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THE LOGICAL STATUS OF A LEGAL PRINCIPLE

SAMUEL J. STOLJAR*

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.

Yet law-abiding scholars write;
Law is neither wrong nor right,
Law is only crimes
Punished by places and by times,
Law is the clothes men wear
Anytime, anywhere,
Law is Good-morning and Good-night.

—W. H. Auden

I

MY PURPOSE IN THIS PAPER is to explain, as briefly and as clearly as I can, the logical status and significance of a legal statement. My purpose is not, let me add at once, to present a primer of professional logic suitably flavored with illustrations from the law:¹ for what I am principally concerned with is to try to map out the logical geography of legal concepts, and to do this from the point of view of a modern, rather than traditional, analysis.²

Although lawyers are daily engaged in finding, stating, deciding, predicting or simply applying legal rules, and often enough perform these activities with respectable efficiency, they seem nevertheless quite unable to

* Bigelow Teaching Fellow, University of Chicago Law School, 1951-52.

¹ See, e.g., Treusch, *The Syllogism*, in Hall, *Readings in Jurisprudence*, c. XII (1938), and Morris, *How Lawyers Think*, 60 et seq. (1937).

² For the expression "logical geography" I am indebted to Ryle, *The Concept of Mind* 7 (1949). This masterpiece shows more clearly than perhaps any other book the practical method and extreme value of logical analysis.

explain exactly what it is they do, or say, in the performance of these operations. "Many people," as Professor Ryle³ has so well put it, "can operate with concepts but cannot talk sense about them; they know by practise how to operate with them, anyhow inside familiar fields, but they cannot state the logical regulations governing their use. They are like people who know their way about their own parish, but cannot construct or read a map of it, much less of the region or continent in which their parish lies."⁴

Yet it must not be supposed that in canvassing the help of logic I intend to build a "system." It is important to make this clear because a common fallacy has been that logic aims at the construction of an exhaustive, perfect and definitive legal system or, at any rate, that its application can yield an ultimate and rigidly scientific certainty in law. Thus it has been assumed, especially by the "pure" theorists of law,⁵ that "system," "science" and "logic" are all somewhat synonymous expressions and that for positive law to claim the privileged rank of "science" it must form (what they call) a "logically exclusive, homogeneous and unalterable complex of norms."⁶ And, curiously enough, even those who, admittedly from a completely different viewpoint, have argued with Holmes that the life of law has not been logic but experience⁷ (or have protested against Euclidean legal thinking⁸) have made, in effect, a very similar assumption.

³ Ryle, *ibid.*, 7-8.

⁴ Two recent contributions, however, have attempted to tell us more exactly where we stand: Williams, *Language and the Law* I-IV, 61 L.Q. Rev. 71, 179, 293, 384 (1945), 62 L.Q. Rev. 387 (1946); Levi, *An Introduction to Legal Reasoning* (1949). Although I have profited greatly from both these writers, my analysis differs substantially from theirs. See also some of the older contributions, in particular Patterson, *Can Law be Scientific?*, 25 Ill. L. Rev. 121 (1930); Dewey, *Logical Method and Law*, 10 Cornell L.Q. 17 (1924); Cohen, *The Place of Logic in the Law*, 29 Harv. L. Rev. 622 (1916); Wigmore, *The Terminology of Legal Science*, 28 Harv. L. Rev. 1 (1914).

⁵ E.g., Hans Kelsen. For a penetrating discussion of his work, see Stone, *The Province and Function of the Law* 91 et seq. (1950).

⁶ Consult Jones, *Historical Introduction to the Theory of Law* 231 (1940).

⁷ Cf. Holmes, *The Common Law* 1 (1881). In this book, however, Holmes' main concern was not with "experience" but with analysis, both historical and logical, of certain legal rules and concepts. Nor can there ever be a conflict between "experience" on the one hand and "logic" on the other. It is true, of course, that the biography of a given rule is somewhat different from its logic, but the difference implies no contradiction. In the one case, our business is a historical report which may supply valuable social insight or experience; in the other, we are concerned with the consistency and compatibility of one rule with another. The short point is that Holmes' oft-quoted and rather overworked dictum possesses but an extremely limited validity; without drastic qualification it is exceedingly misleading. For a fuller and more significant statement of Holmes' views, see Holmes, *Law in Science and Science in Law*, *Collected Papers* 210 (1921); compare also Yntema, *Mr. Justice Holmes' View of Legal Science*, 40 Yale L.J. 696 (1931).

⁸ See Frank, *Justice Holmes and Non-Euclidean Legal Thinking*, 17 Cornell L.Q. 568, 572 (1932).

Such a view of logic, however, would be profoundly and substantially mistaken. The logical function is not to platonize an ideal legal scheme, but to analyze the components of that scheme. The function is precisely to tell us, for example, what we mean, or what we want to mean, by invoking such vague and variable terms as "certainty" or "system." Logical analysis (at any rate in its modern sense) does not intend to give us, in a particular field, more knowledge about more rules, but to make what we already have rather more precise;⁹ it does not seek penultimate completeness, but internal consistency and clarification. In an important and also very prosaic sense the modern machinery of logic is designed to make us understand what exactly it is that we are talking about.¹⁰

Since what will be said hereafter may easily appear slightly technical and somewhat disconnected, it will be worth while to explain immediately what constitutes my central argument. Practically all of what we are wont to call our legal thinking is vitiated by one great error and indeed an error of a very special kind. The error is caused by what modern logicians would describe as a category-mistake which is the failure to allocate legal concepts to their proper logical types or categories.¹¹ For the conceptual geography of our law (as indeed of any law) reveals two entirely separate areas. Each poses a distinct and distinctive type of problem and each has a rather different bearing upon the ultimate question of whether the law can in fact be certain or truly scientific. The first type of problem I may call (for want of a better name and certainly quite undogmatically) the logic of description,¹² and the second type may be denominated (perhaps with rather more conviction) the logic of attitudes.

⁹ Wisdom, *Interpretation and Analysis* 14 (1931).

¹⁰ This conception of logic seems at first sight quite unorthodox, especially to those to whom logic is the study of the Aristotelian syllogism and little else. But at the present time logic has a much wider range and meaning; it has become, as John Locke originally suggested, "another sort of logic and critic than what we have hitherto been acquainted with," *An Essay on Human Understanding*, Bk. IV, c. 21, § 4 (3d ed., 1934). It must also be pointed out, however, that it was actually only in the process of re-examining the formal relations between propositions that modern logical philosophers (Peano, Frege, Russell and others) discovered the tricks which both language and our habitual way of manipulating concepts had for so long played upon us. As G. E. Moore has said: "It seems to me very curious that language . . . should have grown up as if it were expressly designed to mislead philosophers; and I do not know why it should have," Moore, *Philosophical Studies* 217 (1922). See also Stebbing, *A Modern Introduction to Logic* 476 et seq. (6th ed., 1948); Ayer, *Language, Truth and Logic* 46 et seq. (1936); Flew, *Language and Logic*, c. 1 (1951); Russell, *Our Knowledge of the External World*, c. 11 (1941); Pap, *Analytical Philosophy* 445 et seq. (1949).

¹¹ The nature of category-mistake is well discussed by Ryle, *op. cit.* supra note 2, at 16-18. Very briefly, an example of a category-mistake is to regard the "average taxpayer" as a fellow-citizen; to think, in other words, that both are two persons in the same sense of the word "person." For a fuller discussion of category-mistake, see Hofstadter, *Professor Ryles' Category-Mistake*, 48 *J. of Phil.* 257 (1951).

¹² By the logic of description I mean very roughly what Professor K. N. Llewellyn has

The logic of description deals with the inferential pattern of legal thinking; it investigates legal rules as such, i.e., as expressed purely descriptively in terms of facts and consequences, and tries to explain how, or to what extent, they are compatible and consistent with each other. The logic of attitudes, on the other hand, deals with the specific role played by value judgments in the formulation of legal principles; above all, it attempts to analyze the "logical" and linguistic devices by which lawyers seek to attain their moral objectives. Thus, for example, it has only recently been shown that in reasoning with concepts such as "harm," "wrong," "fault" or "duty" (as well as many similar concepts) we are using persuasive, and not logical, definitions.¹³

However, in separating these two areas and their two distinct types of problem, I do not wish to imply that they are completely unrelated. For it is obviously true that our legal reasoning is at almost every turn shot through with emotive attitudes and values. But just as the "rolled-up plea" has first to be unraveled to ascertain what it says,¹⁴ so analysis must also distinguish between different intellectual operations; especially if such a differentiation can throw important light on the nature of our difficulties. At any rate, the principles of logical inference are not all the same as the principles serving good intentions.

My plan of attack will be as follows: I shall, in the first place, discuss the logic of description and try, in this connection, to explain the behavior of legal concepts and to distinguish descriptive from attitudinal or emotive concepts; and I shall also try to recommend certain rules for the better manipulation of purely descriptive legal concepts. In the second place, I shall deal with ethical-legal value judgments and discuss persuasive definitions. Lastly, and by way of summary, a few remarks will follow upon the nature of legal certainty as this discussion has revealed it.

II

DEDUCTION, INDUCTION AND ANALOGY

At the risk of appearing both elementary and pedantic, I must at the outset say a few words about the significance of the terms "deduction,"

called "a system of *description*" which is "the most purely descriptive logical arrangement of the rules of cases." Llewellyn, *The Bramble Bush* 70 (1951). His further argument, however, is that the "logical system refuses to remain on the level of description" because the "logical system shifts *its content* to the level of Ought." *Ibid.*, at 71.

¹³ Stevenson, *Ethics and Language* 206 et seq. (1947), and by the same author, *Persuasive Definitions*, 47 *Mind* (N.S.) 331 (1938).

¹⁴ Cf. *Sutherland v. Stopes*, [1925] A.C. 47; Winfield, *Textbook of the Law of Tort* 280-81 (1950).

