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THE JURISPRUDENCE OF SKEPTICISM

Richard A. Posner*

INTRODUCTION

The skeptical vein in American thinking about law runs from Holmes to the legal realists to the critical legal studies movement, while behind Holmes stretches a European skeptical legal tradition that runs from Thrasymachus (in Plato's *Republic*) to Hobbes and Bentham and beyond.¹ Against the skeptics can be arrayed a vast number of natural lawyers, legal conventionalists, and formalists, including Cicero, Coke, Blackstone, and Langdell,² not to mention the majority of contemporary lawyers, judges, and law professors. This article will set forth and defend a moderately skeptical approach to law and judging, one not so far-reaching as that of the critical legal studies movement or even of Holmes but distinct from orthodox legal thought or at least its pietistic expressions.

A summary of my own judicial credo may help orient the reader to

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* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. — Ed. I am greatly indebted to Albert Alschuler, Paul Bator, Richard Craswell, Frank Easterbrook, Christopher Eisgruber, Daniel Farber, Robert Ferguson, David Friedman, Milton Friedman, Lisa Heinzerling, Anthony Kronman, Sanford Levinson, Eric Posner, Eva Saks, A.W.B. Simpson, George Stigler, David Strauss, Cass Sunstein, Robin West, and members of faculty workshops at New York University Law School and the University of Chicago Law School for helpful comments on earlier versions of this article.

1. The skepticism of the legal realists is well described in Yablon, *Law and Metaphysics* (Book Review), 96 YALE L.J. 613, 615-22 (1987); the skepticism of critical legal studies is everywhere on display in M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987), though not all adherents to the critical legal studies movement are skeptics. Thrasymachus's position, that "everywhere justice is the same thing, the advantage of the stronger," is found in PLATO, *THE REPUBLIC OF PLATO* 16 (A. Bloom trans. 1968) (Bk. 1; p. 339a of the Greek text). Compare the definition of "lawful" in Ambrose Bierce's *The Devil's Dictionary*: "Compatible with the will of a judge having jurisdiction." A. BIERCE, *THE COLLECTED WRITINGS OF AMBROSE BIERCE* 289 (1946). On Hobbes, see T. HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* (J. Cropsey ed. 1971), and on Bentham and his Anglo-American legacy, see H.L.A. HART, *1776-1976: Law in the Perspective of Philosophy*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 145 (1983). On Scandinavian Realism, see Hart's essay of that name in *id.* at 161.

2. For representative modern statements, see Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEXAS L. REV. 35 (1981); A. D'AMATO, *JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW* 56-92 (1984); W. BERNIS, *TAKING THE CONSTITUTION SERIOUSLY* (1987). The phrase "artificial reason," denoting legal reasoning, is from Coke's rebuke to James I for suggesting that an intelligent layman might be competent to render legal judgments. See *Prohibitions Del Roy*, 12 Coke Rep. 63, 65, 77 Eng. Rep. 1342, 1343 (1608). The skeptical view of the American legal realists is contrasted with Ronald Dworkin's antiskepticism in Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, in H.L.A. HART, *supra* note 1, at 123; see also Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205 (1986).

the type and degree of skepticism that the article will defend. Many — though certainly not most, and perhaps only a tiny fraction — of the legal questions in our system, and I suspect in most others as well, are not merely difficult, but impossible, to answer by the methods of legal reasoning. As a result, the answers — the fourteenth amendment guarantees certain rights to fathers of illegitimate children, the right of sexual privacy does not include sodomy, a social host owes a duty of care to persons injured by a drunken guest, laws against selling babies make contracts of surrogate motherhood unenforceable, and so on *ad infinitum* — depend on the policy judgments, political preferences, and ethical values of the judges, or (what is not clearly distinct) on dominant public opinion acting through the judges, rather than on legal reasoning regarded as something different from policy, or politics, or values, or public opinion. Sometimes these sources of belief will enable a judge to come to a demonstrably correct result, but often not; and, when not, the judge's decision will be indeterminate in the sense that a decision the other way would be equally likely to be pronounced correct by an informed, impartial observer.

The skepticism that gives rise to this conclusion is an epistemological skepticism, but it is often and will in this article be conjoined with a skepticism (again partial rather than complete) about the existence of invisible entities, such as "justice" and "legislative intent," to which appeal is sometimes made for answers to legal questions. (These forms of skepticism are distinct: one could believe that there are moral entities such as justice, but that they are unknowable.) Ontological skepticism has significance for legal factfinding as well as for legal reasoning. Doubts about the existence of such mysterious mental entities as legislative intent can incite doubts about the existence of the mind itself and thus make problematic the requirement of proving a mental element in criminal, tort, discrimination, and other cases.

Skepticism is sometimes thought a disposition inconsistent with action and therefore a mere pose — a parlor game — rather than a fighting faith that a public official such as a judge might hold. This is true of global skepticism (a traditional preoccupation of epistemology), which by doubting everything (Are there really other people in the world? Do objects exist when I am not perceiving them?) changes nothing. But as the example of Holmes shows, a judicial career can be influenced — for the better I would argue — by a locally as distinct from globally skeptical outlook. Skepticism closes off certain paths to a judicial decision, it is true, but they are snares and delusions. They impart a false confidence; they fog the mind. When they are swept

away, the judge is still able to act, but he may reason more clearly and incisively, and perhaps express himself differently.

There is more to this article than an exposition and defense of a particular judicial philosophy. I argue that a skeptical perspective can cast light on a variety of jurisprudential questions — not only the nature of legal reasoning, but also criminal intent, civil disobedience, judicial ethics, the issue of specialized courts, the unity of Holmes's thought, the validity of behaviorist approaches to law, and even the law of deodands. I sketch the decisionmaking process of the skeptical judge, emphasizing the importance of what I call social vision. I try, in short, to show that a skeptical perspective can be a stimulant to inquiry and understanding rather than just a slogan, provocation, or wet blanket.

Perspective — not theory. Even if skepticism as dogma is not a contradiction in terms (as well it may be), my own skepticism is a mood or attitude — a disposition to scoff at pretensions to certainty, to question claims (even my own) to the possession of powerful methodologies founded on professional expertise, and to disbelieve in absolutes and unobservable entities — rather than a theory. The skeptical mood can be a by-product of realism or anti-realism; of reverence for science or hostility to science; of cultural and other forms of relativism; of positivism,³ pragmatism, anti-essentialism, materialism, or agnosticism; of Romanticism or of the rejection of Romanticism. But despite its confused lineage and affinities, the skeptical mood has, as I hope to demonstrate, not only a distinctive and bracing tone — astringent, irreverent, unsentimental, no-nonsense — but many fruitful applications to law.

There are, of course, degrees of skepticism. Since mine is of intermediate degree, this article perforce faces in two directions: I am as intent on distinguishing my position from that of the radical skeptics in the critical legal studies movement as on challenging the position of Dworkin, Fried, and others that there is a right answer to every legal question.⁴ I believe I can do this without having to indicate precisely which, or precisely how many, decisions I regard either as indeterminate, period, or as indeterminate by the methods of legal reasoning.

The distinction in the last sentence deserves emphasis. Mingled throughout the article, but important to hold separate in one's mind, are two different though overlapping forms of legal skepticism (this is

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3. Nicely summarized as "seeing is believing" in I. HACKING, REPRESENTING AND INTERVENING: INTRODUCTORY TOPICS IN THE PHILOSOPHY OF NATURAL SCIENCE 63 (1983).

4. For criticism of radical skepticism in the interpretation of statutes and the Constitution, see R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION ch. 5 (forthcoming).

a different axis of distinction from that suggested earlier between epistemological and ontological skepticism). One form, skepticism about the determinacy of legal outcomes in difficult cases, denies Dworkin's "right answer" thesis (discussed in Part II.E of this article) as well as the older legal formalism. The other form, skepticism about the existence of a distinctive legal-analytic methodology ("legal reasoning"), denies Coke's and Fried's "artificial reason" thesis, but is consistent with the possibility that some legal outcomes can be made determinate by methods of analysis that owe little or nothing to legal training or experience. The "right answer" thesis may be said to reflect nostalgia for lost certitudes; the "artificial reason" thesis, nostalgia for a lost sense of the law's autonomy.

I. THE METHODS OF REASON, WITH SOME APPLICATIONS TO LAW

A. *Exact Inquiry*

1. *The Syllogism*

I want to go through the principal ways people acquire beliefs and see which are reliable when applied to law. I begin with the methods of "pure" reason, or exact inquiry (not always so pure or exact), of which the foremost is logical deduction, illustrated by the syllogism: "All men are mortal; Socrates is a man; therefore, Socrates is mortal."⁵ Logical reasoning very often, and in this instance, yields conclusions that seem utterly compelling. The conclusion that Socrates is mortal seems incontestably true because it is included, in almost a tangible sense, in the first premise, which is a (partial) definition of the word "man" that no one is likely to quarrel with.⁶ The first premise says, in effect, here is a box (labeled "all men") with a bunch of things in it, every one of which is "mortal." So anything we pluck out of the box will be "mortal." The second premise tells us that everything in the box is tagged with a name and that one of the tags says "Socrates." When we pluck Socrates out of the box we know that he is mortal

5. Actually, this is a nonstandard syllogism, because the minor premise is not in the form of a statement about a class of things, see W.V. QUINE, *METHODS OF LOGIC* 107, 259-67 (4th ed. 1982); but this refinement is not relevant to the use I make of the example.

6. Of course the conclusion can be no sounder than the premise; and there are doubts in some quarters that any analytic propositions, including definitions, are entitled to the status of irrefutable truths. For discussion, see H. PUTNAM, *The Analytic and the Synthetic*, in *MIND, LANGUAGE AND REALITY* 33 (1975) (*PHILOSOPHICAL PAPERS*, vol. 2). See also D. CLARKE, *PRACTICAL INFERENCES* 5 (1985). Science may someday enable people to achieve a life span close enough to immortality to falsify the major premise of the syllogism about Socrates, which today seems definitional, and hence irrefutable by empirical proof.

because the only things in the box labeled "all men" are mortals. All that we are doing is taking out what we put in.

Notice that we find the syllogism compelling by virtue of a metaphor, the metaphor of the box (odd that one should "prove" the truth of logic by a metaphor!). As we move away from the simplest examples of logical reasoning, the nature and cogency of logical reasoning become less perspicuous. We think that the proposition that $2 \times 2 = 4$ is true by definition in much the same sense that the proposition that Socrates is mortal is true by definition. But as it is not clear in the numerical example what the container and the thing contained are, the metaphor of inclusion or subsumption is no longer available to reassure us of the compelling quality of logical reasoning. And when we ask complicated mathematical questions, such as whether every even number is the sum of two odd prime numbers (e.g., $16 = 13 + 3$), we enter a realm in which the questions are as difficult, uncertain, and inaccessible to lay understanding as the hardest questions about the "real," as distinguished from the conceptual, the definitional, world. Indeed, it has proved impossible to ground mathematics in logic. But I shall put these problems aside and stick with the simplest forms of logical reasoning, for with rare exceptions those are the only ones lawyers ever use.

So compelling and familiar is syllogistic reasoning that lawyers and judges try hard to make legal reasoning seem syllogistic. And often they exceed. A legal rule has the form of the major premise of a syllogism, as in the example "No contract is enforceable without consideration; the contract in suit has no consideration; therefore, the contract is not enforceable." Judges extract rules from statutes and previous decisions (the extraction itself is not a deductive process, as we shall see) and then use the rule to determine the outcome of the case. The overuse of the syllogism, and its cousin the enthymeme (a syllogism one of whose premises is understood), is the principal defining characteristic of legal "formalism" when used in a pejorative sense. Used nonpejoratively, legal formalism just means — or should just mean — logical reasoning in law.⁷

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7. See Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 180-86 (1987). Alternatively, one might say that legal formalism corresponds to pure reason (or exact inquiry), and its antithesis, legal realism, to practical reason. My belief that the latter is the dominant mode of legal reasoning thus makes me a "legal realist," but I think "skeptic" is a more informative term. It is less freighted with polemical associations; someone *might* believe that practical reason leads to determinate outcomes in all cases not decidable by pure reason; and "legal realism," being heavily positivistic, is virtually the antithesis of philosophical realism.

Notice how aptly named "mechanical jurisprudence" (= legal formalism) is in the age of the computer; in principle, and now in practice, logical deduction can be performed by computers

The vast majority of legal questions can be and are resolved syllogistically — provided the validity of the legal rule used to answer the question is assumed. Putting this important qualification to one side for the moment, one will be on safe ground in asserting that most legal questions (Are wages income? Is it illegal to drive sixty miles per hour in a forty miles per hour zone? Is provocation a defense to murder?) are answered by deduction from rules both clear with respect to the case at hand and clearly applicable to it. But as those questions are rarely litigated, lawyers, judges, and law professors are not much interested in them. Lay people are; this may be one reason why lay people are even more likely than lawyers to think of law as determinate, objective.

Some unwarranted invocations of logic may seem transparently and harmlessly rhetorical, as when a judge says that it would be “illogical” to read a statute requiring periodic safety inspections of motor vehicles to exclude jeeps. But it is not a completely harmless locution. Logic has nothing to do with the problem, and judges who do not realize this may fail to interpret rules properly. Although the dictionary defines a jeep as a motor vehicle, the issue for the judge is what the legislature meant,⁸ and dictionary meanings are just evidence of that meaning. The interpretive issue can be given a syllogistic form but its nature is not syllogistic, and the attempts to make it appear so show merely that judges exaggerate the role of logic in legal reasoning.

Similarly, while it is tempting to try to relate logic to the idea of treating like things alike — an idea seemingly so important to law (equal justice under law, equal protection of the laws, equality before the law, one law for rich and poor, and so forth) — the temptation should be resisted. The concept of equality used in law is a substantive political concept rather than a formal concept.⁹ It denotes what differences may properly be considered in the allocation of legal benefits and burdens (e.g., differences in skill and effort) and what differences may not be (e.g., religion, social class, relationship to the judge). It is a statement of policy rather than a method for avoiding contradictions.

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more rapidly and accurately than by humans, including judicial humans. Efforts to create computer models of nonsyllogistic legal reasoning, well described in A. GARDNER, *AN ARTIFICIAL INTELLIGENCE APPROACH TO LEGAL REASONING* (1987), are still in their infancy and have made as yet (a potentially important qualification) no impact on the profession. The use of the syllogism in legal reasoning is well discussed in N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 19-52 (1978); Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45, 64-80 (1985); Comment, *Legal Reasoning: In Search of an Adequate Theory of Argument*, 59 CALIF. L. REV. 821, 833-40 (1971).

8. Reject this point, and you are in deep trouble: for then the rule “Keep off the grass” forbids the groundskeeper to mow the lawn!

9. See Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

There are two serious general limitations on the use of syllogisms in law, and they are still imperfectly acknowledged in legal opinions and advocacy, including the advocacy scholarship that dominates the law reviews. First, numerous and contestable minor premises often are necessary to connect the major premise to the conclusion. Second, the major premise often is not an agreed-upon definition, comparable to the definition of "man" as a mortal being. The point here is not that legal rules have exceptions. As long as the exceptions are themselves rules, that is, definitions, there is no obstacle to using syllogistic reasoning. Take the rule that the statute of limitations in Illinois for bringing suit on a written contract is ten years. The rule has various exceptions; one is for cases where the defendant has misled the plaintiff into thinking he has more than ten years to sue. The main rule will get us as far as concluding that the defendant has a *prima facie* defense that the statute of limitations has run. We may then have to start over and consider whether the plaintiff has rebutted the defense by establishing the applicability of one of the exceptions; but as each exception is itself a rule, and a rule that defeats the main rule, the plaintiff has only to establish the minor premise of the exception (for example, that the defendant misled him) for a conclusion that the suit is not time-barred to be read out.

The problem is not exceptions to rules; the problem is that while in the syllogism about Socrates the dictionary definition that supplies the major premise is an unchallenged given, legal rules are often the product of judicial imagination or innovation, and having been made by judges a rule can be unmade by them if a litigant can come up with a good reason, which need not be based on logic, for changing it. Many an exception to the statute of limitations is judge-made, and can be judge-unmade if, for example, a defendant can argue persuasively that a defense of estoppel both is unnecessary with a long statute of limitations and produces too much uncertainty and litigation. Judges will often refuse to reexamine legal rules, but the reasons for their refusal need have nothing to do with logic; *stare decisis* is not a rule of logic. Moreover, even if a rule is formally beyond the power of the judges to reexamine, because it was made by the legislature, the process of discovering what rule the legislature made is interpretive, and interpretation is not logic (more on this later). And there is always the possibility of reinterpretation.

