BOOK REVIEWS

OBSERVATIONS ON LEGAL REASONING


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This book is concerned with the concrete juristic value judgment as an intermediary product of thought on the road to the formation of the imperative juridical decision. It deals particularly with those thought products of the kind which are obtained in the course of the judge’s activity. They are, although not the only, the most prominent example, especially in Anglo-American law.1

When viewed as a process of thought, the application of law appears as a syllogism, that is, as one of the principal types of indirect correct reasoning: from a plurality of given propositions (the premises, among which one distinguishes the major and the minor) the conclusion is derived as the result. In formal logic one usually distinguishes four figures of syllogistic thought and, within each figure, several moods. Legal reasoning has been called an instance of syllogistic reasoning of the first mood of the first figure.2

The drawing of the conclusion is not difficult in legal reasoning; the real difficulty consists in the finding of the premises. In German law, which appears essentially as a body of statutory norms, the major premise can usually be found quite easily, although difficulties may be encountered when a plurality of “special” norms is to be transformed into a “general” norm3 or when the norm is to be distilled out of a case where it is interwoven with the facts, that is, where the major premise must be separated from the minor.4 The principal problem in Germany is however that of finding the minor premise, of first visualizing “the facts,” that is, a concrete life situation; and, second, ascertaining that these facts have actually occurred. Not a part of the conclusion but of the finding of one of the premises, viz. of the minor premise, is the so-called

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1 Juristic value judgments occur as intermediary products of thought also on the road to the formation of statutory rules by the legislator or in the course of the reasoning applied by laymen in the making of legal transactions; cf. Kelsen, General Theory of Law and State 137 (1945).

2 Ueberweg, System der Logik § 110, at pp. 359, 368 (5th ed. 1882). In the first figure the predicate of the conclusion is also the predicate of the major premise, and the subject of the conclusion is also the subject of the minor premise. In the first mood of the first figure, the major premise, the minor premise and the conclusion are all affirmative and universal.

3 Cf. Engisch, Logische Studien zur Gesetzesanwendung 6 et seq. (1943).

4 Ibid., at 14 et seq.
subsumption, in which there is established that relation between the major and
the minor premise which allows the subsequent conclusion. In the subsumption
a minor premise preliminarily obtained through the visualization of certain
facts and the ascertainment that they have actually occurred, is turned into
the definite minor premise by determining that the facts as visualized and ascer-
tained are such as correspond to the "operative facts" of the norm contained
in the major premise. In such way it is then determined, for the technical pur-
poses of "concluding," that the facts as visualized and ascertained fulfil the re-
quirements for serving as minor premise.

A principal means of subsumption is constituted by the so-called middle
term:

"First one has to ascertain the two premises; then one has to dissect them
into their several terms, and then one sets as the middle term that one which
appears in both premises." 

In syllogistic legal reasoning the middle term appears wherever the minor
premise cannot be related to the major by a subsumption turning directly to a
norm expressed in the major term but where, in order to establish this relation,
the subsumptions must be concerned with an interpretation of the major
premise. According to Aristotle the middle term and the major, the interpreta-
tion and the norm, may be connected with one another by an "example,"\textsuperscript{6} 6 "An
example, a paradigm, is when it is shown that the major term belongs to the
middle, and if this demonstration is made by means of something similar to the
minor."

Thus we know what Levi has in mind when he regards reasoning by example
as the basic type of legal syllogistic reasoning.\textsuperscript{7} As his prime demonstration Levi
uses the so-called "inherently dangerous rule"\textsuperscript{8} which, in a concrete case, pre-

\begin{enumerate}
\item He who acts negligently within the framework of certain relationships is
regarded as either having committed a tort\textsuperscript{9} or a breach of implied warranty\textsuperscript{10}
and has to pay damages;
\item He who introduces into commerce an inherently dangerous object is
acting negligently;
\item Australian Knitting Mills,\textsuperscript{11} by producing and selling underwear in the
\end{enumerate}

\textsuperscript{5} Aristotle, First Analytics, 47a, in fine.
\textsuperscript{6} Ibid., at 68b, in fine, 69a in initio.
\textsuperscript{7} Levi, p. 1. As to the distinction, see Rolfes, Aristoteles' Lehre vom Schluss (2d ed., 1944) at
p. 293: "The example is distinguished from the normal syllogism in that the latter concludes
from the whole to the part, from the general to the particular, while the example applies the
one case considered to the other."
\textsuperscript{8} Ibid., at 7.
\textsuperscript{9} See, for instance, Cadillac v. Johnson, 221 Fed. 801, 803 (C.A. 2d, 1913); cf. Levi at p. 19.
\textsuperscript{10} See, for instance, Grant v. Australian Knitting Mills, [1936] A.C. 85.
\textsuperscript{11} Ibid.
production of which there has been used a substance likely to cause dermatitis, has introduced into commerce an inherently dangerous object;

(4) Therefore, Australian Knitting Mills has to pay damages.