"induction" and "analogy,"¹⁵ for a discussion of these terms will give us a clearer understanding of what we mean by the logical pattern of reasoning, whether it be legal or any other reasoning.¹⁶

Deduction traditionally means reasoning from universal to particular.¹⁷ Thus from the proposition "All men are mortal" we can validly deduce or infer that Jones, or Smith, or Robinson is mortal simply because the mortality of the latter mortals is contained in, or implied by, the mortality of all men. The universal "entails" the particular; the particular "follows from" the universal.¹⁸ By induction we mean reasoning from particular to universal; instead of deriving instances from a general law, we establish that general law from one or several particulars.¹⁹ We want to be able to predict that certain things or events that may have happened in the past will also happen in the future. For example, from having observed that Jones and Smith and Robinson have died we wish to state that mortality will hold good of all men. We can see therefore what our problem is: we cannot simply say that because Jones has died, or Smith has died, and so on, that therefore Tom, Dick and Harry will also die. For in doing this we would only accumulate specific instances of mortality which by themselves alone do not provide a valid basis for prediction: we cannot infer anything at all from *merely* enumerated or accumulated past instances.²⁰

To say, therefore, that Tom, Dick and Harry will one day die means that they must *resemble* Jones, Smith and Robinson in certain respects and that because of this resemblance mortality can be predicated of all of

¹⁵ For a lucid summary, see Cohen and Nagel, *An Introduction to Logic and Scientific Method* 8-13, 273-88 (1934). For a discussion of the technical difficulties, see Stebbing, *A Modern Introduction to Logic* 210-26, 243-56 (6th ed., 1948); also by the same author, *Logic in Practice* 32 et seq. (3d ed., 1948).

¹⁶ For a fine discussion of what is meant by "reasoning," see Stebbing, *Logic in Practice* 10-12, 28-31 (3d ed., 1948).

¹⁷ Consult Joseph, *An Introduction to Logic* 378 n. 1 (2d ed., 1925).

¹⁸ Deduction thus defined raises the so-called "paradox of inference": if the conclusion is not contained in the premise, it cannot be valid; and if the conclusion is not different from the premise, it is useless; but the conclusion cannot be contained in the premise and also be useful; hence, an inference cannot be both valid and useful. But Cohen and Nagel, *op. cit.* supra note 15, at 175-76, have shown that the paradox disappears once the phrase "is contained" (which is a spatial metaphor) is replaced by the word "implied" and when it is realized that the relation of "implication" is of such unique type that only confusion is courted when it is replaced by some analogous relation which has some of its formal properties. It is, therefore, wrong to think that the value of deduction is purely psychological, although the latter element is obviously important; contra Williams, *Language and the Law* IV, 61 L.Q. Rev. 384, 398-400 (1945).

¹⁹ Stebbing, *A Modern Introduction to Logic* 243 et seq. (6th ed., 1948); also Joseph, *Introduction to Logic* 378-80 (2d ed., 1925).

²⁰ Stebbing, *ibid.*, at 246-49.

them. The resemblance is that the six people here mentioned have the same bodily structure usually described as "human": since we know from past experience that all humans die, it follows that Tom, etc., being human, will also die.²¹ It is simply because we possess knowledge of this positive resemblance or analogy that the inductive principle will seem conclusive; yet in the nature of the case it only has a high degree of probability: indeed, so high a probability that in the present state of knowledge, we cannot doubt that "all men are mortal."²² Nevertheless, it is at least possible that some newly discovered pill or powder may one day extend human life indefinitely. In that contingency, the inductive principle of mortality would become invalid—and for the simple reason that the known analogy would no longer be positive but negative: the new immortals would possess a different anatomy, an anatomy spiced with the elixir of life.

Again, deduction and induction, far from being antithetical, are in effect complementary procedures.²³ For in order to be able to deduce we must have an inductive generalization to deduce from; and in order to know whether a certain generalization has validity we must be able to deduce. When, for example, we say that a hypothesis or generalization does not fit the facts, all we mean is that a conclusion does not follow from the premise, i.e., it does not enable us to make a valid deduction. Yet although, in scientific reasoning, induction must precede deduction, the mental operation of deduction should not be overrated both as regards its importance or its independence. Where we establish an inductive principle of relatively small range—where, in other words, the inductive universal contains only a small number of particulars—we can immediately see whether the conclusion (or particular) follows from the premise (or universal). The validity or invalidity of the deduction would reveal itself in the very process of our inductive labors without having to resort to a separate and grandiose syllogism.

The direct interrelation between induction and analogy must now be quite apparent; analogy in this sense is inherent, as it is indeed the central

²¹ Keynes, *A Treatise on Probability* 217–73, esp. at 220 et seq. (2d ed., 1929). This resemblance is called the *known* positive analogy to distinguish it from the *total* positive analogy where the resemblance is unknown; a dissimilarity is, of course, a negative analogy.

²² "As a logical foundation for Analogy, therefore, we seem to need some such assumption as that the amount of variety in the universe is limited in such a way that there is no one object so complex that its qualities fall into an infinite number of independent groups (i.e., groups which might exist independently as well as in conjunction)." Keynes, *ibid.*, at 258. Hume's statement, cited *ibid.*, at 222, puts the matter in a nutshell: "Without some degree of resemblance, as well as union, 'tis impossible there can be any reasoning." See also the excellent essay, *Flew, Language and Logic*, c. V (1951).

²³ Cf. Cohen and Nagel, *op. cit. supra* note 15, at 276–77.

factor, in all inductive reasoning. But there is also another sense in which "analogy" is used. Both Aristotle²⁴ and Mill²⁵ distinguished a third form of reasoning which is neither like deduction nor induction, but is reasoning from part to part or particular to particular. Now it is true that a man's mind may sometimes connect one particular with another without making the connection dependent upon any property which both particulars possess in common. This, however, is a purely intuitive process which psychologists refer to as an "association of ideas,"²⁶ and it cannot be described as a form of logical reasoning at all. For to infer one particular from another one must presuppose the existence of at least one common property which, in turn, presupposes some kind of general principle. Thus analogous reasoning from particular to particular becomes a rather special instance of induction. The word "analogy" must therefore be understood in its inductive sense alone, and not as a separate type of reasoning.²⁷ Nevertheless, the intuitive or associative analogy cannot be completely disregarded; it has a special relevance in the law and we shall meet it again when describing the logic of attitudes.²⁸

PRECEDENTS AND PRINCIPLES. THE BASIC PROBLEM

What may perhaps be regarded as the official common lawyers' theory is to the effect that code law represents a type of deductive reasoning, whereas case law is pre-eminently inductive.²⁹ With the former aspect of

²⁴ See *Analytica Priora* 69a (McKeon ed., 1941).

²⁵ *A System of Logic*, Vol. II, c. iii, § 3 (1850).

²⁶ Cf. Joseph, *Introduction to Logic* 541-42 (2d ed., 1925): "Anyone must admit when questioned, that unless he supposed *b* to share with *a* the conditions on which the presence of *y* depends, he could not rationally infer it in *b* because he found it in *a*; and a process which cannot be rationally performed can hardly be called a process of reasoning. But that supposition is the supposition of a general connection: and therefore *inference* from particular to particular works through an implicit universal principle."

²⁷ It may be noticed that Russell, *Human Knowledge* 193 (1948), uses the word "analogy" in yet another sense. This does not, fortunately, concern us here.

²⁸ See *infra* pp. 210 et seq.

²⁹ Allen, *Law in the Making* 248 (2d ed., 1930): "Whereas precedent is inductive, enactment clearly imposes the necessity of deduction upon the courts." But compare the following remark: "The thought seems erroneous but the emphasis has some meaning," Levi, *Introduction to Legal Reasoning* 19 (1949). For a criticism, see Simpson, *Law in the Making*, 4 *Modern L. Rev.* 121, 124 (1940). Indeed it would seem that the introduction of the case method in teaching derives from the belief in the logical validity of induction. As Judge Learned Hand tells us: "Langdell had arrived at the case-system because he thought of law as a set of principles to be derived from the reports by the process of induction; he appealed to the analogy of the physical sciences, and it may be that it was this that, some years before, had so much impressed President Eliot of Harvard University, who had himself been a chemist. . . . [I]t is hard to resist the belief that this basic concept had something to do with the persistency with which [Langdell] sought to find uniformity amid the decisions, which were by hypothesis the phenomena for his inductions." Hand, *The Spirit of Liberty* 140-41 (Dilliard ed., 1952).

the matter I shall later deal.³⁰ For the present, I should like to concentrate on case law in order to explain how general legal principles may emerge.

Let us assume that a court has decided in two cases, C_1 and C_2 , to grant relief in damages. Suppose that in C_1 the defendant, driving his car, unintentionally hits and injures a pedestrian plaintiff. And suppose that in C_2 the situation is the same except that the plaintiff is not a pedestrian but a passenger in another car and that the injuries occur in different places and at different times of day.

Now it is clear that C_1 and C_2 are both "precedents," but precedents of what? What do they tell us? What principle do they contain? To answer this, we can reason in two ways. First, we can say that "there are two cases in which the courts have held that the driver of a car unintentionally injuring a pedestrian or passenger is liable in damages." Secondly, we can say that all "drivers of cars who unintentionally injure others, whether pedestrian or passenger, are liable in damages." At first sight, there seems to be little or no difference between these two propositions; yet the difference is very great and it is important to understand why this is so.

The first proposition (beginning with "there are two cases" etc.) is technically called a particular proposition because it tells us something of an indefinite part of a class, i.e., of two or some drivers, whereas the second proposition, styled a universal proposition, predicates something about all members of a class.³¹ Yet consider again the particular proposition. It only tells us that two drivers have been held liable in damages. It is thus no more than a report of what the courts have done; it is history which by itself does not generate a principle. The universal proposition, on the other hand, does not affirm the existence of a historical fact: its importance is that it is not existential but functional.³² For what it says is this: if any driver unintentionally hits and injures a pedestrian, etc., then he will be liable in damages. It does not say that there were or that there will be such drivers; it merely argues that a certain class of drivers cannot both injure people and not be liable in damages.

It will be readily admitted that legal precedents are, from a logical point of view, just particular propositions which only report the existence of certain historical events; and that in order to obtain a general or functional rule or principle we must have a universal proposition. Hence, the cru-

³⁰ See *infra* p. 203 et seq.

³¹ For a full discussion of such propositions, see Stebbing, *op. cit. supra* note 10, at 33-56; Cohen and Nagel, *op. cit. supra* note 15, at 44-50.

³² For the distinction between existential and functional propositions, see Stebbing, *ibid.*, 75-76.

cial problem with which we are confronted is to derive the universal proposition from the particular proposition. To find the so-called *ratio decidendi* from one case, or from a line of cases, simply means to transform a particular proposition into a universal one. This, however, is our greatest difficulty, for how, precisely, is this transformation to be made?

It might perhaps be argued that the limitation of the particular proposition is not a serious deficiency at all. For instead of saying that there are some drivers who have been held liable in situations C_1 and C_2 , we could say that "all drivers falling within situations C_1 and C_2 are liable in damages." But such a procedure would be of no assistance whatsoever. The new universal proposition would only be an enumeration of particular instances. We would, in effect, be taking advantage of the inherent—and only too often unnoticed—ambiguity in the word "all,"³³ and merely let the word "all" stand for those instances which "some" had, though in a rather different way already indicated. Again, the new proposition would presuppose that there can be, and indeed that there must be, an exact repetition of the instances C_1 and C_2 . Yet we all know that an exact repetition of events never happens, except perhaps in the common usage of that stubborn phrase that "history repeats itself."