Logic and inference must be distinguished. A syllogism is valid if the conclusion follows from the premises; but the conclusion is true only if, in addition, the premises are true. Often in legal reasoning the premises cannot be shown to be true. So the life of the law really can-

not be logic. Even the syllogism about Socrates would be unimpressive if the speaker were a lexicographical dictator (O'Brien in 1984?) who could redefine "man" and "mortal" at a stroke of the pen; or if Socrates were a boy, a god, a character in fiction, or a hermaphrodite; or if listeners had imperfect command of the speaker's language. We ignore these points because the purpose of the syllogism about Socrates is to demonstrate a logical relation rather than to answer a question about the real world. (This would be even clearer if we substituted *A* for man (men), *B* for mortal, and *C* for Socrates.)¹⁰ We cannot ignore such points when they arise in legal syllogisms, and often they do.

Of course logic and mathematics are used to achieve mastery of the real world as well as to provide intellectual challenge to pure theoreticians — are indeed essential tools of science and technology. But they are powerful in real-world settings because joined with powerful observational and experimental methods. Law uses the most elementary logical tools and the least sophisticated empirical methods; and, because of the hierarchical structure of court systems, it tends to lack the "reality check" that is provided by competition, whether in nature or in markets.

The judges' persistence in trying to force legal reasoning into the mold of logic is not at all inconsistent with a skeptical view of legal reasoning. It suggests a lack either of confidence or sophistication in alternative modes of reasoning to the syllogistic, and thus a kind of desperation. It suggests, too, that legal reasoning has a strong component of bluff, or (more politely) a strong rhetorical element; and rhetoric and reason, though by no means mutually exclusive,¹¹ are uneasy bedfellows.

In emphasizing the limitations of the syllogistic mode in legal reasoning, I may seem to be agreeing with those who deny that there are legal rules. That is not my position. Neither the fact that rules may be subject to ad hoc exceptions nor the fact that they can be changed means they are not "real":

We promise to visit a friend the next day. When the day comes it turns out that keeping the promise would involve neglecting someone dangerously ill. The fact that this is accepted as an adequate reason for not keeping the promise surely does not mean that there is no rule requiring promises to be kept, only a certain regularity in keeping them. It does not follow from the fact that such rules have exceptions incapable of

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10. The fact that *A* stands for two different words in the Socrates syllogism is a clue to its nonstandard status. See note 5 *supra*. In contrast, the syllogism "All Greeks are dark-haired; all Cretans are Greeks; therefore, all Cretans are dark-haired" causes no difficulty when put in the form "All *A* are *B*; all *C* are *A*; therefore, all *C* are *B*."

11. See R. POSNER, *supra* note 4, ch. 6.

exhaustive statement, that in every situation we are left to our discretion and are never bound to keep a promise. A rule that ends with the word 'unless . . .' is still a rule.¹²

And plainly the fact that a rule is not eternal does not mean that it is not a rule while it lasts.

But all this is less comforting to the opponents of skepticism than it may seem to be. The binding character of legal rules is a function of the observer's perspective. From the perspective of the people subject to the rules, the fact that rules have fuzzy edges or may be changed does not make them nonbinding. But from the standpoint of the ruler, rules may be so much putty; the rulers may have complete, or at least extensive, discretion to repeal or revise or "interpret" the rules. We like to think of judges as being under law, that is, as being ruled rather than ruling. But, within broad limits, judges have discretion to change the rules, particularly rules of the common law and of constitutional law. The discretion is not unlimited, of course; nevertheless, the skeptic who approaches the question of "ruledness" from the standpoint of the judge rather than the judged is not refuted by the observation that rules do not have to be pellucid, definite, or impervious to revision or repeal in order to bind the persons subject to them.

It makes a big difference whether one looks at the body of legal rules at one time or over time. The most interesting question about the rules when they are looked at over time is how they came to be what they are today. The body of rules that make up, for example, constitutional law, antitrust law, and tort law have changed greatly in the last century, even though the Constitution and the Sherman Act (1890) have not changed much and torts remains mostly a common-law field. It is the judges who have changed the rules. The process by which they have done so is not a logical process; it is not a matter of their having corrected their predecessors' mistakes in deductive logic. It is importantly a matter of their having changed empirical minor premises.

Insofar as judges and lawyers do use logic, it is the simplest methods of logic they use. Formal logic is not taught in law schools and not found in judicial opinions, in briefs, or in law review articles. The closest thing to formal logic in law is the use by economic analysts of law of mathematical models of legal rules; the model of these models is Learned Hand's formula, which defines negligence in a simple algebraic formula.¹³ In this sense only is the "law and economics" move-

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12. H.L.A. HART, *THE CONCEPT OF LAW* 136 (1961).

13. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (B < PL); *see American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986)

ment properly regarded as a school of legal formalism.

2. *Scientific Observation*

After the syllogism and related techniques of formal logic, the most rigorous and objective methods of establishing "truth" (or, if one prefers, enlarging knowledge) involve systematic empirical inquiry, using either controlled experiments or "natural" experiments statistically verified. Although these methods of inquiry provide only tentative support for propositions, and the "truths" they demonstrate (or at least lead people to accept) are often transient, scientific experimentation is for most people in modern society the very model of objective inquiry. However, partly because parties to lawsuits lack the time and resources necessary to conduct scientific experiments or other scientific studies, partly because the relevant social data are often difficult or impossible to come by, partly because legal judgments may depend on predictions of extremely long-term consequences (e.g., the consequence of abortion on demand, or of the death penalty, for attitudes toward the sanctity of life), partly because lawyers and judges (not to mention jurors!) are not trained in scientific method, partly because many legal doctrines are too entrenched to adjust rapidly to changes in scientific or social-scientific understanding, but mainly (encompassing most of the previous points) because society is unwilling to allow legal judgments to be deferred until the results of patient scientific research are available, scientific methods do not yet play a significant role in legal reasoning.

What I have described in these two subsections are the methods of "exact" inquiry, more or less. It would be incorrect to equate them with science, and not only because mathematics and statistics are usually, though incorrectly,¹⁴ thought distinct from science. Science itself is not always, perhaps not typically, as rigorous as the term "exact inquiry" connotes. Many scientific theories, including natural selection and the "big bang," are not verifiable by experimentation or any other method of exact observation; many have been proved false after having been universally accepted (e.g., Euclidean geometry as a theory of spatial relations); many (some philosophers of science think all) are temporary or ad hoc constructs to explain phenomena that might be explained in other ways; many, especially in the social sciences, yield results that are only weakly supported. And neither logic nor hypoth-

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(formula for when to grant preliminary injunction); W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

14. See, e.g., W.V. QUINE, *Success and Limits of Mathematization*, in *THEORIES AND THINGS* 148 (1981).

esis-testing *generates* scientific theories; the imaginative insight that leads the scientist to propose a new theory is not itself a step in the scientific method. Points like these can be used to show that scientific inquiry is not *so* different, after all, from inquiry in “soft” fields,¹⁵ but it would be wrong for lawyers to derive comfort from this. We may, if we wish, following Popper, regard all scientific knowledge as conjectural — as falsifiable but not verifiable — and yet we could hardly deny that science is rapidly enlarging our understanding and control of the natural world and some social systems (such as the economic system) at a fast clip;¹⁶ progress toward understanding and improving the legal system has been, in comparison, glacial at best.

If the comparison seems unfair because law has a more practical aim than science and therefore cannot aspire to the same theoretical rigor and purity, we can change the comparison, and compare law as a form of social engineering¹⁷ with mechanical or electrical or other forms of applied scientific engineering. But this comparison is not much more favorable to law, because there is little evidence that the modern engineering “marvels” of law, ranging from the class action and the *Miranda* warnings to the new federal Sentencing Guidelines and the good-faith exception to the exclusionary rule, are successful, let alone marvelous, innovations; but I shall note some exceptions later.

B. *Practical Reason: An Introduction*

Set against the methods of exact inquiry are the methods of “practical reason.” This term, which unfortunately lacks a standard meaning, is most often used to denote the methods (“deliberation” and “practical syllogism” are key expressions here) that people use to make a practical or ethical choice (Shall I go to the theater or a concert tonight? Shall I tell a lie in order to avoid undermining a friend’s self-confidence?), as opposed to the methods of “pure reason,” which

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15. See, e.g., H. PUTNAM, *REASON, TRUTH AND HISTORY* 174-200 (1981); 1 S. TOULMIN, *HUMAN UNDERSTANDING* 364-411 (1972). On the problems with the conventional “hypothetico-deductive” model of scientific reasoning, see C. GLYMOUR, *THEORY AND EVIDENCE* 29-48, 110-290 (1980); on the insolubility of certain mathematical problems by strictly logical or “analytic” methods, see A. GOLDMAN, *EPISTEMOLOGY AND COGNITION* § 13.1 (1986); and on “fallibilist” theories of mathematics, see P. DAVIS & R. HERSH, *THE MATHEMATICAL EXPERIENCE* 345-59 (1980) (discussing the mathematical philosophy of Imre Lakatos).

16. “Science reveals hidden mysteries, predicts successfully, and works technological wonders.” Quine, *Natural Kinds*, in *NATURALIZING EPISTEMOLOGY* 31, 43 (H. Kornbluth ed. 1985).

17. On the aptness of this metaphor, see K. POPPER, *Piecemeal Social Engineering*, in *POPPER SELECTIONS* 304 (D. Miller ed. 1985).

we use to determine whether a proposition is true or false.¹⁸ It is sometimes used, notably by the academic lawyers whom I call the "new conventionalists" and discuss later in this article, in a related but distinct sense to denote a methodology for reaching conclusions that relies heavily on the traditions in a particular field of inquiry and is actually suspicious of reason, including, in some versions, practical reason in the first sense. Both of these usages have good Aristotelian credentials, but I shall use the term in still a third sense, one that also partly overlaps the others and also is Aristotelian, being found mainly in Aristotle's discussions of induction, dialectic, and rhetoric. I shall use it to denote the methods that people who are not credulous — who have inquiring minds — use to form beliefs about matters that cannot be verified by logic or exact observation.¹⁹

Practical reason in this sense is not a single analytical method or even a set of related methods but a grab bag of methods, both of investigation and of persuasion. It includes anecdote, introspection, imagination, common sense, intuition (due apparently to how the brain structures perceptions, so that, for example, we ascribe causal significance to acts without being able to observe — we never do observe — causality), empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, "induction" (the expectation of regularities, related both to intuition and to analogy), "experience." There is duplication in this list; and some of the methods listed can be viewed as crude approximations to exact inquiry — for many of the inferences we draw with the aid of practical reason, whether in everyday life, literary criticism, or legal analysis, reflect a form of hypothesis-testing and thus are parallel to scientific inquiry.

Miscellaneous and unrigorous it may be, but practical reason is our

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18. See, e.g., D. GAUTHIER, *PRACTICAL REASONING: THE STRUCTURE AND FOUNDATIONS OF PRUDENTIAL AND MORAL ARGUMENTS AND THEIR EXEMPLIFICATION IN DISCOURSE* (1963); R. MILO, *ARISTOTLE ON PRACTICAL KNOWLEDGE AND WEAKNESS OF WILL* 36-66 (1966); J. COOPER, *REASON AND HUMAN GOOD IN ARISTOTLE* (1975); M. BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON* (1987); Thornton, *Aristotelian Practical Reason*, 91 *MIND* 57 (1982). This is the sense in which Wellman uses the term "practical reasoning" in his project of constructing a jurisprudence of practical reason. See Wellman, *supra* note 7, at 87-115; see also Ladd, *The Place of Practical Reason in Judicial Decision*, in *NOMOS VII: RATIONAL DECISION* 126 (C. Friedrich ed. 1964).

19. I have not found a compendious discussion of these methods, although the essays in Part One of *PRACTICAL REASONING IN HUMAN AFFAIRS: STUDIES IN HONOR OF CHAIM PERELMAN* (J. Golden & J. Pilotta eds. 1986) [hereinafter *PRACTICAL REASONING IN HUMAN AFFAIRS*], discuss some of them, and the essays in Part Two discuss the use of practical reason, in a sense roughly similar to mine, to solve problems of law and justice. (Perelman's own theory of jurisprudence as practical reason is rather empty, however, as argued in Comment, *supra* note 7, at 847-50.) See also H.H. PRICE, *BELIEF* (1969); D. CLARKE, *supra* note 6; J. KINNEAVY, *A THEORY OF DISCOURSE* 236-55 (1971); L. ARNHART, *ARISTOTLE ON POLITICAL REASONING: A COMMENTARY ON THE 'RHETORIC'* 141-62 (1981).

principal set of tools for answering questions large and small. And often it yields as high a degree of certainty as logical demonstrations do; an example is the proposition, neither analytic nor verifiable (and hence, to a strict logical positivist, a pseudo-proposition), that no human being has ever eaten an adult elephant in one sitting.²⁰ Here is a question pertinent to a discussion later in this article that only practical reason can answer, although this time not well: How do we know there are other minds, since we can never observe another person's mind but only words, actions, brain waves, and other physical phenomena? We use a combination of introspection, observation, and induction.²¹ We "observe" (intuit) that we ourselves have minds, which enable us to do things like plan and conceal, and we observe that other people do the same things, which argues for their possessing a similar mental equipment. But this method of inquiry will not tell us whether animals, some of which also plan and conceal, but in more rudimentary and predictable ways than we, and which do not appear to speak, also have minds, or whether a six-month-old human infant has a mind. And there is ambiguity in the concept of "mind." When we say of people that they have minds, it is unclear to what extent we are attempting to denote a thing and to what extent we are merely using a shorthand expression for our ignorance of motives, ourselves' and others'.

For further insight into the utility of practical reason, consider the question, how do you know that you are not merely dreaming this article? The answer given by practical reason is that you have had many dreams, and you have noticed characteristic features of the dream state which (I hope) are missing as you read this article. Of course, you could be mistaken; this could just be an exceptionally realistic dream. Practical reason does not yield certainty, but neither does pure reason,²² and often practical reason can generate a reasonable degree of confidence that is later vindicated when exact methods of inquiry are brought to bear.

Coming closer to the use of practical reason in law, I note (here breaking very sharply with logical positivism) that practical reason

20. The example is from P. KLEIN, *CERTAINTY: A REFUTATION OF SCEPTICISM* 122 (1981). See also H. PUTNAM, *Philosophers and Human Understanding*, in *REALISM AND REASON* 184, 185-86 (1983) (PHILOSOPHICAL PAPERS, vol. 3) ("cats don't grow on trees").

21. And perhaps an intuitive understanding different from all three. See, e.g., R. CHISHOLM, *Verstehen: The Epistemological Question*, in *THE FOUNDATIONS OF KNOWING* 86 (1982).

22. See, e.g., Popper, *The Problem of Induction*, in K. POPPER, *supra* note 17, at 101; H. PUTNAM, *Introduction: Science as Approximation to Truth*, in *MATHEMATICS, MATTER AND METHOD* at vii (2d ed. 1979) (PHILOSOPHICAL PAPERS, vol. 1); Putnam, *What Is Mathematical Truth?*, in *id.* at 60; and references in notes 6 & 15 *supra*.

can answer some ethical questions with a high degree of certainty. It is almost as certain that the Nazi racial policies were evil as that no person has ever eaten an adult elephant in one sitting. Of course, a thousand years from now, perhaps a hundred years from now, the consensus that pronounces those policies evil may dissolve, but at the moment it is so strong that a person who challenges it is likely to be thought crazy (at least by educated persons in Western societies), like a person who thinks the earth is flat, or was created five minutes ago complete with its history, or is going to disappear on the stroke of midnight December 31, 1999.

Thus I do not believe that merely because the methods of exact inquiry are rarely usable by judges in deciding cases, most judicial decisions must be political or random.²³ Practical reason can answer most of the legal questions that logic cannot answer (and logic can answer some, as we saw). Any impression to the contrary is a result of sample bias.²⁴ A sample of cases litigated to judgment will be biased in favor of uncertainty, because if the outcome is clear the parties will usually settle the case before trial. Even within this sample not all cases will be uncertain. Many a case is litigated even to the appeal stage not because the case is truly difficult (let alone indeterminate) but because the lawyers (sometimes their clients, and sometimes, alas, the judges) are obtuse or stubborn, or because the lawyers want to let the meter run longer, or because of acrimony arising from the underlying dispute or the litigation itself. Finally, when a litigated case is easy, the judges often decide it without a published opinion. For all these reasons the universe of published opinions — which is pretty much all that anyone who cares about law reads — is heavily biased in favor of the difficult cases. And even some very difficult cases can be resolved by logic, or (rarely) science, or (commonly) some method of practical reason. But it will become clearer as I proceed that there is bound to be a residue of cases — those that the profession and often the laity care the most about — against which practical reason will break its often none-too-sturdy lance. Moreover, the methods of practical reason that lawyers use to determine the correct outcome of the

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23. Anyone who believes this is apt to think it monstrous that judges would ever impose sanctions — as they do — for the filing of frivolous legal claims or the making of frivolous legal arguments. For an interesting discussion, see Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOOD HALL L.J. 353 (1986).