The interpretation of the norm established in the major premise (no. (1)) through the concept of “inherently dangerous object” as used in the middle proposition (no. (2)) was achieved by the “examples” contained in the operative facts of a series of cases, i.e. concrete judicial norms, which began in 1816 with Dixon v. Bell\(^2\) and preliminarily terminates, for Levi’s purposes, with Grant v. Australian Knitting Mills.\(^3\) According to Levi, in view of the nature of the common law as a case-law the judges could not reach their decision in the latter case in any way other than that of interpreting precedents. Consequently, Levi argues, the syllogism by example is that form of the syllogism which is cut to the very measure of the case-law thinking of Anglo-American law.\(^4\) In contrast with the general kind of juristic syllogism, this kind requires the reversal of the order of the premises. The first step is that of obtaining the minor premise by subsuming the case to be decided under a similar case already decided (which, in turn, is the middle term within the syllogism with interpreting middle term). Only in the second place can we then obtain the major premise by extracting the norm of law from the sample case that has been used as middle. The conclusion then follows by applying to the case to be decided the legal consequences of the rule extracted from the sample case.\(^5\)

At a first glance it seems to be a stroke of genius that Aristotle’s syllogism by example is called by Levi the specific syllogism of case law thinking. The term “stroke of genius” would seem to be particularly appropriate because Levi, foregoing nearly every reference to the immense literature on logic, bases himself immediately upon the Aristotelian fountainhead, which is not too clear in itself.

It seems indeed as if the common law, whose doctrine does not recognize any objective norms outside of those contained in the cases, would need a syllogistic process in which the legal consequences of a major proposition cannot be determined otherwise than by subsuming the facts of the case to be decided under the operative facts of the case or cases used as middle terms. However, in a more incisive epistemological investigation this apparent peculiarity of case law vanishes. Levi himself opposes the view that legal reasoning consists in the

\(^2\) Maule & Selwyn 198 (K.B., 1816).

\(^3\) Levi, pp. 7-19; as to these cases see Zeitschrift fuer auslaendisches und internationales Privatrecht, vol. 5 (1931), pp. 567 et seq., 615; vol. 7 (1933), p. 337 et seq.; vol. 10 (1936), p. 80 et seq. In these articles reference is made to the fact that some of these cases have recognized a so-called direct right of action of the last purchaser against the manufacturer, in spite of the lack of privity between them.

\(^4\) According to the orthodox theory of stare decisis, the norms of the Common Law exist exclusively in that fixation which, made by a higher court, is binding upon the inferior ones; in this view the norms of the Common Law are of the same character as those laid down in the so-called customals, i.e. medieval collections of manorial customs.

declarative application of transcendent rules. Indeed, even when it is regarded as the re-production of judgments already existing, the judicial decision is immanent and constitutive creation of law. If that is correct, no difference exists at all between the objective statutory norm of German law and the objective customary law norms of Anglo-American common law. I am thus doubtful whether it is justified to ascribe to case law thinking a form of the syllogism different from that which the general doctrines of logic ascribe to legal reasoning in general, i.e. that of the syllogism of the first mood of the first figure. In that figure, too, a middle term may come into question, viz. in those situations in which a necessary interpretation must precede the finding of the norm in the major premise so that, by means of that interpretation, that norm may be made applicable, first as an object of subsumption of a minor term under the major term, second, as the indicator of the legal consequences to be applied in the conclusion. Levi cannot be followed, however, when he asserts for that reason that the syllogism of the first mood of the first figure turns into the special figure of the syllogism by example.

Specially incisive justification would seem to be required for Levi's contention, contained in chapters 3 and 4 of his book, that the syllogistic process occurring in the application of statutes or constitutional provisions is of the special type of syllogism by example. This proposition is simply based upon the observation that the application of a legislative text regularly implies its interpretation or, more precisely, upon the idea of placing interpretation in the middle between the legislative text and its application. In this case the proposition that in Anglo-American law legal reasoning is of a peculiar kind lacks even that appearance of conclusiveness which it has with respect to case law. As a matter of fact, Levi's discussion of the problem does not sound any different from other general discussions of statutory interpretation, most of which are of an entirely scholastic character. They do not suffice, however, to convince the reader that statutory interpretation has of necessity to use the syllogism by example.

