* "has effectively abolished capital punishment in the United States for the time being." Cf. *McDonald, supra* note 176, at 762 (believed the public had acquiesced in *Furman*'s "abolishing the death penalty").

183. Irvin & Rose, *The Response to* Furman: *Can Legislators Breathe Life Back into Death?*, 23 CLEV. ST. L. REV. 172 (1974), considered it "unlikely that the Supreme Court, after releasing over six hundred prisoners from death row, would permit the reinstatement of capital punishment in any form." *Id.* at 189. *Accord* Ehrhardt, *supra* note 176, at 7. McDonald thought "the availability of capital punishment to state legislatures through statutory changes may be more theoretical than actual." McDonald, *supra* note 176, at 766. *Cf.* Comment, Furman v. Georgia: *A Postmortem on the Death Penalty*, 18 VILL. L. REV. 678, 720 (1973) (difficulty of drafting a practicable death penalty statute). Junker summarized his sentiments as follows:

> My hunch is that Furman spells the complete end of capital punishment in this country, not because its logic requires it, but because the moral authority of the Court will command it, and because I think I hear a collective sigh of relief emanating from legislators who have more important business to attend to than the passage of necessarily narrow, probably futile and possibly unconstitutional death penalty statutes.

Junker, *supra* note 182, at 109.

184. The idea achieves standing in the society. It is suggested again to a court. The court this time reinterprets the prior case and in doing so adopts the rejected idea. In

as a result of that experiment, the rule does not fit society's moral expectations after all. The new rule is abandoned and the previous position is resumed. In other settings the old rule and the anticipated new one are combined in an uneasy compromise. In these instances the new paradigm is aborted, at least until the compromise no longer seems justifiable. If the time comes when the rationale is no longer acceptable, a new paradigm will replace it. In some cases the compromise produced by the aborted paradigm itself becomes the new paradigm. The death penalty cases provide an example of this latter process. The new paradigm was not stated in *Furman*. Instead, the truncation of *Furman* in *Gregg* became the new death penalty paradigm.

E. Rules Versus Paradigms: The Letter and the Spirit

Such notions as Hart's core and Dworkin's enactment force obscure the lessons taught by paradigms, because they suggest that a judgment need not be made in the application of rules. That view ignores the fact that even a judgment simply to remain with the present rule is still a judgment. For example, the idea of enactment force might suggest that the difference between *Furman* and *Gregg* was that the Court merely applied the *Furman* standards in *Gregg*. That view, however, is seriously misleading. In formal terms such as the notion of enactment force, the standards applied in *Gregg* appear similar to the standards enunciated in *Furman*. But the *spirit* in which the standards are applied is quite different. In *Furman*, the Court intended to discourage the death penalty. In *Gregg*, the Court had recognized the realities of its situation and made its contingent acceptance of the death penalty.

By focusing on *what* rule is applied, concretist approaches such as the core meaning of rules divert attention from the significant nuances in *how* the rule is applied.[185] To conclude the same rule was applied in the two cases is a misunderstanding, because the spirit behind those rules is different. Between *Furman* and *Gregg*, the Court had taken a different perspective on the death penalty. Indeed, that perspective has evolved into a new paradigm, much of the detail of which has been worked out.[186] Focusing on enactment force blots out those significant developments for the rule's heart and soul that are revealed only in the manner or style in which the rationale is expounded.

One contrast between the evolution of the right to counsel paradigms and the death penalty paradigms is the degree of moral consensus regarding the

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subsequent cases, the idea is given further definition and is tied to other ideas which have been accepted by courts. It is now no longer the idea which was commonly held in the society. It becomes modified in subsequent cases. Ideas first rejected but which gradually have won acceptance now push what has become a legal category out of the system or convert it into something which may be its opposite.

E. LEVI, *supra* note 73, at 5-6.

185. Capital punishment opponents held out hopes that factor would work in favor of extending *Furman*. Irvin and Rose stated that "a statute which appears to satisfy Furman may in its application fail to pass constitutional muster." Irvin & Rose, *supra* note 183, at 188.