Turn therefore which way you will, the universal proposition (which, as we have seen, represents the norm or rule or principle we must establish) will have to allow for some amount of variation, and we will have to find a general concept which will cover that variation. It is at this point that induction and analogy come in. From certain positive or negative resemblances between C_1 and C_2 we must inductively produce a principle that will amount to a universal proposition.

However, the process of scientific induction (which we have previously considered) and the inductive process in the law (which we may briefly call legal or normative induction) are very different indeed. In a scientific process of induction the known analogy we choose must ultimately be verifiable by empirical tests. It is in this sense alone that a scientific proposition can be either true or false. But in the case of legal or normative induction we do not seek to establish a truth but seek to establish a norm or rule. In choosing, therefore, the positive or negative analogy that will determine the legal rule, the analogy will not be empirical or scientific; the choice of analogy will depend upon what, with regard to the task of rule-

³³ To illustrate this ambiguity, take the following two statements: (i) All words in this paper are printed in black ink; and (ii) All men are mortal. In (i), "all" denotes an enumerated and finite group of things; in (ii) "all" means "all possible" members of a class, which goes beyond mere enumeration.

making, the legal mind³⁴ may deem important. Importance, however, is a matter of purpose and of point of view,³⁵ so that our legal induction will be guided by the attitudes that we may have towards certain injurious drivers or by the possible results we think we can achieve by punishing them with damages. More, of course, will be said about all this at a later stage of this discussion; for the present we are mainly concerned with the logical problems that are involved in the formulation of a general principle out of particular instances. As we have seen, we must find our universal proposition, and to find this proposition we must say something about *all* members of a given class. The precise task, then, is to delimit or define a certain class of injurious drivers of whom liability in damages can be predicated. But to make all this clearer it is necessary to discuss briefly both the concept of a class and definition by intension.

THE THEORY OF CLASSES AND DEFINITION BY INTENSION

Looking again at our previous universal proposition it will immediately be seen that it states a relation between two classes.³⁶ These classes were, briefly, (i) all drivers unintentionally injuring people in certain situations and (ii) (defendants) liable in damages.³⁷

The next question is how we can define classes (i) and (ii). Class (ii)

³⁴ The expression "legal mind" is, of course, a euphemism for the kind of thinking lawyers are traditionally associated with. See Amos, *The Legal Mind*, 49 L.Q. Rev. 27 (1936). But compare also Thomas Reed Powell's more humorous definition: "If you think you can think about something else without thinking about what it is attached to, then you have what is called a legal mind," cited from an unpublished manuscript, in Thurman Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 Yale L.J. 53, 58 (1930).

³⁵ Stebbing, *Logic in Practice* 13, 16-17 (1934): "It is desirable to understand what the word 'important' means. To say of anything that it is 'important' is to say that it 'makes a difference relevant to our purpose.' Nothing has importance apart from a purposive being. What makes a difference for one purpose makes no difference for another purpose. Hence, importance is relative to a point of view. It must be insisted that for different purposes different properties are important. The reader would be well advised if, whenever he meets the word 'important' in a serious discussion, he were to ask himself: 'Relative to *what purpose*, or from *what point of view*, is this important?'"

³⁶ On the theory of classes, see Russell, *Introduction to Mathematical Philosophy* 12-14, 181 et seq. (2d ed., 1920); Stebbing, *ibid.*, at 139-42, 502-5; and see also the short discussion, Williams, *Language and the Law*, 61 L.Q. Rev. 179, 189 et seq. (1945).

³⁷ Russell, *ibid.*, at 182, called classes "logical constructions" or "logical fictions," because taken by themselves classes are "incomplete symbols" since they do not assert anything about themselves. But Professor Stebbing pointed out, *ibid.*, at 153, that "(there) is nothing fictitious about logical constructions. To say that tables are logical constructions is not to say that tables are fictitious, or imaginary or in any way unreal." The same criticism must apply to the "fiction-theory" in jurisprudence. "In a sense," said Jerome Frank, *Law and the Modern Mind* 167 (1930), "all legal rules, principles, concepts, standards—all generalized statements of law are fictions." If this means that the law is an illusory fiction, it is clearly untrue. All that "fiction" can here mean is (i) that legal classes and concepts are logical constructions and (ii) that a legal principle or rule is not an existential, but a functional, proposition. For a full review of the "fiction-theory," see Jones, *op. cit. supra* note 6, at 164 et seq.

does not need further definition, for it only states a consequence that attends a certain type of careless driver, and at this moment we are not interested in the consequences but in the class of facts upon which certain consequences will follow. It is clear, therefore, that in order to be able to infer which drivers will be liable in damages, we must have a precise knowledge of the members of class (i). In other words, we must find the defining quality of the class of injurious drivers that will include not only the situations in C_1 and C_2 , but also the situations in $C_3, C_4 \dots C_n$. Since, however, we will never be able to enumerate all these possible situations—and since these situations may in fact be infinite and not even theoretically enumerable³⁸—we shall have to derive our knowledge about all these situations by what logicians call a “definition by intension” or “connotation” (i.e., by the assigning of a common property) and not by a “definition by extension” or “denotation” (i.e., by enumeration).³⁹

But the difficulty now is that a given class can always be defined by many different characteristics selected from the many known analogies which, though interchangeable for many practical purposes, are never unique, i.e., they do not refer to one set of members alone.⁴⁰ Take, for example, the class “men.” It may be defined as “featherless bipeds, or as rational animals, or (more correctly) by the traits by which Swift delineates the Yahoos.”⁴¹ But the quality of “featherless biped” may apply to gorillas as well as men, whereas “rational animal” may exclude lunatics or small infants but may (conceivably) include trained dogs.

It will immediately be seen how variegated the number of the defining properties of class (i) may be. A court of law might hold that the drivers in C_1 and C_2 were liable, and that drivers in $C_3, C_4 \dots C_n$ will be liable, because of any, or almost any, combination of the following analogies.

- (i) The (defendant's) name was Smith (or any other specified name); or
- (ii) the injury occurred at a particular time of day; or (iii) the injury oc-

³⁸ These situations are thus very similar to natural numbers. “We cannot enumerate all the natural numbers: they are 0, 1, 2, 3, *and so on*. At some point we must content ourselves with ‘and so on,’” Russell, *ibid.*, at 13; but see note 39 *infra*.

³⁹ See Stebbing, *op. cit. supra* note 35, at 243 et seq; Cohen and Nagel, *op. cit. supra* note 15, at 31–33. It must not be thought, however, that all legal principles are intensional rather than extensional. The legal statement, for example, that “all persons in this room will go to prison” enumerates a given class of people. Only in those cases where we try to establish a principle or rule, without being able to enumerate all the covered situations, does definition by intension become essential or inevitable.

⁴⁰ It is also important to appreciate that we can “know a class through the defining property, not through acquaintance with its members, even when the members are of such a sort that we could be, or actually are, acquainted with each one.” Stebbing, *ibid.*, at 142.

⁴¹ Russell, *op. cit. supra* note 36, at 14.

curred on a highway; or (iv) the injury was committed by drivers of automobiles; or (v) the automobiles were of a certain kind; or (vi) the injury was "direct" as distinguished from "indirect"; or (vii) the injury was "likely" to ensue by driving in a certain manner;⁴² or (viii) the drivers were "careless"; or (ix) the injury was the result of a negligent act independently of the fact that the defendants were drivers; or (x) the injury constituted a "wrong" or "fault" or "unjustified harm," and so on.

Some of these analogies seem strange and even absurd. Yet it would be wrong to think that liability because (say) the defendant has a particular name, or has committed a tort at a particular time, is an "illogical" type of liability. Such liability would, in our day and age, be regarded as "irrational"; but it should be clear that all we mean by irrationality in this context is simply that this type of liability would not fit our contemporary and generally accepted ideas as to what should constitute a legal "fault."⁴³ My main point, however, is to show and stress the versatility of the defining concepts which we may obtain by the inductive process or by reasoning by analogy. Since the class membership of injurious drivers comprised by each defining concept will either immediately or eventually diverge, the adoption of any particular concept will produce a different biography of a rule.

The upshot is that there is no logical compulsion in the doctrine of precedent to give us *one* principle of law.⁴⁴ The logical compulsion only exists insofar as the precedents provide a wide or limited range of analogy, and provided the court keeps within this range of analogy, the reasoning is logical simply because it is inductive; if it goes outside that range, the reasoning is not logical since, without analogy, there can be no induction. If, for example, the court had formulated a rule concerning our injurious drivers without any regard whatever for the analogies indicated in our previous list, the reasoning would have been completely disconnected with the precedents in question. But there is a further point. Suppose that the court decides that the drivers in C_1 and C_2 , and the drivers in C_3 , C_4 C_n , will be liable because they are all named Smith. The question then is whether the doctrine of precedent requires us to hold, as a matter of logical necessity, that only drivers named Smith can ever be liable in

⁴² The significance of the word "likely" (as distinct from the word "careless" in (viii)) is explained, *infra*, p. 197.

⁴³ Although the choice of an analogy may be "arbitrary," "undemocratic," "wicked," and so on, the choice, provided it is an analogy, can never be "illogical."

⁴⁴ See also Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 72-73 (1928); Llewellyn, *The Bramble Bush* 63-66 (1950).

damages; or whether, in addition to the Smith-rule, the court may subsequently select another analogy from C_1 and C_2 and thus establish another line of principle. In other words, the precise difficulty is whether a one-time choice of one particular analogy excludes the possibility of the adoption of another analogy in a given "universe of discourse."⁴⁵ It will be seen, however, that the logical necessity which would confine us to the Smith-rule can only then arise if the doctrine of precedent is interpreted to mean that the choice of one analogy is to be final and exclusive; but, again, such an interpretation is not a matter of logic but dependent upon our attitudes to given rules, i.e., the attitudes we have as to how long we want to keep a particular rule or how soon, or to what extent, we want to change it.⁴⁶ There is, therefore, no conflict between change and adaptation on the one hand and logic on the other. For while there certainly would be a logical contradiction between the proposition that only Smiths can be liable in damages and the proposition that also all non-Smiths can (for whatever reason) be liable in damages, the inconsistency immediately disappears once we decide that the "only-Smiths" proposition is to be no longer valid.