It is my impression that Levi has not recognized the difference between interpretation and subsumption both with regard to the application of statutes and constitutions and with respect to that of the common law. With the enthusiasm of a discoverer he finds a peculiar interpretative subsumption allegedly occurring in the course of a special syllogistic process in all those cases where an

16 "The pretense is that the law is a system of known rules applied by a judge; the pretense has long been under attack." Ibid.
17 Ueberweg as cited by Engisch, op. cit. supra note 3, at 16.
18 As we have observed in the text above, the problems of how to extract the norm out of the reciprocity relation of norm and facts exists not only in the common law, but in any other modern law including German law; cf. note 3 supra.
21 For instance, the Commerce Clause of the Constitution of the United States, Art I, § 8.
interpretation with examples precedes the subsumption without thereby changing, however, the syllogism of subsumption.

"In this place interpretation and subsumption touch upon each other. One may be tempted even more closely to amalgamate the two processes. One might argue, indeed, that interpretation means the discovery of all the situations which are covered by the meaning of the statute, while subsumption is statutory interpretation with a view to the particular case at hand. The commentators of the Codes, when interpreting their provisions, to a large extent resort to the citation of particular decisions as subsumptions already made. However, unless confusion is to result, one has to remember that the reference to earlier cases is the logical prius to the subsumption to be made now. This is equally true when through 'subordination,' entire groups of cases have been brought within the operative facts of the statutory provision and thus now serve as material for comparison, or when reference is made for purposes of comparison to only one case of prior subsumption, for instance that found in a Supreme Court decision. Insofar we thus derive from prior subordination and subsumptions the point of contact for the subsumption to be made now. This latter subsumption is then the logical posterius to interpretation. But it, too, can of course be regarded as a new interpretation and can thus become the logical prius to a new, subsequent explanation of the statute. One can thus speak of a kind of reciprocal relationship between interpretation and subsumption. However, that fact must not make us overlook the differences between subsumption and interpretation. Interpretation frequently proceeds without resorting to subsumption; it can use the subordination of entire groups of cases which one is prone to describe and define by general criteria (for instance by stating that 'cruelty is to be taken to have occurred when corporeal integrity has been interfered with')."

The passage just quoted neatly covers the situation which Levi has tried to master, and it may be applied to the very instance by which Levi has tried to illustrate his syllogism by example, viz. the cases concerned with inherently dangerous objects. Our quotation is appropriate to show that Levi is concerned not with subsumption or the syllogism but rather with interpretation by example. At least we see that there is carried on in Levi's syllogism by example exactly that which should never be done, viz. the amalgamation of interpretation and subsumption or, in other words, "the identification of the result with one of its necessary conditions." Thus the confusion is great, indeed. Interpre-

23 Engisch, op. cit. supra note 3, at 26 et seq.

24 Bierling, 4 Juristische Prinzipienlehre 202, 205 (1911).
tation is the analytical preparation of a statement of operative facts carried on for the purpose of determining whether or not a particular fact situation ought to be subsumed under it. In that process subsumption itself is to a certain degree modified. Nothing is changed thereby, however, in the nature of the syllogistic process, if this includes a subsumption which is necessarily preceded by an interpretative analysis of the statement of the operative facts as contained in the major premise, and nothing justifies what Levi does, viz. elevate to the level of a special form of syllogism, a syllogistic reasoning including a subsumption which is necessarily preceded by an interpretative analysis of the statement of operative facts as contained in the major premise.

As to terminology, it remains to observe that Levi's use of terms does not achieve that precision which is essential in matters of logic. It is strange that Levi does not use at all the concept of subsumption, the use of which would seem to be particularly called for in the context. It is true that the term "subsumption" is fairly alien to English legal parlance; however, there is quite current in it the term "denotation," which achieves by induction exactly that contact between operative facts and actual facts which we achieve deductively through the use of the term "subsumption."²⁵

In the most crucial place of his book Levi tries to elucidate the nature of the minor premise of his syllogism by example, which, of course, must be ascertained in the first place. He does so by calling it the search for "similarity between cases."²⁶ What is meant, however, is similarity between the "actual facts" of the case to be decided and the "operative facts" of the precedents. In Levi's terminology "case" means both actual facts and operative facts. In a passage three lines earlier he also speaks of a process of "reasoning from case to case." Obviously that cannot mean anything but the process of relating the facts of the case to be decided to the norm of the precedents. Thus in Levi's terminology "case" means not only "actual facts" and "operative facts" but also "norm," i.e. co-ordination of operative facts and legal consequences. The problem is not one which would not have been previously dealt with in Anglo-American jurisprudence. In the Essays in Honor of Roscoe Pound, Julius Stone defines case as "actual situation," i.e. as "actual facts."²⁷ Besides, for the more exact significance of the phenomena "actual facts" and "operative facts," English legal terminology has at its disposal certain qualifiers of the noun "fact," as they appear, for instance, not only in the combinations used here ("actual" and "operative" facts) but also in the terms recently used by Kelsen,²⁸ viz. "ascertained facts" (i.e. the facts ascertained to have actually

²⁵ Cf. Holmes, The Common Law 214 (1890), and, on this passage, Becker, Rerum Notitia (1950). Juristische Rundschau, n. 11.
occurred in the case at bar) and "established facts" (i.e. facts established by
law as generally productive of certain legal consequences). In the Roscoe Pound
volume the problem is discussed by no less than five authors, viz. Cowan, Hall,
Hocking, Radin and Silving. When Levi speaks of the "rule of law inherent
in the first case," he creates a latent ambiguity by leaving it open whether
he means the entire norm of the precedent, i.e. the statement of both the opera-
tive facts and their legal consequences, or only the latter. As Austin has estab-
lished long ago and clearly, the distinction between "primary" and "secondary"
duties, which means the distinction between operative facts and legal conse-
quences, the desire for greater clarity might not be improper in this respect,
too.

