Objectivity in the Law

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Scholarly criticism of judicial decision-making has been abundant and wide-ranging over the past ten years. It has included charges of judicial usurpation and complaints about the quality of judicial opinions. It has brought the objectivity of the courts into question. While the Supreme Court has attracted the largest volume of criticism, state courts, and even lower federal courts, have been embroiled in similar controversy. But scholars have found it easier to detect errors than to suggest alternative courses of action. Professor Henry Hart, for example, was unable to do much more than remind the legal profession that "reason is the life of the law." Similarly, Professor Wechsler has urged a search for "neutral principles" for the adjudication of con-


1. For a cross-section of what is generally considered responsible criticism of the Supreme Court, see, e.g., Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 HARV. L. REV. 1, 1-6 (1957); Kurland, Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," The Supreme Court, 1963 Term, 78 HARV. L. REV. 143 (1964); Lewis, Consumer Picketing and the Court—the Questionable Yield of Tree Fruits, 49 MINN. L. REV. 479 (1965); cf. Hart, Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term, 73 HARV. L. REV. 84 (1959). One need not subscribe to Professor Kurland's method of presentation in order to agree with many of his criticisms. For a recent example of what Kurland would probably consider the misuse of the per curiam decision, see Cameron v. Johnson, 381 U.S. 741 (1965). Another distressing practice of the Court is the frequent treatment of counsel's statements in oral argument as facts proved by competent evidence at trial and, therefore, as a proper basis for decision. See Justice White's critical comments on the practice in Cox v. Louisiana, 379 U.S. 539, 592-93 (1965).

For what most observers would call less responsible criticism of the Court, see J. Keating, The Sovereign States (1957); A. Scott, The Supreme Court v. The Constitution (1963).


Although written criticism of the state courts is not as plentiful as that regarding the Supreme Court, the late Karl Llewellyn, in 1969, noted what he called "a crisis in confidence" about these courts "which packs danger." K. Llewellyn, The Common Law Tradition: Deciding Appeals 3 (1960).


4. Hart, supra note 1, at 125. In H. Hart & A. Sacks, The Legal Process 588 (tent. ed. 1958), the suggestion is made that the degree of reason in a court's decision is measured by the "respect accorded" the decision by future judges and by how long the decision remains unoverruled. Unfortunately, the point is not developed any further, although there is an intimation that the ability of a decision to withstand "professional criticism" may also be a criterion of whether it is well-reasoned. For comments on Professor Hart's references to "reasoned" decisions, see J. Stone, Legal System and Lawyer's Reasoning 317-19 (1964); J. Stone, Social Dimensions of Law and Justice 656-57, 670-72, 678-89 (1959).
stitutional issues. Not surprisingly, both were met with demands that they give "valid examples of what they consider to be judicial reference to neutrality or impersonality of principle." It was even unfairly suggested that what Professor Hart would have called a reasoned decision is simply one with which he would have agreed.

Much of the scholarly debate has focused specifically on Professor Wechsler's call for the discovery of "neutral principles." Wechsler was met initially with the obvious objection that by definition principles, including principles of adjudication, cannot be neutral. Professor Deutsch has gone beyond this logical criticism and more accurately characterized the demand for neutral principles as the "hopeless" call for principles that can and will be generally applied and that are, at the same time, publicly acceptable. Deutsch points out, however, that even this reformulation is subject to attack. The general applicability of a principle would not be sufficient to establish its "neutrality" for Wechsler, since he would certainly reject any such principle as, for example, that Negroes should always win (or lose) cases. If the fundamental test of the neutrality of a principle lies in its public acceptability, on the other hand, the point of Professor Wechsler's criticism is lost, because Wechsler would require, in addition to acceptability itself, criteria of acceptability to which men of good-faith might subscribe despite differences in their personal values. For Wechsler, to say that a principle is publicly acceptable cannot be to say only that the public accepts it.

Faced with these discouraging and inconclusive results, one might abandon the attempt to show that the process of adjudication can be impersonal or neutral. One might recognize, for example, that all legal activity, whether or not concerned with constitutional issues, is goal-oriented, and that it would be more productive to specify particular goals and work toward them. However, most legal scholars have been

10. Deutsch, supra note 9, at 193-195.
11. This is somewhat the approach taken by Professor Black, who sees the elimination
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unwilling to adopt a goal-oriented point of view. They have felt that if a system of decision-making is to be called a legal system, it must make it possible for people who disagree strongly over the merits of a decision to agree nevertheless that the case was properly decided, or, if this is impossible, at least to agree that the decision was adequately justified. Although it is generally accepted that the law does in fact meet this requirement, scholars have been unable to show how and why it is met or even to prove that it is met at all. This article will attempt to explain this inability by examining the conditions which judicial decision-making must fulfill in order to meet the minimal standard of objectivity.12

I. Traditional Theories of Legal Reasoning

A. Law as a Set of Rules

Scholars attempting to identify an objective method of legal reasoning have typically assumed that the law consists of rules. When they have been unable to account for actual decisions solely in terms of rules, they have enlarged their description of the law to include more general rule-like statements called principles and still broader propositions called standards.13 It has been recognized, however, that if objectivity in legal reasoning exists because legal reasoning consists of reasoning from rules, then legal rules must theoretically be capable of complete statement, although as a practical matter such completeness may be difficult to attain.14 Furthermore, once the rule has been com-

of racism from our society as the most important present function of the legal system and who asserts that the nice distinctions upon which the traditional notions of the scope of the judicial function are based cannot be permitted to impede this process. Black, Foreword: "State Action," Equal Protection and California's Proposition 14, The Supreme Court, 1966 Term, 81 Harv. L. Rev. 93, 105 (1968). See also id. at 82.

12. In the parlance of contemporary philosophy, the proposed model is an explication of the concept of legal reasoning. As an explication, the model is prescriptive because, in exploring the concept, it attempts to stipulate what legal reasoning would have to be in order to meet the demands of objectivity made upon it. Yet it is also descriptive because it is partially based on what actually occurs in the legal process. On the subject of explication, see Hempel, Fundamentals of Concept Formation in Empirical Science, 2 International Encyclopedia of Unified Science No. 7, at 11-12 (1952).

13. An example of a legal "principle" is that no one should be liable to pay damages in a tort action in the absence of a showing of fault. Pound, The Theory of Judicial Decision, 36 Harv. L. Rev. 641, 645-46 (1923). The proposition that fault is present when one fails to behave as would an ordinary prudent man exemplifies a "standard." Id. See also R. Pound, An Introduction to the Philosophy of Law 58-59 (1922); Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14, 22-31 (1967).

14. See Dworkin, supra note 13, at 25-26. Professor Dworkin postulates that legal rules are capable of complete statement in order to contend that in fact judges do not have discretion in any non-trivial sense in the application of the law. To avoid the only problem that he recognizes—that of controlling the judge's power to change the law—he contends that there exist "principles" which are themselves part of the law and which control
pletely stated, it must be possible to ascertain from the formulation itself the factual situations to which the rule applies.\textsuperscript{16} Unless this can be done, one is obliged to admit that judges have a large measure of discretion in applying legal rules\textsuperscript{16} and to conclude that the assumption that the law consists of general rules precludes any possibility of objective decision-making. But experienced lawyers would agree that it is counter-intuitive to contend that so-called rules of law can be completely stated and that it is still more implausible to maintain that the statement of a rule can completely indicate the situations to which it is applicable. This problem has been explored at length elsewhere.\textsuperscript{17}

In the remainder of this article, it will be assumed that legal rules cannot be completely stated and that one can never be certain of exactly when a so-called rule of law is applicable.\textsuperscript{18}

It is not surprising that legal rules are unable to fulfill such stringent requirements. If legal rules were complete and self-applying, their application by the courts would be largely a deductive process, which it clearly is not. To put the matter another way, it is precisely because legal reasoning is not primarily deductive that one is unable to state a legal rule completely or to ascertain from the statement of the rule when it is applicable. As a simple illustration, consider whether a statute requiring “motor vehicles” to pay a road tax is applicable to go-karts.\textsuperscript{19} Only if the statute had defined “motor vehicle” to include

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15. Dworkin, supra note 13, at 25.
19. The example is suggested by Burns v. Currell, [1963] 2 Q.B. 438, where the defendant was prosecuted for operating a go-kart without liability insurance. The question was whether a go-kart was “a mechanically propelled vehicle intended or adapted for use of roads.” In earlier cases, “dumpers” used for construction work had been held to be outside the scope of the statute, whereas a farm tractor had been held to be within it. Lord Chief Justice Parker thought the test was “whether a reasonable person looking at the vehicle would say that one of its users would be a road user.” Id. at 440. He decided that the go-kart was analogous to the “dumpers” and quashed the conviction. Cf. McBoyle v. United States, 293 U.S. 25 (1931), which held that an airplane was outside the scope of a statute prohibiting the transportation of stolen motor vehicles in interstate commerce. “Motor vehicle” was defined as an “automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails.”
go-karts would the decision be primarily deductive; if there were such a statutory definition, moreover, the case would probably never be litigated. Without such a definition, the decision cannot be deduced until the court has supplied a minor premise by deciding whether a go-kart is a motor vehicle for the purposes of the statute. Consider, as another example, the statute prohibiting the transportation of women in interstate commerce for prostitution, debauchery, or any other immoral purpose. Suppose a man transports a woman from one state to another where she undresses in a motel room and cavorts in the nude before her escort and a male photographer who takes obscene photographs. Here also, deduction only enters the situation in a very minor way. The major question is whether these actions constitute transportation for an "immoral purpose" within the meaning of the statute. If the purpose is found to be immoral, a simple logical operation will determine that the statute has been violated and that the prescribed penalties should be applied. But this second or logical part of the problem is relatively trivial. These examples illustrate that the two aspects of the problem—the substantive or classificatory aspect, and the logical one—seldom, if ever, merge.

21. This example is suggested by United States v. Mathison, 229 F.2d 358 (7th Cir. 1956). The activities were held not to be "immoral" within the Mann Act.
23. The insignificance of deduction noted supra note 22 is often reflected in the cases. In Alder v. George, [1964] 2 Q.B. 7, the question whether a statute prohibiting certain activities "in the vicinity of" a particular place applied to activity within the place was carried on appeal to the level of the divisional court of the Queen's Bench. See also, People v. Soto, 49 Cal. 67 (1874), holding that a man who had stolen a heifer could be prosecuted under a statute making it a crime to steal a cow; Gli v. M'Dowell, [1933] 2 K.B. 463 (K.B.), where the question arose whether a plaintiff, intending to buy two heifers and a bullock or two bullocks and a heifer, could recover for breach of warranty or for deceit when in fact he was sold a bullock, a heifer, and a hermaphrodite. (The court ruled that the plaintiff had a cause of action.)

In the days when solutions to conflict of laws problems depended primarily on questions of "personal status," "domicile," "contract," or "substantive" and "procedural" law, a substantial body of literature developed around the proper use of these conceptual categories, which were anything but self-applying. See, e.g., Cook, "Characterization" in the Conflict of Laws, 51 Yale L.J. 191 (1941); Robertson, A Survey of the Characterization Problem in the Conflict of Laws, 52 Harv. L. Rev. 747 (1939).