186. *See, e.g.*, W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 611-25 (5th ed. 1980 & Supp. 84-90 1985).

two issues. Anyone comparing the two situations would recognize that, prior to *Gregg*, the *Furman* issue was highly problematical, because the death penalty was an issue in ferment.[187] By contrast, appointed counsel for felons, just prior to *Gideon*, was not an issue that was the subject of serious dispute. The Attorneys General of twenty-three states joined in an *amicus curiae* brief urging the Supreme Court to overrule *Betts*, while opposition to the change was supplied by Florida and two other states in soulful isolation.[188] The issue was hardly the subject of heated moral argument. The enactment force of *Betts* therefore appears comic. The enactment force of *Furman*, on the other hand, is merely misleading rather than inaccurate, *if* careful attention is paid to its limits.

A further factor to consider is the different social contexts in which decisions must be viewed. One such setting is the immediate legal context, exemplified by the arguments before the Court and within the legal community at the time of *Gideon*. On the other hand, the broader popular setting of moral argument is illustrated by the death penalty debate at the time of *Furman*. The historical settings of these two cases differ markedly in the degree of moral consensus both within the legal community and the larger political community. That contrast demonstrates the present point. If enactment force is viewed as existing in reality rather than as the product of the moral consensus of the community, then legal thinkers are being fooled into accepting a comfortably simple fiction in place of the complexity of reality. That reality depends in fact on the state of moral argument both in the legal context and in the broader social context.

Hence, Dworkin is correct in claiming that law is a matter of moral argument, even when it appears to be a purely legal argument, because legal argument is simply a particular form of moral argument. Recognition of that insight fosters awareness that legal argument occurs in a context of generalized moral argument. Without this background, the legal argument would have neither coherence nor meaning. Awareness of these levels, or layers, of moral argument in law reveals a fluidity, a dynamic quality, that almost certainly would be overlooked if law were viewed in terms of such concrete notions as the core of rules or even enactment force. This awareness looks beyond the

187. *Compare* Comment, *supra* note 183, at 719-20 ("[A] mandatory death sentence is indicative of regressive penology. Manifest in our penal system is the desire to reform a criminal; mandatory death is the antithesis of this desire.") *with* Polsby, *The Death of Capital Punishment?* Furman v. Georgia, 1972 SUP. CT. REV. 1, 39 ("[I]t does not seem to me necessarily barbaric, that someone might believe that certain criminals ought to be put to death, the inhuman brutality of their crimes being so great as to outrun all possiblity of forgiveness or amends.") *and* Eckardt, *Punishment* in PUNISHMENT: FOR AND AGAINST 165, 169-70 (Harold Hart ed. 1971) ("All will agree that the humanizing of the administration of justice is a good thing from the standpoint of the dignity of persons and the quality of human relationships. However, it is not impossible that this process can prove self-defeating — if no boundaries are set upon it. Death by murder is, after all, a rather 'cruel and unusual punishment' from the point of view of the victim. The complaint is often heard that the rights of wrongdoers are being allowed to take precedence over the rights of victims. Ought not the targets of criminality, it is asked, be entitled to humane and civilized treatment as much as, if not more than, their assailants? However we feel about this, we may agree that the humanization of punishment, for all its virtue and continuing urgency, can hardly be permitted to erode all punishment away.").

188. *See supra* note 153.

letter of the law to the spirit that animates the rule paradigm, giving it life in the societal context. As the dynamic triumphs over the static in this evolution of rules, morality becomes predominant in its interaction with law. Thus, viewing law as paradigms enhances perception of the dynamics of the interaction of law and morality.