I wish I could agree with Rumpf when he says that legal reasoning "cannot
be squeezed into the narrow fetters of the Aristotelian syllogism." However,
at the end of this rather complicated review I find myself, somewhat to my
regret, compelled to recognize, as Huber does, that "the logical forms are indis-
pendible in legal reasoning." This statement is, of course, contrary to the al-
legations of the realists, who have been said to be "concentrating" on facts with-
out even suspecting that facts presuppose concepts. It is also contrary to the
thesis of Levi, who, turning towards the syllogism by example, has modified
the formulation. The tested concept of the general syllogism will still do.

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In *An Introduction to Legal Reasoning* Professor Levi presents three fascinat-
ing and illuminating series of cases, from case, statutory, and constitutional
law. The judiciously selected and adroitly delineated series furnish rich material
for consideration by the legal theorist, the social philosopher, and the logician;
and certainly they provide weighty evidence for significant conclusions.

Levi, indeed, presents conclusions and interpretations of his own; but with-
out disparaging his conclusions, one may observe, to borrow a term he himself
uses, that these conclusions are "mere dictum." The cases are here, providing
valuable data; and what story they tell, and what its moral, may be found in
the cases themselves both by those who want to check Levi's interpretations
and by those who want to turn the evidence to the support of other theses.

29 Interpretations, op. cit. supra note 27, at 130 et seq., 132, 323, 335, 579 et seq., 586, 642
et seq.
31 Jurisprudence, at 96, 89, 444, 760 et seq., as cited by Kelsen, op. cit. supra note 28, at
62 et seq.
32 Rumpf, Der Strafrichter 215 et seq. (1912).
33 Huber, E., Recht und Rechtsverwirklichung 356, 377 (1925).
34 Hall, Interpretations, op. cit. supra note 27, at 316.
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On the face of the matter, however, some of Levi’s remarks, together with Professor Becker’s review, tempt the reader to stray into an issue which, at best, belongs in another jurisdiction, and, at worst, is no issue at all. Thus, Levi, referring to Aristotle, suggests that “[t]he basic pattern of legal reasoning is reasoning by example”; and Becker, referring also to Aristotle but especially to Engisch, Logische Studien zur Gesetzsanwendung, asserts that legal reasoning proceeds syllogistically, in terms of the first mode of the first figure.

Since the syllogism, considered in terms of figures and modes, that is, as a pattern of terms and propositions, is merely a form into which any content may be placed, it is possible to maintain that all reasoning runs, when properly formalized, in syllogisms. Moreover, it is possible to maintain, as, for instance, so prominent a logician as J. S. Mill did, that all reasoning runs from particulars to particulars. Indeed, it is possible to maintain both of these doctrines at the same time. Since both doctrines may be asserted generally and may be defended as plausibly by examples from physics as by examples from law, it seems unlikely that the assertion of either would carry one very far toward determining the specific character of legal reasoning. Both doctrines may be true, and, indeed, when properly qualified and stated, probably are; but whether they are, and the sense in which they are, true is a rather abstruse problem in logical theory.

Since it may be the case both that legal reasoning runs in terms of syllogisms (this statement being about the form of the reasoning) and that legal reasoning proceeds by example or from particular to particular (this statement being directed to the ground of the reasoning or the logical priority of the various premises or propositions involved), it poses no issue at all and offers an invitation to profitless discussion to ask: “Which is legal reasoning: reasoning in syllogisms or reasoning by example?”