24. Nor are the most important elements of legal reasoning accounted for by induction, the second branch of classical logic. In its most usual sense, induction refers to the process of inferring from known facts the existence of unknown facts, an inference often expressed in terms of a rule-like general statement which can serve as the starting point of deductive reasoning and which can be verified or refuted by future observation. But no sophisticated observer any longer believes that law consists of preceding rules which men somehow discover. The application of the law is always at least partially a creative process. Even if one were to suppose that inductive arguments are as sound and
Because identifiable "rules," "principles" and "standards" do not exist, any theory of legal reasoning that requires them is necessarily incomplete. If one asks himself what so-called rules of law are, he will be obliged to conclude that they are constructs formed by scholars writing books and articles, by lawyers litigating cases, and by judges preparing to decide cases. As such they serve a very useful purpose. They are, first of all, a helpful mnemonic device for classifying large numbers of cases. They provide a concise shorthand for referring to matters which, at any particular moment, are not in issue. As general statements of our expectations and preferences, they also provide a means of predicting the outcomes of future cases and for arguing about the desirability of those outcomes. Yet the position that rules are the actual content of the law, rather than a means of understanding it, is untenable because there are any number of so-called rules which logically can be constructed out of any given number of cases, and there is no authoritative statement of which is correct. Under traditional theory, not even a court's express attempt to state the correct rule is authoritative; it is only evidence of what the rule is, and sometimes not even the best evidence.

If one took seriously the attempts of even the most prestigious courts to state correct rules of law, he would be forced to conclude that half the decided cases in England and America were decided improperly.

as compelling as deductive ones, legal decisions are no more compelled by induction than by deduction.

If one seeks to justify induction by employing the techniques of deductive logic, then the induction cannot be "logically" justified. See K. Popper, THE LOGIC OF SCIENTIFIC DISCOVERY 27-31 (1959). It should be noted that even in mathematics induction concerns discovery. The discoveries are not facts about the world of material objects, of course, but about the system of mathematics being examined. See I. Polya, MATHEMATICS AND PLAUSIBLE REASONING 3-8 (1954). If one is trying to predict what decisions courts will make, rather than making those decisions himself, he may indeed be using inductive methods. Though induction may be useful in this practical sense, it is not useful in developing a theory of judicial decision-making.

25. See L. Fuller & R. Braucher, BASIC CONTRACT LAW 227-28 (1964). For other sources recognizing the purely instrumental nature of legal "rules," see Cook, SCIENTIFIC Method and the Law, 13 A.B.A.J. 503 (1927); Corbin, Sixty-Eight Years at Law, 13 U. KAN. L. REV. 183 (1964). The point was put very well by a noted contemporary philosopher:

Principles and laws may serve us well. They can help us to bring to bear on what is now in question what is not now in question. They help us to connect one thing with another and another. But at the bar of reason, always the final appeal is to cases (emphasis supplied).

Wisdom, A Feature of Wittgenstein's Technique, in J. Wisdom, PARADOX AND DISCOVERY 90, 102 (1965). The same point was made recently by the Supreme Court. "[T]he error made by the Court of Appeals was precisely its reliance on formulae extracted from their contexts rather than on pragmatic analysis." Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 104, 119, n.16 (1968) (Justice Harlan).

26. See, e.g., Le Lièvre v. Gould, [1933] 1 Q.B. (C.A.), in which Lord Esher was compelled to retreat from the principles delimiting the nature of liability for negligence.
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Indeed, these attempts at generalization have left us with the unsolvable problem of distinguishing between the supposed holding of a case, often expressed as a rule or rules of law, and what is merely dictum. The English have taken this distinction more seriously than the Americans, although they have often concentrated on formulating the rule of a particular case rather than the rule of a series of cases. They have nevertheless found even the search of the ratio decidendi of individual cases to be the pursuit of a chimera. The best minds in the profession joined in the search but have disagreed even as to what was being sought.27 Attempting to base their search on some notion of the relevant facts of a case, they found that selecting the relevant facts was no easier than determining the rule of law itself.28 Here again, a court's statement that certain facts were relevant to its decision was not conclusive,29 and the difficulties of the search were compounded by the possibility that later courts might say that the bar misunderstood the ratio decidendi of any particular case. Hedley Byrne & Co. v. Heller & Partners, Ltd.30 revealed that the Court of Appeal and most of the bar


28. The failure of the attempt to buttress the theory on some notion of the "relevant" or "material" "facts" is discussed in detail in J. Stone, Legal System and Lawyer's Reasonings 267-74 (1964).

29. Attempts to treat a particularly succinct and sensible judicial statement as a statute, so that future development of the rule would be an interpretation of that statement, have ended in failure. Cf. the treatment of Indemnum v. Dames, L.R. 1 C.P. 274 (1859) in London Graving Dock Ltd. v. Horton [1951] A.C. 737. Lord MacDermott declared: The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto.

Id. at 761. See also Lord Porter's speech, id. at 744, Lord Normand's speech, id. at 751, and the House of Lords' treatment of the "rule of construction derived from Shelmer's Case," Gilb. 200 (1725), concerning the meaning of the word "money" in a will, in Perrin v. Morgan [1943] A.C. 399, 405.

30. [1964] A.C. 465 (1965). The case stated that liability for negligent misrepresentation could lie even in the absence of the special relationships of attorney-client, trustee-beneficiary, etc., and that Derry v. Peek, infra note 31, merely held that an allegation of
had been operating for seventy-five years under a mistaken view of the ratio decidendi of Derry v. Peck. A concept of such mythical proportions does little to bolster attempts to establish the objectivity of legal reasoning by reference to the binding nature of legal precedent as expressed in rules.

B. The Levi and Llewellyn Models

The theories proposed by several legal scholars may serve to illustrate the range of difficulties inherent in rule-oriented models of judicial decision-making. In America, the most generally accepted theory of the nature of legal reasoning is that of Edward Levi. Levi hypothesized that the law consists of rules, however imprecise, derived from previously-decided cases and existing statutes. When new cases arise, the courts must declare a rule which encompasses the relevant statutes, the unoverruled past cases, and the new case. If the courts cannot state such a rule, then some or all of the past cases must be outright fraud had been inadequately proved rather than that an action for negligent misrepresentation would not lie on the facts of that case.

31. [1889] A.C. 337. Among those who seem to have been confused was Lord Devlin, a member of the panel that decided Hedley Byrne. See P. Devlin, LAW AND MORAIS 15 (1961). In Hedley Byrne, the House of Lords declared that there was no warrant for this misunderstanding after Lord Shaw's speech in Nocton v. Ashburton, [1914] A.C. 592, 605. Nocton came twenty-five years after Derry itself and twenty-one years after the ratio decidendi of Derry was misunderstood in Le Lievre v. Gould, [1939] 1 Q.B. 491. Whether many eyes were opened in 1914 is another matter, however. The Court of Appeal felt bound to follow Le Lievre in Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164. Even Denning, L.J., who dissented in Candler, was unaware of the true state of affairs, for he thought that while Derry did rule on the question of liability for negligent misrepresentation, it had merely held that on its own peculiar facts an action would not lie. [1951] 2 K.B. at 177. In Law and Morals Lord Devlin himself seems to have thought that Nocton was only a limited exception to the general rule denying liability for negligent misrepresentation absent a contractual duty of truthfulness. Moreover, in his speech in Hedley Byrne, Lord Devlin indicates that the misunderstanding of Derry was general in the profession. [1964] A.C. at 528. This general misunderstanding, as well as his own earlier feelings on the issue, may account for Lord Devlin's hesitation in indicating when such liability would arise. [1964] A.C. at 525, 532. The question whether the information was directly communicated to the person who relied upon it assumed an importance in Lord Devlin's mind which it did not seem to have when he wrote Law and Morals. See [1964] A.C. at 533.

32. It is sometimes asserted that the notion of rule is necessary to account for the "binding" nature of law. See H.L.A. HART, THE CONCEPT OF LAW 77-86 (1961). For one who accepts it, a rule is a good reason for acting in the way the rule directs, over and above prudential reasons which might exist. Such a person adopts what Hart calls an "internal" point of view, as opposed to the "external" point of view of a person who obeys a rule only because of fear of sanctions. Leaving aside the facts that rules cannot be specified precisely and that most people are unaware of most of the so-called legal rules which bind them, there still seem to be few people in society who can be said to accept all of its rules as binding independently of fear of sanctions. "Internal" factors may often play a small part in determining obedience to laws governing the sale of liquor, sexual behavior, taxation, and traffic. To ask why law is binding is to ask more than a logical question.

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overruled until it is possible to subsume the new case and the remaining prior cases under a single rule. The present case will then be decided in accordance with this rule. The process is repeated as new cases arise. Levi characterized his method of legal reasoning as a “moving classification system.”

It has often been described as a process of synthesis and resynthesis.

The late Professor Karl Llewellyn, who used a similar model of the judicial process, described in greater detail the techniques courts use in operating this moving classification system. If, for example, a court wishes to follow precedent, it could say that “the rule is too firmly established to disturb,” thereby also affirming that the present case was within the scope of the rule obtained from prior cases. If it wished to avoid overruling previous cases, a court could say that each case of the type before it “must be dealt with on its own facts,” thus restricting the scope of the rule for which the prior cases stood. To extend the reach of an earlier case, a court could lift some general language from a prior case and put it into rule form without regard to the limitations imposed by the facts of that case. In short, the decision-making techniques that Llewellyn catalogued are means by which the courts, in the process of synthesis and resynthesis, can openly or covertly reformulate the rule for which the prior cases stand.

The difficulties with this model are immediately apparent. First, the theory must recognize that subsequent courts are always free to reformulate the rule of law for which prior cases stand. Furthermore, as Levi and Llewellyn both admit, there are no objective criteria for deciding what is the correct rule of law to be found in any prior case or cases. The latter is the more serious problem. If the theory is to describe an objective decision-making procedure, it requires the exis-

34. Id. 398, 406. See also E. LEVI, AN INTRODUCTION TO LEGAL REASONING, supra note 33, at 1-3. Levi distinguished between cases and statutes on the ground that the words of a statute are fixed authoritatively, although he admits that there “may be some ambiguity in the words used.” Id. 26; cf. id. 30. He refers primarily to vagueness rather than ambiguity in the strict sense. All words are to some extent vague; not all of them are ambiguous. See Christie, VAGUENESS AND LEGAL LANGUAGE, 48 MINN. L. REV. 885 (1964). Thus the “moving classification system” applies to statutes as well as cases, subject to Levi’s proviso that in interpreting statutes a rigorous notion of stare decisis must be observed. E. LEVI, supra note 33.

35. It seems to me that this terminology is the most usual. Cf. N. DOWLING, E. PATTERSON & R. POWELL, MATERIALS FOR LEGAL METHOD 155-215 (1946).


37. K. LLEWELLYN, supra note 2, at 77.

38. Id. at 84.

39. Id. at 79.

40. See E. LEVI, supra note 33, at 1-4.

41. See K. LLEWELLYN, supra note 2, at 62-63.

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tence of objectively discernible rules of law which serve as the starting points of legal reasoning. In point of fact, however, there are logically any number of rules of law to be derived from any case or series of cases. In addition, because statements in prior judicial opinions are themselves not rules of law but only evidence from which the correct rules may be ascertained, the theory must acknowledge that there can never be, even momentarily, an authoritative statement of a correct rule of law. Yet under the theory, rules of law are the essential raw material of legal reasoning.

Levi apparently recognized the difficulty of establishing correct or true rules of law. He construed Professor Wechsler's call for "neutral principles" as a plea for extending the synthesis of existing cases to include as many similar hypotheticals as one can realistically imagine, and then rejected the plea as unwise. He feared that, in attempting to increase the rationality of judicial decisions, Professor Wechsler asked too much of the courts. Levi suggested that Wechsler's request might even be dangerous, because, in attempting to find a rule of law to cover this extended range of hypotheticals, the courts may be led to decide future cases prematurely and to foreclose the consideration of important distinctions.