24. For good recent discussions, see Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986); Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); Langille, *Revolution Without Foundation: The Grammar of Scepticism and Law*, 33 MCGILL L.J. (forthcoming 1988); Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 471-95 (1987).

difficult case may not be methods of *legal* reasoning in a distinctive sense.

C. *Some Methods of Practical Reason*

I shall not discuss every method of practical reason, but some deserve particular consideration because of their importance, real or imagined, in legal reasoning.

1. *Authority*

In an age not only of science but of hostility to almost all forms of authority, we tend not to realize how many of our beliefs, including scientific ones, are the product of authority rather than observation.²⁵ An example is the proposition that the earth revolves around the sun. This is not an observable or readily inferable fact (unlike the roundness of the earth); it is simply the theory that best organizes the existing data. Very few of us have a firsthand acquaintance with the data or can replicate the reasoning that connects them with the theory. Common sense and intuition support the utterly discredited geocentric theory. We believe in the heliocentric theory because scientists are unanimous in believing it and because we are taught to defer to scientific consensus on matters classified as scientific, of which the revolution of the earth is today one.

"Authority" has a different connotation in law; indeed it is a different concept. Decisions are authoritative not when they command a consensus among lawyers, corresponding to a consensus among scientists, but when they emanate from the top of a hierarchy, normally a judicial one. (The authority of statutes is different; I shall come to it later.) The only connection between this political authority and the kind of intellectual authority to which laymen defer in forming scientific beliefs is that judicial decisions made at the top of the hierarchy are more likely to be correct than those of judges lower down. The higher judges are more carefully selected and have a broader view, as well as the benefit of the lower judges' thoughts on the case and additional briefing and argument by the parties. But this presumption of correctness is weak; moreover, even if all the judges up and down the line agree, their decisions have much less intrinsic persuasiveness than unanimous scientific judgments, because judges' methods of inquiry are so much feebler than scientists' methods. (And does anyone doubt

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25. For good discussions see De George, *The Nature and Function of Epistemic Authority*, in *AUTHORITY: A PHILOSOPHICAL ANALYSIS* 76 (R. Harris ed. 1976); W.V. QUINE & J. ULLIAN, *THE WEB OF BELIEF* 54-63 (2d ed. 1978); H. PUTNAM, *supra* note 20, at 186; Coady, *Testimony and Observation*, 10 AM. PHIL. Q. 149 (1973).

that, as Justice Jackson once suggested, if there were a court above the Supreme Court a large fraction of the Supreme Court's decisions would be reversed?²⁶) That is why the legal profession probably would look askance at a judge who cultivated a close personal relationship with the members of the court above him in order to be able to predict their decisions more accurately by obtaining a better understanding of their values and beliefs. Society does not have such confidence in the superior wisdom of the higher judges that it wants their judicial inferiors to abdicate all independent judgment.

There are other reasons not to place too much weight on the fact that many judicial decisions (even in the Supreme Court) are unanimous. Few judges will write or note a dissent in every case in which they disagree with the majority. And when a case is indeterminate but not highly charged ideologically, some, maybe most, of the members of the court may lack a strong conviction as to how it should be decided and may therefore yield to a colleague who does have such a conviction — without necessarily “agreeing” in any strong sense with him.

Granted, it is a legal convention — though one not fully shared by the rest of the community or even by the entire profession — that a decision foursquare in accord with a recent decision by the highest court in the jurisdiction is “correct” by virtue of its conformity to authority. But it is a weak convention. A lawyer who loses a case in the Supreme Court, a judge who is reversed by the Court, or a law professor commenting on the Court's latest (and let us say unanimous) decision is not speaking nonsense — is not even violating professional etiquette — if he says the decision is wrong. Our legal discourse is not so positivistic that one is forbidden to appeal to a “higher law” even after the oracles of the law have spoken; nor need the appeal be couched in such terms. Moreover, even when the latest decision is admitted to be correct in virtue of an immediately preceding decision, it is always possible to argue that it is incorrect in a larger sense because the earlier decision was wrong too. Vast areas of established jurisprudence, including substantive due process, the “incorporation” doctrine, the “fundamental rights” doctrine, comparative negligence, “interest analysis” in conflict of laws, and many others, are weakly grounded.

Scientific authority, on which nonscientists rely in forming their beliefs on scientific matters, is derivative from the genuine power and well-deserved prestige of scientific methodology; science works. Judi-

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26. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

cial authority is essentially political: Decisions are authoritative because they emanate from a politically authorized source rather than because they are agreed to be correct by persons in whom the community reposes an absolute epistemic trust. The political connotations of the word "authoritative" are apt; the word evokes power and submission, not truth and conviction.

Of course there are decisions that not only all judges, but all lawyers, would agree were correct; and there are many scientific questions about which scientists disagree. The difference is that scientists have procedures that enable them to answer questions with a high degree of confidence and then move on to other and more difficult questions, so that while at any moment the scientific community is full of controversy there is a sense that scientific knowledge is growing continuously. That sense is missing in law. We do not think, for example, that although the question whether and to what extent the Constitution should be interpreted to protect sexual freedom is undoubtedly a difficult one, the legal community will eventually answer it and be able to move on to other questions. The question may eventually cease to trouble, but not because it will have been answered to the satisfaction of all reasonable persons; we cope with, we manage, such problems — we do not solve them. This lack of closure, of convergence,²⁷ of progressivity — the sheer interminability of so much legal debate — makes the problem of legal indeterminacy different in principle from the problem of scientific or mathematical indeterminacy. Another fundamental difference is that the scientific community itself largely determines the field of inquiry; it is not forced to butt its head against stone walls.²⁸ Judges, whether rightly or wrongly, decide virtually all issues society flings at them, however intractable the issues may be; only very occasionally will the judges balk (e.g., in cases raising "political questions").

2. Reasoning by Analogy

The heart of legal reasoning as conceived by many modern lawyers is reasoning by analogy. This method of practical reason has a solid Aristotelian pedigree,²⁹ but I have come to believe that, in the legal

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27. I realize that the proposition that science is "converging" on the "truth" is controversial. See I. HACKING, *supra* note 3, at 55-57. It is not essential to my argument.

28. See R. MILLER, *FACT AND METHOD: EXPLANATION, CONFIRMATION AND REALITY IN THE NATURAL AND THE SOCIAL SCIENCES* 133-34 (1987).

29. As emphasized in what is still the authoritative treatment of reasoning by analogy in law: E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949). See also M. GOLDING, *LEGAL REASONING* 44-49, 102-11 (1984); Wellman, *supra* note 7, at 80-87; J. AUSTIN, *Excursus on Analogy: Analogical Reasoning and Syllogism*, in 2 *LECTURES ON JURISPRUDENCE* 1001 (5th ed.

setting in any event, it has no content or integrity, but merely names a class of mutually unrelated methods of reasoning. This is an important point, not a quibble. If as I noted earlier formal logic plays no role in legal reasoning, reasoning by analogy is left as the principal candidate for a distinctively legal method of reasoning — for there can be nothing very impressive about the fact that lawyers and judges, like everyone else, employ simple syllogisms.

Defined broadly enough, reasoning by analogy becomes another name for induction. I have owned Volvo automobiles (a total of four) since 1963, and have been generally satisfied with them. I infer from this experience that if I replace my present Volvo with a new one, I probably will be satisfied with the new one too. The prior purchases are “precedents” or “analogies” that create a certain probability that I will be satisfied if I buy another Volvo the next time I am in the market for a car. This is fine (unless, with Hume and Popper, we reject induction), but a little low-key to be the core of legal reasoning in a satisfying sense. For this reason, and in light of earlier discussion in this article, it should come as no surprise that the way in which lawyers actually “reason by analogy” is often, and misleadingly, syllogistic (technically, enthymematic). The property lawyer who says that oil and gas should be analogized to rabbits or deer or other wild animals is really saying that the rule on wild animals (“the rule of capture”) is an instance of a more general rule that subsumes oil and gas: namely the rule that there are no nonpossessory property rights in fugitive resources. The problem is then to justify the general rule, which cannot be done syllogistically or by analogies.

There is another sense in which lawyers and other practical reasoners reason by analogy. Analogies, viewed simply as instances similar to the problem at hand (examples, anecdotes) rather than as steps in a logical demonstration or even as the pieces in a regular pattern (my Volvo example) on which an inductive inference might be based, provide a fund of information upon which to draw in choosing a course of action. It just is common sense that before a staff officer formulates a plan for a military campaign he consider “precedent” in the form of similar campaigns. Previously decided cases supply lawyers and

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1885). For criticism of Levi's treatment, see R. Barrera, *Legal Reasoning According to Edward H. Levi: An Epistemological Critique* (Jan. 12, 1988) (unpublished University of Chicago Law School seminar paper). For compendious philosophical treatment of analogy, see H. PUTNAM, *THE MANY FACES OF REALISM: THE PAUL CARUS LECTURES 73-75* (1987); W.V. QUINE & J. ULLIAN, *supra* note 25, at 90-95. On the role of analogy in scientific problem solving, see P. JOHNSON-LAIRD, *THE COMPUTER AND THE MIND: AN INTRODUCTION TO COGNITIVE SCIENCE* 266-67 (1988). And on the fallacious quality of much reasoning by analogy, see M. BEARDSLEY, *THINKING STRAIGHT: PRINCIPLES OF REASONING* § 11, at 125 (3d ed. 1966).

judges with a wealth of facts and reasons that may bear on how a new case should be decided.

The use of precedents (previous cases) as analogies thus must be distinguished from their use as authorities. All analogies are, from the user's standpoint, precedents — that is, things that go before — whether or not they are authoritative. The use of analogy, example, and anecdote is inevitable in fields where theory is weak, as it is in military science, in advertising, in law, and in many other fields of human endeavor. I merely question whether “reasoning by analogy” deserves the hoopla and reverence that the legal profession accords it. It seems nothing special at all. Obviously if one has a case that raises for the first time the question whether automobile manufacturers should be liable in negligence to their ultimate consumers, one will want to find out what previous cases said about analogous questions of liability, such as the liability of drug manufacturers to the ultimate consumers of drugs. (This is like asking other people who have owned Volvos what their experience has been.) And one can conduct such a canvass with only the vaguest sense of what shall count as “similar,” though similarity or analogy presupposes some categorization.

The canvass of analogies may turn up all sorts of useful information — relevant policy considerations, for example. But unless the new case is somehow contained in (logically entailed by) a prior case — unless the outcome of the new case can be deduced from the prior case *and* the prior case cannot be reexamined, maybe because it was decided by a higher court (if it can be reexamined, one must go beyond logic to decide the present case) — it is unclear how the judges can “reason” from the prior case to the present one. The prior case may be authoritative in the sense of announcing a major premise that cannot be questioned, but if not, it is just a source of data, anecdotal in character, or of reasons, considerations, values, policies. I grant that people have an innate capacity for recognizing patterns, an innate standard of similarity;³⁰ that is what enables us to recognize faces after an interval and objects seen from a new angle. And a set of cases can compose a pattern. But whenever lawyers or judges differ on what pattern a set of cases composes, their disagreement cannot be resolved by an appeal to an intuitive sense of pattern or similarity.

An example discussed by Neil MacCormick³¹ will help make my main point, which is that reasoning by analogy, when it is neither en-

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30. See H. MARGOLIS, *PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT* (1987) (especially pp. 113-14); Quine, *supra* note 16.

31. N. MACCORMICK, *supra* note 7, at 161-63.

thymematic nor fallacious,³² is just a form of, or a way station to, a policy judgment. MacCormick discusses a case in which the plaintiff, despite the absence of any contractual or other understandings, asserted a right to recover expenses he had incurred in saving the defendant's property. The court had previously allowed such recoveries when life rather than property had been saved, and the question was whether to decide the property case in favor of the plaintiff by analogy to the life case. The only way to answer such a question rationally is to bring to light the considerations that had led the court to allow such recoveries when life was at stake and see whether they continue to hold in the case of property. Maybe the earlier case had rested on the simple idea that the defendant, if asked before the emergency that endangered his life, would have said that he would be delighted to promise to compensate the plaintiff for the costs of rescuing him. Then the question would be how plausible such an imputation of promissory intent was when something of lesser value than life is at stake. In the end one would be making a policy judgment, using the earlier case as a source of information relevant to the judgment.

Consistent with my view that precedent is more significant as information than as authority, I predict that a careful study would show that judges who know more about a particular field of law are less deferential toward precedent than equally able (and no more "restrained") judges who know less about the same field. A related prediction is that a specialized court will be less deferential to precedent, and therefore perhaps less (rather than, as one might think, more) predictable, than a generalist court. These hypotheses illustrate a distinctive aspect of the approach to jurisprudence set forth in this article: that it has explanatory and predictive potential.

It is often said that precedents can be read broadly or narrowly, and that deciding which course to follow is central to the art of lawyering or judging. But what is actually involved is less mysterious and impressive than this statement and has nothing to do with decision according to precedent viewed as a form of logical or quasi-logical deduction. Only if a precedent is controlling when read as narrowly as possible is the decision of the later case "based" on precedent in a strong sense. When a court chooses to read a precedent more broadly than it has to, the key step in its analysis is that choice, which is not

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32. Nor purely rhetorical. Often a judge will quote or cite language from a case that is factually remote from the case at hand; I call this method rhetorical because either the general language states a truism, for which no reference to authority should be necessary, or general language pointing in the opposite direction could be found in other cases, which the judge does not cite. In either case, the quotation or citation exaggerates the extent to which the outcome of the case is compelled by precedent.

itself compelled by precedent. Once the choice has been made, the precedent, viewed as authority rather than example, drops out of the picture; for there is no practical difference between on the one hand treating a case as one of "first impression," and on the other hand subsuming it under a previous case after first deciding as a matter of discretion to read the previous case broadly enough to enable the subsumption.

Searching the past for relevant experience and considerations is an important dimension of practical reason but so ordinary — a word I use not as a pejorative but merely to indicate the remoteness of reasoning by analogy from an inferential technique that might have to be taught, as statistical inference or formal logic has to be taught — that I am led to wonder whether the highly inductive, case-oriented, analogy-saturated "Socratic" method³³ actually teaches legal *reasoning* at all. It familiarizes the student with legal materials, most of them written in the profession's standard style, which exaggerates the uniqueness and power of the analytical methods that lawyers and judges use. It also imbues the student with the style, at the same time training him to exploit the indeterminacies in those materials. To recur to an earlier "analogy," what law school teaches is a language rather than a method of reasoning — and courses in foreign languages do not purport to teach methods of reasoning.

Even so, it can be argued that the immersion in particulars that is the activity of a legal education and subsequent legal experience, both of which will include reading thousands of appellate opinions, yields a rich, if incompletely articulable, intuition about legal questions.³⁴

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33. On which see the interesting discussions in Heffernan, *Not Socrates, But Protagoras: The Sophistic Basis of Legal Education*, 29 BUFFALO L. REV. 399 (1980); Epstein, *The Classical Tradition of Dialectics and American Legal Education*, 31 J. LEGAL EDUC. 399 (1981); Cole, *The Socratic Method in Legal Education: Moral Discourse and Accommodation*, 35 MERCER L. REV. 867 (1984). The best discussion I know of the methodology and aspirations of the Socratic case method is Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1 (1951).

34. This position I call the "new conventionalism," and examine in Posner, *Conventionalism: The Key to Law as an Autonomous Discipline?*, 38 U. TORONTO L.J. (forthcoming 1988), and more briefly in Part II.G of the present article. (An alternative appellation, less confusing to philosophers, who use "conventionalism" in a special sense, might be "neotraditionalism.") The philosophically most sophisticated proponent is Anthony T. Kronman. See Kronman, *Practical Wisdom and Professional Character*, 4 SOC. PHIL. & POLY. 203 (1986); Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987). For extensive references to the literature, see Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1645 n.129 (1987). The distinction between the new conventionalism and practical reason is well brought in the rejection by James Boyd White, another leading figure in the movement, both of theory in general and means-ends rationality — a key component of practical reason — in particular. See White, *Judicial Criticism*, 20 GA. L. REV. 835, 843-45 (1986); J.B. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 41 (1985); Cole, *Against Literalism* (Book Review), 40 STAN. L. REV. 545 (1988).

Cases do provide not only information about the substance and rhetoric of law but also a kind of surrogate experience of life, and of the particular slices of life (such as crime, breach of contract, and racial discrimination) that the lawyer is likely to encounter in his career. But I question whether the reading and discussion of cases inculcate a distinctive style of reasoning. The immersion in particulars that is indeed characteristic of legal inquiry may be not a source of strength but a brute necessity indicative of weakness — a stopgap pending better (more rigorous, scientific, empirical, interdisciplinary, policy-oriented) legal theory, rather than a superior alternative to legal theory.