I do not find it easy to determine just what thesis Becker is maintaining or what position he is assuming. He concludes: “I find myself, somewhat to my regret, compelled to recognize, as Huber does, that ‘the logical forms are indispensable in legal reasoning.’” On this point, Becker is surely correct; and if in moments of enthusiasm or absent-mindedness Levi has been led by his interest in examples to speak lightly of logical form, then we should remind him that lawyers and judges are not exempt from the universal requirement applying to all rational beings of thinking reasonably and in accordance with the principles of logic. If, however, Becker asserts no more than this, then there seems no serious issue. One might suspect that he intends much more, that he intends, indeed, to assimilate legal reasoning to the Aristotelian doctrine about the scientific and demonstrative syllogism. Though it is perhaps unjust to ascribe such a position to Becker, examination of it may serve as a way of opening up the issues and seems appropriate in view of the fact that both Levi and Becker mention Aristotle and seem disposed to formulate their doctrines in Aristotelian terminology.
It is clear, first, that in the Aristotelian doctrine, the characterization of scientific knowledge and demonstration involves much more than the reference to the forms of the syllogism. The syllogism is used in dialectical reasoning and in rhetorical argument as well as in demonstration. In order to distinguish demonstration it is necessary to examine the premises, to see whether they are axioms or definitions or first principles or the opinions of authorities, and to examine the terms, to see whether they refer to essences or properties or accidents. "Scientific knowledge and its object differ from opinion and the object of opinion in that scientific knowledge is commensurately universal and proceeds by necessary connections, and that which is necessary cannot be otherwise. So though there are things which are true and real and yet can be otherwise, *scientific knowledge* clearly does not concern them."² In order, then, to develop an account of legal reasoning as demonstration, an account which would apply to legal reasoning the Aristotelian characterization of scientific knowledge, one would have to examine the matter of the law and find basic truths, necessary connections, and essential attributes.

Though some such treatment of law has been attempted in late versions of the Aristotelian tradition, any such procedure is certainly emphatically rejected by Aristotle himself. Legal reasoning deals, presumably, with actions; and Aristotle sharply distinguishes reasoning about actions from science and from theoretical knowledge. "Now no one deliberates about things that are invariable, nor about things that it is impossible for him to do. Therefore, since scientific knowledge involves demonstration, but there is no scientific knowledge of things whose first principles are variable (for all such things might actually be otherwise), and since it is impossible to deliberate about things that are of necessity, practical wisdom cannot be scientific knowledge."³ "Practical wisdom on the other hand is concerned with things human and things about which it is possible to deliberate; for we say this is above all the work of the man of practical wisdom, to deliberate well, but no one deliberates about things invariable, nor about things which have not an end, and that a good that can be brought about by action. The man who is without qualification good at deliberating is the man who is capable of aiming in accordance with calculation at the best for man of things attainable by action. Nor is practical wisdom concerned with universals only—it must also recognize the particulars; for it is practical, and practice is concerned with particulars."³

The only extensive discussion of legal reasoning which Aristotle provides is in the *Rhetoric*. For dealing with matters of opinion, as distinguished from matters susceptible of scientific knowledge or demonstration, there would seem to be two arts, dialectic and rhetoric. Dialectic is the art of discussing matters which, in a loose sense, may be called theoretical. Rhetoric, which is defined by

² Posterior Analytics, Bk. I, c. 33.
³ Nicomachean Ethics, Bk. VI, c. 4, 1140a.
³ Nicomachean Ethics, Bk. VI, c. 7, 1141b.
Aristotle as "the faculty of observing in any given case the available means of persuasion," seems to deal with the processes by which political and legal decisions are reached. "The duty of rhetoric is to deal with such matters as we deliberate upon without arts or systems to guide us, in the hearing of persons who cannot take in at a glance a complicated argument, or follow a long chain of reasoning. The subjects of our deliberation are such as seem to present us with alternative possibilities: about things that could not have been, and cannot now or in the future be, other than they are, nobody who takes them to be of this nature wastes his time in deliberation."4

It would be a mistake to suppose that in Aristotle's view rhetoric is concerned merely to give advice to people as to how they may win their cases. On the contrary, "the arousing of prejudice, pity, anger, and such has nothing to do with the essential facts, but is merely a personal appeal to the man who is judging the case. Consequently, if the rules for trials which are now laid down in some states—especially in well-governed states—were applied everywhere, such people would have nothing to say. . . . Rhetoric is useful (1) because things that are true and things that are just have a natural tendency to prevail over their opposites," and because "we must be able to employ persuasion, just as strict reasoning can be employed, on opposite sides of a question, not in order that we may in practice employ it in both ways (for we must not make people believe what is wrong), but in order that we may see clearly what the facts are, and that, if another man argues unfairly, we on our part may be able to confute him."5 It would seem fair to say that it is Aristotle's view that in matters of action, where there may be difference of opinion as well as conflict of interest, the proper process for determining solutions is argument and discussion, the effective procedures for which are treated in rhetoric.