Professor Llewellyn was also aware of the difficulty of formulating a correct rule of law from a case or series of cases. He expressed this difficulty in terms of the "minimum" and "maximum" values of precedent, or in other words, the narrow and broad interpretations of a case. However, Llewellyn was never able to establish criteria for deriving these minimum and maximum values, or for determining whether a particular precedent should be given minimum, maximum, or some intermediate value in a particular case. Thus Llewellyn was forced to look beyond the mechanics of legal reasoning to support his

42. Levi, supra note 33, at 408-409. Part of Levi's objection to extending the synthesis to as many hypothetical cases as possible seems to result from his assumption that the ultimate basis of analogy is the "similarity" between the cases under consideration. See E. Levi, supra note 33, at 7, 9. It is submitted that epistemologically this assumption is incorrect. There are an infinite number of differences and similarities among any group of cases. A large number of similarities among the cases does not make the cases similar if there are significant differences as well. Thus the usefulness of analogy can be increased by dealing with differences rather than similarities, for when a significant difference is found the inaccuracy of the analogy will have been demonstrated conclusively. The situation is not unlike questions about the truth of scientific hypotheses. For example, statements like "all swans are white" can only be disproved; they can never be proved conclusively. See K. Popper, The Logic of Scientific Discovery 27-31 (1959). This epistemological point of view is reflected in the model of legal reasoning to be presented in section IV(f) infra.

thesis that the judicial activism of the past thirty years has not destroyed the predictability of judicial decision-making. He found this predictability in the fact that, in addition to generally accepted techniques for handling precedents, there were also "correct results" to cases. Certain results, moreover, were so important that courts would occasionally be obliged to reach them regardless of what the accepted means of arranging precedents would permit. In most situations, technique and result were interrelated. Capable practitioners and judges were aware of a "Law of Fitness and Flavor" which enabled those who understood it to know what results justified what techniques. Llewellyn posited finally a "Law of the Singing Reason" which was fulfilled when "a rule which wears both a right situation-reason and a clear scope-criterion on its face yields regularity, reckonability, and justice all together." In short, the law was predictable because it was a craft with known techniques, whose practitioners had long apprenticeships and whose goals were those of common sense. Since the decision-makers, the judges, were visible, the astute attorney was able to observe the responses of judges and thus to assemble the package of result and technique that was best for a particular court.

No one can deprecate the value of Llewellyn’s insights into the nature of the judicial process. However, more important for our purposes is the fact that his herculean attempt to demonstrate the predictability of judicial decision-making by means of the traditional model was forced to revert to a sense of craft and the notion of skill. The occasional contention that there is a correct decision for every case, even if it cannot be shown what that decision is, seems no more than an extension of Llewellyn’s view of the legal process as a skilled craft and of the lawyer as a skilled craftsman or even an artist. While a description of law as art may satisfy lawyers reminiscing at their clubs,
it would be disquieting if this were the only answer that can be made to laymen who claim that law is not an objective process. The profession must provide a better rationale than this or prepare to abandon its pretensions.

C. Inadequacies of the Realist Approach

Out of dissatisfaction with legal theories of this type, with their focus on unknowable entities and their invitations to sophistry, the legal realists emphasized the study of what the courts in fact were doing. The realist reaction was stimulated by traditional theories which insisted upon the existence of particular "rules of law" even after courts had decided cases in a manner irreconcilable with their existence.48 The difficulties of the realist theories arose largely when they were pursued beyond a justified emphasis on what the courts were doing and beyond the unquestionable requirement that a theory of legal reasoning must help to predict the outcomes of future cases. When some realists took the further step of defining law as a set of predictions of the outcomes of future cases, the law became even more unknowable and unidentifiable than before.49 Obviously, the theory could not be used by judges who were interested in finding out what they ought to do and not in predicting what they would do. Moreover, in the absence of an authoritative prediction-maker, whose very existence would make the theory meaningless, the question arose as to whose predictions were correct. In certain situations, furthermore, one might feel that no reliable prediction could be made. Are unreliable predictions law? What if a court decided a case contrary to the predictions of the entire bar? Since the theory would not permit one to say that the court was wrong, he would be forced to conclude that it was merely an instance of bad prediction. Attractive as it was to view the law as a set of predictions of actual human behavior—for surely legal theory must provide a basis for predicting the outcomes of future

48. This is theoretically possible under the Blackstonian view that judicial decisions are only "evidence" of what the law actually is, and that "it sometimes may happen that the judge may mistake the law." 1 W. BLACKSTONE, Commentaries *71. If a theory distinguishing judicial decisions from law is to be comprehensible, however, law must be defined as the prediction of the long-range trend of judicial decisions. Otherwise, to maintain that a particular decision was not law would be tantamount to asserting that the critic had some special vision of truth which others lacked.

49. The problem is discussed with reference to the relevant literature in Christie, The Notion of Validity in Modern Jurisprudence, 48 Minn. L. Rev. 1040 (1964). At that time I believed that, although the law could not be defined as predictions of future judicial action, it could profitably be considered a collection of norms, a position which, as will be made clear in § III infra, I have abandoned.
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cases—the attempt to define law in terms of predictions was doomed to failure.

II. Law and Argumentation

Despite the many disappointments that have been experienced in the attempt to find criteria which establish the objectivity of judicial decision-making, the quest for these criteria has been resuscitated as part of the modern revival of the study of argumentation. The man most prominently associated with this revival is the Belgian philosopher Chaim Perelman.\textsuperscript{50} Perelman studied the techniques of practical reasoning and argument discussed by Aristotle in the \textit{Topics} and the \textit{Rhetoric}, applying and extending them to the problems of modern argumentation. Aristotle divided practical reasoning into two basic categories.\textsuperscript{51} The first, called dialectical reasoning, consists of reasoning deductively from premises that are only probable or that are generally but not universally considered true.\textsuperscript{52} Because the premises used in dialectical reasoning are not necessarily true, the conclusions, though deduced correctly from these premises, will also not necessarily be true. Aristotle called the premises of dialectical reasoning \textit{topoi} and in the \textit{Topics} supplied a great number of examples of them.\textsuperscript{53} \textit{Topoi} are typically common-place statements such as, "what is desired for its own sake is more desirable than what is desired only for its effects,"\textsuperscript{54} or, "of two things not otherwise distinguishable, that which produces the more beneficial effects is the more desirable."\textsuperscript{55} The \textit{topoi} are not dissimilar in function from many maxims of the law, particularly those

\textsuperscript{50} Perelman's major work is the two-volume \textit{Traité de l'Argumentation} (1958) which he co-authored with Mme. L. Obrechts-Tyteca. This work has recently been translated into English. C. PERELMAN, THE NEW RHETORIC, A TREATISE ON ARGUMENTATION (J. Wilkinson & P. Weaver transls. 1969) [hereinafter cited as \textit{TREATISE}]. Where pages in the \textit{Treatise} are cited, parallel citations to the French edition will appear in brackets. Some of the papers reprinted in C. Perelman, \textit{The Idea of Justice and the Problem of Argument} (Petrine transl. 1965) [hereinafter cited as \textit{The Idea of Justice}] are similar to chapters in the \textit{Treatise}.


\textsuperscript{52} \textit{Topics} Book III, ch. 1, \textit{100a}30ff, in \textit{1 Aristotle}; \textit{Topics} Book I, ch. 10, \textit{104a}5ff, in \textit{1 Aristotle}.


\textsuperscript{54} \textit{Topics}, \textit{supra} note 52, Book III, ch. 1, \texti{116a}27-31.

\textsuperscript{55} \textit{Topics}, \textit{supra} note 52, Book III, ch. 2, \textit{117a}5-15.
of statutory interpretation. Like legal maxims, topoi can frequently be marshalled in support of contradictory conclusions.

Aristotle's second broad category of practical reasoning was rhetorical argument, which is concerned with persuasion and thus, should the discussion pertain to possible courses of action, with motivating the listener to act in a certain way. Rhetoric employs a variety of tools. The astute orator will not only use dialectical reasoning but will also appeal to the presuppositions and the prejudices of his audience. He will know how to enhance his own prestige in order to dispose his audience to accept his views and how to destroy the prestige of his opponents in order to undermine the effects of their arguments.

Perelman was concerned with both dialectical and rhetorical argument. He noted, of course, that the common-place statements which can serve as premises in practical reasoning will vary with one's society and audience. He pointed out contemporary examples of the commonplace arguments found in Aristotle and other ancient writers. Perelman's major emphasis, however, was upon rhetorical argument—upon persuading people to accept one's conclusions and to act in accordance with one's wishes. In the main, his discussion was an expansion of Aristotle's method of analysis. His stressed that, in the last analysis, the test of a good argument is whether it succeeds with the audience to which it is addressed.

Perelman concluded from his study of argumentation that the major problems of legal reasoning concern the "interpretation" of legal rules. Interpretation occurs (a) when there is a conflict between two existing rules, (b) when it is claimed that an otherwise applicable rule is not

56. For a listing of typical maxims of statutory construction and a demonstration of the fact that different maxims can be marshalled in favor of contradictory decisions, see Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 Vand. L. Rev. 395 (1950). Much of this article is reproduced as Appendix C to N. LLEWELLYN, supra note 2, at 221. For the broader "maxims of equity," see J. Pomeroy, Equity 363 (1941).

57. For a discussion of the scope and purpose of Aristotle's conception of rhetoric, see Rhetoric, supra note 51, Bk. I, Ch. 2 (1555b25ff). See also id. Bk. I, Ch. 1 (1554a1ff).

58. TREATISE 1-9 [1-12]; cf. The Idea of Justice 144-142.

59. TREATISE §§ 2-9, 21, 26, 27. Perelman observes, however, that there are general groupings into which common-place statements of varying content can be placed. The categories which he notes are quality, quantity, order, existence, essence, and person. Id. 85 [114]. See also id. §§ 22-24.

60. Id. §§ 21-24.

61. Id. 1-9 [1-12]. Perelman's conclusions regarding the techniques of rhetorical argument do not differ significantly from those of Aristotle. See id. 5-8 [6-10]. See also id. §§ 1-12.

62. See id. §§ 1-10.

63. Id. 196-197 [264-565], 200 [289], 414-15 [554-55]. Cf. Id. 59 [78-79], where Perelman notes that there may be a conflict in the interpretation of a particular rule similar to the conflict between two rules.

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valid, or (c) when there is no applicable rule on the subject but the judge is legally obliged to decide the case. He did not, however, attempt to provide more enlightenment on these problems of interpretation than to remind us of the obvious point that the normal techniques of argumentation will apply. Not surprisingly, Perelman concluded that analogical reasoning plays a relatively minor role in legal argument, because what many people would call analogical reasoning Perelman believes to be only the presentation of examples or instances of general rules. He did not discuss at any length the application of law to concrete factual situations, since he assumed that such application is a rule-directed activity and therefore easier than "interpreting" or establishing the existence of rules of law. Because of these assumptions, Perelman had little to say about legal reasoning that is particularly helpful or novel. Though Perelman's work on argumentation and its uses as a means of persuasion is interesting and perceptive, the reasons for the supposed objectivity of judicial decision-making will not be found there.