It might be possible to examine the question empirically. If a lawyer's conventional experience increases the power of his legal analysis, we might expect the performance of a judge (something more readily, though not easily, measurable than the performance of a practicing lawyer, by counting citations to the judge's opinions and the number and percentage of his cases that are reversed³⁵) to vary systematically with the nature of his experience. We might also expect more experienced judges to outperform less experienced ones on average.

If it were more generally recognized that the main significance of precedents is information rather than authority, judges and lawyers might make greater use than they do of nonlegal and comparative materials — important sources of information but not of authority. Modern judicial opinions do cite nonlegal materials, but all too often these reflect the reading of the law clerks rather than the judges. The preoccupation with precedent as authority may be one factor in American judges' insensitivity to the ways in which foreign legal systems deal with problems similar to ours. Perhaps Professor Glendon's brilliant recent study of foreign approaches to the abortion problem will help us overcome our provincialism.³⁶

3. *Interpretation*

An important branch of practical reason — especially for lawyers, and especially in an era when an increasing fraction of legal questions concerns the interpretation of statutes and the Constitution — is the understanding of communications. If a neighbor, seeing your house on fire, calls you up and says, "your house is on fire," it is important that you be able to decode the message. To do so you will need a certain linguistic competence, but you will also need to know something about the speaker's seriousness and reliability, that is, about

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35. It should be apparent from earlier discussion why reversal rates cannot be the sole measure of judicial performance.

36. M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 10-62 (1987).

character, capacity, and intentions. The process of understanding communications is thus not a logical process, though lawyers and judges often pretend it is one. It is an imaginative process. We understand a message by putting ourselves in the speaker's shoes.³⁷ We understand the message about the fire by imagining that we are seeing a house burn and telling the owner about it; and the congruence between the speaker's intentions and our imaginative reconstruction — the success of the latter — is what enables the communication to go through. The role of imagination in understanding is one reason you can decode my sentence, "I'll eat my hat," as ironic (another is that it is a well-known idiom); you know you would never try to eat a hat (even though it's smaller than an elephant), and you assume that I am enough like you in this respect not to try either.³⁸

The difference between a logical proposition and a communication can be clarified with the help of the syllogism about Socrates. Its conclusion, "Socrates is mortal," is a logical proposition; but if you say to me, "Socrates is mortal," your statement is a communication, and to grasp its meaning I will need to know a lot more than the rules of logic and the contents of the dictionary. The statement may have no meaning, no intended meaning anyway; you may be a parrot repeating what you have heard, without any comprehension. Or you may be referring to your pet gerbil, "Socrates," rather than to its Athenian namesake. Or by "mortal" you may mean "fallible" rather than bound to die.

The danger of misunderstanding a spoken communication is reduced by the fact that the speaker's inflection and facial expression help dispel ambiguities in his words and, above all, by the fact that the listener can seek clarification from the speaker. The potential for misunderstanding a written communication is much greater (this is the kernel of insight in the deconstruction movement), especially if the document was written by someone who is dead or by a committee (all of whose members may also be dead), or is in a foreign language, or was written hundreds of years ago. Interpreting the Constitution involves all of these problems except possibly that of translation from a

37. Shoes — not head. The listener need not be able to recreate in his mind an image in the speaker's mind. As Gerald MacCallum explains in a neglected contribution to the literature on legal interpretation, if you ask your assistant to fetch you all the ash trays he can find (for a meeting where you do not know how many of the people who will be attending are smokers — an example that rather dates MacCallum's fine article), it would be idiotic of him to return empty-handed with the excuse that he was not sure which of the ash trays that he had seen were the ones you had in mind when you dispatched him on the errand. MacCallum, *Legislative Intent*, in *ESSAYS IN LEGAL PHILOSOPHY* 237, 256-57 (R. Summers ed. 1968). The visual imagery in my fire example is thus inessential.

38. MacCallum's parallel example to mine has the assistant complying with the request to fetch all the ash trays he can find by ripping some off walls and stealing others. *Id.* at 256-57.

foreign language — but in some respects eighteenth-century English *is* a foreign language. Even interpreting recently enacted statutes can be a daunting task, because the authors may not have foreseen and addressed — or may have foreseen and decided not to address — the question of meaning or application that has arisen. This last point helps show why the interpretation of judicial opinions is less problematic than statutory interpretation. If the previous opinion did not address a question, that is a good reason for not treating the opinion as authoritative on the question, and therefore for looking elsewhere for the answer.

The fact that imagination is the key to understanding communications helps show why the interpretation of statutes and the Constitution can be so difficult. Normally a person can readily understand what he himself is saying, because he already is, as it were, in his own shoes. When one reads something one wrote many years ago, at a time when one may have been in some sense a different person, the attempt at imaginative reconstruction may fail. These examples can be generalized: the greater the “distance” between reader and writer, the likelier an attempt at communication is to go awry. Old married couples understand each other’s fragmentary utterances better than a stranger would because married people grow to be alike by sharing the same experiences. And so with identical twins, with people brought up together, and with people educated in the same way. The closer-knit the interpretive community (that is, the community that includes the speaker and his audience) the simpler the interpretive task. In economic terms one might say that the more homogeneous the interpretive community is, the lower are the costs of overcoming the inevitable “noise” in the communication channels.

This point can help us see why the idea that understanding is imaginative reconstruction was a Romantic idea (Schleiermacher’s³⁹); the Romantics were trying to break down the barriers between individuals. But the idea (or ideal) has only limited utility for the modern

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39. See R. PALMER, *HERMENEUTICS: INTERPRETATION THEORY IN SCHLEIERMACHER, DILTHEY, HEIDEGGER, AND GADAMER* 84-97 (1969). The “empathic” theory of legislative interpretation is actually much older, however:

[A]ll law is universal but about some things it is not possible to make a universal statement which will be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing . . . [Therefore] it is right, when the legislator fails us and has erred by over-simplicity, to correct the omission — to say what the legislator himself would have said had he been present, and would have put into his law if he had known.

ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, § 10, in 2 *THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION* 1795-96 (J. Barnes ed. 1984).

judge. A twentieth-century judge has little in common with the draftsmen of the Constitution, and it is futile to try to put oneself in their place in order to figure out whether they would have wanted to strike down laws forbidding abortions or sodomy or antitakeover statutes or affirmative action or the one-house veto, or authorizing the censorship of student newspapers or of pornographic video cassettes. The Framers did not know what we know (and we have forgotten much of what they knew), and how can we tell how they would have fitted our experience to their values? Even the community that consists of the members of a recent legislature and the judges asked to interpret the legislature's enactments is not at all like one person, or a married couple, or a group of friends chatting over lunch.⁴⁰

The Romantic ideal of an imaginative coalescence between writer and reader may, however, provide too stringent a criterion for legal interpretation. Even though the hypostatization of "legislative intent" — a group mind, when even the concept of a single mind is problematic, as we shall see — is an insult to philosophy, statutes and constitutional provisions undeniably are purposive utterances. Often the purposes can be discerned from text and context (including what the draftsmen may have said about the text in a committee report or hearings, or in floor debate) and used to answer a question of interpretation in a way that advances the cooperative enterprise set on foot by the enactment. It may not be necessary to "enter" a legislator's "mind" in order to understand and follow the command embodied in a legislative enactment.⁴¹ The proper conception is knowledge by empathy, not knowledge by mind reading. Nevertheless, the mental processes used in interpretation are distinct from the procedures of logic and scientific observation.

This has not deterred judges from casting their interpretive reasoning in syllogistic form, which they do by stringing together canons of statutory construction without letting on that the canons are often contradictory and always themselves contestable. Most interpretive

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40. A problem that Hart and Sacks elide, in their influential version of interpretation as imaginative reconstruction, by assuming that the legislators are just like the judges. "[A] court should try to put itself in imagination in the position of the legislature which enacted the measure. . . . It should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably." H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1414-15 (tent. ed. 1958).

41. The command approach to statutory interpretation, which is distinct from both the method of imaginative reconstruction and the method of textualism, is developed in Posner, *supra* note 7, at 186-201; *see also* R. POSNER, *supra* note 4, ch. 5. And recall that the idea of entering a speaker's or writer's "mind" is actually a distortion of the idea of interpretation as imaginative reconstruction. *See* note 37 *supra*.

canons, such as the “plain meaning” rule and *expressio unius est exclusio alterius* and *eiusdem generis*, are linguistically or epistemologically naive,⁴² and most political canons, such as the principle that remedial statutes should be broadly construed or that statutes waiving sovereign immunity should be narrowly construed, are arbitrary, premised on dubious extra-textual propositions, or selectively ignored (as are the interpretive canons also). Statutory analysis is the least edifying form of judicial writing today.⁴³

4. Means-Ends Rationality

The weatherman has forecast rain, and I must decide whether to take an umbrella with me when I leave the house. In making this decision I will consider (very rapidly, perhaps unconsciously) the probability that the forecast is correct, the discomfort of being rained on, the bother of carrying the umbrella, and the probability of losing it. This type of analysis, which is called cost-benefit analysis by economists and means-ends rationality (sometimes “deliberation”) by philosophers of practical reason, is important in every department of thought and certainly in legal reasoning. The choice between alternative legal rules often depends on deciding which one makes a better fit to some underlying legal goal. But this, as we saw in discussing reasoning by analogy, is simply policy analysis. When the goal is agreed on and it is clear which of two alternative rules, interpretations, or applications is better suited to achieving the purpose, then what I am calling policy analysis will conduce to a determinate outcome, which is fine but does not identify a distinctive method of *legal* reasoning.

Consider the old chestnut about whether the beneficiary in a will who kills his testator should be permitted to inherit. The case is sometimes seen as involving a conflict between the principle that donative intentions should be honored and the principle that no man should be allowed to profit from his wrongdoing; but an alternative approach (showing, by the way, the close relationship between imagination — that essential faculty for exploring alternative possible states of the world — and means-ends rationality) is simply to ask whether the tes-

42. See, e.g., Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 280 n.281 (1981).

43. I discuss an example of such writing in Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 774-77 (1987). That article should be consulted by readers desiring a fuller picture of my jurisprudential views than the present article provides; see also R. POSNER, *supra* note 4, chs. 5 & 6; authorities cited in notes 7 & 23 *supra*; R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 198-222 (1985) [hereinafter R. POSNER, *THE FEDERAL COURTS*]. On the problems of statutory interpretation generally, see W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 569-828 (1988); on the canons, see R. POSNER, *THE FEDERAL COURTS*, *supra*, at 276-86, and references therein.

tator, had he thought about the possibility of being murdered by his heir, would have included in the will a clause disinheriting the murderer. Almost certainly he would have, so his donative intentions are honored by forbidding the heir to inherit, and there is no conflict between legal principles. (This is “imaginative reconstruction” writ small.) What this conclusion has to do with legal reasoning, in some distinct sense of the term, escapes me.

Professor Wellman has tried to show that the fitting of means to ends is (and rightly so) *the* method of justification used in law; fidelity to precedent is just another consideration — another policy or principle — to be placed in the balance in deciding whether a particular outcome would be a suitable means for accomplishing the judicial ends or (the word he prefers) goals.⁴⁴ In taking this approach, Wellman believes that he has identified what is at once a distinctive and an adequate form of legal reasoning, but actually he has described the making of policy judgments under conditions, often, of radical uncertainty. As such judgments, made under such conditions, are unreliable, it is not surprising that he acknowledges that his theory of law as practical reason “denies that legal statements are true or false.”⁴⁵ His article illustrates both halves of my thesis: that legal reasoning is not special, and that it often does not yield determinate outcomes.

Given the close relationship between means-ends rationality and cost-benefit analysis, and recalling the close relationship suggested earlier between logical reasoning and economic models (such as the Learned Hand formula for negligence), one can begin to understand why economics has made such inroads into law in recent years: The implicit structure of much legal reasoning is economic. But law is not merely a translation of or approximation to economic analysis; in particular, authority and interpretation are not — not yet, anyway — forms of reasoning that can be fruitfully modeled in economic terms.

5. *Tacit Knowledge*

Michael Polanyi has emphasized that some of our most complex thinking is tacit, unconscious.⁴⁶ The mathematical formula for adjusting one's weight on a bicycle to keep from falling is highly complex, yet without knowing the formula people learn to ride bicycles. People write complex prose without thinking in advance of what they are go-

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44. See Wellman, *supra* note 7, at 87-115.

45. *Id.* at 108.

46. See M. POLANYI, *The Logic of Tacit Inference*, in KNOWING AND BEING: ESSAYS BY MICHAEL POLANYI 138 (M. Grene ed. 1969); see generally *id.* at 123-207; M. POLANYI & H. PROSCH, MEANING 46-65 (1975).

ing to say; it spills from the pen. Ideas leap to mind, unbidden. So much "thinking" is unconscious that the concept of "mind" becomes problematic — an issue to which I shall return later.

Tacit knowledge is important in legal reasoning. Judges develop a feel, not fully articulable, for what types of argument are in the legal ballpark, what types are not. One speaks of lawyers who have good "judgment," some ineffable compound of caution, detachment, and imagination. Yet I doubt whether judicial sagacity or lawyerly judgment owes much to legal training and experience. Sagacity and judgment are qualities that are brought to bear on legal methods, materials, and experiences rather than created by them.

A more basic difficulty with relying on the concept of tacit knowledge to make legal outcomes determinate is that the possession of such knowledge is, by definition, gauged by observations of the use to which it is put, and it is hard to make the requisite observations in law. We evaluate the bicycle rider's tacit knowledge by watching him ride; if he keeps falling down, we know his tacit knowledge is deficient. What are the counterparts in law to the rider who keeps his balance and the rider who keeps falling down? In the case of practicing lawyers, the market for legal service provides some criteria for evaluating performance. But they are imperfect, because information about causality is sparse; surprisingly little is known about successful technique in law. The problem of information is acute in the case of judges; the evaluation of judicial performance is extremely difficult, which in turn makes it extremely difficult to determine which judges are well endowed with the requisite tacit knowledge and which are poorly endowed.

The broader point, which relates to my next topic, is that legal inductions, outcomes, etc., are rarely confirmable by experience. Little is known about the consequences of legal decisions. Not only are the usual sorts of scientific verification unavailable, but so are the commonplace observations and experiences that enable us to correct our everyday behavior, whether in riding a bicycle, or changing a fuse, or assembling a piece of equipment.

6. *The Test of Time*

An important device of practical reason is to subject a proposition to the test of time and to accept it if it passes. The test is particularly important with regard to aesthetic evaluations,⁴⁷ but it is also important with respect to factual and legal propositions. It is a refinement of

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47. See R. POSNER, *supra* note 4, ch. 2; A. SAVILE, *THE TEST OF TIME: AN ESSAY IN PHILOSOPHICAL AESTHETICS* (1982).

the idea that whatever most people think is probably true. The idea itself is not very helpful, even if we believe that "truth" is a real thing. Most people are ignorant about most matters, and history is littered with examples of consensus on matters of fact that we now know (or think we know) to be false. But the longer a widespread belief persists, surviving changes in outlook and culture and advances in knowledge, the likelier it is to be correct; the intergenerational consensus is more reliable (you can't fool all of the people all of the time). Much of our stock of commonsense knowledge and elementary moral beliefs is validated in this and no other way.

The test of time can thus be seen to rest on the idea (a pragmaticist idea, as we shall see) that, with the possible (not certain) exception of elementary logical and mathematical truths, consensus is the only operational concept of that truth we have. Granted, there is paradox in suggesting that truth is a matter of consensus: It implies that the earth once was flat, and now is round; that the sun used to revolve around the earth, but now the earth revolves around the sun. But there is equal paradox in using present opinion as the criterion of truth, and thus saying that the earth is round because our present methods of validating propositions show it to be round although future methods may show otherwise. This is equivalent to saying that the earth *really* is round today but a century from now we may know better — a pretty confused statement. From a skeptical or relativistic standpoint truth is not an external criterion of the validity of propositions but merely the term used to identify within each culture the propositions that command a consensus.