As to the kind of arguments which achieve proof or apparent proof, Aristotle is explicit. "[J]ust as in dialectic there is induction on the one hand and syllogism or apparent syllogism on the other, so it is in rhetoric. The example is an induction, the Enthymeme is a syllogism, and the apparent Enthymeme is an apparent syllogism. . . . Every one who effects persuasion through proof does in fact use either Enthymemes or examples there is no other way. . . . When we base the proof of a proposition on a number of similar cases, this is induction in dialectic, example in rhetoric; when it is shown that, certain propositions being true, a further and quite distinct proposition must also be true in consequence, whether invariably or usually, this is called syllogism in dialectic, Enthymeme in rhetoric."6

Such statement about the manner of argument does not, however, give information about the character or content of legal arguments, or the materials from which the examples and enthymemes are constructed. Since the aim of legal

4 Rhetoric, Bk. I, c. 2, 1357a.
5 Rhetoric, Bk. I, c. 1.
6 Rhetoric, Bk. I, c. 2, 1356b.
reasoning is to arrive at a judgment that an action is just or unjust, such reasoning involves reference to laws; but there are particular laws and universal law, and particular law may be written or unwritten. "Particular law is that which each community lays down and applies to its own members; this is partly written and partly unwritten. Universal law is the law of nature. For there really is, as every one to some extent divines, a natural justice and injustice that is binding on all men, even on those who have no association or covenant with each other." Two related facts are particularly important for understanding the character of legal reasoning, the fact that there is conflict or discrepancy among the different kinds of law and the fact that all the kinds of law are to some extent indefinite, indeterminate and changeable. The first fact comes out in Aristotle's discussion of equity. "What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start." The kind of problem involved is also indicated in the Rhetoric: "The second kind makes up for the defects of a community's written code of law. This is what we call equity; people regard it as just; it is, in fact, the sort of justice which goes beyond the written law. Its existence partly is and partly is not intended by the legislators; not intended, where they have noticed no defect in the law; intended, where they find themselves unable to define things exactly, and are obliged to legislate as if that held good always which in fact only holds good usually; or where it is not easy to be complete owing to the endless possible cases presented." Further light on how the conflict of laws affects legal reasoning is found in Aristotle's suggestions as to how one may argue on either side of a case. If the written law is not favorable to our case, we may argue that "justice is like silver, and must be assayed by the judges, if the genuine is to be distinguished from the counterfeit," or "perhaps that the law in question contradicts some other highly-esteemed law, or even contradicts itself. Thus, it may be that one law will enact that all contracts must be held binding, while another forbids us ever to make illegal contracts. Or if a law is ambiguous, we shall turn it about and consider which construction best fits the interests of justice or utility, and then follow that way of looking at it." If, on the other hand, the written law supports our case, we can argue that "not to use the laws is as bad as to have no laws at all. Or that, as in the other arts, it does not pay to try to be cleverer than the doctor: for less harm comes from the doctor's mistakes than from the growing habit of disobeying authority."
The above statements also indicate why the law, at least, the written law, is to some extent indeterminate, indefinite and changeable. That this point holds in regard to the unwritten law of a community is probably obvious. With regard to natural law, Aristotle is explicit. "With the gods it is perhaps not true at all, while with us there is something that is just even by nature, yet all of it is changeable; but still some is by nature, some not by nature. It is evident which sort of things, among things capable of being otherwise, is by nature; and which is not but is legal and conventional, assuming that both are equally changeable. And in all other things the same distinction will apply; by nature the right hand is stronger, yet it is possible that all men should come to be ambidextrous."

The discussions in the *Rhetoric* apply directly to the reasoning of the opposing advocates. How do the judges reason? If we put everything together, it seems clear that the judges reason in the same way. When laws conflict and are indeterminate and changeable, when reasonable men can construct opposing arguments, the judges attempt to abstract from their prejudices and the interests of the parties and to strike a fair balance among the opposed considerations; and they do this by "dint of a certain skill and experience rather than of thought. . . . Now laws are as it were the ‘works’ of the political art; how then can one learn from them to be a legislator or to judge which are best? Even medical men do not seem to be made by a study of text-books. Yet people try, at any rate, to state not only the treatments, but also how particular classes of people can be cured and should be treated—distinguishing the various habits of body; but while this seems useful to experienced people, to the inexperienced it is valueless. Surely, then, while collections of laws, and of constitutions also, may be serviceable to those who can study them and judge what is good or bad and what enactments suit what circumstances, those who go through such collections without a practised faculty will not have right judgment (unless it be as a spontaneous gift of nature), though they may perhaps become more intelligent in such matters."

If, now, we look at Levi’s analysis in relation to Aristotle’s doctrine, it would seem that Levi comes out with very much the Aristotelian position, which is not necessarily to his discredit. Aristotle, of course, wrote long ago, without the benefit of modern erudition, and he may be wrong. His doctrine may, nevertheless, be useful in determining the possible types of theory about the nature of legal reasoning.

It would seem that there are three major possibilities. One would result from denying Aristotle’s distinction between science and practical reason. Such a position would analogize legal reasoning to science or to demonstrative reasoning. It would need to establish first principles or basic truths in regard to action; or if these were supposedly supplied by statute law, it would have to ignore natural law and would also have to provide univocal terms for specifying actions and show that despite changing circumstances and shifts in ends and in the

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11 Nicomachean Ethics, Bk. V, c. 6, 1134b.