The assumption that legal conclusions are controlled by rules underlies much of the other contemporary philosophical discussion about the nature of non-formal argumentation. The fallacy of this assumption is particularly well illustrated by the conclusions of Professor Julius

64. Id. 59 [78-79].
65. Id. 59-60 [78-79], 131 [176]. Perelman discusses this situation in substantially the same manner in THE IDEA OF JUSTICE 100-01. The judge is "legally obliged to decide the case" under some European codes which put the judge "under an obligation to give judgment under pain of denial of justice." Another legal problem discussed in both the TREATISE and THE IDEA OF JUSTICE is the use of presumptions of fact as starting points of legal argument. TREATISE 102-104 [136-140]: THE IDEA OF JUSTICE 102-103.
66. TREATISE 373-374 [502-503].
67. Perelman discusses the application of legal rules as a subcategory of interpretation. If there is doubt about the applicability of a rule, it must first be made more precise so that its applicability or inapplicability becomes self-evident. TREATISE 241 [325], 351 [472], 354-55 [477], 356-57 [479-480].
68. See, e.g., S. TOULMIN, THE PLACE OF REASON IN ETHICS (1959). Toulmin asserts that, just as rules are institutionalized "good reasons" for conclusions in legal arguments, similar good reasons can be found in ethical arguments. The use of legal analogy pervades Toulmin's THE USES OF ARGUMENT (1958). In THE LOGIC OF CHOICE (1968), Professor G. Gottlieb discusses the problem of legal decision-making to support his thesis that choice in the law is "guided" by rules. Like Toulmin, Gottlieb builds on Ryle's notion that rules are "inference tickets" [see RYLE, "If," "So," and "Cause" in PHILOSOPHICAL ANALYSIS 333 (M. Black, ed. 1950)] concluding that rules "guide" legal decision-making by leading from the "material facts" to the decision of the case. G. GOTTLEIB, supra this note, 32-49. What facts are material is to be determined by (i) the applicable rule, (ii) maxims and rules of interpretation, (iii) moral rules and principles, (iv) economic and social considerations, and (v) the consequences of the proposed decision. If this is how rules of law guide decisions, then the control they exercise does not justify a claim that judicial decision-making is an objective process. Moreover, it is often the purpose of law to exclude from consideration standards like race, sex, and wealth because they are deemed immaterial.
Stone, who actually tried to apply Perelman's work to legal analysis. Stone was unable to say more than that leading cases serve the function of Perelman's common-place seats of argument, or Aristotle's topoi. This observation is not especially valuable, as Stone himself acknowledged. The basic and difficult question is how legal topoi are used and how it can be said that particular legal decisions are correctly derived from these starting points. If there are no means of answering these questions, it would be hard to say that there is anything objective in legal reasoning; one would be led to conclude that legal reasoning, far from being a more rigorous form of argument, suffers from all the defects of ordinary argument. Thus contemporary legal and philosophical writing on the nature of argumentation has not helped significantly to confirm our intuition that judicial decision-making is objective. If anything, an examination of this literature makes us start to doubt our instincts. Perhaps our trouble has been that we have been proceeding upon a wrong assumption as to the nature of legal reasoning. We must therefore begin again and ask ourselves what we mean by legal reasoning.

III. Preliminaries to a Fresh Approach

A. Reference Points for a Theory of Legal Reasoning

We start from the premise that if judicial decision-making is objective it must have objectively discernable reference points. It has been suggested that rules of law provide such reference points and that they may even be considered the premises of legal reasoning. Yet the lack of an authoritative form for the so-called rules of the common-law, together with their incompleteness, makes them inadequate for this role, however useful they might be for other purposes. If one is seeking something that he can call "the law," if he is seeking the fixed reference points of legal reasoning, all he will find are those marks on paper called statutes and cases. Although the authoritative style in which statutes are stated seems to differentiate them from cases, I shall disregard the distinction for present purposes because I wish to

69. J. STONE, LEGAL SYSTEM AND LAWYER'S REASONINGS, supra note 4, at 323-37. See also J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE, supra note 4, at 768-81.
70. J. STONE, LEGAL SYSTEM AND LAWYER'S REASONINGS, supra note 4, at 334-35.
71. Id. 335.
72. See note 25 supra and accompanying text. It is often desirable to summarize legal knowledge or to express our conclusions about a particular legal question. Labelling such summaries rules is not harmful so long as one does not endow them with an authoritative-ness which neither legal theory nor reality permits them to bear.
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make clear that only the uninterpreted statute is unambiguously law, just as only the uninterpreted case is law. There is no transcendental world of "meaning" in which we can take refuge when debating the meaning of a particular case or statute. Whether adequate or inadequate, vague or precise, the words must speak for themselves however little they may tell us. Legislative history and the climate of the time may assist in interpreting a statute and in predicting the outcome of a case, but they provide nothing specific enough to be incorporated in a definition of the law. If we wish to identify something as the law, then it is a statute which is the law and not a statute plus its legislative history. Similarly, insofar as they are part of the law, cases themselves are the law and not cases plus the ratio decidendi, "rule," or "rule of law" that one might wish to superimpose on them.

The importance of insisting that only the raw form of a statute is definite enough to be called "the law" and the great danger inherent in attempts to hypostatize one's interpretation of statutory provisions into a "rule of law" are graphically shown by an example from the life of Justice Holmes. Holmes was an ardent supporter of the result in Hepburn v. Griswold, which struck down a congressional attempt to make paper money legal tender. Soon after that decision, Holmes wrote a letter to the American Law Review defending the result of the case. He argued,

It is hard to understand, when a power is expressly given, which does not come up to a required height, how this express power can be enlarged as an incident to some other express power. The power to "coin money" means, I take it . . . (1) to strike off metallic medals (coin), and (2) to make those medals legal tender (money). I cannot therefore, see how the right to make paper legal tender can be claimed for Congress when the Constitution virtually contains the words "Congress shall have power to make metals legal tender." It is to be remembered that those who deny the power have only to maintain that it is not granted by implication. They are not called on to find a constitutional prohibition.76

73. The Constitution does not differ in this respect from ordinary statutes and case law. Even if, as is often contended, the provisions of the Constitution have a fixed meaning, the reformulation of that meaning into directly applicable terminology must remain unauthoritative. See Senator Ervin's speech concerning the Senate's consideration of the nomination of Justice Fortas for Chief Justice, 114 Cong. Rec. 11538, S. 11599-10 (daily ed. Sept. 27, 1968). See also Senator Ervin's article in The Washington Post, Sept. 15, 1968, § B (Outlook), at 2, col. 1, and Thurman Arnold's reply, id. col. 5.

74. 75 U.S. (S Wall.) 603 (1870).

Nevertheless, shortly after the letter was published, a differently-constituted Court overruled *Hepburn v. Griswold*, despite the vigorous dissent of Justice Fields, who adopted Holmes's argument.\textsuperscript{70}

The fallacy in Holmes's argument was pointed out several years later by James Bradley Thayer,\textsuperscript{77} who found Holmes's reasoning "obviously defective."\textsuperscript{78} Thayer correctly pointed out that Holmes's error lay in the syllogism on which he based his argument.\textsuperscript{79} Holmes's initial premise that Article I, Section 8, of the Constitution empowers Congress "to coin money" was unexceptionable. However, his restatement of this provision as a grant of power "to strike off metallic medals (coins) and to make these medals legal tender (money)" imputed to the Constitution an explicitness which it lacked. If Holmes had taken the constitutional text as he found it, his argument would have had to take a different form, which Thayer stated as follows: "(a) Congress has an express power to coin money; (b) in that is implied a power to make it a legal tender; and (c) this implied power excludes an implied power to make anything else a legal tender."\textsuperscript{78} As Thayer himself concluded, "That argument is not a strong one."\textsuperscript{81}

Of course, even if we agree that objectively discernable reference points are desirable, the question remains whether even statutes and cases can fulfill that purpose. I would answer that as an empirical fact they can. Experienced legal observers can agree among themselves as to whether a particular identifiable object is a statute or a case, even when these terms are taken in a broad sense to include constitutional provisions (as in the Holmes example), administrative regulations and decisions, and local ordinances. This much understanding is sufficient for purposes of the following discussion.

The contention that the only identifiable things which can accurately be called law are statutes and cases is not, of course, a novel one. Joseph Bingham presented the argument persuasively over 50 years ago.\textsuperscript{82} Bingham shrewdly pointed out a contradiction in the traditional

\textsuperscript{76} Knox v. Lee and Parker v. Davis, Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871).
\textsuperscript{77} Thayer, *Legal Tender*, 1 Harv. L. Rev. 78 (1887).
\textsuperscript{78} Id. 83.
\textsuperscript{79} Id. 83-84.
\textsuperscript{80} Id. 84.
\textsuperscript{81} Id. Apparently, Holmes eventually acknowledged his error. See M. Howe, *supra* note 75, at 63. Howe intimates that Holmes may have come to believe that syllogistic reasoning should not play a dominant role in the resolution of constitutional issues. However, it is not Holmes's reliance on syllogistic reasoning that accounts for his error, but rather his substitution of an abstraction of his own creation for the words of the Constitution.
\textsuperscript{82} Bingham, *What is the Law?*, 11 Mich. L. Rev. 1, 1-25, 109-121 (1912). In Erle R.R. v. Tompkins, 304 U.S. 64 (1938), the Supreme Court rejected the view that the common
requirement that courts must find general rules under which new cases can be subsumed before any such cases can be decided. On the one hand, courts were instructed to decide only the case before them and not to decide moot questions or to give advisory opinions; on the other hand, the requirement that they base decisions on general rules in fact compelled them to determine what would be the proper decision in cases not before them. Bingham was met, however, with Morris Cohen's contention that his views were "old nonsense." Cohen argued that, if the law consisted only of statutes and cases, there was no way of explaining how the courts proceeded from decided cases to the decision of new ones. It is true that Bingham's inability to answer this question was a serious short-coming of his work. Yet Bingham's point was that the traditional view of law as a collection of rules did not satisfactorily explain how to proceed from decided cases to new cases either, and, indeed, that it obscured the process. My purpose in what follows is to remedy this short-coming in Bingham's work.

B. Necessary Assumptions

We have shown that the reference points of judicial reasoning, the statutes and the cases, can be ascertained in an objectively valid manner. Our problem is to examine whether it is possible to contend that judicial decision-making, based as it is on the statutes and the cases, is an objective process. In considering this problem, it will be necessary to make an assumption about the social objectives of the judicial process. It will be assumed that the primary social purpose of the judicial process is deciding disputes in a manner that will, upon reflection, permit the loser as well as the winner to feel that he has been fairly treated. As Professor Fuller has contended, this goal requires that courts grant the parties the right to present proofs and reasoned

law could have any foundation other than state statutes and state court decisions. Bingham, however, was making the more fundamental point that the law of a state was not only found in the statutes and decisions; it was the statutes and decisions.

85. Id. 362-63.
86. Kocurek raised this point in a review of Bingham's What is the Law?, supra note 82, although he was not as unsympathetic to Bingham's views as was Cohen. Kocurek, Review, 8 ILL. L. REV. 138 (1915).
87. Bingham, supra note 83, at 102-103.
88. Whether any particular loser in the judicial forum will feel this way is another question. We are concerned with the optimum conditions for making it possible for losers to feel this way.