Seen in this light, the rule of *stare decisis* is nearly worthless. For its only logical significance is that in a given type situation or universe of discourse, later decisions must somehow be connected with previous precedents; this, however, amounts to no more than saying that our reasoning must move within the framework of analogy. Yet even though the doctrine is of little logical value, it plays a very important part in our moral attitudes to facts and issues which come up for litigation. This I shall later explain in somewhat greater detail.⁴⁷

LEGAL PREMISES RECONSIDERED

We now come to another aspect of this investigation. Henceforth the problem is how we can formulate our legal premises for them to become part of a deductive system properly so called. For we must define our premises by way of concepts from which straightforward inferences can be

⁴⁵ Every proposition refers to some context within which it is significant. Thus the proposition "Hamlet Killed Polonius" refers to Shakespeare's play. In other words, the universe of discourse is the domain of reference within which the proposition moves; see especially Cohen and Nagel, *op. cit.* supra note 15, at 40; Stebbing, *op. cit.* supra note 35, at 55.

⁴⁶ The only logical requirement in this connection is that legal propositions, like all other propositions, must comply with (what are usually called) the "laws of thought," i.e., they cannot at the same time assert both "A" and "non-A." Professor G. L. Williams has cast some doubt on that law (see *Language and the Law* II, 61 L.Q. Rev. 181-82 (1948)), but the doubt appears unjustified; consult Cohen and Nagel, *op. cit.* supra note 15, at 183-85.

⁴⁷ See *infra* p. 208 et seq.

made; and the corollary is that we must avoid such concepts which do not permit us to make deductions. In brief, the argument is that we must choose *descriptive* and not *emotive* (or ethical) concepts. The reason is that a descriptive concept actually describes certain facts and situations, whereas emotive concepts merely label our attitudes to certain facts or situations.⁴⁸ It is one thing to say that every Smith injuring another will be liable in damages; and it is quite another thing to say that an *unjustified* injury will constitute a tort. It is one thing to say that a person killing another will go to the gallows; and quite another thing to say that the "guilty" will suffer legal retribution. For in the one case the legal norm actually tells us what will happen; whereas in the other we cannot know as yet what is going to happen: we must wait for what a court would make of "unjustified" or "guilty." It is clear, therefore, that the concepts forming legal premises must be expressed in descriptive or strictly referential language, and we must eschew as much as possible emotive or attitudinal concepts. I say "as much as possible" simply because, as we shall later see,⁴⁹ the adoption of only descriptive concepts is not always feasible.

Two specific problems arise in connection with descriptive concepts. In the first place, we must distinguish dispositional concepts on the one hand and episodic or occurrence concepts on the other.⁵⁰ Broadly speaking, dispositional words state capacities, tendencies, abilities or propensities, whereas episodic or occurrence words report or describe particular happenings or events. For example, the words "possession," "knowledge," "intention," or "danger" are all dispositional expressions; and words like "speaking," "writing," "running" or "hunting" are all episodic statements. The importance of this distinction is that dispositional concepts are used differently from episodic concepts. Although we can say that John Smith is now engaged in hunting, shooting or fishing, we cannot say that John Smith is now engaged in knowing, possessing, having a right or intending. The dispositional sentence does not serve a fact-reporting purpose; its job is to state that John Smith might, could or would do certain things in certain circumstances. Consider, for example, the word "knowledge." If I say that John Smith "knows" the law, this does not mean that two mysterious quantities—the "law" and "knowledge"—are somehow embodied in John Smith.⁵¹ All that it means is that he might, would, or

⁴⁸ This is further explained *infra* p. 204 et seq.

⁴⁹ See *infra* p. 197.

⁵⁰ For a full discussion of this distinction, see Ryle, *The Concept of Mind* 116-53 (1949).

⁵¹ See also Ryle, *ibid.*, at 123-24 for a similar illustration of a person who is said to "know French."

could read and understand a law book, or write a law book, or answer some or many questions pertaining to the law, or argue in court, or be a judge and so on. Nor could we say that because John Smith may give an absent-minded or inadvertent answer to a legal question, or has not read or remembered all the legal rules that he does not know the law. "To know the law" is, therefore, a rather vague expression which moves at a much higher level of abstraction than the particular episodic reports of what a "knowing lawyer" may do at a given time or place.⁵² It is true, of course, that the vagueness of most disposition words does not lessen their practical importance for ordinary or everyday discussion,⁵³ but their meaning must be determined—or at any rate, must be made easily determinable—if they are to become part of legal premises from which deductions are expected to be made. This, however, involves recourse to stipulative definitions with which we will later be concerned.⁵⁴ A better understanding of disposition concepts also throws considerable light upon the so-called "necessary or fundamental concepts" which have so greatly occupied jurisprudential writers.⁵⁵ Certain concepts—such as duty, right, wrong, intention, ownership and possession—are regarded as so pervasive in the law that mastery of them is deemed essential. And while this is, fortunately, not the place to review all the refinements of this subject,⁵⁶ two brief things may be said about it: (i) If the "fundamental-concept" theory is a plea for the *consistent* use of words, it is an entirely admirable

⁵² But not all disposition words move on the same level of abstraction. Some disposition words are highly abstract and generic, whereas others are highly specific and concrete. For example, the disposition of "being a ruminant" describes something very limited, while such disposition words as "know" or "possess" or "intend" refer to manifold activities. Although these particular distinctions need not trouble us at present, it is perhaps useful to remember that most dispositional concepts of specifically human behavior, especially those used in the law, are usually more abstract than specific.

⁵³ It is necessary to appreciate in what respects even vague language may, by being short, be useful. First, it may be useful where we are using language to express feeling or emotion. To say, for example, that "John is suffering very much because Mary has rejected him" does not require us to specify precisely what operations of "suffering" John is actually going through. Secondly, vague language may be useful in all those situations in which the vagueness cannot lead to false inferences. For example, the statement "this book deals with logic" tells us only very vaguely what the book is about, except to differentiate it from books not concerned with logic; and if the hearer is only interested in poetry, the vagueness of the statement can cause no damage, for all that it amounts to is to tell the reader that that particular book does not deal with poetry.

⁵⁴ See *infra* p. 197 et seq.

⁵⁵ Cf. Stone, *The Province and Function of Law* 67–70, esp. at 68 (1950); see also Hall, *Readings in Jurisprudence* 442 et seq. (1938), where most of the relevant material is collected.

⁵⁶ See also the interminable discussions about the nature of the "corporation" and the distinction between "public" and "private" law; Jones, *op. cit. supra* note 6, at 139–63. For a modern discussion of the concept "possession," see Williams, *Language and the Law* IV, 61 *L.Q. Rev.* 384, 390–91 (1945).

venture. (ii) But if the theory is to point to the existence of certain transcendental legal notions, it has nothing to commend it.⁵⁷ For such notions proceed from the mistaken and misleading assumption that dispositions constitute some separate activities. Such an assumption, for example, "would lead to the conclusion that since being a solicitor is a profession, there must occur professional activities of soliciting, and, as a solicitor is never found doing any such unique thing, but only lots of different things like drafting wills, defending clients and witnessing signatures, his unique professional activity of soliciting would be one which he performs behind locked doors."⁵⁸ It is exactly such ways of thinking that have been responsible for the hypostatization of legal concepts,⁵⁹ and only an awareness of the behavior of disposition words will clear away the intellectual rubbish that has accumulated.

The second problem that arises in connection with descriptive concepts is rather more difficult to handle. Let us (to explain the problem) suppose, again, that a driver has injured a pedestrian and that the court has held that the driver is liable because (i) his driving was *likely* to cause injury or (alternatively) (ii) his driving was *careless*.⁶⁰ Is there any difference between the expressions "likely" and "careless" in this context? At first sight, the concepts seem more or less identical to the lawyer, but further consideration easily reveals their difference. In describing an act as "careless" we not only say that the injury was likely to arise, e.g., because the defendant was drunk or driving too fast, but also that such driving was "faulty," "bad" or "wrongful," i.e., we simultaneously express an attitude toward this particular kind of driving. "Careless" is thus partly an emotive concept and partly a descriptive concept, whereas "likely" is a descriptive concept and (generally speaking at least) not emotive in any sense. Furthermore, to say that a man drives "carelessly" is, when the matter is given but a little thought, merely an interesting (though perhaps unconscious) device of avoiding an important difficulty which is this: Since every accident or injury is likely (for if not likely it would not happen), how then do we distinguish between one likely injury that gives rise to legal liability and another likely injury that does not? Although only statistics can determine which accidents have a high, and which a low,

⁵⁷ Precisely such transcendental concepts John Austin believed could be established; see Stone, *op. cit. supra* note 55, at 68.

⁵⁸ Ryle, *op. cit. supra* note 50, at 119.

⁵⁹ Holmes was probably the first who clearly saw this danger. For example, he had "seen into the pseudo-concept of 'a right' and begun the process of setting off the several conceptions involved in our use of that term long before the present ferment in analytical jurisprudence in America," Pound, *Judge Holmes's Contributions to the Science of Law*, 34 *Harv. L. Rev.* 449, 452 (1921).

⁶⁰ See the list of possible analogies *supra* p. 191.

degree of probability, the law does not usually employ such mathematical procedures, and instead it employs a rule of thumb. What, then, is this rule of thumb? It is, in effect, a kind of belief as to how closely or remotely two events are causally connected.⁶¹ It is, in other words, a more or less intense feeling or conviction that between a given act and accident there is either a "direct" or "remote" relation.⁶² We can see, therefore, that such descriptive concepts as "likely" (or "possible," "probable," "direct," "proximate," etc.) neither actually describe a specific causal relation (apart from the truism that everything that happens has a cause); nor do they represent a statistical formula. What they do describe are just beliefs or convictions as to what that causal nexus is, quite independently of the mathematical probabilities involved.⁶³

This necessarily raises a further point. If it is conceded that a word like "likely" states, in this context, merely a belief, and often enough only an incomplete and partial belief, different judges may of course have different beliefs: that is to say, every judge may interpret differently the causal connection between two or several events. The question then is whether we can measure, and thereby standardize, these beliefs,⁶⁴ for unless we do so our propositions can never become properly descriptive. But this poses an enormously difficult and very specialist problem, and I have merely tried to state the nature of the difficulty.

THE THEORY OF DEFINITION

Definitions have been a perennial pastime both with lawyers and logicians; and the only surprising thing is how little actual headway has been made during centuries of debate and disagreement.⁶⁵ What will be said hereafter is a concise attempt to apply some of the more recent logical researches to legal methodology.⁶⁶

The purpose of a definition is to establish or fix the meaning of a word,

⁶¹ It still seems part of our mental outlook to try and find preferably *single* causes for everything. It is an idea which science has taken over from theology; Dewey, *Freedom and Culture* 84 et seq. (1939). On the other hand, there is some hopeful evidence that some courts have become aware of the pitfalls of causation; see in particular *Monarch Steamship Co., Ltd. v. A/B Karlshamns Oljefabriker* (1949) 1 All E.R.I. 14 (Per Lord Wright), noted in 65 L.Q. Rev. 137-39 (1949), and 64 L.Q. Rev. 2 (1948).