V. Conclusion: Morality and Law in Interaction in Judicial Decisionmaking

Conceptualist notions like the core of rules and enactment force are necessarily static in nature. The certainty sought by literal approaches such as conceptualism is unavailable unless the concepts are held static. By contrast, skeptics who deny that rules are capable of holding meaning consider themselves "realistic" in asserting that certainty, and therefore stability of legal rules, is impossible. For them, law cannot become static, because it is by nature in a state of free-floating change. The middle view, however, perceives that law should be both dynamic and grounded at the same time. To fulfill its mission in society, law must be both stable and flexible. Stability is necessary to carry out the role of law in maintaining and enhancing social order. Flexibility is essential if law is to adapt to the changing needs of society. To meet both conditions simultaneously, law must continually remain in a state of flux, caught in a tension between the pull to remain constant and the tug to stay abreast of the times.

A. Rules as Mental Constructs

These competing perspectives embrace quite different views of the function of rules. The conceptualist views rules as absolute, self-applying, and concrete, as in Hart's core or Dworkin's enactment force. That view produces the wooden certainty of a literalistic approach, but it does so at the expense of being inconsistent with social reality. Because most people yearn for certainty, the idea of rules having fixed meanings has a siren call. Indeed, people may fool themselves into believing in fixed meanings, simply because rules are extremely convenient. But the convenience is not in thinking that rules are self-applying without need for the exercise of judgment. That view distracts from the truth. The true convenience of a rule is as a mental shorthand. Encountering a particular fact situation, the skeptic sees only the possibility of unconstrained policy. To the skeptic's embarrassment, a judge may reason, "Oh yes, the applicable rule is *res ipsa loquitur.*" That rule serves as a convenient shorthand for all of the decisions that have been reached in previous examinations of the problem. The competing arguments, principles, and purposes have already been weighed, leading to the comfortable conclusion that this sort of situation should be treated in that particular way.

The evolution of the rule of separate but equal was examined earlier in this article. That "rule" initially stands for the judgment that the Court in *Plessy v. Ferguson* meant that separate facilities may sometimes satisfy the equal protection clause. The conceptualist, however, views the case as an act of legislative choice; the Court announced a new rule which it then applied to subsequent

cases as a matter of deductive logic. The skeptic recognizes only the possibility of discrete choices; consequently, each case is nothing but an independent policy decision. The views of both conceptualist and skeptic distort reality. In contrast, the perspective of the new rhetorics provides a clearer picture. Although the inductive reasoning process used in developing the rationale of the rule is not absolute enough in its conclusions to satisfy the conceptualist, the nature of the argument is nonetheless logical. Moreover, its persuasive power confounds the skeptic by making possible both a degree of predictability and a measure of stability in the evolution of the law.

A study of the cases succeeding *Plessy* reveals that, as the Court proceeded to apply the standard that eventually came to be known as separate but equal, the rule was gradually formulated in sharper terms. As that occurred, the Court could expect the lower courts to apply it to a wider array of situations. During the time that the rule continued to reign, the Court was spared the necessity of reexamining whether the purpose of the rule was desirable. It served as a convenient shorthand for the value-decisions embraced in its purpose.

The case study of *Plessy* provides the basis for framing a definition: A rule is a mental construct which represents a temporal distillation of resolved arguments. How temporary that resolution will be varies widely in time, as the examples canvassed in preceding sections demonstrate. The arguments resolved and contained in the distillation are all of the persuasive arguments raised in the process of the issue's adjudication. Although in form those arguments address the rationale of the rule, in substance they concern the just treatment of the situation. That question of justice will necessarily be judged in light of the morality of that society.

On this relationship of morality to law, conceptualist and skeptic again take issue. The former sees law as conceptually separate from morality. The latter, seeing no law, acknowledges either some form of morality only, or nothing at all, depending on whether the skeptic is such only as to rules or to values as well. In any event, neither can see law and morality in necessary interaction. But the present definition of a rule consists of just such a necessary interaction, a dynamic tension between the effort to formulate a settled practice and the struggle to adapt to evolving values and circumstances. Hence, as long as the social definition of the situation remains relatively constant, and the conception of the just treatment of that situation also holds steady, then the mental construct enshrined in that rule will continue to represent a convenient and useful shorthand.