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arguments to them and that the courts squarely meet the proofs and reasoned arguments addressed to them by the parties.\textsuperscript{89}

In performing these tasks, the courts will not and should not be oblivious to what they deem are the demands of justice or of social policy. All men, including judges and lawyers, are goal-oriented and can be expected to utilize all available means, including the legal system, to achieve their goals. Nevertheless, the furtherance of social and moral ends or the achievement of other goals through the judicial process should be secondary to its function of deciding fairly disputes between the parties who invoke it. Under this view, therefore, the courts are in a position somewhat similar to that of the managers of a game who wish to make the conditions of play such that the losers as well as the winners will wish to continue to play. The fairness of the judicial process should not be sacrificed even in the name of other social or moral goals, and the courts will therefore at times be unable to pursue social or moral goals because of the requirement that the judicial process be fair.

Almost everyone would agree that the fair decision of disputes between the parties before the courts is an important function of the judicial process, but it is crucial to note that courts and commentators have not always been willing to treat it as the central social function of judicial decision-making. As will subsequently be made clear, however, if fairness to the parties in the resolution of their disputes is not accepted as the primary social function of the judicial process, it will be impossible to maintain that the process is objective. Moreover, one could think of better ways to resolve basic social and political disputes than the judicial process. Its stylized procedures, its restricted fact-finding processes, and the limited number of parties present in any case, make it particularly ill-suited to the resolution of such disputes.\textsuperscript{90}

\textsuperscript{89} L. Fuller, The Forms and Limits of Adjudication 28, December 29, 1959 (paper delivered in Chicago before the Association of American Law Schools). An abbreviated version of this paper was delivered at the 1960 meeting of the American Society of International Law. Fuller, Adjudication and the Rule of Law, 54 PROCESSES OF THE AM. SOC'Y OF INT'L LAW 1 (1960). See also Fuller, Collective Bargaining and the Arbitrator, 1963 Wis. L. Rev. 5.

\textsuperscript{90} Cf. articles cited notes 1 and 2 supra. See also Wellington & Albert, Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson, 72 Yale L.J. 1547 (1963). The unwillingness of the parties to call relevant witnesses can often severely limit the ability of the courts to ascertain all the relevant facts. See Johnson v. United States, 335 U.S. 46 (1948) (neither plaintiff nor defendant called the only eyewitness to the accident other than the plaintiff); cf. Fowler v. Fowler, [1949] Ont. W.N. 214 (C.A.). See also Wyzanski, A Trial Judge's Freedom and Responsibility, 62 Harv. L. Rev. 1281, 1284-85, 1293-96 (1952). This is not, of course, to deny that courts have an important law-making function in implementing basic policy decisions made by those who have adopted a constitution or enacted legislation, or in rationalizing inconsistencies in the common law. Hart, Comment on "The Courts and Lawmaking," in LEGAL INSTITUTIONS TODAY AND TO-
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Perhaps in more primitive times, when the courts policed the morals of the community through the construction of common-law crimes, the courts were obliged to play this role because more adequate machinery did not exist. Today, however, the justification for such a role is considerably weakened. Indeed, if the resolution of the great issues of the day is the most important function of the judicial process, it is not surprising that the courts are unable to propound neutral principles; under these circumstances, the only way in which the courts could satisfy the demand for neutral principles and reasoned decisions would be to provide a comprehensive and publicly acceptable theory of government and economic organization. This is surely an impossible task.

Even courts that would make fairness the chief goal of the judicial process may fail to achieve it for at least two reasons. Occasionally the courts, under the pressures of the calendar, decide cases either on issues not raised by the parties or on points only cursorily briefed and argued. A particularly glaring example of this failing was the Supreme Court's decision in *United States v. E.I. du Pont de Nemours & Co.*, in which the Government attacked du Pont's holding of 23% of all General Motors common stock. The case was tried and argued almost exclusively under Sections 1 and 2 of the Sherman Act because the parties had no indication that any other statutory provisions mentioned in the complaint were relevant. In the Supreme Court, on the Government's appeal from the dismissal of the complaint, only a few pages at the end of the briefs and the last few minutes of oral argument were

Moscow 49 (Paulsen ed. 1959) refers to the judiciary's "primary responsibility for all questions of interstitial and subordinate policy making" presented in the cases coming before the courts. Id. 45. Cf. Peck, The Role of the Courts and Legislatures in the Reform of Tort Law, 48 MINN. L. REV. 265 (1965). Professor Peck supports a role for the courts in the field of tort law rather more extensive than most observers would recognize. For example, he believes that the courts should abolish the defense of contributory negligence and substitute for it a system of comparative negligence. Id. 304-07.

91. A distressing recent example of the construction of a common law crime is Shaw v. Director of Public Prosecutions, [1962] A.C. 220 (1961). The House of Lords, inter alia, affirmed Shaw's conviction on a count charging him with the common-law crime of conspiracy to corrupt public morals, in publishing a directory of prostitutes. Counsel for Shaw argued that conspiracy to corrupt public morals did not constitute a common-law crime at all, much less one sufficiently broad to cover the conduct involved in the case. Id. at 241. In commenting on Shaw, Lord Devlin noted that "the Crown only cited three reported cases of conspiracy to corrupt public morals since Lord Mansfield's dictum in 1763," Devlin, *Law, Democracy, and Morality*, 110 U. PA. L. REV. 635, 647 (1962).


devoted to Clayton Act cases. Indeed, counsel for du Pont made no reference to the Clayton Act until Justice Douglas raised the question at the end of counsel's argument. The Court nevertheless decided the case under Section 7 of the Clayton Act by drastically reinterpreting that provision. Whether such reinterpretation was justified is not the point at issue. Rather, the point is that however certain the court was that its decision was correct, at the very least the parties were entitled to reargument and perhaps even to a remand.

The second eroding factor is the subtle transformation of the role of the amicus curiae from disinterested friend of the Court or spokesman for the public interest in the person of the Attorney General to vociferous spokesman for private interests. Under such a broad view of his role an amicus may well attempt to take control of litigation. Professor Mermin has shown in his studies of the fate of the Wisconsin Development Authority that the Wisconsin Supreme Court twice ruled on the constitutionality of the Authority on points raised for the first time by an amicus curiae, despite the high quality of legal counsel employed by both parties to the dispute.

An example on the federal level was the maneuvering which surrounded the Rosenberg case at its last stages. After the case had seemingly run its course, counsel for one Edelman, a man having no connection with the litigation, filed a petition for a writ of habeas corpus based on a ground which the "able and zealous" attorneys for the Rosenbergs had fully considered and had rejected earlier in the litigation. Because the Rosenbergs were under sentence of death, the

93. See id. at 609 (Justice Burton dissenting). It should also be noted that the Court's decision in du Pont overturned an administrative interpretation of forty years' standing. An examination of the record indicates that only eight of one hundred pages of argument in the Government briefs were devoted to the Clayton Act issue. The du Pont brief devoted seven of two hundred fifty-five pages to the issue; the General Motors brief, eleven of ninety-two.


In Dept. of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965), the petitioner asserted that it had been denied due process of law because the state supreme court had decided the case on a basis not adequately presented in the record and the briefs. The Court did not reach the issue, for it vacated the judgment in order to secure clarification of whether the case had been decided below on federal or state grounds.


96. S. MERMIN, JURISPRUDENCE AND STATECRAFT (1963); Mermin, Concerning the Ways of Courts: Reflections Induced by the Wisconsin "Internal Improvement" and "Public Pur-

pose" Cases, 1958 Wis. L. Rev. 192.


98. Id. at 292 (concurring opinion of Justice Jackson).
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Supreme Court reluctantly decided to hear arguments on the issue. Unless carefully regulated, the granting of an expanded role to the amicus curiae, even in the name of the public interest, can partially compromise the integrity of the judicial process.99

These methods by which control of litigation can be taken away from the parties are significant because the model of legal argument that is about to be constructed demands at least that Professor Fuller's minimal requirements of fairness be fulfilled. While Professor Fuller's requirements are not by themselves a sufficient guarantee either of fairness or of objectivity, the model will not work unless the parties to a lawsuit are permitted to present proofs and arguments to the court and unless the court responds to those proofs and arguments.

IV. A Fresh Approach

A. General

Our task, then, is to ascertain whether there are any reasonably objective means for determining how to proceed from the objectively-given reference points of the judicial process—the statutes and the decided cases—to the decision of new cases. In terms of the social function that we have posited for the legal system, only such a claim of objectivity will make it possible for the losers in the judicial forum to feel that they have been fairly treated. As we have noted, fairness requires that a party before a judicial tribunal be permitted to present proofs and arguments and that the tribunal's decision meet these proofs and arguments. Beyond this minimum, we are obliged to provide criteria which, if we are speaking in terms of "fairness," will permit us to say that the proofs and arguments of the parties have been adequately met and which, if we are speaking in terms of "objectivity," will permit us to say that a case has been properly decided. Without such criteria, a disappointed litigant cannot be criticized if he refuses to acknowledge the objective character of the judicial process and if he claims that the court's statements about his arguments are only window-dressing and that his participation in the process was merely a charade.

In order to avoid confusion, it is important to make clear at the outset what we shall be saying when we declare that a case has been properly decided. It is too stringent a requirement to impose upon a

99. See note 89 and accompanying text supra.
theory of legal argument to insist that, before we can claim that a case was properly decided, we must show that the case could not have been decided in any other way. It is impossible in many instances to establish objectively that there is only one correct decision to a case. The model to be presented will claim, however, that it is possible to establish objectively whether a decision was incorrectly decided, and therefore whether a case was correctly decided in the sense of not being incorrectly decided, a property which several possible decisions of a case can sometimes share. In the model, the terms “properly” and “improperly” decided will refer to cases “correctly”, and “incorrectly” decided in the sense just indicated. If we can supply criteria for making such claims, we will have shown that it is possible to construct a model of legal argument which permits the conclusion that judicial decision-making is an objective process. Criticism of judicial decisions can then also have an objective foundation. In providing such criteria and in constructing this model we shall at the same time be explaining what it is for a court adequately to respond to the proofs and arguments addressed to it by the parties.

B. The Model

We wish to propose the following model for legal argument. First, legal reasoning differs from most other types of practical reasoning in that its reference points are objectively given in the form of marks on paper called statutes and cases. Legal reasoning is thus spared the arguments over premises that characterize ethical disputes. Second, no new case can be decided differently from any of the decided cases unless it is “significantly different” from all such cases. A similar requirement applies in the use and interpretation of statutes, whether or not they have already been interpreted by prior cases. The model requires that anyone who wishes to use a statute in the course of legal reasoning give what he believes to be the paradigm case or cases covered by the statute. “Presenting a paradigm case” does not mean divining the “true meaning” of the statute—the model makes no such demand—but only presenting a case as to which it is asserted that, whatever else may also be covered by the statute, this case is. The party must then argue that the instant case is or is not significantly different from any such paradigm case. Thus, a party who asserts that a statute requiring motor vehicles to pay a road tax is applicable to go-karts or to farm

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100. In the discussion that follows, the term “statutes” will include constitutional provisions, administrative regulations and local ordinances. Cf. Part III § A supra.
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tractors must state what he claims to be the paradigm case covered by the statute. In this instance, the paradigm case would presumably be the family motor car, although of course the bus or long-haul truck might equally be paradigm cases under the statute. If a party were unable to supply any such paradigm cases, he would be forced to conclude that the statute was unintelligible. Cases also could be unintelligible, in the sense that people might be unable to reach even minimal agreement as to their factual circumstances (e.g., whether the plaintiff was run over by defendant's automobile) or even as to their results (e.g., whether the plaintiff received judgment for $10,000). Unintelligible cases, however, are much less dangerous than unintelligible statutes because they are more likely to be ignored.