This is not the skepticism that doubts the existence of a world external to human sensation or even the existence of (as distinct from the knowability of) truth. We may agree that the earth is "real," that it is either round or not round, and that, if it is round today, almost certainly it was round 2,500 years ago, when the consensus view was that it was flat. Today's consensus view is strongly supported by the kinds of evidence that we have good reason to find persuasive. We regard the probability that we are right and the ancients wrong on this question as very high. Closer to truth we cannot come. Knowledge, as Popper emphasizes, is conjectural — settled "truths" are open to revision. And precisely because consensus is a provisional, uncertain, mutable criterion, the broader the consensus on a particular question the greater its reliability. The significance of time is that it enables the consensus to be broadened; in effect it expands the franchise. It also enlarges or multiplies our perspectives, which is vital if, like Nietzsche, we hold a perspectival or relativistic theory of truth, a theory that (if

not pushed too hard) is compatible with and reinforces the moderate skepticism that informed my discussion of the question of the earth's true shape. A related point is that time enables ideas to be subjected to a competitive or Darwinian test, which makes any consensus that emerges more convincing (comparison shopping across the centuries). The relationship between the test of time and survival theories in biology and economics should be apparent: We have greater confidence in a commercial method that has passed a marketplace test; we believe a competitive market more likely to meet consumer needs than a monopolistic one.

The test of time is implicit in Karl Popper's influential (though also highly controversial and, it seems, seriously incomplete⁴⁸) philosophy of science, which is Darwinian. He believes that theories cannot be confirmed, but only falsified; that all knowledge is conjectural; and hence that the best methodological rule is to "try out, and aim at, bold theories, with great informative content; and then let these bold theories compete, by discussing them critically and by testing them severely."⁴⁹ The more tests they survive, the more confidence we can have that they are a close approximation to truth. And the process of severe and thorough testing takes time; look how long it took to falsify Newton's laws of motion, which (until Einstein) had survived repeated tests triumphantly.

The test of time becomes especially important for objectivity in law if, giving up on the attempt to discover a distinctive methodology of legal reasoning, we describe the lawyer's and the judge's reasoning as the "art" of social governance by rules⁵⁰ (which may just be a fancy term for tacit inference). The fact that law schools do not teach a distinctive analytic method, the heavy rhetorical element in judicial opinions, and the low voltage of the methods of legal reasoning converge to support the idea that law is indeed better regarded as an art (more humbly, as a craft, or as a skill such as riding a bicycle or speaking a foreign language) than as a system of reasoning. But if art is ineffable, so is its critique. Art cannot be reduced to a set of analytic procedures; no more can art criticism. So if law is an art, what can be the criteria for a "correct" legal decision? The very word "correct" becomes ill chosen, for we do not ask whether a work of art is correct, but whether it is beautiful, meaningful, stirring. Since these words are inapposite to legal rulings, an aesthetic view of law is hard to imagine,

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48. See, e.g., Putnam, *The 'Corroboration' of Theories*, in H. PUTNAM, *supra* note 22, at 250.

49. Popper, *supra* note 22, at 112.

50. An approach suggested by Paul Bator in conversation and unpublished talks.

but it would in any event require a wrenching alteration in our vocabulary of legal evaluation.

It is dizzying to see the autonomy and objectivity of law defended first by treating law as a branch of logic, and then by treating it as a form of art. This does not trouble me; what does trouble me is that the aesthetic view is proposed as a method of salvaging conventional law talk, with its insistence on being allowed to denominate judicial decisions, even in the most difficult cases, "correct" or "incorrect."

The aesthetic view (perhaps in the form, legal rulings are "lawyerly" or "unprofessional," or perhaps "elegant" or "inelegant," as distinct from "correct" or "incorrect") would make the test of time the sovereign method of legal reasoning. So inconclusive is evaluative criticism of art, and so striking are the vicissitudes of artistic taste, that the test of time is the only criterion of aesthetic excellence that regularly and dependably persuades doubters. "Traditionary" theories of precedent (Hale and Blackstone) may have glimpsed this point. Unfortunately the test of time does not really respond to the needs of the legal profession, not only because it is strictly *ex post* (it does not tell the judge how to write an opinion that will survive) but also because the rulings that interest the profession are for the most part too recent to be evaluated by their survival properties. We can use the test to criticize the *Dred Scott* decision, *Lochner*, and the early free-speech cases; but possibly even *Brown v. Board of Education*, and certainly *Roe v. Wade*, are too recent to be adjudged good or bad by reference to their survival. Remember, *Swift v. Tyson* had a "run" of a century.

A final observation is that in order to work best, the test of time requires a feedback mechanism—something law seems, as I have already suggested, especially deficient in. The test of time is related to the idea of trial and error. Scientists (in Popper's conception of scientific progress) try one theory after another, confront each one with data, discard the ones that the data falsify, and by this process progressively expand the scope and penetration of scientific knowledge. Artists, too, try one thing after another, and most of their innovations are rejected but some survive, and those that do survive seem robust because of their power to command the interest of diverse audiences. Unlike the case of science,⁵¹ however, one is never confident that a rejected artist or art form will stay rejected; there is a continual rediscovery of forgotten authors, painters, composers. It is much the same in law. Except for a relative handful of dramatic examples such as the

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51. More precisely, less so than in science. For Copernicus may be said to have revived Aristarchus; and nuclear physics, pre-Socratic atomic theory.

Dred Scott and *Plessy* decisions, competitive or survivalist notions rarely bring about decisive rejections of legal innovations. Long after the demise of *Swift v. Tyson* and *Lochner v. New York*, of privity of contract in personal injury cases, of strict liability in collision cases, of fact pleading, and so on almost without end, discarded doctrines continue to enlist distinguished champions who cannot be silenced effectively by pointing to the rejection of their views in the legal marketplace.

But this is to paint too bleak a picture. If we go back far enough — to trial by battle, for example — we can find plenty of legal practices that no one defends any more — that seem conclusively to have flunked the test of time. And a number of legal practices that were innovations in their time have passed the test triumphantly. They include the trust, the counterclaim, estates in land, the doctrine of estoppel, the recording of titles, habeas corpus (however overextended the current practice may be), summary judgment, burden of proof, impoundment, the injunction, the receivership, and many more. Some of these, though, seem a bit commonplace; and even such fundamental and long-surviving innovations as the canons of statutory construction, tort liability for accidents, the civil jury, cross-examination, the privilege against compelled self-incrimination, limited liability, and punitive damages are vigorously questioned. Like legal questions that do not get into court because they can be decided deductively, legal practices and institutions that have been validated by functioning smoothly over a long period of time refute extreme versions of legal skepticism but do not justify complacency about the power of legal reasoning to solve tough problems in law, whether doctrinal or institutional. And, as I have stressed, the test of time will not help us with the evaluation of recent decisions — let alone with the making of new ones!

II. ELEMENTS AND IMPLICATIONS OF A SKEPTICAL JURISPRUDENCE

A. *The Limits of Reason in Adjudication*

The analysis to this point may help to deflate the overblown rhetoric (which is still very common among judges at all levels, other public officials, practicing lawyers, and academic lawyers of traditional bent) about the power of legal reasoning to yield demonstrably correct answers to difficult legal questions and about the existence of a distinctive methodology of legal reasoning. Legal reasoning is not a branch of exact inquiry in an interesting sense, although continued progress in

the economic analysis of law may compel a modification of this conclusion eventually. It is for the most part a branch of practical reason, and the methods of practical reason that it uses are the same rough tools that we use in coping with everyday life. There is no distinctive methodology of legal reasoning.

Yet this conclusion need not undermine the law's objectivity, as distinct from its methodology; for might it not be argued that, provided only that the reasons ranged on either side of a legal dispute are not of exactly equal weight, the judge can always decide in favor of the party with the stronger case, and thus need never resort to personal values, preferences, or policies? Abstracting from the problem (to which I return later) of assigning weights to arguments, the judge could indeed do this — but it would be a mistake to do so. No one should surrender one's deeply felt beliefs on the basis of a weak argument, merely because one cannot at the moment find a stronger argument in defense of those beliefs. Intuition, itself a method of practical reason, has its claims, and establishes presumptions that the other methods of practical reason may not be able to overcome.⁵² A judge who has a powerful intuition that it would be an outrage to decide a particular case a particular way should not feel compelled to decide it that way merely because a comparison of the reasons pro and con shows the pros with a slight preponderance. Of course this may make it extremely difficult to know whether a legal decision is correct or incorrect, since, as noted earlier, the judge's intuition will probably not be confirmable (or refutable) by experience.

The power of legal reasoning to generate determinate outcomes could be saved by turning law into something else — economics perhaps (I gave the example of the Hand formula), or some (other?) branch of ethics or political philosophy that might be capable of generating determinative solutions to ethical or political problems. But the arguments for the transformation could not be based on legal reasoning, and there may be inherent limitations to their power to convince. Either there is a strong political or ethical consensus and it penetrates and shapes legal doctrine, or there is not — and a fragmented political and ethical discourse will no more yield determinative outcomes than legal reasoning will. Ronald Dworkin may be seen in this light as jumping the gun: treating law as the embodiment of his brand of moral and political philosophy before that brand has won enough sup-

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52. See R. NISBETT & L. ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 167-69 (1980); G. HARMANN, *CHANGE OF VIEW: PRINCIPLES OF REASONING* 35-41 (1986).

port to be entitled to dictate which legal outcomes are correct, which incorrect.

The evidence for the inconclusiveness of legal reasoning is not merely aprioristic. One familiar datum is the controversy over the politics of judicial appointees. Here is another:⁵³ American judges today are subject to exquisitely refined and elaborate rules on disqualification for conflict of interest. The tiniest conflict is disqualifying. This would make no sense if legal reasoning (including the resolution of factual disputes) were as transparent and reproducible as scientific reasoning and experimentation, for then an erroneous decision would be perceived and corrected and the judge ridiculed for having yielded to temptation. So there is an evident lack of confidence in the ability to detect judicial errors. Consistent with this point, the rules on conflict of interest have been growing stricter in lockstep with the decline of consensus in law and the concomitant growth in judicial discretion. The greater the consensus, the easier it is for judges to fix the premises of decision and thus transform the process of legal reasoning into something approximating logical deduction. Because legal reasoning is more powerful in a consensus setting, conflict of interest rules are less needful in that setting to prevent bias from operating.

One can be more precise about the decline in consensus. The immediate causes are, first, the growth of statutory and constitutional law relative to common law, which has a more logical structure than statutes or the Constitution,⁵⁴ and, second, the increase in litigation, which has multiplied judges and precedents and in particular has increased the indeterminacy of Supreme Court adjudication. The Court's capacity for decisions is relatively fixed, but it is selecting cases from an ever "richer" population, with the result that an increasing fraction of the cases it decides are difficult rather than easy cases. And, as the court of last resort, it cannot be (or at least has chosen not to be) ruled by precedent. Moreover, as the ratio of Supreme Court decisions to lower-court decisions shrinks, lower courts are increasingly deprived of authoritative precedent to guide their decisionmaking; so more of their cases fall in the open area, too.

There are deeper causes of the decline in legal consensus. Hierarchy and other forms of authority often weaken as peoples become wealthier. (So judges, like other authority figures, are trusted less — another cause of more stringent rules against judicial conflicts of interest.) An immediate effect is more litigation, which can lead to greater

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53. Well discussed in Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237 (1987) (especially pp. 249-50, 261).

54. As emphasized in Posner, *supra* note 7, at 185-87.

indeterminacy by the path sketched above. Moreover, with the decline of authority a community becomes morally heterogeneous, to the point where people may come to inhabit incommensurable moral universes within the same political community. This is the situation of the pro-abortionists and the anti-abortionists in this country today and is the reason the abortion controversy seems to admit of no rationally demonstrable resolution — seems interminable in a literal sense.⁵⁵ This standoff is repeated in a variety of legal contexts involving issues of personal, economic, religious, and sexual liberty. So when the judge reaches an epistemological impasse and, of necessity, bases decision (whether reflectively or unreflectively) on some ethical or political principle, public opinion, or whatever, he is likely to find that he has not escaped indeterminacy; and the interesting question will then be, what accident of psychology or personal history or social circumstance has moved him to adopt one social or political principle rather than another? Our nation's legal heterogeneity mirrors its moral heterogeneity.

A further point is that, partly because of restiveness with authority, partly because the growth of scientific knowledge may have increased the factfinding capacities of courts, and partly because courts are less comfortable with harsh, "inequitable" outcomes than they used to be, there has been a long-term trend in law toward replacing rules with standards, that is, with legal tests that try to take full account of the particular facts of a dispute rather than attach determinative legal significance to one or a few salient facts. Decision by standard appears to be intrinsically less predictable, less "objective," more discretionary, than decision by rule. The appearance is to some extent deceptive, given the "unruliness" of rules, discussed earlier. Nevertheless, I predict that if we ever move back toward greater reliance on rules — and there are some signs of such a countermovement — faith in law's objectivity will rise and legal skepticism will decline.

B. *The Skeptical Judge*

A skeptical epistemology of law has implications for the attitudes of judges and possibly for the style of judicial opinions. Begin with attitudes. The skeptical judge need not be a cynic; he may want to do the best he can; but he realizes that what he is doing in the interesting

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55. See A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 6-10 (1984). The case for moral skepticism across the board is powerfully argued in J. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977); the pros and cons of moral skepticism are well summarized in Moore, *Moral Reality*, 1982 WIS. L. REV. 1061. Of course this is not just a modern problem; consider the debate over slavery before the Civil War.

cases is not feeding facts and arguments into a computer that will print out the right answer. But then what is he doing? I suggest that in every case the judge is trying to reach the most reasonable result in the circumstances (which include but are not limited to the facts of the case and to legal doctrines). This position⁵⁶ resembles but is different from Holmes's conception of the judge as interstitial legislator⁵⁷ and (equivalently) Article I(2) of the Swiss Code of 1807, which provides, "If no rule can be derived from the statute, the judge shall decide in accordance with the rule which he would promulgate if he were the legislator."⁵⁸ The picture of the judge as an interstitial legislator is misleading, on a realistic view of the legislative process, because it suggests that the only difference between a judge and a (real) legislator is that the former fills the gaps left by the latter. Actually there are other differences as well, having to do with the institutional and procedural differences between judges and legislators. *Pace* Hart and Sacks,⁵⁹ a legislator is not constrained by the traditions of his office to be "reasonable"; he can if he wants be a pure practitioner of interest-group politics. The judge is constrained, and while the domain of the reasonable is large, it is not infinite.

No more am I suggesting that the judge be an arbitrator and ignore "the law." The circumstances that determine the reasonableness of a judge's decisions include statutory language, precedents, the principle of *stare decisis*, and all the other conventional materials of judicial decisionmaking. In many cases those materials will lean so strongly in one direction that it would be unreasonable for the judge to go in any other. In some the materials will narrow the range of permissible decision but leave an open area. Within the open area the judge will try to decide the case in accordance with sound policy — in those grand symbolic cases that well out of the generalities and ambiguities of the Constitution, in accordance with his vision of the good society — having due regard for the imprudence of attempting to foist an idiosyncratic policy conception or social vision on a recalcitrant citizenry.

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56. Which is close to that taken by Kent Greenawalt in a fine article, Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975). See, e.g., *id.* at 377. Compare the distinction, Humean in origin, drawn by Chaim Perelman and his followers between "rational" judicial decisions (those based on pure reason) and "reasonable" ones (those based on practical reason). See PRACTICAL REASONING IN HUMAN AFFAIRS, *supra* note 19, at 153-255. See also Robison, *The Functions and Limits of Legal Authority*, in AUTHORITY: A PHILOSOPHICAL ANALYSIS, *supra* note 25, at 112, 119.

57. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). See also B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113-15 (1921); J. BELL, *POLICY ARGUMENTS IN JUDICIAL DECISIONS* 17-20, 226-46 (1983).

58. I am indebted to Gerhard Casper for this translation.

59. See note 40 *supra*.

It does not follow that a judge who conceives his role so will be a judicial activist; judicial self-restraint, in the sense of hesitation to overturn the decisions of the other branches of government, may be part of the judge's vision of the good society. But even though judicial self-restraint is a theory about the proper behavior of judges, it is a political theory rather than the outcome of legal reasoning; it cannot be deduced from legal materials.

I can illustrate my conception of judicial decisionmaking with the example of antitrust law. The first step in deciding a tough antitrust case, a case not controlled by precedent, is to extract (not — it goes without saying — by a deductive process), from the relevant legislative texts and history, from the institutional characteristics of courts and legislatures, and, lacking definitive guidance from these sources, from a social vision as well, an overall concept of antitrust law to guide decision. A popular candidate for such a concept today is the economic concept of wealth maximization, but it is, needless to say, a contestable choice. Having made this choice (the current Supreme Court has almost, but not quite, made the choice for him), the judge will then want to canvass the relevant precedents, and other sources, for information that might help in deciding the case at hand. This is step two. Step three is a policy judgment (in some cases it might approximate a logical deduction) resolving the case in accordance with the principles of wealth maximization. Step four returns to the precedents, but now viewed as authorities rather than merely as data; the judge will want to make sure that the policy judgment made in step three is not ruled out by authoritative precedent. Actually this is the third rather than the second time that the judge will have consulted precedents, since they must be consulted at the outset to determine whether the case is indeed in the open area; if not, the four-step analysis that I have described is pretermitted.