B. The Rationale of Paradigms

The definition of rules set forth above assumes the dynamic context of a changing society. It therefore projects an evolutionary perspective on law in which legal rules evolve over time. In that light, Thomas Kuhn's view of the historical evolution of science may usefully be applied to law. From that perspective, rules are viewed as paradigms. But only the middle view of rules finds utility in paradigms. For the skeptic, even that degree of order is impossible, a self-deception. For the conceptualist, the idea is irrelevant, asserting

a necessary morality of law by claiming the rationale as part of the rule. As seen earlier, Hart categorically rejects that idea.[189] But the middle view proudly claims the rationale as the heart and soul of the rule, accepting bravely the moral challenge that implies.[190]

The middle view also finds compatible the idea that routine legal "science" is undertaken within established rule paradigms. Because of the pressures of the moral challenge, however, those paradigms break down from time to time and must be replaced by new paradigms. For example, the *Plessy* paradigm was replaced by the paradigm of *Brown v. Board of Education*. That paradigm has, in turn, been partially superceded by a paradigm of racial integration, albeit one whose contours are neither entirely consistent nor completely settled.[191] Each of these paradigms has served as the reigning rule for its respective period of ascendancy.

Moreover, legal change occurs at two levels: within a rule paradigm and from one paradigm to the next. Obviously, interparadigm change is major change. Paradigm shift is the sort of change illustrated by the breakdown in persuasiveness of the "separate but equal" rule of *Plessy* and its replacement in *Brown* with a new paradigm of equal protection. New paradigms arise in response to dissatisfaction with the existing paradigm. Several factors are potentially responsible for such change: 1) the inconsistency of the old paradigm's rationale with the rationales of other rule paradigms; 2) the perceived unfairness of the existing rationale of the paradigm; and/or 3) the failure of the social definition of the situation assumed by the rule to meet presently accepted standards of morality.

When *Brown* supplanted the rule of *Plessy*, each of these factors was involved: Inconsistency with the rationale of other rule/paradigms, perceived unfairness of the rationale of separate but equal, and perceived failure of the social situation of blacks as defined by the rule to match the existing standards of morality. The perceived unfairness of the rationale of *Plessy* is shown by the failure of the Court to apply it purposefully for such a long period prior to *Brown*. Likewise, the language of those cases shows the Court had become increasingly uncomfortable with the implicit expression of moral approval for a caste system in American society. Finally, in its treatment of racial equality in the restrictive covenant cases[192] and in the voting rights cases,[193] the Court had been applying rules whose rationale was made consistent with the rationale of separate but equal only with great strain and discomfort.

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189. *See* H. HART, *supra* note 42, at 614.

190. *See* L. FULLER, *supra* note 69, at 89.

191. *Compare* Fullilove v. Klutznick, 448 U.S. 448 (1980), *and* United Steel Workers v. Weber, 443 U.S. 193 (1979), *with* Firefighters Local 1784 v. Stotts, 104 S. Ct. 2576 (1984), *and* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

192. Shelley v. Kraemer, 334 U.S. 1 (1948).

193. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941).

C. *The Challenge of Consistency*

Each factor of dissatisfaction creates tension, because the Court questions whether it is acting consistently. The apparent inconsistency challenges the Court to take a coherent moral stand. The decline of *Plessy* demonstrates the significance of the demand for consistency. To justify a decision, as Dworkin says, a theory must be derived which provides a consistent explanation of all rules and principles in the system.[194] If that cannot be done, if no consistent justification for the rules can be found, then the resulting tension presses for resolution. It engenders a form of cognitive dissonance[195] in which a court, having the task of providing justifications for its decisions, must provide one kind of justification in a certain set of cases and a different, not really consistent, justification in other similar but separately treated cases.[196] The Court is pressed to achieve consistency by ironing out the conflicts between the rationales of these competing lines of cases. The conflict can, of course, be resolved by framing a new rule paradigm whose rationale is compatible with related paradigms.