When a case is brought before a court, any of the parties may assert that the instant case is like a prior case or is governed by a particular statute. Where the interpretation of a statute is at issue, a party will be obliged, as has been explained above, to supply a paradigm case, unless the statute has already been the subject of judicial decision and the party is content to use the prior decision as a paradigm case. In default of supplying such a paradigm, a party will be subject to the use of paradigm cases supplied by the other party or by the court. Under the model, no criterion of relevancy is imposed upon the cases that a party claims are like the instant case or upon the statutes that a party claims are applicable. Naturally, the model will work better if the parties behave in good faith, but the model does not require any prior screening of cases and statutes. If one casts his net wide enough there are some likenesses between any two cases decided within the same legal system, and it is fruitless to argue about how many such likenesses are necessary before one case can be said to control the decision of another.

101. Materials relating to legislative history will be helpful in establishing paradigm cases. Undoubtedly, a concern with making the lawsuit as fair as possible a contest between contending parties led Justice Jackson to condemn the use of legislative aids because

[aside from a few offices in the larger cities the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history.
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 399 (1951) (concurring opinion). While one may share Justice Jackson's concern for the small town attorney, one cannot ignore the growing urbanization of American society and the increased use of complex legislation to meet social problems. Fairness seems to dictate broadening the distribution of legislative materials, not restricting their use.

102. Because an unintelligible statute provides no basis on which one can regulate his conduct, ideally one would hope that a totally vague statute would be declared void for vagueness. Unfortunately, the void-for-vagueness cases show an "almost habitual lack of informing reasoning," and the void-for-vagueness test is often a way of deciding cases without articulating basic differences of policy between courts and legislatures. Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 70-71 (1960). Cf. Christie, supra note 34. 

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When the parties have cited the statutes and cases that they claim control the instant case and the court has supplied to the parties its own list of statutes and cases, the case will be ready for decision. Naturally, in presenting the statutes and cases which they deem controlling, the parties will also be presenting arguments to the court as to why the case should be decided in their favor. These arguments will have a bearing upon the court's decision for reasons that will appear obvious once the mechanics of the judicial decision-making process are described in greater detail. Under the model, the court is free to decide the case in a manner different from that of the decided cases and from the paradigm cases under statutes only if it can point to a significant difference between the instant case and each of the decided cases and paradigm cases.

In deciding the case before it, the court may also refer to hypothetical cases posed by the parties or by the court itself. The consideration of hypothetical cases is an important adjunct to the method of reasoning now being presented, for hypothetical cases are of material assistance in establishing the relation of the instant case to the prior cases and to the paradigm cases. To be pertinent, a hypothetical case must be one not significantly different from the instant case. A court which has constructed or which is referred to such a hypothetical case must then determine whether the hypothetical case is itself significantly different from the prior cases and the pertinent paradigm cases. For the court to decide the instant case in a particular way, not only the instant case but also all pertinent hypothetical cases must be significantly different from the prior cases and the paradigm cases pointing to a contrary result. Only then can it be said that the instant case is truly significantly different from these cases and not just apparently significantly different.

The use of hypothetical cases thus broadens the scope of a court's inquiry and helps it to deal with the body of law which it is administering. Hypothetical cases, for example, help a judge to appreciate the reach of his decision by indicating the extent to which, in deciding the instant case, he is committing himself to decide future cases in a particular way. Similarly, hypothetical cases are a bridge between the instant case and previously decided cases whose relevance to the instant case the judge has not initially appreciated. In this way, hypothetical cases broaden his understanding of existing legal materials and help him to comprehend more fully their restraining influence on the choices available to him in the instant case. At the same time, the model requires that hypothetical cases themselves pass the significant
difference test and thereby prevents their use from degenerating into a ludicrous and improper *reductio ad absurdum*, the so-called "parade of horrors" which law students are quite properly told to avoid.103

The key to the basically analogical model of legal reasoning that is being described here is the concept of a significant difference. Under the traditionally-accepted model of legal reasoning discussed earlier, two cases are considered similar if they illustrate the same general rule and significantly different if they illustrate conflicting or inconsistent rules. This is not a particularly helpful test because there are any number of rules, many conflicting and inconsistent, for which two cases can stand. Depending upon which rule is accepted as "correct," it is possible, under the traditional model, to distinguish on its facts any case from any other case or cases. The traditional model thus provides an objective test of judicial decision-making only if there is some way of choosing, in terms sufficiently concrete to be useful, the "true" or "correct" rule for which a case or group of cases stands. Unfortunately, experience has clearly confirmed that there is not. Under the proposed model, on the other hand, the significant differences between cases that will justify differences in result will lie in the factual circumstances of the cases rather than in the rules or principles which they supposedly illustrate. It should be clear that this criterion is, as a logical matter, an easier one to meet. It is logically more stringent to insist that, before any two instances can be classed as similar, one must construct a general rule or definition such that all other instances which one might wish to characterize as similar will fall within it, than it is to provide that any two cases will be considered similar if, according to whatever criterion of similarity is imposed, they are within a certain degree of proximity.104 The advantage of the model is that it is easier to decide whether a group of cases are significantly different from one another according to any given factual criterion than to decide the "proper" rule or rules under which all these cases should be grouped. The only question is whether we can realistically come close to fulfilling even this easier logical requirement, and, even if we can, whether we will thereby be able to show that judicial decision-making is an objective process.

The nub of our theory, then, is that it reduces disputes about the propriety of judicial decisions to disputes about the significant factual

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103. Cf. note 34 supra.
differences among cases. Naturally, in proposing which of the infinite observable factual differences among cases should be examined, the litigants and the judge will be influenced by their personal values and goals, as well as by the particular results they desire in the instant case and the empirical data at their disposal. While the judicial process is not rule-controlled, it is, in the last analysis, an arena for purposive activity ultimately founded on the human preferences and values often grouped together under the rubric "policy." The model, however, takes note of the fact that policies are often vague and amorphous and may also be limitless in number and conflicting. In order to achieve an objective decision-making procedure, it therefore recognizes policies only as they are filtered through the facts of the previously-decided cases and of the paradigm cases under statutes. This is the point of the significant difference test. The model, furthermore, tries to focus disputes about significant factual differences among cases, in the realm of decidables, rather than in the realm of undecidables as is the case with disputes about the "true" rule or principle for which cases stand.

This focusing can be illustrated at several levels of argument. At the simplest level, in attempting to determine what are in fact significant differences among cases, there will be some differences among cases which common sense will tell us are not significant. For example, if the only difference between two cases is that in the first the plaintiff had black hair and in the second he has red hair, common sense tells us that this difference is so insignificant as to be even irrelevant. Of course, a party is always free to contend that this factual difference is significant, but, unless he can give some additional reasons, the court will not accept his contention. Beyond these easy cases, there will be points of difference between cases that the decided cases and the paradigm cases under statutes have already shown not to be significant or not even to be relevant. This illustrates the proposition that law can be viewed as a calculus, which builds on its established the-

105. Recognizing the importance of value judgments in the decisional process (that may, with perfect propriety, be called rules or "rule-like") does not mean that we have now recognized that legal reasoning is rule-controlled. See note 25 supra and accompanying text. The absence of an authoritative form of statement for the expression of such value judgments and the fact that no particular value judgment is dispositive in legal reasoning precludes the assertion that the recognition of the importance of values is an admission that legal reasoning is rule-controlled.

106. Under the more traditional theory of legal argument, while one might intuitively know that such differences are insignificant, he would still be obliged to undertake the additional and often unnecessary inquiry of determining whether the cases in question stand for a rule expressed in terms of all men, all human beings, all adults, or all U.S. citizens.
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orems, embodied in statutes and decided cases, using its characteristic methods of transformation and standards of consistency. If a Caucasian man has recovered a judgment against the manufacturer of ginger beer for negligently permitting a snail to get into the bottle, it is not a significant difference, in our system of law, that in the next ginger beer case the plaintiff is a woman or a Negro man. In other words, whatever the personal scheme of values of the parties, the empirically-given statutes and decided cases (which reflect the values of our society) have refused to recognize factual differences of this type as relevant in these situations. Accordingly, such factual differences are not significant under our model, for under it courts will examine only those factual differences among cases whose relevance has not already been rejected in the statutes and the decided cases. Naturally, a party is always free to assert that differences in skin color alone are significant factual differences. However, the universal rejection of this assertion by the statutes and the unoverruled decided cases, all of which must be distinguished under the model, will preclude acceptance of the assertion. The statutes and decided cases will also restrict the possible significant differences between cases even when the relevance of certain types of facts, in a given set of circumstances, has to some extent been recognized. Thus in deciding whether a particular factual difference is significant, a judge will find his freedom to conclude that the difference is significant restricted by the existence of prior cases which cannot be distinguished from the instant cases and in which arguments asserting the significance of the distinction under consideration were rejected, because he will be obliged to take into consideration the nature of such arguments and the circumstances in which they were made.

Next, there will be differences which scientific evidence will help

107. For a discussion of the calculus-like nature of law and the points at which law resembles mathematics and logic, see Stone de Montpelier, The Compleat Wrangler, 58 Minn. L. Rev. 1001 (1964); R. Stone, Affinities and Analogies in Jurisprudence, 1964 Camb. L.J. 266, 280-288; cf. R. Stone, Ratio Negatio Not Rationalization, 74 Minn 463 (1965). For an attempt to apply this analysis to the question of the binding effect of precedent upon the House of Lords and to the notion of the ratio decidendi of a case, see R. Stone, supra note 27.

108. If there were empirical evidence that Negroes were more, or less, susceptible to the chemicals contained in the ginger beer bottle than Caucasians, a difference in race might be a significant difference between the cases, but then the cases would not be ones where there was merely a difference in race.

109. Suppose that a party argued that the number of persons injured by the defendant's conduct constituted a significant difference between the instant case and a prior case. If, in another case not significantly different from the instant case, a court had rejected the argument that the difference was significant because multiple lawsuits would burden the courts, that case would be relevant. The party would have to supply an additional factual distinction to support his claimed significant difference.
show to be either totally irrelevant to the instant case, or, if the differences have some connection with the case, factually insignificant. For example, in one case of intentional homicide the victim may have died immediately from gunshot wounds; in another, quite properly carrying the same penalty, the victim may have lived for hours after being shot and then succumbed despite the best efforts of competent physicians. Scientific evidence here demonstrates that the time factor is irrelevant. The importance of scientific evidence will not, of course, be limited to such clear cases. In a suit to enjoin the operation of an airport as a nuisance, for example, the total yearly traffic of the airport will be of more practical importance, in distinguishing among the cases, than the assertion that "the public interest requires airports;" and the decibel level of sound created by the planes will be more important than the maxims *sic utere tuo* or *cujus est solum, ejus est usque ad coelum.*

The model of judicial decision-making being presented will promote every effort to reduce disputes about significant differences to disputes over measurable differences, or to disputes about matters susceptible to scientific examination. Of course, there will remain a class of cases involving factual differences whose significance, despite all available scientific evidence, is still disputable. Here, the advocate has leeway in argument, and a tribunal has leeway in decision. Nevertheless, regardless of what the tribunal may think of the justice of the claim and regardless of its view of social policy, in order to decide any two cases differently it must come up with at least a plausible significant factual difference between them. By "plausible" is meant a difference which is accepted as such by the vast majority of observers. The parallel to scientific reasoning is apparent. What makes a scientific conclusion or hypothesis plausible is that its justification conforms to certain widely accepted standards for evaluating empirical evidence. In this approach to legal reasoning, a conclusion is accepted as plausible not because of any intrinsic characteristics, but because its justification conforms to certain accepted standards for evaluating empirically given legal materials. In law as in science, we proceed by using a previously agreed upon method of arriving at conclusions on the basis of the evidence available.\[110\]

It is submitted that this model of legal argument, because it con-

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110. The fact that a court has convincingly shown that its decision in a particular case was not controlled by the statutes and the prior cases, and thus that it is free to follow admittedly distinguishable cases or to strike out in new directions, does not guarantee that people will like the decision which the court reaches. This will depend on the court's skill in justifying its decision.
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trols the decisions of courts and protects the participation of the parties in the resolution of their disputes, will permit the assertion that judicial decision-making is objective and fair. This is something that the traditional model of legal reasoning does not permit. The supposed conflict between logic and experience in the law arises only when the decision-makers focus on the construction of ersatz general rules to which experience must somehow be made to conform.