The suggested approach describes, I believe, the actual (though often implicit) reasoning process that good judges use in the tough cases. It also recasts legal analysis in those cases as a form of policy analysis, with legal materials being used only for help in setting an initial orientation and in providing specific data, and later as a source of possible constraints. Such analysis is not arbitrary, but often it merely forecloses certain outcomes rather than generating a unique one.

In an earlier work I suggested two principles for stabilizing judicial decisions in the face of the indeterminacy problem.⁶⁰ One is the avoid-

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60. See R. POSNER, *THE FEDERAL COURTS*, *supra* note 43, at 205-06.

ance of contradiction by the judge, not only within an individual opinion but across his opinions. The problem is that this principle, if adhered to rigidly, would prevent the judge from changing his mind. The second principle, the "publicity" principle, is that the judge avow the true grounds of decision. This principle will prevent the judge from rejecting consensus views; but since with regard to many important political and social questions in the United States today there is no consensus, the principle has limited bite.

Other, more specific principles or techniques can be used to stabilize legal doctrine. These include the principle of judicial self-restraint mentioned above, rules defining and limiting the circumstances in which judges consider themselves free to overrule previous cases, and the conversion of multifactored tests to formulas or algorithms. I am intensely interested in all of these approaches,⁶¹ but none will close the open area all the way and all rest on policy judgments that can be and are contested. There are still other auxiliary principles, as one might call them by analogy to the auxiliary hypotheses of science, that might be used, for good or ill, to stabilize legal doctrine. They include strict construction, rigid adherence to *stare decisis*, favoring the underdog in close cases, and a bewildering variety of other approaches. None of them, however, can be derived by the methods of legal reasoning. All depend on a judgment of political theory.

The concept of judicial decisionmaking that I have sketched raises a question of legitimacy. Who has licensed judges to decide cases in accordance with social vision? But to state the question that way is to appeal covertly to a particular political theory, that which regards the judge as an agent of legislators, of constitutional framers, or of earlier judges, and thus insists that every judicial decision be fairly referable to a command by the principal — be pedigreed as it were. This is a perfectly good theory of judicial legitimacy — one I find attractive — but it is not the only plausible, or demonstrably the best, theory. Nor does it preclude a role for judges' social vision. For if the framers of statutory and constitutional provisions know, as they must, that there is an open area in judging that judges can fill only by bringing in policy preferences, ethical values, and the like, maybe the framers can be taken to have authorized this type of judicial decision — or maybe they just accepted it as the unavoidable price of an independent judiciary.

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61. On self-restraint, see *id.* at 198-222; on overruling, see Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 36-37 (1987); and on the conversion of multifactored tests to algorithms, see *American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589 (7th Cir. 1986).

Among alternative theories of judicial legitimacy to the pedigree or chain of title theory, two require particular emphasis in light of the themes of this article. One, the Darwinian, points out that judges seem always and everywhere (at least everywhere in the Anglo-American sphere) to have followed something like the four-step approach that I described with the aid of the example of antitrust, and infers that it would probably be futile and might be risky to make them stop. The other approach, the pragmatic (here used in the loose popular sense), argues that if this sort of judicial decisionmaking "works" we should not lose sleep over the fact that it cannot be fitted into a neat table of organization inferred from the Constitution and democratic theory.

The approach to judicial decisionmaking that I have sketched may describe the style of thinking, but it does not describe the dominant style of writing, of modern judges. Most judicial opinions even in the toughest cases depict the process of reasoning as a logical deduction (syllogistic or enthymematic) from previous decisions or from statutes viewed as transparent sources of rules, and, consistent with the logical form, imply that even the very toughest case has a right and a wrong answer and only a fool would doubt that the author of the opinion had hit on the right one. This is also the style of much law review commentary. Such a style of writing may seem obviously inconsistent with a skeptical jurisprudence — but is it really? Here is an area where skepticism about skepticism may prevent us from jumping to conclusions prematurely. Maybe the dogmatic style, pretense of humility, and ostentatious abnegation of will that characterize judicial opinions serve a social purpose. By concealing from the judges themselves the degree to which they exercise discretion, the formalist mode may make them more restrained: virtue begins in hypocrisy (maybe). By pulling the wool over the public's eyes, the pretense of certitude and neutrality may strengthen the political position of the courts in our society, and maybe that is a good thing — or maybe not. The psychology of judging may make it impossible for most judges to take a detached view of their decisions. Maybe law clerks, who today write most judicial opinions, just cannot write any other way. Only one thing is clear: We should not be so naive as to infer the nature of the judicial process from the rhetoric of judicial opinions.

The necessary inconclusiveness of the analysis in an opinion deciding an indeterminate case suggests a point about criticism of judicial opinions. It is easy in the indeterminate case, but also hollow, to show that the court failed to prove the correctness of its result. The demonstration demonstrates only what is obvious, and also and by the same

token does not establish that the contrary result would have been correct. The opinion can of course be criticized for ignoring opposing arguments, for misrepresenting precedent, for concealing the grounds of decision, and for all the other sins to which judicial flesh is heir. A proper criticism of the *result*, however, would have to "take on" the policy analysis or social vision that animated the decision and show that it is deficient.

C. *Ontological Skepticism in Law*

Skepticism about unobservable entities, especially minds, can help to clarify a variety of questions in legal theory, including, as we shall see beginning in the next section, questions directly related to my central theme of law's objectivity (or lack thereof). This type of skepticism emerges naturally from the pragmatism of a Charles Peirce (Peirce's own term, and preferable to "pragmatism" with its loose connotations) or the logical positivism of an A.J. Ayer. If the meaning of a proposition is exhausted in its effects (Peirce) or in its verification (Ayer), then propositions that make no difference even if believed, or that cannot be verified, are meaningless. This admittedly is a special and rather forced, not to mention polemical, notion of "meaning." The proposition that God created the universe, but having done so withdrew and has never intervened in its operations and will never do so, is not meaningless, even though it cannot be verified or alter our behavior. It would be better if less dramatic to say not that the statement is meaningless but that it is not worth bothering one's head about.

The pragmatist approach does nicely with the basic epistemological conundrum contained in the question, how do you know you are not just a brain in a vat, receiving impressions of an external world from a mad scientist who controls your access to the sensory world? This is the technocratic version of the age-old puzzle, how do we know there is a real world out there, when all we have is sensations?⁶² The usual efforts to defend realism against the brain-in-a-vat type of attack founder on the inability to find an external reference point by which to compare the experience of being a brain in a vat with the experience of inhabiting the "real" world. The conundrum is cleverly set up to eliminate any such reference point. If you are a brain in a vat (unlike a person dreaming, who also has a waking state), you have by assumption the identical sensations that you would have if you were not one

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62. These and related questions are well discussed in B. STROUD, *THE SIGNIFICANCE OF PHILOSOPHICAL SKEPTICISM* (1984); see also A. GOLDMAN, *supra* note 15, at 28-41; P. UNGER, *IGNORANCE: A CASE FOR SKEPTICISM* 7-46 (1975).

— so how do you know whether you are one or not? The pragmatist answer is that believing oneself to be a brain in a vat, fed impressions of an external world by a mad scientist, can have no consequences for one's behavior unless one is crazy. One carries on just as before. The proposition that one is a brain in a vat has no consequences and therefore makes no serious claim to assent.⁶³

What are the consequences of believing that other people (animals, things, or whatever) have minds? We cannot observe other minds, so why should we posit their existence? If there are no consequences to the idea of mind, maybe we should jettison the idea and thereby elide the ontological puzzle created by the notion of a mental entity able to cause physical effects.

Maybe, indeed, we use the word "mind" not to name a thing but to cover our ignorance of certain causal relationships. Dispel the ignorance and the concept ceases to have consequences and can be — more interestingly, is — discarded. For example, although a powerful computer is in some ways more articulate and intellectually able than a cat (try matching a cat in chess against a chess-playing computer), we are far more likely to impute a mind to a cat than to a computer. One reason may be that while we have complete knowledge of the causality of a computer's operations, this is not so with respect to the cat. We are not sure why it jumps onto one person's lap rather than another's, why it meows in a certain way, why sometimes it purrs and at other times it flattens its ears; we are not sure all this is just instinctual, programmed. Partly we impute a mind to the cat just in the hope that we can influence the cat's behavior in the same way that we can often influence people's behavior by assuming that they think the way we do. This would not be a plausible strategy with a computer.

My analysis implies that as human beings learn more about the world, the number of mental entities diminishes — and so we observe. Ancient and primitive peoples often impute minds to "inanimate" objects, such as the sea (this is notable in Homer — and it is unlikely that he regarded Poseidon as merely a fictional construct). Their ignorance about nature makes this a plausible imputation. The sea behaves in a tempestuous and unpredictable fashion, a little like a person; maybe it *is* a person, and therefore can be placated the way a wrathful, powerful person sometimes can be. Once we learn that the causality of the sea is different, we cease imputing mental activity to it. If we understood the stock market better, we would cease personifying it.

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63. An alternative approach, also pragmatist, would be to regard the external world as simply the best hypothesis about reality.

The analysis further implies, as Oliver Wendell Holmes believed, that the role of mental entities in law, such as "intention," should diminish as law becomes more sophisticated.⁶⁴ Holmes illustrated his point with the legal concept of "deodand," an object (say the wheel of a cart) that kills a person, and that in early law frequently is punished as a criminal on the theory (probably believed, and not just a legal fiction) that it has an evil will which caused it to kill. Holmes believed that as law matures, liability — even criminal liability — becomes progressively more "external," that is, more a matter of conduct than of intent. For example, if we had a complete model of the criminal act, so that we could predict a crime with one hundred percent accuracy from information about a person's genes or upbringing, we probably would not require proof that the act had been "intended" in order to punish the actor (maybe we would not use the word "punishment" any more, though). We would talk about people being "programmed" to kill rather than "deciding" to kill. We would deal with criminals as we deal with unreasonably dangerous machines. Holmes foretold such a development.⁶⁵

William Landes and I have discussed intentional torts from an economic standpoint in which the notion of "intent" plays no role other than as a proxy for certain characteristics of the tortious act, notably a big disparity between the cost (great) of the act to the victim and the (small or even negative) cost to the injurer of avoiding the act.⁶⁶ I now see that there is no element of paradox in our proceeding thus.⁶⁷ For a pragmatist, the concept of "intent," rather than being constitutive of human nature, is merely a stopgap. Indeed, it is a confession of ignorance, and if economics can help us to dispel the ignorance it may help us to dispense with the concept.

Our tactic was a natural one, however weird it might have seemed to conventional lawyers, because the process by which hypostatized mental states give way to behavioral hypotheses is central to economic analysis. The "utility function" in economics is a parallel concept to "intent" in law. The utility function summarizes the tastes, values, preferences, and objectives of the individual characterized by the func-

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64. This is the major theme of O.W. HOLMES, *THE COMMON LAW* (1881). The deodand example is in Lecture 1; the (exaggerated) emphasis on a historical trend toward external standards of liability pervades the book.

65. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 470-71 (1897).

66. See W. LANDES & R. POSNER, *supra* note 13, at 149-89.

67. So I am not surprised to find a rather similar analysis of criminal intent by a philosopher. See Kenny, *Intention and Purpose in Law*, in *ESSAYS IN LEGAL PHILOSOPHY*, *supra* note 37, at 146, 159-61; see also Nuttall, *Did Meursault Mean to Kill the Arab? — The Intentional Fallacy Fallacy*, 10 CRIT. Q. 95 (1968).

tion. An important goal of economic research is to change as many of the elements of the utility function — which are mysterious mental entities — as possible into parameters, which can be measured.⁶⁸ So one might begin by suggesting that some people have a “taste” for obtaining a college education but then show that this taste is instrumental to a more general goal such as income maximization. The propensity to go to college will then be a function of the effect of college in raising one’s lifetime income and of the cost of college.⁶⁹ Ideally one could predict whether people would go to college without one’s having to know anything about their thoughts on the subject, and one might stop talking, in analytical work at least, about people “wanting” to go to college or “thinking about” going to college. People would still have desires and thoughts, but these would be strictly epiphenomenal.

Generalized, this example may seem to imply that if we could confidently predict people’s behavior from the nonmental facts about them, the very idea of the human mind would cease to be useful and might be abandoned. Virtually no one expects to be able to push behaviorism that far: Not only are the data requirements staggering, but it is hard to imagine how even in principle a model of human behavior could predict the reactions by the persons modeled to the predictions made about their behavior. The illusion of freedom may be more than illusion; there may be real limits to a determinist view of human behavior; and free will implies a mind, though mind need not imply free will. At all events, mentalist explanations are inescapable at present.⁷⁰ One reason is the essential role of the imagination in practical reasoning.

Yet much of the limited progress that law has made as a method of effective social control, particularly in the area of criminal justice, has come from the replacement of mentalist by behavioral explanations — not only in dealing with deodands, but also in determining how severe the punishment of particular offenders and offenses should be. Criminologists have developed models of recidivism that enable them to predict (though very imperfectly⁷¹), on the basis of characteristics having nothing directly to do with the criminal’s thoughts, or “free will” —

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68. For a particularly bold example of this approach, see Stigler & Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76 (1977).

69. See G. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION (2d ed. 1975).

70. See Putnam, *Logical Positivism and the Philosophy of Mind*, in H. PUTNAM, *supra* note 6, at 441, 446.

71. See S. KLEIN & M. CAGGIANO, THE PREVALENCE, PREDICTABILITY, AND POLICY IMPLICATIONS OF RECIDIVISM 37-38 (1986); von Hirsch & Gottfredson, *Selective Incapacitation: Some Queries About Research Design and Equity*, 12 N.Y.U. REV. L. & SOC. CHANGE 11, 44-45 (1983-1984). See generally N. MORRIS & M. MILLER, PREDICTIONS OF DANGEROUSNESS IN

characteristics such as drug addiction, poor education, youth, and criminal record — which criminals are likely to commit crimes after being released from prison. Furthermore, while we punish premeditated crimes more severely than impulsive ones, conceivably we do this for the nonmentalist reason that the criminal who premeditates is more likely to succeed in his criminal aim (and thus do greater harm) than the impulsive criminal and is harder to apprehend and punish and therefore less likely to be punished. On both counts, deterrence requires a heavier punishment if the criminal is caught.⁷² Moreover, we punish the premeditating criminal without worrying about what was going through his head when he was committing the crime, by employing a behaviorist account of deliberation.⁷³

There likewise is no need to assume the existence of free will in order to distinguish between the defendant who would not have killed if he had not had insane delusions and the defendant who would not have killed had he not been raised in a poor home by unfeeling parents. In the first case the threat of punishment is (we think) not efficacious; in the second it probably is, one bit of evidence being that most people raised in poor homes by unfeeling parents do not murder. So there are deterrent benefits from punishment in the second case that are not present in the first case.

Many areas of legal inquiry may be able to do quite nicely without the idea of mind. Perhaps the concept of causality — another unobservable entity — can also be dispensed with, as Landes and I have argued with respect to causation in tort law.⁷⁴ And reputation plays a mischievous role in law when viewed as an (unobservable) entity, but a useful role when reconceived as an attitude, or disposition, on the part of potential transactors. When reputation is regarded as a thing owned by the person whose reputation is in issue, it is easy to suppose that someone who reveals a true but unflattering fact about the person is taking something away from him and should be liable for the resulting harm. But what is actually involved is facilitating informed transactions with the person by dispelling misconceptions that actual or potential transactors may have.

THE CRIMINAL LAW (National Institute of Justice, Research in Brief, Mar. 1987), and references therein.

72. See Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1222-23 (1985).

73. See the fascinating discussion in Nuttall, *supra* note 67. Even some philosophical accounts of deliberation “reduce” it to cost-benefit analysis, means-ends rationality, or decision theory — all closely related, and arguably deterministic, accounts of human action. That is Wellman’s strategy, as we saw; see also D. CLARKE, *supra* note 6, at 15-69, 109-26. So it may be possible, if paradoxical, to understand premeditation itself in nonmental terms.

74. See W. LANDES & R. POSNER, *supra* note 13, at 228-55.

The broader point — which may explain in part why I, devotee of economic analysis of law that I am, am a skeptic about legal reasoning — is that economics itself rests on a skeptical ontology. The economist uses abstractions such as marginal cost, utility, and rationality not to identify entities, mental or otherwise, but to expand our knowledge of the observable world. (Rationality to the economist is not a conscious state, but rather the state in which means are well fitted to ends.)⁷⁵ Economic models are concerned with predicting behavior — a typical prediction would be that a rise in price (holding quality and other prices constant) will result in a reduction in the amount of the good that is bought — rather than with establishing the existence of a metaphysical world of costs, benefits, utility, efficiency, perfect competition, and the like. So if the economic approach to law, or some other behavioral approach to law, catches on, mentalist conceptions may play a diminishing role in law; some legal thinkers will oppose such approaches for this very reason.