⁶² For the legal details on all this, see Prosser, *Law of Torts* 311 et seq. (1941).

⁶³ The whole problem is discussed in Ramsay, *The Foundations of Mathematics* 166 et seq., 199 et seq. (1950).

⁶⁴ *Ibid.*, at 169.

⁶⁵ See, e.g., the rather confusing account by so modern a logician as Professor Stebbing, *op. cit.* supra note 35, at 421-42.

⁶⁶ The most important recent contribution is Robinson, *Definition* (1950). As my discussion shows, I am greatly indebted to this work; and I must add that I have greatly simplified many of the points which Mr. Robinson discusses in detail.

and we do this either (i) by correlating one word to another word (a word-word definition), or (ii) by correlating one word to a thing (a word-thing definition). The latter, however, must be subdivided into a lexical definition and a stipulative (or legislative) definition.⁶⁷ An example of a word-word definition is to define "tort" by "delict": all that we say in such a case is merely that "tort" has another name, without trying to explain what "tort" or "delict" actually stand for or refer to. It is like saying that the French for "name" is "nom." An example of a lexical definition is to say that the old reference to an actual transaction was "covenant" or "assumpsit." Thus "lexical definition is a form of history. It refers to the real past. It tells us what certain persons meant by a certain word at a certain less or more specified time and place."⁶⁸ It is not like a word-word definition because we here assume that the hearer is already aware to what kind of document or situation the term "contract" usually applies. The stipulative definition is rather different. For when we say that a certain thing is henceforth to be called by a certain name, we are stipulating or legislating or imposing *as from now* that between some word and some object there is going to be a definite verbal relation. Nor does it matter, for the purposes of a stipulative definition, whether, previously, a word had a different meaning, for the effect of the stipulation is that its meaning is henceforth to be as stipulated.

It will now be possible to appreciate the precise significance of the distinction between these three types of definition. The word-word definition does not tell us very much: if you do not know, at least roughly, the events or situations which the word "tort" is meant to cover, the information that "delict" is a synonym for "tort" does not convey significant additional knowledge. There are, furthermore, some important differences between a lexical and a stipulative definition. Whilst the former constitutes a proposition, i.e., that certain people used a certain word with regard to certain things, the latter is not a proposition, but merely a proposal, or command or request. A lexical definition can therefore be true or false, depending on whether the historical report is true or false, whereas the stipulative definition has no truth-value.⁶⁹ Again, the former, if purporting to be correct, must report all the ambiguities of a word or symbol, but the latter is concerned with establishing *one* meaning. In short, we need the stipulative definition for the precise formulation of any legal premise from

⁶⁷ Ibid., at 18-19.

⁶⁸ Ibid., at 36.

⁶⁹ "A lexical definition is an assertion that certain people use a certain word in a certain way, and is therefore either true or false. A stipulative definition, however, is not an assertion at all. Therefore, since assertions are the only sentences that have a truth value, it has no truth value." Ibid., at 62.

which inferences are to be made. For we can only make safe inferences if the terms that form the legal premise are clearly unambiguous.

This, however, has not been always recognized. The main reason seems to be that both lawyers and laymen (aided by an ancient tradition of respectable philosophy) have constantly assumed that at any rate "simple" words contain a "correct" or "true" meaning which, with appropriate application, can duly be discovered. More precisely, the basic misconception has been that, apart from the three types of *nominal* definitions which we have previously discussed—they are nominal because their business is with words or symbols (*nomina*)—there exists also another valid type of definition, which is the so-called *real* definition.⁷⁰ Thus it has been customary among philosophers and lawyers to ask such questions as "what is equity?" or "what is justice?", the assumption being that there exist such things as equity and justice and that a (real) definition can truly define their core or "essence." "A definition," said Spinoza,⁷¹ "if it is to be perfect, must explain the inmost essence of a thing." Thus, if "X" was the thing to be defined, "X" had to be defined in terms of other things which were deemed to be the heart and soul of "X." Yet the trouble is that although *prima facie* the quest for essence seems to make some sense (and, indeed, seems to have made excellent sense to many excellent thinkers), the intended sense is wholly dependent upon what exactly is meant by "essence." This, however, philosophers have been singularly unable to establish, and even all that Aristotle could say was that essence is what is stated in a (real) definition.⁷² Such real definitions, then, lead us straight into metaphysics which, whatever else we may think of it, is certainly not a convenient tool to work with. Again, the search for "essence" or "true nature" has also led people to try to discover a nonexistent identity of meaning in words which are ambiguous. Thus it has been thought that, e.g., a word like "possession" enshrines a unique quality called *possession* that covers all the manifold and different activities when men are said to "possess" things.

The moral is apparent. We must eschew the pitfalls of real definition, for the simple reason that real definitions do not define. Even where they purport so to do, we may find that what is described as the "essence" of a thing is only what, previously, other men have held a certain word to

⁷⁰ Robinson has been able to distinguish between twelve different intellectual activities which have all been called real definitions. *Ibid.*, at 152 et seq.

⁷¹ Van Volten and Land, *Improvement of the Understanding* 1-31, cited by Robinson, *ibid.*, at 154.

⁷² Robinson, *op. cit. supra* note 66, at 154.

mean or what as from now on we stipulate a certain word to mean. Of this the age-old controversy about the meaning of "law" is perhaps the most telling illustration.⁷³ The dispute was whether only law with a sanction, or whether even law without a sanction, could validly be called "law." The controversy then raged about a "true" or real definition which made the controversy both futile and insoluble. Neither camp seems to have realized that since they could only be arguing about a future meaning, a stipulative definition was involved, i.e., a definition based on deliberate choice and mutual agreement. And the lexical definition of "law"—what different writers may, in the past, have taken "law" to mean—became for this purpose quite irrelevant. Indeed, with a clearer understanding of the distinction between these types of definitions, the whole controversy could never have arisen.

Yet the adoption of so thoroughly nominalist an attitude, coupled with the plea for a firm recognition of stipulative definitions, is not meant to reduce everything to a mere matter of words.⁷⁴ Humpty-Dumpty was certainly right in stating that we can call a thing by any name we wish; that we can, for example, call the things we describe as "law" by such other names as (say) *lex*, *love* or *killjoy*. Once, however, the baptismal choice is made, the christening ought to be final. For it is precisely the purpose of a stipulative definition not only to legislate a univocal meaning, but also to agree to make that meaning both durable and consistent.⁷⁵

⁷³ See also the discussion by Williams, *International Law and the Controversy as to the Word "Law,"* *British Yearbook of International Law* (1946).

⁷⁴ In other words, the nominalist attitude here propagated is but a "program of terminological economy"; see Pap, *Analytical Philosophy* 87-90 (1949).

⁷⁵ A rather different but connected question may at this juncture be raised and answered. It has been argued, notably by Professor G. L. Williams, *Language and the Law* III, 61 L.Q. Rev. 302-3 (1945), that many words have a basic uncertainty about their meaning. This is true especially of what are called "fringe-words," i.e., words such as "reasonable" or "open," etc. Williams concluded that because of this general uncertainty in the meaning of words, there could be no certainty in law. I think that this argument needs very drastic qualification. Although it is true that some words are more vague than others, it is also true that even so-called "fringe-words," *except emotive words*, can be given a stipulative (or operational) definition. In other words, while many word-thing relations may often be uncertain, it is precisely the job of the stipulative or operational definition to make them certain. The certainty thus imposed is no doubt arbitrary and conventional, but it is enough to make descriptive meaning as certain as can be. Nevertheless, situations may occur where our stipulative definitions may prove to be inexhaustive and incomplete. Suppose, for example, that a thing or event "x" has remained unnamed, but that things "y" and "z" have been baptized by the word "A." If "x" resembles "y" or "z," the immediate question is whether "x" is to be defined as "A," or whether it is to be given a completely new name, say, "B." But this is, again, merely an arbitrary choice, and does not mean that there is an uncertainty in words: all it means is that our word-thing relation, as far as "x" is concerned, has not yet been stipulated. Now where such a situation arises in the law, and where the naming of "x" as either "A" or "B" may produce a different legal result, the fact that "x" has remained unnamed, though it (closely) resembles "y" and "z," may look like an inherent uncertainty in the meaning of "A." But it is submitted

THE NATURE OF CONCEPTS AND THEIR IMPROVEMENT

Since nothing has as yet been said about concepts in particular, they deserve a little discussion. Perhaps the best and briefest explanation is that a concept is the habit of thinking of a certain form rather than of individual objects, and of thinking of that form by means of a name appropriated to it.⁷⁶ But the expression "form" may cause some difficulty, for it is a general element or property or quality or pattern or characteristic of which we become aware in experience by the process which we call abstraction. Thus to become aware of a particular dog running in the street would hardly be called abstraction; but to become aware of the form or pattern dog as distinguished from the form cat or mouse is properly called abstraction. Yet it is only after that abstraction has been given a name that the abstraction becomes a concept. Nor is this process limited to purely physical objects. For the furniture of our universe comprises also events and situations. Lightning, laughing and loving are as much concepts as are dog, document or demon.

However, what we are interested in is not one lonely concept, but a system of concepts.⁷⁷ Our business is to investigate a relation between two or several concepts; and in this task two intellectual activities become exceedingly important. One may be called the analysis of concepts which deals with the question whether a relation between some specific concepts is efficient or appropriate. The other is the synthesis or integration of concepts which tries to simplify the system by a merger or reorganization of several concepts. While these activities are thus (but only slightly) distinguishable, their over-all purpose is nevertheless the same: it is the improvement of the conceptual system in order to facilitate the job of logical inference and implication.⁷⁸

that the correct explanation of this is otherwise: when our legal proposition was announced, of which "A" (meaning "y" and "z") is a term, "x" was not *thought of*, and that when a legal situation with "x" arises we have to make a *new* rule with regard to "x" in the same way as we previously did with regard to "y" and "z." However, the necessity to make new rules for situations which have not been legislated for before can hardly be regarded as an exemplification of the uncertainty of words.

⁷⁶ For a full discussion, see Robinson, *op. cit. supra* note 66, at 170 et seq.; Williams, *Language and the Law* I, 61 *Law Q.R.* 71, 73, 81-82 (1945).

⁷⁷ Patterson, *Can Law Be Scientific?* 25 *Ill. L. Rev.* 121, 129-30 (1930).