C. The Model and Recent Judicial Decisions

In order briefly to illustrate the model of legal reasoning that has been constructed and to document its promise of reducing legal disputes to arguments over observables, it may be helpful to use the model as a critical tool for examining several comparatively recent decisions of the Supreme Court. In the course of this examination, an indication will be given of what would have been proper decisions in cases which were not properly decided in terms of the model. Although some of the cases involved questions of constitutional interpretation, all of them were purportedly decided in the traditional judicial manner; none were cases in which the Court acknowledged exercising any basic legislative or political function entrusted to it by the Constitution.

In Gibson v. Florida Legislative Investigation Committee, the Florida courts had adjudged the petitioner in contempt of the Florida Legislative Investigation Committee. The Investigation Committee was a duly-constituted committee of the Florida State Legislature and had summoned Gibson, the President of the Miami Branch of the N.A.A.C.P., to appear and to bring with him the membership lists of his chapter. Gibson appeared but did not bring the lists. When asked if certain persons previously identified as Communists or members of Communist front organizations were members of his branch, he testi-

111. Because of its rigorous attention to particulars, some major contemporary philosophers have found the law a fruitful source of illustrations in their examination of non-deductive reasoning. See, e.g., A Plea for Excuses in J. Austin, Philosophical Papers 123, 135-36 (1961); Wisdom, The Logic of God, in J. Wisdom, supra note 25 at 1; Wisdom, Gods, in J. Wisdom, Philosophy and Psycho-Analysis 140, 152-59 (1957); Wisdom, Philosophy, Metaphysics, and Psycho-Analysis, in id. 218; cf. Bambridge, Principia Metaphysica, 39 Phil. 97 (1964). Wisdom's famous metaphor, in Gods, characterizing reasons in non-deductive reasoning as "legs of a chair" rather than "links of a chain" is often cited by legal philosophers in conjunction with their discussions of Perelman's work on argumentation. See J. Stone, supra note 22, at 527; Weller, supra note 47, at 431, n.65. It must be kept in mind, however, that, unlike Perelman, Wisdom is interested not merely (and not so much) in persuading as in arriving at truth. For Wisdom, deduction is not the only means of deriving true conclusions, and he uses legal illustrations in order to demonstrate his contention.
fied that he could not associate these persons with the N.A.A.C.P. and that the N.A.A.C.P. had taken action to exclude subversives from its ranks. Fourteen people who had been identified in previous testimony before the Committee as Communists or members of Communist fronts had been mentioned as having participated in the affairs of the Miami branch of the N.A.A.C.P. As to these fourteen, Gibson was asked to check his lists to ascertain whether they were in fact members. At the same time, he was advised that he was not being asked to turn the lists over to the Committee. Nevertheless, he refused to consult the lists and for this refusal was adjudged in contempt.

Florida tried to support the decision of the state courts by pointing out that the Court had upheld the right of congressional and state legislative committees to require testimony and the production of evidence in comparable circumstances. For example, it had upheld the right of congressional committees to investigate Communist infiltration of the universities and of basic Southern industries and had refused an invitation to hold that a congressional committee could not investigate alleged Communist infiltration of the press. Finally, in Uphaus v. Wyman, it had upheld Uphaus’ conviction for contempt for refusing to produce lists with the names of all persons who had been guests at a camp maintained in New Hampshire by World Fellowship, Inc. Uphaus was the Executive Director of World Fellowship, Inc.; and Wyman, the Attorney General of New Hampshire, had been constituted a one-man legislative investigating committee by a joint resolution of the New Hampshire Legislature. The record developed before Wyman contained testimony that Uphaus had participated in “Communist front” activities and that nineteen speakers invited to speak at World Fellowship had either been members of the Communist Party or had been affiliated with it or with organizations listed in the United States Attorney General’s list of subversive or Communist-controlled organizations.

Against this background, it is difficult to understand how the Court could reverse Gibson’s conviction without overruling at least some of the prior cases. And yet this is what the Court did. In an opinion written by Justice Goldberg, it stated that the “thrust of the demands on the petitioner” was that he disclose whether certain persons were

members of the N.A.A.C.P., a "concededly legitimate and non-subversive organization." It then held that there was "no semblance" of a sufficient connection between the N.A.A.C.P. and subversive activities. This lack of connection, the Court declared, distinguished Gibson's case from that of Uphaus. One might point out in rebuttal, as did Justice Harlan in his dissent, that the Court had upheld a conviction under the membership clause of the Smith Act in which part of the Government's evidence included the Communist Party's desire to win the support of the Negro population of the South for its program of violent revolution. The Court might nevertheless have found a possible distinction between the Gibson and Uphaus cases if there were some basis for finding that, unlike the N.A.A.C.P., World Fellowship, Inc. was a subversive organization. But nothing in the record would permit that conclusion: World Fellowship was not even on the discredited United States Attorney General's list. With such evidence, the distinction would be plausible, and the decision reversing Gibson's conviction without overruling Uphaus would therefore have been proper. Without such evidence, whatever the "proper" reach of legislative investigating committees or the "true" rule of constitutional law, the asserted distinction totally fails and the decision is improper. Indeed, Gibson's conviction should have been easier to support because he was not asked to turn over the lists but only to refresh his recollection by examining them.

117. 372 U.S. 548.
118. Id. at 550.
119. Id. In a footnote, id. at 556, n.7, the Court cited Sweezy v. New Hampshire, 354 U.S. 254 (1957), in support of its decision. But Sweezy antedated all the cases cited above and was a case in which petitioner had already been asked whether he was a member of the Communist Party and whether he advocated the violent overthrow of the Government and had answered both questions in the negative. The questions he refused to answer concerned his personal beliefs, the contents of a lecture delivered to a humanities course delivered at the University of New Hampshire, and the membership of his wife and others in the Progressive Party of America. The Court held, with two justices dissenting, that these questions were not pertinent to an investigation of subversion. There was no "opinion of the Court." According to Justice Goldberg in Gibson, 372 U.S. at 556, n.7, Sweezy's case involved more of a connection with subversive activities than Gibson's, a position which I find difficult to accept.
120. Id. at 579-80.
122. The Florida state courts had already ruled, in a prior proceeding, that petitioner could not be compelled to produce the list, but could only be asked to refresh his memory. 372 U.S. at 540-41. This alone would make somewhat inappropriate the reliance by the Court in Gibson on the fact that it had said in Uphaus that as to the "lodgers," the operators of the camps were required to maintain a register open to inspection by police officers. 369 U.S. at 50. In Gibson Justice Goldberg interpreted the requirement to mean that the "disputed list was already a matter of public record." 372 U.S. at 550. The conclusion embodies a factual error as well, for the court in Uphaus noted that "the lists sought were more extensive than those required by the statute," although "most of the names were recorded pursuant to it." 360 U.S. at 80, n.7. See also id. at 91; id. at 97, n.7
The approach toward precedent exhibited by the Court in Gibson was repeated in United States v. Brown, where the Court struck down, as a Bill of Attainder, a statute making it illegal for someone who had been a member of the Communist Party within the previous five years to be an officer of a labor union. In presenting its case, the Government had proceeded on the basis that, whatever the "true" definition of a Bill of Attainder, the Brown case was controlled by Board of Governors of the Federal Reserve System v. Ager. in which a statute making it illegal for a person engaged in the "underwriting . . . of securities" to serve as a director of a member bank of the Federal Reserve System was upheld over the challenge that it was a Bill of Attainder. While the two cases could have been distinguished on several other possible grounds, the main apparent basis on which the Court distinguished them was that "communist" and "person likely to cause political strikes" were not synonymous, whereas "employee of underwriting house" was synonymous with "person likely unduly to influence the investment policy of a bank." One would like to have seen some evidence demonstrating that a communist was less likely to cause political strikes than an underwriter unduly to influence the investment policies of banks. Without further empirical evidence, the distinction offends common sense.

United States v. Philadelphia National Bank is a final example showing that the significant difference test provides sufficiently objective criteria of the correctness of judicial decisions to permit us to say that the process is, in a meaningful sense, objective. Unlike the previous cases, this case involved economic regulation and raised only a question of statutory construction with no constitutional over-tones. The decision turned on the construction of Section 7 of the Clayton Act which, prior to 1950, read as follows:

(dissenting opinion of Justice Brennan). Is it possible, therefore, that Justice Goldberg was suggesting that, if the N.A.A.C.P. were required to maintain a list of members by statute, he would have been governed by Uphaus! A large measure of skepticism on this point would appear justified.

123. 381 U.S. 437 (1965).
125. For example, the statute involved in Brown, like the historical Bill of Attainder and unlike the statute involved in Ager, was aimed at political conduct. Moreover, under the statute involved in Ager, the Federal Reserve Board could grant individual exemptions, while no such exemption was possible under the statute involved in Brown. Although it noted this difference, the Court expressly declined to hold that the possibility of individual exemption made the statute constitutional in one case and unconstitutional in the other. 381 U.S. 437, 454-55 (1965).
126. Id.
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That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce. 128

An earlier case had construed the section not to cover acquisitions of assets. Then, in *Arrow-Hart & Hegeman Electric Co. v. FTC*, 129 a divided Court held that a merger or consolidation of two manufacturing corporations, when followed by the combination of their assets, was also not an acquisition of stock but merely an acquisition of assets and was thus not covered by the Act. The Federal Trade Commission accordingly had no power, after the transfer of the assets, to order the resulting corporation to divest itself of any of the acquired assets. 130

In 1950, Section 7 of the Clayton Act was amended to read, insofar as pertinent, as follows:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. (Emphasis supplied.) 131

The Federal Trade Commission Act expressly provides that banks are not corporations subject to the jurisdiction of the F.T.C. 132 Relying on this provision, the Philadelphia National Bank and the Girard Trust Corn Exchange Bank of Philadelphia decided to merge by consolidating assets in a new corporation. The Comptroller of the Cur-

129. 291 U.S. 587 (1934). See also the three cases decided sub nom. FTC v. Western Meat Co. 272 U.S. 554 (1926).
130. The House Report accompanying the 1950 Clayton Act amendments described *Arrow-Hart* as holding

that if an acquiring corporation secured title to the physical assets of a corporation whose stock it had acquired before the Federal Trade Commission issues its final order, the Commission lacks power to direct divestiture of the physical assets . . .

(codified at 15 U.S.C. § 18 (1964)).
rency approved the plan, stating in his annual report to the Congress that, although the scheme would have an unfavorable effect on competition, the consolidated bank would better serve the needs of the community.\textsuperscript{133} The United States sued to enjoin the proposed merger, alleging that it violated Section 1 of the Sherman Act and Section 7 of the Clayton Act. The major focus at the trial was on the Sherman Act issue. The district court rendered judgment for the defendants, and the United States appealed. The Supreme Court reversed and held that the proposed merger was unlawful under Section 7 of the Clayton Act.