12 Nicomachean Ethics, Bk. X, c. 9, 1181b.
organization of society the subsumption of particulars under general laws can proceed by simple deduction.

The opposed possibility would deny Aristotle's contention that argument and discussion in matters of practice tend toward the right and the just. According to this view, there would be no reason in law. Individuals might use reason to discover means of furthering their interests by influencing the legal or judicial processes or by predicting their outcome; but the law and the legal processes would be merely the resultant of conflicting interests and forces.

The third position, which Aristotle stated and which Levi illustrates so effectively, is in a way a mean between the other two. It has been stated in various ways by other men. I suppose that the view of Stammler, and its version in this country by Roscoe Pound, according to which law is thought of as natural law with a changing content, is a variation on the same theme.

It is not clear to me that Becker takes the first position. If he does, he does not seem to be aware of just what commitments he is making. Levi, as I have indicated, clearly takes the Aristotelian position, no doubt making for himself an independent rediscovery of the kind of doctrine which Aristotle had, developing it in an illuminating way in relation to modern problems. To say that he is rediscovering Aristotle is no disparagement of his originality, because the fact seems to be that no one understands Aristotle until he has himself laboriously thought through the problems with which Aristotle dealt. We seem able to find in Aristotle and other great thinkers only what we have independently discovered for ourselves.

As to what is reasonable and true, there is no doubt in my mind that reason in the law is something like Aristotle and Levi portray it. There are many refinements to be made and many difficult questions to be answered precisely, but the objections to the other two positions are so overwhelming that it is necessary to reject them.

Reasoning in the law, then, uses syllogisms and examples; but what is important is that it is a moving equilibrium between justice and convention, maintained by argument and discussion, and reflecting shifts in interests, in purposes, and in the circumstances of society—an equilibrium which in a well-ordered society tends toward what is reasonable and just but which cannot be exactly specified by demonstration or by scientific reasoning.

MAX RHEINSTEIN*

In his review of Levi's book, Becker is interested in two problems, viz., first, whether Levi's analysis of legal reasoning is correct from the point of view of logic in general and, second, whether, although it may be correct as to common-law thinking, it also fits modern continental law. Perry's review of both Levi and Becker seems to proceed upon the assumption that legal reasoning is by

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and large the same everywhere and at all times. In Aristotle's Greece it was undoubtedly true that legal reasoning both of the advocate and the judge was primarily an application of practical rather than scientific reason. But can this be said of reasoning in modern, and especially modern continental, systems of law? Do we perhaps have to say that in different systems legal reasoning proceeds along different lines none of which can, of course, dispense with logic, certain unguarded and probably now regretted statements by yesterday's realists notwithstanding.

As to this problem we can find suggestive ideas in the typology of methods of legal thought which Max Weber undertook to establish in the Sociology of Law part of his Wirtschaft und Gesellschaft.

As one possible criterion by which legal systems may be classified Weber uses those characteristics of law which vary in accordance with the differences between the types of honoratiores, i.e. the men which exert the decisive influence in shaping a system of law. If they are, for instance, priests or expounders of a sacred doctrine, the law will primarily strive at actualizing that doctrine's ethical tenets. It will be guided by considerations of what Weber calls substantive ethics. Simultaneously, it will contain, in the words of Roscoe Pound, more principles than rules; the conceptual formulations will be vague and elastic. If a law is primarily shaped by judges, it will be concrete, casuistic, near to life; it may develop principles, but to a lesser extent than a sacred law, and it will either refrain from formulating clearly formulated rules or will tend to use rules which use formalistic rather than substantive concepts. If a law is dominated by scholars, as continental law was from the 13th century to the age of the modern codifications, it will tend toward systematization and clarity in the formulation of both principles and rules. It will tend to use clearly defined concepts, but it is also likely to be theoretical and to lose touch with ethical convictions of the people and the exigencies of practical life. Again different will be a law which is dominated by bureaucratic administrators, who will strive for legislative fixation and unification, may tend toward paternalism, but also toward consistency of substantive ethics or of raison d'état.

Such a typology also indicates that different modes of reasoning predominate in different types of legal systems. In a judge-made law, such as the common law, reasoning by example appears, so to speak, to be natural. Reasoning from case to case is reasoning by example. Common-law judges have been notoriously weary of formulating rules of law. "Let us decide the concrete case on its peculiar merits." Such statements cannot be taken literally lest the common law be regarded as a collection of arbitrary judicial pronouncements, which, of course, it is not. The case stands for the law, i.e. an underlying principle or rule, even where that principle or rule remains unarticulated. By reasoning from case to case the judge tries to apply to the new case the principle or rule upon which he thinks, or often "feels," that the old one or ones were decided. Here we have the logic of the system. An attempt is made consistently, i.e. logically, to
apply to the new situation, the policies which are found or felt to underlie the precedents and the total legal and social order. But the way in which, in the manner of the classical common law, this policy, i.e. the rule, is found is through reasoning by example. When found or felt in that way, the new case is subsumed under it in the way of the syllogism; but the terms of the syllogism are not necessarily formulated and the subsumption is made more by way of short circuit than by formulation and articulation of every step involved.