D. *Behaviorism and the Judicial Perspective*

In commending a behaviorist approach to law, and concomitantly deemphasizing mentalist explanations, I may seem to be assuming a stance inconsistent with my profession as a judge, which requires me to make decisions, implying mental activity and the exercise of free will. The behaviorist perspective is external rather than internal. How can it possibly be adequate to the self-conscious activity of a judge?

There is no inconsistency. Parents, economists, psychologists, marriage counselors, and probation officers all have the experience of being able to predict correctly what another person will do even when the person himself is genuinely undecided.⁷⁶ It is not that the expert or the grown-up knows the contents of another's mind better than the other does (an almost meaningless suggestion), but that the expert or parent has a nonmentalist method of prediction which the person whose actions are being predicted either does not command, for want of the requisite training or experience, or cannot use on himself be-

75. On the economist's conception of rationality, and on the methodology of economics more broadly, see *RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY* (R. Hogarth & M. Reder eds. 1987); B. CALDWELL, *BEYOND POSITIVISM: ECONOMIC METHODOLOGY IN THE TWENTIETH CENTURY* (1982); A. ROSENBERG, *MICROECONOMIC LAWS: A PHILOSOPHICAL ANALYSIS* (1976); M. FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3 (1953).

76. Cf. D. HUME, *A TREATISE OF HUMAN NATURE* 408 (L.A. Selby-Bigge ed. 1888) (Bk. II, pt. 3, § 2) ("We may imagine we feel a liberty within ourselves; but a spectator can commonly infer our actions from our motives and character . . .").

cause of his emotional involvement (it is much easier to be analytical about other people than about oneself). Many judges are quite predictable;⁷⁷ no judge thinks he is predictable. Courts, it is true, as distinct from individual judges, *are* unpredictable; but this is a result once again of sample bias. If parties to a dispute converge in their predictions as to how the court will decide their case, they will settle the case rather than litigate it. So the sample of litigated cases is drawn from those disputes in which the court's resolution is difficult to predict — as well it may be: In a court with seven members, if three always vote a stereotyped “conservative” line and three always vote a stereotyped “liberal” line, the unpredictability of the remaining judge will make the court as a whole unpredictable.⁷⁸

We should hesitate to take at face value descriptions of judges as striving always to find the correct answer rather than exercising discretion or enacting their personal values and preferences. A teenager may honestly feel that he is deliberating over a choice of colleges that his parents know is foreordained. Adults delude themselves as well; what is more common than lack of self-knowledge? We should distrust not only the self-serving descriptions of the judicial mind by judges but also descriptions by academics who, when they are not merely inferring the judicial mentality from the rhetoric of judicial opinions — a perfect illustration of the difficulty of obtaining knowledge of other minds — are projecting onto persons who generally lack academic background, temperament, tastes, and aptitudes the academic's own vision of what it would feel like to be a judge.

Whatever judges may say or even believe, there is little reason to doubt that they exercise considerable discretion and frequently must and do decide indeterminate cases. Besides everything I have said on this score so far, consider the following points. First, a judge may feel constrained only by virtue of a network of principles such as self-restraint and *stare decisis* that are (1) chosen by judges on (2) contestable grounds — two facts the judge may forget. Second, because policy and ethical considerations are permissible elements of decision in our judicial culture, the judge may lack a distinct sense of where

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77. Admittedly, little progress has been made in predicting judges' votes on the basis of ideology, political party affiliation, etc. The recent literature on judicial behaviorism is illustrated by S. GOLDMAN & T. JAHNIGE, *THE FEDERAL COURTS AS A POLITICAL SYSTEM* (3d ed. 1985) (especially pp. 134-84); Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911 (1978); Spaeth & Teger, *Activism and Restraint: A Cloak for the Justices' Policy References*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 277 (S. Halpern & C. Lamb eds. 1982); Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981*, 78 AM. POL. SCI. REV. 89 (1984).

78. And that is apart from the vote-aggregation problems discussed in Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 814-23 (1982).

legal reasoning leaves off and policy judgment or social vision (the essential tools for resolving the indeterminate case) begins. Indeed, the judge is likely to lack a sharp sense of the line between the pure judicial hunch and a well-founded proposition of law. Third, neither the conditions of judging nor the methods of selecting judges (including self-selection) would lead one to expect the deep introspection that so much academic literature attributes to judges. The judge's essential activity is the making of a large number of decisions in rapid succession, with very little feedback concerning the correctness or consequences of the decisions. People who are uncomfortable in such a role do not become judges, do not stay judges, or are unhappy judges. The judge makes the best decision he can and rarely looks back. He does not have the luxury of withholding decision until persuaded by objectively convincing arguments that the decision will be correct, and he no more wants to wallow in uncertainty and regrets than a law student wants to retake an exam in his mind after having taken it in the examination room. The very foundation of Peirce's pragmatism is the idea that people hate being in a state of doubt and will do whatever is necessary to move from doubt to belief.⁷⁹ Judges decide cases with greater confidence than the nature of judicial decisionmaking permits, and they write with more confidence than they feel.

Fourth, like other people judges want to diffuse responsibility for their unpopular, controversial, or simply most consequential actions, and they do this by persuading themselves that their decisions are dictated by law, rather than the result of choice. Finally, as no one likes to think he is making a lot of mistakes, the psychology of judging includes the belief that one is almost always (some judges think always) right. But since "[c]ertitude is not the test of certainty,"⁸⁰ it would be a mistake to infer from judicial rhetoric and beliefs that judges are usually right in the difficult cases (or even that this is a meaningful statement), or that the edifice of American justice painstakingly created by two hundred years of adjudication is demonstrably superior to a variety of alternative edifices that might have risen in its place. Compared to chess players, military officers in war, and businessmen in competitive markets, judges receive little information about the effects of their decisions, information that might enable correction or improvement; and the methods of legal reasoning are not sufficiently trenchant or incisive to enable the correctness of decisions in difficult cases to be determined a priori with any reliability. The very criteria

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79. See C. PEIRCE, *The Fixation of Belief*, in PHILOSOPHICAL WRITINGS OF PEIRCE 5, 10 (J. Buchler ed. 1955).

80. O.W. HOLMES, *Natural Law*, in COLLECTED LEGAL PAPERS 310, 311 (1920).

for evaluating legal decisions are heavily political and contested. And to a great extent judicial decisions are “winners’ history,” for unless there is a dissenting opinion the decision is likely to state the facts and deploy the authorities in a one-sided fashion that cannot be detected without more digging than most observers will have the time or inclination to do.

What then is the function served, when a case is indeterminate, by the justificatory (as distinguished from the rule-defining) part of the judicial opinion? Is it a string of lies concealing the actual grounds of decision, which are unavowable personal and policy preferences? It need not be. The fact that a position cannot be shown to be correct does not mean that it is the product of impulse or meanness. The position may reflect a social vision that can be articulated and defended even though it cannot be proved right or wrong. Few ethical propositions — almost none that people are interested in debating — can be proved right or wrong, yet ethical discourse is not fruitless; and in indeterminate cases legal discourse is a form of ethical or political discourse.

This is no reason for complacency. The time pressure under which judges work, the narrowness of their training and experience, and the politics of the selection process, which guarantee that many judges will be intellectually mediocre, limit the capacity of the judiciary to contribute to ethical and political discourse. Aggressive as our judiciary has been for two centuries, one may question how much it has contributed to American social thought by virtue of the power of its reasoning and expression rather than by its political power. Could any judges besides Holmes, Brandeis, and John Marshall claim to be significant shapers of the American mind?

Additional reasons for downplaying the importance of legal reasoning can be found in the history of judicial reputations. The greatest judges by common professional consent are not the ones who write the best-reasoned, most professionally deft, most logical, polished, careful opinions.⁸¹ Instead, with a few exceptions such as Henry Friendly and (the second) John Harlan, they are those who most vividly express a vision of law (or of a part of law) or society. I am thinking in particular of — besides Marshall, Holmes, and Brandeis — Cardozo, Jackson, and (Learned) Hand; and in England, Mansfield and Bramwell. A separate point to note is the “dialectical” or back-and-forth movement of a typical Learned Hand opinion; more than any other judge

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81. This theme is developed in R. POSNER, *supra* note 4, ch. 6.

he discloses the essential style of legal reasoning, which is a groping amidst uncertainties rather than a direct logical thrust.

E. *Right Answers: Historical and Literary Analogies*

Ronald Dworkin has flung down the gauntlet to legal skepticism by arguing that there are right answers to even the most difficult and controversial legal questions. In a well-known essay⁸² he asks whether the existence of controversy over the legal soundness of a case demonstrates that there are no right answers to difficult legal questions, and he answers "no." Here is one of his examples. Controversy continues over the question whether Richard III had the little princes killed. Nevertheless, he either did or did not; so there is a right answer to the question notwithstanding the controversy over it, and we would arrive at that answer if only we knew more of the facts; and so it is with law.⁸³

But "the law" does not have the same ontological status as Richard III and the little princes. Although it is a nice philosophical question what exactly it means to have knowledge of the past, there is no reasonable doubt that Richard III and the little princes were real people and that the princes were killed by someone, which is to say, either at Richard III's direction or not at his direction.⁸⁴ The fact that it is a question about the past no more makes it unanswerable (in principle) than the fact that the theory of evolution is a theory about the past makes the theory unscientific. But if we ask, for example, whether the fourteenth amendment forbids public school segregation, we are not asking a question about, or only about, historical events — things that happened. We might be asking such a question if we thought the only basis for an affirmative answer would be that the draftsmen and ratifiers of the fourteenth amendment had meant to order the courts to forbid public school segregation; for then the question whether they issued this order would be like the question whether Richard III or-

82. R. DWORKIN, *Is There Really No Right Answer in Hard Cases?*, in A MATTER OF PRINCIPLE 119 (1985).

83. *Id.* at 120. The example is offered in passing and I may be making too much of it, especially since Dworkin later retracted the metaphysical (ontological) implications of the "Right Answer" paper. See R. DWORKIN, *LAW'S EMPIRE* at viii-ix (1986). For additional criticisms of the thesis, see Janzen, *Some Formal Aspects of Ronald Dworkin's Right Answer Thesis*, 11 MANITOBA L.J. 191 (1981); Moore, *Metaphysics, Epistemology and Legal Theory* (Book Review), 60 S. CAL. L. REV. 453 (1987); Greenawalt, *supra* note 56.

84. I am ignoring the intermediate states of encouragement, ratification, and condonation, plus the possibility that the little princes died of natural causes, or in an accident, rather than being killed. Here is a cleaner example of a question that has a right answer but not one that is likely ever to be discovered: "[I]t is either true or false that there was an odd number of blades of grass in Harvard Yard at the dawn of Commencement Day, 1903." Quine, *What Price Bivalence?*, in W.V. QUINE, *supra* note 14, at 31, 32.

dered the little princes killed. But it is not Dworkin's theory of constitutional interpretation that we should ask whether a challenged practice was in the conscious thoughts of the Framers. On the contrary, he thinks we should consider the level of generality of the provision, the values and purposes that inform it, the course of events unforeseen by the Framers, and the judicial decisions that have interpreted the provision. In other words, ascertaining "the law," for Dworkin as for most legal thinkers, is not a simple matter of asking whether the Framers issued an order one or two centuries ago to contemporary judges to do thus and so. Hence the law is not the same kind of entity as the events of Richard III's reign. (Actually it is no kind of entity, as we shall see.) Even to ask whether "it is true" that the fourteenth amendment means this or that has an odd ring.

Dworkin moves quickly off the Richard III example and tries a different tack: suggesting that correctness in law is similar to correctness in literary interpretation.⁸⁵ A literary interpretation succeeds to the extent that it accounts for the relevant data — the incidents, language, etc., of the work. Likewise, suggests Dworkin, a legal interpretation succeeds to the extent that it accounts for the relevant ethical and political data that inform legal decisionmaking. But despite the scientific form of the "fitness" inquiry — an interpretation is proposed as a hypothesis, and refuted or supported by its success in explaining the data furnished by the text — a literary interpretation is not verifiable by the methods of exact inquiry, because the data do not lend themselves to experimental or statistical observation. No more is a legal interpretation, which is why I earlier classified interpretation as a problem in practical reason rather than exact inquiry.

An example may help. A literary counterpart to the question whether Richard III ordered the little princes killed is, did the Macbeths (in Shakespeare's play) have children? This may seem an absurd question, treating as real what, for Shakespeare's purposes anyway, are fictitious entities. But it is not absurd. A reader or viewer of the play is entitled to wonder why Macbeth would be upset (as he plainly is) that Banquo's descendants will be kings of Scotland, if Macbeth had no children of his own. For then his own descendants cannot be kings of Scotland, and Macbeth feels no enmity toward Banquo apart from the question of whose descendants will rule. (Could he

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85. See R. DWORKIN, *supra* note 82, at 138-43. Dworkin also suggests, *id.* at 144, that law is not indeterminate so long as no observer would describe the case as a "tie." Here metaphor gets in the way of understanding. The arguments in difficult cases cannot be "weighed," so it is indeed awkward to describe them as being in "equipoise." Yet a dispute in which it is impossible to tell which side has the stronger argument is indeterminate. See Mackie, *The Third Theory of Law*, 7 PHIL. & PUB. AFF. 3, 9 (1977).

perhaps be jealous of Banquo for having children, just because he (Macbeth) is childless? But there is no suggestion of this.) The reader may therefore conclude that the hypothesis that the Macbeths did have children, or at least were planning to have children, makes the best fit with the “data” provided by the playwright. Dworkin believes that the same sort of reasoning would enable us to decide whether *Brown v. Board of Education* and *Roe v. Wade* were decided correctly.

But the analogy is unsatisfactory because the question about the Macbeths’ children is unanswerable after all. Macbeth’s concern about Banquo’s descendants is one datum but against it is the complete silence of all of the characters about the Macbeth children.⁸⁶ If Macbeth had children, the question of what to do with them — and in particular how to make sure that none of them is allowed to succeed Macbeth on the throne of Scotland — would be bound to arise and be discussed in the world created by the play. (And it is impossible to visualize the Macbeths as a young couple planning to have a family sometime in the future!) The hypothesis of Macbeth progeny may appeal to a literal-minded person but is incongruous with the atmosphere of the play — one simply cannot imagine the Macbeths as parents. So in one sense they must have children and in another and equally strong sense they must not. This seems illogical, but not in an aesthetic sense, which is the relevant one in literary interpretation.

It seems illogical, moreover, only because I have implicitly assumed that the criterion for deciding whether one has answered the question about Macbeth’s children correctly is psychological realism. The assumption may make the question less intractable or more so, but either way it is an arbitrary assumption, or at least a highly controversial one — like making feminism or utilitarianism or Roman Catholicism one’s criterion for deciding those legal cases that will not yield to the methods of legal reasoning.

Dworkin is correct in his larger point, that the existence of controversy is not proof per se of indeterminacy, but the point has little bite once we distinguish between determinacy in principle and determinacy in practice. There is a sense in which there must be a right answer to the question about Richard III, but if the answer is inaccessible, it is as if there were no right answer. The pragmatist would say (though I do not agree) that in such a case there is no right answer even in principle; the question is meaningless.

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86. Lady Macbeth does mention, in the famous “pluck’d my nipple from his boneless gums” speech in Act I, scene 7, that she had nursed a baby, presumably her own; but there is no indication the child is still alive.

Dworkin's comparison of statutory to literary interpretation undermines his endeavor in two other respects:

1. It is easy to find literary examples of utterly indeterminate questions: not perhaps the question whether the Macbeths had children, but the question whether the Macbeths had fair or swarthy complexions, or blue or brown eyes. There is an infinity of questions like that.⁸⁷ They are ignored because nowadays no serious person is interested in them. But suppose a law were passed entitling anyone with such a question to compel the Modern Language Association to answer it; then we would see "litigation" over indeterminate questions with a vengeance. Many legal questions are indeterminate in a similar sense. The authors of the relevant texts just have not provided the reader with enough information to yield an answer; and the judges are not supposed to say, we won't decide your case because we don't have enough information to figure out what the right answer is. They may resolve the indeterminate case by placing the "burden of persuasion" on one party, but that just regresses the debate to who should be assigned the burden.

Imaginative writers might seem to have greater license than legislators to omit essential clues or to decide what may count as a relevant question about the text. Yet, often, as the price of obtaining majority agreement, legislators deliberately leave a question unanswered, just as Homer deliberately omitted from the *Iliad* a description of Helen's appearance. In both cases there is a deliberate gap, which (in the legal case) our conventions of adjudication require the judges to fill rather than ignore.