⁷⁸ Sometimes a concept may become inefficient or cumbersome in certain situations only. For example, Wisdom, *Interpretation and Analysis* 18 (1931), has suggested the following puzzle with regard to the concept "round": a dog is attacking a cow, trying to get around and bite her; but she keeps her horns always toward him; as the dog revolves so does the cow. Should we say that the dog has gone "round" the cow because he has completed a circle? Or shall we say that he did not, because he never got behind the cow? The illustration shows the partial inefficiency of the concept "round" as well as the lack of a more appropriate concept describing the circular movement of the dog.

Unfortunately, our law abounds in inefficient and improvable concepts, and it would lead much too far to discuss even a sizeable number. For present purposes, just one example must suffice. The example concerns the distinction in the law of tort between "direct" and "indirect" injury; a distinction which purported to draw the line of demarcation between the action of trespass on the one hand and the action on the case on the other.⁷⁹ The famous illustration was the log which could be either launched directly against the plaintiff or left lying in a road for him to stumble over.⁸⁰ Although this particular example was really quite telling, the great majority of cases failed to conform to pattern. Apart from the fact that a "wilful" assault and battery, being "direct," constituted trespass, nothing else was clear. In particular, it was never clear what kind of test distinguished "direct" from "indirect." If the test was based on "act" and "consequences," most injuries, except the intentional battery, were indirect or consequential; if the test was physical causation all injuries were usually direct. There can be little wonder that by the turn of the nineteenth century the distinction had reached an impasse. Observe, for example, the situation in *Leame v. Bray*.⁸¹ The defendant, traveling on a dark night on the wrong side of the road, collided with the plaintiff's carriage. When his horses bolted, the plaintiff jumped out of the carriage and sustained serious injuries thereby. The court held the defendant liable in trespass, although the injury was clearly consequential. Perhaps one reason, above all, forced the court to this conclusion. For Lawrence, J., indicated one tremendous disadvantage of the action on the case:⁸² "[I]f any of the witnesses should say that in his belief the defendant did the injury wilfully, the plaintiff will run the risk of being non-suited." Thus the distinction had, in effect, become self-contradictory. There was no room left for the concept of "direct" between the Scylla of "indirect" and the Charybdis of "wilful." The practical result was that the nineteenth century law of tort had gradually to abandon this distinction until, in the end, unintentional injuries were swallowed up in the tort of negligence; and trespass became confined to such obviously direct invasions as assault and battery, false imprisonment and trespass to goods or land.⁸³

⁷⁹ See Prosser, Torts 37-38, 79-81 (1941). The most persistent applications of this distinction are the "blasting cases" where recent decisions have revived it; see Smith, Liability for Substantial Physical Damage to Land by Blasting, 33 Harv. L. Rev. 542, 667 (1920); and Gregory, Trespass to Negligence to Absolute Liability, 37 Va. L. Rev. 359 (1951).

⁸⁰ Cf. *Reynolds v. Clark*, 1 Str. 634 (K.B., 1795).

⁸¹ 3 East 593, 102 E.R. 724 (1803); see the arguments of counsel, at 594-98, as an illustration of the enormous difficulties involved in the distinction.

⁸² *Ibid.*, at 601.

⁸³ For the history of this development, see Winfield and Goodhart, Trespass and Negligence, 49 L.Q. Rev. 359 (1933); Winfield, History of Negligence in the Law of Torts, 42 L.Q. Rev. 184

DEDUCTION RECONSIDERED

Although enough has already been said about deduction, a few clarifying points may now be added. It is, to begin with, palpably untrue that, in contradistinction to deductive statute law, case law represents inductive reasoning. In one respect, indeed, all law is obviously deductive, simply because we have to *apply* our legal premises to given persons or situations. Nevertheless, the method by which the relevant premises are supplied differs substantially for either case or code law. In case law, as we have seen, the legal reasoning, if logical, must remain within the four walls of induction and analogy: this does not say very much in terms of practical result, and to think that the doctrine of precedent can logically do more is merely an illusion.⁸⁴ In code law, on the other hand, the production of the premises is independent of existing limiting analogies. For a statutory rule does not emerge from the framework of previous decisions but is intended as a new departure.⁸⁵ In short, the above dichotomy is largely false, since it disregards a rather primitive distinction, i.e., the distinction between reasoning *about* premises and that *from* premises. And however obvious these points may seem, they are still too often overlooked.⁸⁶

But the really important logical problem is not merely to distinguish different types of reasoning, but to make the law a deductive system. Technically this means, as has already been explained, that we must so formulate our legal premises that they will fit the deductive system. To do, in other words, what Holmes perhaps thought could not be done, i.e., to make general propositions decide concrete cases. What would be the practical effect of such a system? The primary effect would be to keep our legal premises within a rather restricted range of situations: the universe of discourse covered by each rule would become both limited and very specific. Thus the result would be a harvest of more rules about more type situations. Perhaps one possible objection must be met. For it may be

(1926). An early case in which the transition can be seen is *Vincent v. Stinehour*, 7 Ves. 62 (1835); cf. also *Hawksley v. Peare*, 96 Atl. 856 (1916).

⁸⁴ That law is reasoning by analogy seems to have been first stated by Francis Bacon, *Advancement of Learning*, Bk. 8, c. 3, tit. 1, 10-11 (1605), and great weight was recently attached to it by Levi, *op. cit. supra* note 4.

⁸⁵ Needless to say, even code or statute law may often enough constitute reasoning *about* premises. This occurs where the statutory rules are so ambiguous as not to permit deduction. For a valuable illustration, see Levi, *op. cit. supra* note 4, at 19 et seq.

⁸⁶ This becomes especially apparent when we consider the main argument put forward by Becker, *Review of Levi, An Introduction to Legal Reasoning*, 18 Univ. Chi. L. Rev. 394 (1951). His contention was that all legal reasoning must be syllogistic and, in particular, conform to the first mode of the first figure. This is true provided we in fact possess the major premise; but the contention seems quite false when no such major premise is available.

argued that legal principles should do more than this; that instead of being microscopic they should be macroscopic; and that they should be broad and simple and cut across niggling detail. But the argument unfortunately assumes that *precise* concepts can still be flexible and that a functional proposition can do more than in fact it is capable of. The validity and usefulness of a descriptive system does not derive from generalization but from specialization. A scientific proposition, for example, can only do one job, i.e., assert one (small) truth, not many. If it tries to do too much, the proposition itself will become vague and variable; it will, in effect, cease to be a proposition in the sense that it will not immediately state a truth or falsehood.

III

THE LOGIC OF ATTITUDES. INTRODUCTORY

We must now turn to the second part of this investigation. To begin with, it is necessary to explain the basic theory upon which this analysis proceeds.⁸⁷ The traditional philosophical position has been that our knowledge is of two kinds: that we have (or can have) knowledge of empirical facts and true propositions about facts and that, in addition, we have knowledge of truths concerning moral values and moral value judgments. Thus the view has, broadly speaking, been that "John Smith is mortal" is a proposition of the same logical type as the proposition "John Smith is wicked."⁸⁸ The obvious difficulty with this view was the problem of its verification. One could verify the proposition about Smith's mortality by letting him die; one could not, however, verify his wickedness by any empirical method. A solution of this particular dilemma was proposed by the "utilitarians."⁸⁹ According to them, the correct guide as to what was "good" or "just" was the principle of pleasure and pain as well as the happiness of the greatest number. Hence to say that "X was good" was to say that "X was pleasure" or that "X was conducive to a maximum of happiness." But although this view of morals received wide acceptance—especially among lawyers who, since Bentham, believed to have found in it an infallible theory of legislation⁹⁰—it easily proves inadequate. Very simply, the inadequacy is this: that in the language that we daily use, and the ethical judgment that we usually make, we still say, and do in fact say often enough, that "X is good," even though "X" is unpleasant.⁹¹ For

⁸⁷ This analysis closely follows the views of logical positivism as well as those of Stevenson, *Ethics and Language* (1944).

⁸⁸ Ayer, *Language, Truth and Logic* 102 et seq. (1948).

⁸⁹ For a full discussion of utilitarianism, see Stone, *op. cit. supra* note 55, at 267 et seq.

⁹⁰ Jones, *op. cit. supra* note 6, at 93.

⁹¹ Ayer, *op. cit. supra* note 88, at 104-5.

example, we say that it is "wrong" or "wicked" to be brutal however much happiness and pleasure such acts of savagery provide. This example shows that we must have definite criteria by which "X is good" could validly be asserted to be *true*. But it is precisely those criteria which philosophers have singularly failed to give. Nor, indeed, is the reason far to seek. For the statement that "X is wrong" does not contain a *factual* statement; and since, moreover, only factual propositions are empirically verifiable and thus can be either true or false, it follows that definite and testable criteria of "goodness" or "rightness" or any other ethical concept are a logical impossibility. As Ayer has well put it:

Thus if I say to someone, "You acted *wrongly* in stealing that money," I am not stating anything more than if I had simply said, "You stole that money." In adding that this action is wrong I am not making any further statement about it. I am simply evincing my *moral disapproval* of it. It is as if I had said, "You stole that money" in a peculiar tone of horror, or written it with the addition of some special exclamation marks. . . .

If now I generalise my previous statement and say, "Stealing money is wrong," I produce a sentence which has no factual meaning—that is expresses no proposition which can be either true or false. It is as if I had written "Stealing money!!"—where the shape and thickness of the exclamation marks show, by a suitable convention, that a special sort of moral disapproval is the feeling which is being expressed. It is clear that there is nothing said here which can be either true or false.⁹²

This argument should not be taken to imply that ethics has no "meaning" or that moral questions are both unimportant and nonsensical.⁹³ For a society is ruled as much by values as it is by facts. What this argument does try to drive home is that we must distinguish between two meanings, i.e., between emotive, attitudinal or evaluative meaning on the one hand and descriptive, factual or truth-functional meaning on the other.⁹⁴ This is a vital and paramount distinction which, for the purposes of logical analysis, can simply not be overlooked.

⁹² Ayer, *ibid.*, at 107.

⁹³ Although it may be true that logical-positivist philosophers may have overstated their case, most of the attacks upon them seem largely misconceived. Positivism did not try to discredit ethics, but to cut through the cobwebs surrounding traditional moralist discussions; Stevenson, *op. cit.* supra note 87, at 265-68. For an interesting discussion of some of the basic problems, see Robinson, *The Emotive Theory of Ethics*, 22 (Supp. Vol.) *Proceedings Aristotelian Soc.* 79 (1948).

⁹⁴ For the sake of clarity it must be pointed out that even ethical concepts may have a descriptive meaning, e.g., the statement "Smith is wicked" may mean two things: (i) a proposition that the announcer of the statement dislikes Smith, which may be either true or false; or (ii) a moral judgment about Smith, which has no factual content except in the purely derivative sense of (i). In connection with persuasive definitions, see *infra*; the phrase "descriptive meaning" is also used in a slightly different sense, i.e., to denote the type or range of conduct to which the judgment "wicked" is applied.