Although the preceding discussion purports to concern major change between paradigms, much of it applies with equal force to change within paradigms. Carrying on what Kuhn calls normal science, practitioners operate within a paradigm, working out the detailed contours of the reigning rule. Routine science produces a developing conception of the paradigm's meaning. Similarly, routine decisions in law constitute a growing awareness of the meaning of the rule. Those decisions appear to be made primarily with reference to the rationale of the reigning rule paradigm, but comparable principles or rationales of similar paradigms are also implicated in the decision. Finally, lurking in the background are general conceptions of morality beyond the particular bundle of moral concepts essential in the statement of the individual paradigm. The growth and development of any rule can be traced in its history. Such an examination reveals how the rule has expanded, eroded, or undergone less perceptible change in response to all of the factors mentioned above.

D. *Moral Argument and Legal Change*

In sum, the process of change within a paradigm is different in *scope* from interparadigm change. But the two sorts of change are not really different in kind. Each focuses on the moral acceptability of the rationale of the rule. Both sorts of change respond to the evolving morality of society as that morality is reflected both directly in standards of fairness, as well as indirectly in the moral connotations that are attributed to situations in the process of their social definition. Although this method of viewing rules is quite in harmony with the middle view of law, it is inconsistent with conceptualism and skepticism. The

194. *See* R. DWORKIN, *supra* note 92, at 116-17.

195. *See generally* L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

196. The court is caught in the same kind of conflict that Fuller predicted for Holmes' "bad man," if he were to try to appear moral while acting amorally. L. FULLER, THE LAW IN QUEST OF ITSELF 92-95 (1940).

reasons have already been stated. Conceptualism manages its rigid certainty in part by excluding the morality that would creep in were the rationale admitted to be part of the rule. Skepticism harvests anarchy by denying the common sense of the middle view that a common purpose can be pursued with a reasonable degree of coherence.

The most important lesson to be learned from the paradigm metaphor, however, is that the impact of morality is both greater and less than it is often seen to be. Virtually everyone concedes that morality is intimately involved in the major turning points that occur as paradigm shifts. Conceptualists accept that view by labeling the occurrence judicial legislation. But the paradigm mode teaches that change is not usually abrupt enough to be honestly categorized that way, even when it may seem so in retrospect. Moral argument is central to the legal change, but there is more concession to the pull of the past rationale and less to the emerging one than is often believed.

On the other hand, routine legal work is regularly dismissed as not involving moral argument, at least in any central way. Acknowledgment of some role for morality can be avoided only by defining a rule in such a way as to exclude its rationale. The conceptualist resorts to such a definition. But the focus on rationale that characterizes work within paradigms belies that avoidance of the moral interface. When a legal rule is scrutinized in light of its purpose, its continuing evolution is seen within a framework that is infused with morality. That recognition of the significance of morality to routine legal work may be the most important insight that a paradigm view of judicial decisionmaking can offer.

It is appropriate to add a word of appreciation for the contribution of Judge Ginsburg to this issue. Her article provides both detail and statistics that enhance appreciation of the fact that the prime focus of an intermediate appellate court is on the tremendous volume of routine legal work to be carried on within paradigms provided by previous decisions and statutes.[197] Her exposition also demonstrates that very little of that work is easy enough to be fobbed off as merely mechanical. The tough part is the reasoning that is the judge's obligation. In making that reasoning her central focus, Judge Ginsburg provides a salutary emphasis on the role of persuasive argument in judicial decision. She also offers an important reminder of the collegial nature of the judging enterprise. This special environment heightens the role of persuasion in the process. Lawyers first offer persuasive argument to judges, and the judges then convince one another of the more satisfactory view. Viewing judging as a collective endeavor (of panels, of the entire circuit, of all circuits, of all judges) emphasizes its social nature. Understood in all its ramifications, the social nature of the judging process has its fundamental import in enhancing awareness of the interaction of morality and law in the decisions that judges must make.

197. Ginsburg, *supra* note 96, at 205.