The Court produced many reasons for its conclusions that the proposed merger was undesirable, but it did not hold that the \textit{Arrow-Hart} Court misinterpreted Section 7. This holding would have been possible, although the relative antiquity of the case and the acquiescence of Congress in it would have made such a course very awkward. Nor did the Court attempt to show that \textit{Arrow-Hart} had been misunderstood by Congress and the bar. Instead, it held that the addition of a clause—

and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets [of another corporation]

—which admittedly did not apply to banks changed the meaning of the first clause—

\textit{[n]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation,}

—which had not been amended at all. Thus it concluded that the \textit{Arrow-Hart} case was no longer applicable. This astounding reasoning must have surprised the Government as much as anyone else because even as late as 1957—seven years after the amendment of the Clayton Act—the Department of Justice concluded that it had no jurisdiction to challenge bank mergers under the Clayton Act.\textsuperscript{131} Undoubtedly, it was for this reason that the Government and the defendants in \textit{Philadelphia National Bank} devoted almost all of their argument before the Court to the Sherman Act.\textsuperscript{135} In terms of the

\textsuperscript{133} \textit{Cf. Comp't of the Currency, 99th Ann. Rep't 18 (1961).}

\textsuperscript{134} The position of the Justice Department is stated in the materials quoted by Justice Harlan in his dissent. 374 U.S. at 377-78.

\textsuperscript{135} Only ten out of eighty pages of argument in the Government briefs were devoted to the Clayton Act issue.
proposed model, the Court's disposition of the case amounts to a decision that the amendment of a statute by the addition of a provision expressly not applicable to the parties in the instant case creates a significant difference between the instant case and a prior case. Appreciable research devoted to discovering cases in which a similar technique of statutory interpretation was used has uncovered few even moderately similar instances and none in which the reasoning is so clearly implausible.128

D. Additional Remarks

It must be stressed that, under the model that we have constructed, a court may not decide any two cases differently unless it can demonstrate a plausibly significant difference between the cases. The fact that different results in different cases could have been adequately justified is no answer to a charge that the decision was improper, if the court itself was unable to supply the necessary justification.129 This is not so much because courts, particularly the Supreme Court, must give guidance to future litigants and to inferior courts, but because our criteria of fairness and objectivity empower a court to decide only these cases whose decision it can justify.

128. Two analogous cases deserve some attention. In United States v. Hutcheson, 312 U.S. 219 (1941), the Court held that the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1954), by expanding the scope of union immunity from injunctive relief, had expanded the scope of exemption from criminal prosecution accorded unions and their officers by Section 29 of the Clayton Act, 29 U.S.C. § 52 (1914). Justice Roberts and Chief Justice Hughes dissented, arguing that Congress meant Norris-LaGuardia to affect only the equity powers of the federal courts. Hutcheson is clearly distinguishable from Philadelphia Nat'l Bank. It is not implausible to argue that since Congress combined original immunity with equitable remedy under the same section of the Clayton Act, it intended subsequent enlargements of the equitable remedy except to expand the scope of criminal immunity as well.

A further example is Agar v. Orda, 244 N.Y. 245, 190 N.E. 478 (1934). Prior to New York's adoption of the Uniform Sales Act, a seller could sue a defaulting buyer for the price of the goods not only where title had passed, but also where there was only an executory contract to sell provided that, in the latter case, the seller made an appropriate tender. The Sales Act retained this remedy where title had passed, but provided that where there was only an executory contract to sell, the seller could only sue for damages. However, the Sales Act did not apply to sales of securities. In Agar, a stockbroker was suing a customer who, under an executory contract to buy stock, refused to accept the stock certificates when they were tendered to him. The Court of Appeals held that a change in the law regarding tangible property justified a change in that regarding intangible property. Agar is even more easily distinguished from Philadelphia Nat'l Bank than is Hutcheson. Since the prior doctrine under review in Agar was a common law doctrine, the court could properly make even a drastic modification of the law as to stocks and bonds in the light of legislation covering tangible goods. Indeed, it would be foolish to ignore statutes as very proper and useful sources of public policy and of analogies in the judicial decision-making process. See Traynor, Statutes Reviving in Common-Law Orbits, 18 Cath. U. L. Rev. 401 (1968).

129. In Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959), Professor Pollak attempts to supply rationales to meet criticism of the school segregation and restrictive covenant cases. Under the model, such commentary cannot add to the objectivity of past decisions.
While the model we have constructed requires a legal system in which past cases are not lightly overruled, the model does not require that a rigid system of stare decisis prevail. Nevertheless, although the model does permit the overruling of past cases—that is, the removal of cases from the body of case law which controls courts unless they can justify new decisions by finding significant differences—it requires that precedents be overruled only in certain ways. It requires that, when the validity of a particular precedent is questioned, the precedent cannot be looked at in a vacuum but must be examined in the context of the entire body of the law. Thus Case X, which held that a go-kart is not a motor vehicle for purposes of the road tax, may be considered indirectly overruled by a subsequent decision in Case Y that a farm tractor is a motor vehicle for such purposes—i.e., that for purposes of the statute there was no significant difference between a farm tractor and the paradigm case, the family motor car. Such a conclusion can be drawn if, but only if, one is also willing to maintain that there is no significant difference between a go-kart and a farm tractor for purposes of the statute. If there are significant differences, then the decision of Case Y is not a sufficient basis for overruling Case X or for treating Case X as overruled.

Under the model one can also overrule Case X directly through the decision of another go-kart case, Case Z, but only if one can demonstrate that the significant difference between a go-kart and the family automobile put forth in Case X does not in fact obtain. One could do this by pointing to some overlooked legislative history making clear that the distinction is not one that should be recognized or by showing that the factual premises of the distinction are not sound. One might show that the legislature considered and denied an express statutory exemption for go-karts or for analogous vehicles like formula-one racing cars. Alternatively, one might show that the court's assumption in Case X that go-karts rarely travel on public highways was factually incorrect. Unless one of these showings can be made, however, Case X cannot be overruled and must be taken into account in the decision of future cases. In a like manner a case involving a matter of common law can be overruled if it is no longer significantly different from other cases in which a conflicting result was reached or if its factual assumptions are subsequently proved incorrect.138

138. In Escobedo v. Illinois, 378 U.S. 478 (1964), the Court did not attempt the difficult task of distinguishing the facts before it from those in Gideon v. Lagay, 357 U.S. 504 (1958). The Escobedo Court distinguished Gideon on the ground that it was decided in reliance upon Crooker v. California, 397 U.S. 431 (1969), a case in some important respects
Objectivity in the Law

It should finally be mentioned that, in point of fact, the method of reasoning described in this article is the predominant method of argument in many areas of the law. Under a rule-oriented method of reasoning, the judicial application of vague notions like "negligence" and "recklessness" would often appear completely arbitrary; yet because of the many decided cases involving such concepts, they are sometimes easier to apply than even a seemingly precise statute. Therefore, while the model is in many respects a great departure from the way courts say they decide cases, it does not represent so great a departure from the way courts in fact decide them.

V. Conclusion

The search for objectivity in the law is undoubtedly motivated by the desire to justify the great powers that courts are granted and to explain why the public should have confidence in the courts' proper performance of their function: without such justifications and explanations, the judicial system is merely a vehicle for the application of public power. It is our contention that we have supplied a model of legal argument that permits one to make a limited claim of objectivity for judicial decision-making, a claim that is both meaningful and useful. In deciding new cases in accordance with the model, courts inevitably must and do legislate, but they can do so only in a restricted and stylized manner. In many ways our present legal system approaches this model; if it wishes to lay the strongest claim to objectivity that can be made, it will have to embrace the model completely. Naturally, accepting the model entails recognizing that there are certain things that a court cannot do, whether in constitutional law or in the creation of new "common law." One cannot choose to be objective and not objective at the same time. To be objective means to accept limitations upon what one can do. To act objectively is not merely to act in a manner whereby one convinces himself that he has acted objectively, but to operate in a manner that will convince others—particularly unsympathetic others—that one has. In this regard, legislatures must not make the task of the courts more difficult by saddling them with broad statutes that cover large, important areas

distinguishable from Escobedo. See 378 U.S. at 491-92. Under the model of legal argument that has been presented in this article, the Court could not properly employ this artifice to avoid the necessity of distinguishing Gicen ".


of social and economic activity and yet give the courts very little
guidance as to their scope and application.\footnote{141}

One might object that the courts, particularly the Supreme Court,
have a constitutional role to play which requires that they legislate
and make policy in addition to deciding legal disputes.\footnote{142} This may be
so, and yet it is not unreasonable to believe that the Court was given
its great constitutional role not in the hope that political decisions
could be subsumed under the rubric "law," nor in the belief that
autocratic decision alone could hold the country together in the face
of divisive controversy, but in the expectation that the Court \textit{qua}
court could bring something to the resolution of difficult issues.
 Assuming, for the moment, however, that no reconciliation between the
Court's legislative and judicial functions can be effected and granting
that the Court must perform a basically legislative function, we will be
obliged to conclude that there is no objectivity in constitutional ad-
judication: one can only hope for wisdom, compassion, and common-
sense. One might nevertheless urge that, in \textit{applying} its constitutional
choices as opposed to making them initially, the Court should follow
the proposed model of legal argument. Such a course would spare the
Court the criticism of those who are unwilling to recognize its dual
role. One might further urge that the Court not carry into the arena
of nonconstitutional litigation——where it exercises a judicial function
—habits and methods developed in dealing with constitutional ques-

\footnote{141. The Sherman Act, 15 U.S.C. §§ 1-7 (1964) is such a statute. A judge still active on
the federal bench has suggested, however, that he enjoys large antitrust cases because they are
far more exciting to try than are "run of the mill" cases. C. WYZANSKI, WHEREAS——A
JUDGE'S PREMISES 6 (1965).

Many commentators have suggested that the Court should have rejected the broad de-
egation of authority that it was granted over labor relations. See Bickel & Wellington, \textit{supra}
note 1; Wellington & Albert, \textit{supra} note 2. Cf. Feck, \textit{supra} note 2. It has been suggested
that delegation of power without sufficient guidelines has made a farce of quasi-judicial
proceedings before the F.C.C. Harwood, \textit{\$20 Million Eggs from Blind Goose Called FCC},
Washington Post, Oct. 22, 1967, § B (Outlook), at 1, col. 1. One response to broad dele-
gation is the construction of simplistic, per se formulas, which diminish the amount of
judicial discretion. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); cf.

\footnote{142. See, e.g., M. SHAPIRO, \textit{LAW AND POLITICS IN THE SUPREME COURT} 1-40, 328-33 (1964); WELS & GROSSMAN, \textit{THE CONCEPT OF JUDICIAL POLICY-MAKING: A CRITIQUE}, 15 J. PUB. LAW
285 (1966); cf. A. MASON & W. BRANEY, \textit{THE SUPREME COURT IN A FREE SOCIETY} 305-320
(1968). For a lengthy comment on Shapiro, see Deutsch, \textit{supra} note 9.}
Student Contributors to This Issue

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Eric R. Neisser, Part One: Constitutional Issues
John Shattuck, Part Two: Survey of State Law
Daniel J. Kornstein, Insurance Mergers and the Clayton Act
David Schoenbrod, Large Lot Zoning
Jeffrey A. Burt and Irving S. Schloss, Government Litigation in the Supreme Court: The Roles of the Solicitor General