PERSUASIVE DEFINITIONS

It is now time to deal with persuasive definitions.⁹⁵ When in a given situation we use words or concepts that have emotive content—words such as “good,” “wicked,” “harm,” “duty” and many others which express either laudatory or derogatory attitudes—we do not seem at all aware that what we are doing is merely to redirect or change or intensify our attitudes. We not only use definitions but use them for the purpose of persuasion.⁹⁶ To make this clearer, take the following example.⁹⁷ Suppose that A and B are discussing the merits of their mutual friend. A argues that the friend is an altogether “fine” fellow simply because he is educated, scholarly and an expert in poetry and old wines. B, on the other hand, contends that the friend is, far from being “fine,” a real bounder: he drinks and perpetrates indignities upon his wife. Both A and B are using the word “fine” in a strictly laudatory sense: all things being equal they would both approve of men described as “fine.” But whereas A’s *descriptive* meaning⁹⁸ of “fine” refers to learning, verse and vintage, B’s *descriptive* meaning of the word connotes abstinent behavior. Although B would probably agree that refined tastes are “fine” qualities, he seeks to redirect A’s attitude about the friend by stressing characteristics which both A and B agree are not “fine.” His purpose is to persuade A to stop his admiration for the friend and to see and judge him in his “true” light.⁹⁹

It should not be supposed, however, that these persuasive definitions are fruitless activities. Indeed, quite the contrary is true. They are the intellectual tools which not only help us to debate but also direct us to decide upon specific moral problems, for a disagreement as to the descriptive range of things that is to be included in the “fine” man, or a “fair”

⁹⁵ Stevenson, *op. cit.* supra note 87, at 206 et seq.; also by the same author, *Persuasive Definitions*, 47 *Mind* (N.S.) 331 (1938). Robinson, *The Emotive Theory of Ethics*, 22 (Supp. Vol.) *Proc. Aristotelian Soc.* 79, 92 (1948), has suggested that persuasive definitions be called “evaluative definitions,” since the phrase “persuasive definitions” is liable to be taken in its more obvious sense of a definition which people are strongly inclined to believe true.

⁹⁶ We are, in effect, using the “One-And-Only-One-True-Meaning” superstition as a rhetorical device; Richards, *The Philosophy of Rhetoric* 39 (1936).

⁹⁷ See also Stevenson, *op. cit.* supra note 87, at 211–17.

⁹⁸ See note 94 supra.

⁹⁹ The U.S. Constitution provides an excellent example where such ethical terms abound. As Pekelis, *Law and Social Action* 4 (1950) has written: “It must be remembered, indeed, that in a sense the United States has no written constitution. The great changes of the Constitution, just as the more important provisions of our statutes, contain no more than an appeal to the decency and wisdom of those with whom the responsibility for their enforcement rests. To say that compensations must be ‘just,’ the protection of the laws ‘equal,’ punishments neither ‘cruel’ nor ‘unusual,’ bails or fines not ‘excessive,’ searches and seizures not ‘unreasonable,’ and deprivation of life, liberty or property not ‘without due process’ is but to give a foundation to the lawmaking, nay, constitution making activity of the judges, left free to define what is cruel, reasonable, excessive, due or, for that matter, equal.”

wage, or a "just" legal result or whatever it may be, forces us to recognize the precise evaluative issues. We are thus forced to look at the facts, naked and neutral by themselves, and look at them again in order to make a decision as to whether we approve of them or not. Furthermore, discussion will bring out the reasons for our disagreement: thus it may call attention to the causes or consequences of a particular situation, and in doing this the discussion will move from the purely emotive level on which agreement is not possible to the descriptive and empirical level where agreement might be obtained. What then may begin with the pleading of a cause may culminate in logical argument. This does not mean that the final value judgment that we form will itself become a scientific proposition; it will remain a value judgment, though the reasons from which it stems will have the advantage of being, *qua* reasons and on their own level, logically consistent and empirically verifiable.¹⁰⁰

Although ethical definitions will at one stage or another become persuasive, there are some that are not so and they raise a rather different problem. Take for example, Ulpian's famous definition of justice. Justice, he said, was to give to everyone his due.¹⁰¹ The point about this definition is that it has no immediate *normative import*, i.e., it does not even invite disagreement or discussion as to its precise descriptive range.¹⁰² For properly translated all that the definition means is this: everyone should get what he ought to get; and everyone may interpret the words "what he ought to get" according to his own politics or predilections. Such a statement, therefore, only postpones the kind of decision we have to make when confronted by a specific moral issue; so that when there is disagreement as to whether John Smith does, or does not, get what he ought to get we will have to begin with the business of deciding what constitutes John Smith's "due" share.¹⁰³

¹⁰⁰ According to Stevenson, controversial ethical issues present a dual nature. First, they present a necessary disagreement in attitude; and secondly, they usually also present a disagreement in belief. There is no way of resolving disagreements in attitude, apart from discussing and testing the reasons or beliefs which support those attitudes. For even though no amount of discussion can *make* us have the same attitude, our beliefs are often enough the "proofs" for our attitudes. In short, attitudes are the function of beliefs. Furthermore, we can discuss our beliefs in an empirical manner, i.e., determine whether they are actually true or false, and to the extent that they are true, the attitude can also be said to be true or correct; Stevenson *op. cit.* supra note 87, at 11 et seq., 152 et seq.

¹⁰¹ For a historical discussion of this and related definitions, see Moyle *Iustiniani Institutionum* 97-98 (1903).

¹⁰² Stevenson, *op. cit.* supra note 87, at 223.

¹⁰³ The reason for such statements lies in the cards. For it is certainly much easier to reach agreement on a high level of abstraction than to fix the precise proportions of "due" share; cf. Levi, *op. cit.* supra note 4, at 22 *passim*.

PRECEDENTS AND PERSUASIVE DEFINITIONS

The question might be asked that if ethical or emotive terms are always subject to persuasive definitions, how can any kind of certainty ever be achieved? Since ethical words may cover an indefinite range of descriptive meaning, which range entirely depends on our attitudes, are we not forever committed to continue to persuade each other? The answer to this is twofold. In the long run, of course, we shall go on pleading moral causes as long as we have moral causes to disagree about. Nevertheless, within rather specific and restricted fields and types of conduct our moral attitudes may become settled, i.e., the forms of our approval and disapproval may become crystallized and quite predictable.

Of this there is perhaps no better illustration than some of the recent developments in the law of negligence. The problem was whether there should be liability for the harmful consequences of a negligent omission, and it has now firmly been established that certain such omissions, e.g., on the part of a manufacturer and similar persons, will give rise to a duty to pay damages. The injury which the defendant causes we now stigmatize as "unreasonable," or "careless," or as a "fault" or "breach of duty." These concepts have always called for our immediate moral reprobation, and what we have done was to include within their range of descriptive meaning certain injurious omissions to take care. But since within this particular universe of discourse our attitudes are, so far as they go, at present settled and accepted, we rarely stop to think how recent these moral judgments are: they were certainly not shared, not even to a remote extent, in the first half of the nineteenth century.

But in other negligent situations our attitudes and value judgments are by no means so secure. In these areas lawyers will continue to use the language of persuasive definitions,¹⁰⁴ for it will have to be decided whether novel injuries are to ground liability or not. Take, for example, the *Palsgraf* case,¹⁰⁵ where the short facts were that a railway guard, assisting a

¹⁰⁴ For the sake of precision, it needs to be mentioned that "persuasive definition" may be used in three different senses: (i) Strictly speaking, a persuasive definition is one where we attempt to change the descriptive meaning of an ethical or emotive term. (ii) We may also adopt an inverse procedure, i.e., retain the descriptive meaning of an emotive word and attempt to change our attitude to it; e.g., we may agree what "dictatorship" stands for and only try to persuade each other that it is a "good" or "bad" system, as the case may be. (iii) In addition, there is what Stevenson calls the "mixed" persuasive definition, which occurs more frequently than (i) and (ii). It consists of the simultaneous attempt to change both the descriptive and the emotive meaning of a word. For example, when we advance views, as against other views, of "true" honor, virtue, honesty, and so on, we usually not only try to alter the descriptive range of honor, but also our attitude to all things now described as "truly honorable." Stevenson, *op. cit. supra* note 87, at 277-82.

¹⁰⁵ *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). See also Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 Yale L.J. 449 (1930); Seavey, Cardozo

late passenger in boarding a train, knocked a package from under his arms. The package contained fireworks (of which the guard was unaware), a violent explosion followed overturning some scales a considerable distance away which hit the plaintiff passenger. Although both the trial court and the Appellate Division gave judgment in favor of the plaintiff, the New York Court of Appeals reversed their decision. In speaking for the majority, Cardozo, C. J., had this to say:¹⁰⁶ "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away." And further:¹⁰⁷ "The argument for the plaintiff is built upon the shifting meanings of such words as 'wrong' and 'wrongful,' and shares their instability. What the plaintiff must show is a 'wrong' to herself, i.e., a violation of her own right, and not merely a wrong to someone else, nor conduct 'wrongful' because unsound, but not 'a wrong' to anyone." And finally:¹⁰⁸ "Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not wilful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended." On the other hand, Andrews, J., argued for the minority:¹⁰⁹ "The proposition is this. Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty to the one complaining but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that alone, but all those in fact injured may complain."

What transpires from this elaborate legal language? No more, indeed, than the previous discussion has already led us to expect. Both sides em-

and the Law of Torts, 52 Harv. L. Rev. 373 (1939), 39 Col. L. Rev. 20 (1939), 48 Yale L.J. 390 (1939); Gregory, Proximate Cause in Negligence—A Retreat from Rationalization, 6 Univ. Chi. L. Rev. 36 (1938); Cowan, The Riddle of the Palsgraf Case, 23 Miss. L. Rev. 46 (1938); Loss Shifting and Quasi Negligence, 8 Univ. Chi. L. Rev. 729 (1941).

¹⁰⁶ Palsgraf v. Long Island R. Co., *ibid.*, at 341 and 99.

¹⁰⁷ *Ibid.*, at 343 and 100.

¹⁰⁸ *Ibid.*, at 345 and 101.

¹⁰⁹ *Ibid.*, at 350 and 103.

ployed persuasive definitions either to extend or to restrict the descriptive range of "wrong," "right," "negligence" and "harm reasonably to be expected." Whilst the majority sternly refused to make the extension, the minority seemed quite cheerfully prepared to do so. The court was presented with a dramatic and undecided moral issue, i.e., was the guard's inadvertent action to be disapproved of or not; in the result, the majority felt unable to announce their disapproval, at any rate such disapproval that would go as far as liability in damages.