In modern continental law the terms of the syllogism are more meticulously formulated. The rules, rather than influencing without any, or with only vaguely and always tentatively regarded formulations, are articulated in statutory commands or scholarly elaborations and by training the lawyers have become accustomed to reveal as clearly as possible every step of their reasoning.

There is thus a difference, but it is not that in one system judges would be guided by logic and in the other by experience. Now, both logic and experience, or better, experience seized upon by logic, determine legal reasoning in both systems, simply because it is reasoning, and reasoning cannot be otherwise than by logic. But where the systems differ is the way in which the steps of reasoning are articulated; and as they are less articulated in the common law, that system presents an example of reasoning by example, i.e. a reasoning in which the major premise of the syllogism is not always formulated, not always revealed, and not always made fully conscious even to the reasoner himself.

There also exists another difference, which we can exemplify by the three legal systems which have been referred to by Levi, Perry, and Becker; that of Aristotle's Greece, that of the common law and that of modern continental law. In all three the judge is not only a law finder but also a law maker. But he is least so in modern continental law, most in ancient Greek law, and to an intermediate but considerable degree in the common law countries. The difference is connected with differences in the state and extent of legislation. In ancient Greece laws were few, especially in the field of private law; in modern continental countries no law at all exists, at least in theory, outside of statute. With us legislation is extensive but anything but complete. The less legislation there is, the more the judge has to be a law maker. Of course, nowhere is he supposed to be arbitrary. Even the khadi or the judge of ancient Greece was expected to express in his doom the value judgments of his community. But these value judgments were not articulated. They lived in the "Volksgeist" and the judge's task was either to find the happy expression of the principle or, at least, to decide the case in accordance with the "sound feeling of the people." In that respect, he was a law finder, but simultaneously a law maker. And he was to be a law maker even more in those situations in which no clearly felt popular convictions were in existence. But even there it was his art to find that decision of which the people would approve. We have intentionally chosen this word "art," because, indeed, in such a world the decisional activity is primarily an exercise of practical reason; but still, even there, remains that element of scientific reason by which alone it can be ascertained whether or not the decision conforms with the prin-
principle which is vaguely felt by the community. But the process is more one of divining than of articulate reasoning and so again akin to the practical art.

In modern continental countries the judge is expected primarily to rely upon scientific reason. All the rules are, or at least are supposed to be, formulated in the statute or the authoritative scholarly text, and in his publicly pronounced opinion the judge is supposed to have his decision appear as a logical conclusion inevitably following from the subsumption of the case under the rule. We know, of course, that the officially pronounced syllogism does not always represent the true motivation of the decision, especially in the novel case which cannot be subsumed under the old rule without distortion. In recent decades, the pretext has not infrequently been abandoned and the true grounds of the decision are stated with frankness. But even then the decision has not been found without logic or syllogism. The judge creates the major premise under which he subsumes the case, but in creating it he applies other syllogisms, deriving from other existing rules the principles or rules of a higher order from which he derives the rule of the new case. His office binds him to apply this process, simply because the community will not tolerate judicial arbitrariness. It expects its judges to implement, if necessary through the creation of new rules, those policies by which it wishes conflicts of social interests to be resolved. To find the right rule of this kind is an art, an exercise of practical reason, but, again, the policies of the community can neither be ascertained nor applied without also applying scientific reason.


This book is an eloquent statement against all the prejudices disliked by the author—he does not discuss prejudices to be found among members of groups with which he is by and large in sympathy. Like all good men, he regrets that deliberate defamation of character is so frequently used against individuals and groups as a political weapon. They are called names not so much because one dislikes them, as because one tries in this way to advance one’s own goals or to intimidate others from pursuing their goals. The author shows how prejudice and persecution of minorities has always been with us: true though discomforting. In this country it began with the persecution of the Quakers and the sad story continues to show that even the most venerated figures of the Republic, from Washington to Lincoln and Roosevelt, did not escape unjustified smearing by their opponents. The bulk of the book is devoted to stating and elaborating the calumnies made use of by those who think they can best reach their goals by attacking Jews, Negroes, labor unions, and progressive groups or individuals in general.

The values of the author coincide, by and large, with those of this reviewer: hence, the favorable impression he received, which other readers will share if they hold this particular set of values and political opinions. Mr. Davis himself