But an examination of persuasive definitions also points to another lesson. For let us suppose, if only for a moment, that the above decision had unanimously gone the other way, i.e., had granted judgment to the plaintiff. What would have been the impact of such a decision? The impact would have been to settle a moral attitude to this particular situation. More precisely, the effect would have been a purely psychological one, operating in roughly two ways. Not only would we have been bound by the "authority" of seven wise old gentlemen pronouncing a certain type of injury as "wrongful," "harmful," the "violation of a right," and so forth;¹¹⁰ but the "authority" would also have produced an "association of ideas";¹¹¹ the next explosion would be far less of a shock; the next bystander would "obviously" suffer a "wrong"; and the next originator of the harm might, in the famous phrase, have "acted at his peril." This is, I submit, the major importance of precedents that are built upon persuasive definitions. In this sense, also, precedents are the great proliferators of moral values, especially values arising at the very grass-root level of society. While professional moralists and ethical philosophers traditionally confine themselves to the so-called "big" issues—e.g., "goodness," "justice," and so on—the law is continuously settling the "small" moral issues, i.e., those which come up and confuse us every day.

Yet a final problem must now be mentioned. We have just seen that in situations like the *Palsgraf* case our initial moral attitudes are by no means clear. Not only because these situations are extraordinary and unusual, but also because a definite moral judgment is very difficult to arrive at. For, generally speaking, we only make a moral judgment to influence

¹¹⁰ We seem to have an emotional attachment for such "authority" in the same way as we have often an emotional attachment to old and primitive law; Patterson, *Historical and Evolutionary Theories of Law*, 51 Col. L. Rev. 681, 684 (1951).

¹¹¹ See also p. 187 *supra*. It might perhaps be argued that this situation would present but an example of reasoning by analogy. My point, however, is that in deciding whether *this* or *that* analogy is to be selected calls for an ethical decision, especially within a universe of discourse where our ethical judgments are still unsettled; and that only *after* we have made the ethical decision can we begin to frame a principle with regard to future cases by the mechanism of induction or analogy.

future conduct and in particular with conduct which plainly is *avoidable*.¹¹² Unfortunately, in situations of this kind the avoidability or unavailability of the injury is not really explicit. Even though the railway guard may have been careless, can we say that the whole accident was actually avoidable? Can we say that railway guards will become more mindful of their travellers' nicely wrapped-up parcels in case they contain dynamite instead of candy? And quite apart from the avoidability and unavailability of the accident involved, another moral attitude is at work. For both lawyers and laymen alike seem often enough to accept a kind of moral presumption that an injured victim deserves compensation independently of whether the injury was avoidable or not. The upshot is that in this type of situation there is a conflict between a purely compensatory attitude on the one hand and the desire to influence future action on the other. Thus the moral judgment that is operative in such cases is, to say the least, extremely mixed, and no amount of rationalization could probably neatly separate the ingredients of that mixture.

It must be stressed, however, that this analysis does not apply to all those types of conduct about which our moral attitudes are more or less completely settled. There is, for example, nothing very contradictory about our moral judgments with regard to murder or to theft, although the intensity of the moral reprobation may find expression in the varying severity of the penalty imposed. Similarly, in the field of civil liability, we now subject almost all intentional injuries to legal liability, and the same is true of all such negligent conduct where the resultant injury appears clearly to be avoidable. Nevertheless, this does not mean that all conduct regarded as "blameworthy" or "immoral" is automatically visited with a legal sanction. For the law, or rather the officers of state who are commissioned to make the "law," only take cognizance of such immoral acts that constitute an invasion or violation of an "interest" which is considered worthy of protection, i.e., such "interests" which a given society decides to do something about. The question as to what kinds of things, and why, a particular society may decide to take action, falls fortunately outside the scope of this discussion: it belongs, in the main, to sociology and social anthropology.

IV

CERTAINTY IN LAW

In dealing with the problem of "legal certainty" several preliminary misconceptions must be first got rid of. Thus one argument insists upon

¹¹² All this is very well explained by Stevenson, *op. cit.* supra note 87, at 298-318. For a full discussion of the bases of the law of torts, see Williams, *The Aims of the Law of Tort*, 4 *Current Legal Problems* 137 (1951).

an inevitable uncertainty in law simply because in no branch of science can "certainty" ever be achieved. Since (so the argument runs) there is always a chance that a proposition may ultimately prove false in at least one instance, nothing can be certain; and if this is so in the physical sciences, this applies with even greater force to law.¹¹³ However plausible it may sound, the argument is in effect quite faulty. For to define certainty in the above sense means to stipulate an impossible and unattainable ideal. "[One] can fall short of an ideal, only if it makes sense to speak of *attaining* the ideal. But the philosophers have defined 'certainty' in such a way that it does not make sense to speak of attaining certainty. And therefore it does not make sense to speak of *failing* to attain certainty."¹¹⁴ In brief much of the discussion about the uncertainty in science is fallacious, simply because in its absolute meaning "certainty" is a somewhat self-contradictory expression. This does not mean, of course, that every scientific proposition is and remains certain: all that it means is that it is rather foolish to say that science is necessarily and irrevocably committed to "uncertainty." Again, we do not always appreciate that we are using the word "science" in two different senses. Whereas in the natural sciences the word refers, in the main, to the more or less thorough and tested techniques of verifying hypotheses about natural phenomena, in law the word only refers to the more or less orderly arrangement of the rules or principles regarding human conduct.¹¹⁵ For the inductive reasoning by which, especially in case-law, our legal propositions become established is completely independent of empirical verification. It follows that the problem regarding the certainty or uncertainty of "legal laws" represents something quite different from that posed with regard to "scientific or empirical laws."

¹¹³ Frank, *Law and the Modern Mind* (1949); see also Stone, *op. cit. supra* note 55.

¹¹⁴ Malcolm, *Certainty and Empirical Statements*, 51 *Mind* (N.S.) 18, 22 (1942); see also Black, *Comment, ibid.*, at 361.

¹¹⁵ This is the only meaning that can be given to the phrase "legal science." At the basis of the notion of science lie the rather difficult concepts "system" and "order," for which see the discussion by Stebbing, *op. cit. supra* note 35, at 198 et seq. Another misconception may be mentioned. There is a common belief that the methods of the physical sciences can, or should, be transferred to law; and this belief is obviously connected with the very great prestige that modern scientific method has achieved. See for example, Beutel, *An Outline of the Nature and Methods of Experimental Jurisprudence*, 51 *Col. L. Rev.* 415 (1951). There can, of course, be no objection to using wholly scientific methods in such branches of learning as sociology, anthropology, psychology, etc.; nor is there any objection to lawyers and legislators taking advantage of the knowledge which the social sciences may reveal. Thus, for example, if it could be conclusively shown that the death penalty has no deterrent value whatsoever, it would be foolish not to take notice of this truth. But to make of this and similar things a separate "experimental jurisprudence" seems to me somewhat too grandiose an undertaking, since there is surely no evidence to believe that "experimental" lawyers could obtain better or broader scientific data than the social scientists themselves.

There is also another argument against the notion of certainty in law. From the valid, though perhaps rather neglected, observation that both judges and juries may behave quite unpredictably, the conclusion has been drawn that the law can be no more than "jurisprudence."¹¹⁶ It is, no doubt, essential never to forget that such behavioristic vagaries may decisively influence the machinery of trial; but this is, again, a rather different problem. For (to put it rather broadly) it is one thing to prove that " $x = y$," and quite another thing to ask whether people will accept, or believe, or act upon, or reject the knowledge that " $x = y$."¹¹⁷

It is submitted that the relevant and crucial problem with regard to legal certainty simply comes to this: can our legal principles be expressed in terms of propositions that have a precise normative significance, i.e., can they be statements of facts and consequences from which definite predictions can be made? As we have seen, such propositions can be formed, but only to the extent that our logic will allow it. This means (i) to the extent that we possess and apply the necessary logical technique of translating our various concepts into strictly descriptive language, and (ii) to the extent that our basic moral judgments have been made and our attitudes have become settled with more or less durability. In other words, we can achieve certainty in law on a purely descriptive level, but we cannot, generally speaking, achieve it on the attitudinal or emotive level. For in the latter case the nagging process of changing attitudes constantly sets in, i.e., the process of reversing, or modifying, previous ethical decisions. Nor is this process, in our present stage of knowledge, reducible to a scientific and predictive pattern. In this respect, "uncertainty of law" becomes partly another expression for the uncertainty as to when, or to what measure, future attitudinal changes will occur. Nevertheless, these two "uncertainties" are not strictly synonymous in meaning. It would indeed be wrong to think that because we cannot foretell the future, that for *that* reason the law should be regarded as uncertain. For the law, properly so-called, consists of *actual* commands, not of commands not yet made or even thought of.¹¹⁸

¹¹⁶ Frank, *op. cit.* supra note 113, at xi.

¹¹⁷ Another argument about "uncertainty" which relates the uncertainty of law to the uncertainty in the meaning of words, has already been dealt with, see supra note 75.

¹¹⁸ There is often enough confusion between the uncertainty of actual commands and the uncertainty of future (judicial) legislation. Every society must have a respectable body of actual commands controlling the basic pattern of its governance, and to this extent their commands are certain. As Llewellyn and Hoebel have pointed out: "Law has one of its main purposes to make men go round in more or less clear ways; law does in fact to some extent make men go round in more or less clear ways." *The Cheyenne Way* 20 (1941).

The practical upshot of all this is that "certainty in law" presents a rather exaggerated and sterile issue. For stated in a sweeping way, the problem of legal certainty contains too many pitfalls connected with the nebulous semantics in the words "certainty" or "uncertainty" themselves. Yet once these pitfalls are explained, the problem becomes so transparent as not to deserve discussion. For, in summary, the problem is not whether the law has certainty or uncertainty *as such*, but in what areas (and how) certainty can be achieved and in what areas (and why) it cannot.

CONCLUSION

This investigation of legal concepts gives us but a rough and ready sketch. Its main purpose, indeed, was to trace the contours of the basic problems and to provide an overall view of the "logical geography" of our subject. But implicit in every logical or methodological analysis (call it which you will) is yet another purpose: to clear the path for a more efficient manipulation of the given concepts and thus also to indicate the mechanics of effective conceptual economy and organization. That there is still much work to be done, must by now be quite apparent. Much of our law of torts, for example, requires thorough rethinking and rewriting, especially with regard to the types of problem which have previously been discussed. Only by much determined and detailed effort will any kind of logical certainty in law ultimately be achieved.