2. People with similar educational backgrounds, politics, religious beliefs, and so forth tend to interpret literature convergently, while people with different backgrounds, etc., tend to interpret it divergently; and it is much the same in law. When the legal profession is tightly homogeneous in social and educational background, politics, religion, professional experience, and so forth, it tends to agree on the premises for decision; and the more agreement there is on premises the more legal reasoning can follow the syllogistic model, and then law will appear to be (is, in a sense) objective, neutral, impersonal.⁸⁸ Unfortunately for the profession's *amour propre*, which is bound up with the idea that law is objective, neutral, impersonal, the American legal

87. See the interesting discussion in S. BLACKBURN, *SPREADING THE WORD: GROUNDINGS IN THE PHILOSOPHY OF LANGUAGE* 203-10 (1984).

88. See Simpson, *The Common Law and Legal Theory*, in *OXFORD ESSAYS IN JURISPRUDENCE* 77, 95 (A.W.B. Simpson ed. 2d ser. 1973); cf. Fish, *Interpretation and the Pluralist Vision*, 60 *TEXAS L. REV.* 495, 498 (1982).

profession today, reflecting larger fissures in the society, is politically and culturally divided. The profession's heterogeneity, interacting with the predominance of forms of law that give judges great discretion — common law, constitutional law, and statutes enacted by legislatures in which party discipline is so weak that many statutes represent complex, hard-fought, even unprincipled compromises — has produced a legal terrain in which the consensus that might fix the premises for decision and allow law to proceed on logical tracks is unattainable.

F. *What Is Law?*

1. *Holmes and the Prediction Theory of Law*

Ronald Dworkin is unusual in trying to use epistemology to pump up rather than deflate the certitude of legal reasoning. Almost all self-consciously epistemological reasoners in law — notably Holmes, the legal realists who followed him, and their perhaps illegitimate descendants, the adherents of the critical legal studies movement — have been led toward skepticism. For although most epistemologists have tried to refute skepticism, their efforts have not been highly successful and thus have tended rather to make people acutely conscious of the weak groundings of human knowledge than to create a robust faith in the power of reason.

Holmes was a precursor of the logical positivists, who believed, as I have noted, that statements that are neither analytic (definitional, logical, or mathematical) nor scientifically verifiable are devoid of truth content. As he was also keenly aware of the limited scope for syllogistic reasoning in law, he embraced a pervasive skepticism about the power of reason to yield determinate answers to legal questions. This skepticism expressed itself in a variety of ways. Holmes's fondness for external standards of liability, which I have already discussed, is one. Others include the "marketplace of ideas" metaphor for freedom of speech,⁸⁹ a metaphor that rests on skepticism about the possibility of settling intellectual disputes by reason which could then be embodied in law;⁹⁰ the characteristically abrupt, incompletely rea-

89. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

90. Parts of the *Abrams* dissent seem almost a paraphrase of Peirce's essay *The Fixation of Belief*. Compare C. PEIRCE, *supra* note 79, at 13-14, with *Abrams*, 250 U.S. at 630. For another example, compare O.W. HOLMES, *supra* note 80, at 310 ("our test of truth is a reference to either a present or an imagined future majority in favor of our view"), with Peirce, *How to Make Our Ideas Clear*, in C. PEIRCE, *supra* note 79, at 23, 38 ("The opinion which is fated to be ultimately agreed to by all who investigate, is what we mean by the truth . . ."). And note the affinity of these remarks to Popper's philosophy of science, mentioned earlier. Holmes, Peirce, and Popper have much in common. The possibility that Holmes derived his theory of external standards of

soned nature of many of Holmes's most famous opinions;⁹¹ the "hands off" stance that he adopted toward state and federal legislation (other than legislation restricting free speech) that he personally thought foolish or worse but could not be utterly confident was unsound; the reduction — quintessentially pragmatist — of law to consequences, as in Holmes's theory that a contract is a promise to pay unless a stated contingency (performance, or some excusing condition) occurs;⁹² and, above all, his conception of law as merely a prediction of what judges would do when confronted with a particular set of facts.⁹³

The prediction theory will help us focus the issue of the law's ontology. On the one hand Holmes was not likely to posit the existence of so abstract an entity as "the law"; on the other hand, as a good pragmatist, he realized that since the law affected behavior, it was "real" in some sense. The solution to the dilemma was to ask how law affects behavior. The answer is that the state has coercive power, and people want to know how to keep out of the way of that power. So they go to a lawyer for advice. All they want to know is whether the power of the state will come down on them if they engage in a particular course of action. To advise them the lawyer must predict how the judges, who decide when the state's coercive power can be brought to bear against a person, will act if the client engages in the proposed course of action and is sued for it. So law is simply a prediction of how state power will be deployed in particular circumstances. Law, an abstract entity, is dissolved into physical force, also an abstract entity but one that has somehow a solidier ring and can be interpreted in behavioral terms: If I do *X*, the sheriff will eventually seize and sell assets of mine worth \$*Y*.

In federal diversity cases and (other) choice of law cases, where the judge is applying the law of another jurisdiction, the prediction theory of law may seem at once correct and inconsistent with Holmes's skepticism. For in such cases the judge's function *is* to predict how (other)

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liability from Peirce is explored in Note, *Holmes, Peirce and Legal Pragmatism*, 84 YALE L.J. 1123 (1975).

91. See White, *The Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633, 650-52, 664, 668-71 (1982); Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889-1910*, 52 U. CHI. L. REV. 867, 900 (1985); Currie, *The Constitution in the Supreme Court: 1910-1921*, 1985 DUKE L.J. 1111, 1145-55, 1161; Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1379-85 (1986). A good example is Holmes's terse and eloquent dissent in *Olmstead v. United States*, 277 U.S. 238, 469-71 (1928), describing the government's illegal wiretapping as "dirty business," and stating, "We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."

92. See O.W. HOLMES, *supra* note 64, at 300.

93. See Holmes, *supra* note 65, at 460-61.

judges would decide, and prediction may appear to be a method of rendering the decisionmaking process determinate. But the appearance is deceptive. The method involves the judge's putting himself in the shoes of another judge, and aside from the difficulties of doing this, once there he will face the same indeterminacies as would afflict that judge's effort to decide the case. As is well known, the prediction theory will not help *that* judge; a judge cannot decide a case by predicting his own decision. So Holmes's solution seems (an important qualification, as we are about to see) just to push the analysis back a step. If the judge decides the case in accordance with what he thinks "the law" is, we have not escaped the ontological question; for what is this entity "the law" that the judge is going to steer by? The traditional answer is that the law is the set of rules of social behavior that carry substantial sanctions, so the rules are mediated by a corps of officials (the judges) thought to have the requisite competence, disinterest, and integrity to be entrusted with the responsibility for applying rules of such fell significance. I have discussed the inadequacies of this conception, and need repeat but one point here. Because legal rules frequently, perhaps characteristically, do not make a perfect fit with the facts that lawyers and judges subsume under them — either the facts were not foreseen when the rule was adopted or the rulemakers were not able to agree (or just would not agree) on how to deal with those particular facts — the judge has to decide whether to extend or modify or "interpret" the preexisting rule. In such a case the rule does not rule, yet the case is decided somehow. So law must be more than rules, unless we want to say that judges are lawless whenever they exercise the kind of discretion I have just illustrated.

We can save Holmes's account and reconcile it with his skepticism by noting that if the law is just a prediction of what the judges will do, it is meaningless to ask how the judges can use prediction to discover the law. The law is not a thing they discover; it is the name of their activity.⁹⁴ They do not act in accordance with something called "law," they just act; and the law is the bar's attempt to discern the regularities in their action. If this is right, the question whether "the law" is just the rules, or also includes the considerations that judges take into account when the rules "run out" or when a brand-new rule is being created, is a pseudo-question, whose significance is political and ideological rather than analytical. Because the word "lawless" is a pejorative and because aggressive judges want to minimize the appearance of judicial discretion in order to give their (discretionary)

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94. I am indebted to Robin West for this point.

decisions a more "objective," less political, and therefore more authoritative ring, commentators such as Ronald Dworkin who approve of an aggressive judiciary define "the law" as broadly as possible, while those desiring greater restraint define it more narrowly. It is just a semantic game (the game of "persuasive definition"), and it seems unworthy of the academic attention that it has received. The question whether judicial decisionmaking should be more or less freewheeling is interesting and important, but it is not a question about the nature of law. The law is not a thing, and it has no nature. Like "literature," "time," "fascism," "democracy," and "beauty," the word "law" is not referential, that is, does not denote some set of objects, physical or mental, real or fictitious, as the word "chair," or "rabbit," or "unicorn," or "ice cream," or "electron," or "fear" does, though often with much ambiguity at the edges (and some of my examples are controversial). The word can be used, but not defined; "definitions" of law are political statements or jurisprudential claims.

If "law" is the name of an activity (what judges and other legal actors do) rather than a set of concepts, the question is not whether the law consists just of rules laid down by public authorities or also includes some "higher law" that can be used to change the rules, adjust them to new circumstances, or (what is really the same thing) fill gaps between them; it is whether judges can decide cases by modifying old rules or creating new ones without being assailed by indignant charges of lawlessness. They can; so apparently one can still be "doing law" even if one is not just applying rules. It does not follow that one is appealing to a metaphysical or moral entity — "natural law." Law is something that licensed persons (judges, lawyers, legislators) do rather than a box that they pull off the shelf when a legal question appears, in the hope of finding the answer in it (thus inviting debate over whether the box includes only rules, or rules plus principles, or rules, principles, and policies — perhaps the whole of political morality). The common law, though judge-created, is law; so is equity jurisprudence, with its open-ended maxims; so are freewheeling interpretations of statutes and the Constitution; and so are exercises of avowedly discretionary powers by judges, such as the power to determine what sentence to impose in a criminal case within the range fixed by the legislature (a discretion now curtailed for federal judges by the new Sentencing Guidelines).

I want to make three more points about the prediction theory of law. First, it cannot be a complete theory, because it implies in principle a slavish subordination of the judgment of lower-court judges to the will of higher-court judges. The first task that the theory assigns

to lower-court judges in a case is to predict how their superiors would decide the case, and only if they cannot predict are they allowed to exercise an independent judgment. But I said earlier that we want lower-court judges to exercise some independent judgment. This point weakens the prediction theory but also and more important suggests the indefinability of law, its inexhaustibility by any theory.

Second, and in tension with the first point, the prediction theory implies a more creative scope for the lower-court judge confronted by a seemingly dispositive precedent decided by a higher court than the theory that law is a set of concepts. The latter might be taken to imply that the precedent *is* the law — it is a part of the box labeled “law.” The prediction theory teaches that the function of the lower-court judge is to predict how his case would be decided by the higher court. Precedents are essential inputs into the predictive process but they are not “the law” itself, so if the lower-court judge has a strong reason to believe that the higher court would not follow its own precedent if the case arose today, he is not being lawless in declining to follow it.

Third (and closely related), the prediction theory avoids the following paradox created by the theory of law as a set of concepts. Suppose that two lower courts, *A* and *B*, have before them cases identical both to each other and to a case decided by the higher court many years ago but never overruled, or even substantially undermined by later decisions. Nevertheless it is evident to both *A* and *B* that if the same case arose today the higher court would abandon the precedent because experience has shown that it was a big mistake. *A*, which adheres to the prediction theory, disregards the precedent — and is affirmed. *B*, which adheres to the law-is-a-set-of-concepts theory, follows the precedent — and is reversed. On the prediction theory, *A* is right and *B* is wrong and therefore the affirmance of *A* and reversal of *B* are just what one would expect in a system where error is corrected by higher courts. On the law-is-a-set-of-concepts theory, *A* is wrong and *B* is right, producing the paradox that the court which decided the case in accordance with law was reversed as if it had committed an error, while the court that flouted the law was affirmed. The fact that in our system a higher court is allowed to overrule its own precedents is thus an argument in favor of the prediction theory.

2. *Nuremberg and the Hart-Fuller Debate*

Because I do not believe that law is fruitfully regarded as a set of concepts, I am impatient with such old chestnuts as whether the Nuremberg trials were legitimate even though the laws applied in them had been invented for the occasion and thus had not existed (other

than as ethical principles) when the defendants had violated them, and even though the defendants had been acting not only in conformity with, but sometimes under the compulsion of, Nazi laws that were valid according to the applicable “rules of recognition” of the Third Reich. It is no good saying that since the Nuremberg Tribunal was a court, its judgments were law; whether and in what sense it was a court are deeply problematic. Rather than ask whether the Nuremberg judgments were “lawful,” we should ask whether it was sensible to punish the Nazi leaders using the forms of law. It was unthinkable to let those monsters go free, so the question was whether to kill them summarily or after a trial. The value of the trial, deficient as it was in the elements of due process, was that it enabled a public record to be compiled and gave the defendants a chance to say what they could in their behalf, which for most of them was very little. As a result their moral guilt was established more convincingly than if they had been liquidated hugger-mugger.

Reading from a distance of thirty years the famous Hart-Fuller debate on (among other matters) the legality of Nazi laws,⁹⁵ I am struck by how little was at stake. Hart expresses fear that if law and morals are run together, the moral condemnation of the Nazi laws will be diluted; so he wants to make the word “law” synonymous with positive law, which the Nazi laws were (but the laws enforced by the Nuremberg Tribunal were not). Fuller is concerned that if law is defined so broadly — broadly in the sense of including all positive laws, however evil, though narrowly in the sense of excluding natural law, viewed either as an independent source of legal obligation or as a filter that screens out evil positive laws — the legitimacy of the Supreme Court’s broad interpretations of the Constitution may be called into question. He also makes the point that if the Nazi laws were law, then in evaluating the wickedness of the Nazis we shall be compelled to give them at least a few points for fidelity to law — yet how, he says, can a thoroughly amoral law give rise to even the most qualified moral claim to obedience?

Hart and Fuller are both wrong, I think. The word “law” is frequently, and harmlessly, used to denote both positive law, however wicked, and natural law (= basic political morality). Murder is deliberate *unlawful* killing, yet we say without strain that the Nazis “murdered” the Jews even though the killings were authorized by the positive law of the Nazi state. There is no contradiction in saying that

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95. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615-21 (1958); Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 632-33, 648-57 (1958).

the Nazis were obeying positive law yet violating natural law, or in saying that the Constitution has been interpreted (whether rightly or wrongly) as authorizing the courts to use natural-law principles to invalidate positive law.

I am speaking of how the word “law” is used, rather than how it should be used; but as it happens I do not think that the existing usage, loose as it is, should be abandoned. That would imply that if a judge thought the legal arguments on both sides of a case evenly balanced, he would be required to dismiss the case on the ground that it could not be decided by law. If the case is within his jurisdiction, he should decide it as best he can; and his decision, though of course not beyond criticism, will have to be awfully zany before it can fairly be called “lawless.” Now, this is just my opinion; and others may believe that if the issue is so uncertain, the defendant should not be punished or (if it is a civil suit) made to pay damages or incur other costs. But even if that is right, it would not follow that the judge who went ahead and decided the case against the defendant was being lawless. A wrong decision is not lawless in an interesting sense. To call it “lawless” is to attempt to resolve by persuasive definition what is properly a question of sound policy. But, equally, to call the judge’s decision in such a case “lawful” is not necessarily to commit oneself to believing that there are objective legal norms outside of those found in positive law — norms of “natural law.”

In suggesting that there was little at stake in the Hart-Fuller debate, I mean that the *analytic* stakes were small. Debates over entities of doubtful ontology can, of course, have profound effects in the real world — can cause religious wars, for example. For some people, especially in this country, “law” has the same significance that “God” has for other people (sometimes these are the same people). But the theological, symbolic, and propagandistic aspects of the concept of law are not my concern in this article.

G. *Holmes, Nietzsche, and the New Conventionalists*

The Common Law was written just a few years before one of Nietzsche’s great works, *On the Genealogy of Morals*, and both employ an effective method of skeptical analysis: the genealogical. In the *Genealogy* and other works Nietzsche undermines the ontological status of Christian morality by showing that moral beliefs reflect the needs and circumstances of the dominant groups in the communities that happen to hold them; morality in other words is relative rather than absolute. Holmes in *The Common Law* did the same thing with law. By tracing legal doctrines to their origins and thus relating each doctrine to a

particular constellation of social circumstances, he showed the absurdity of supposing that, as the nineteenth-century formalists against whom he was writing supposed, legal doctrines were unchangeable formal concepts, the way the Pythagorean theorem is. He enforced the lesson of relativism. His technique continues to be an important part of legal analysis. Often one traces a line of precedents to its source and finds that the first of the line based decision on a mere assertion and that the next in the line merely cited the first, and so on to the latest case. The genealogical technique can show that a rule which seems firmly grounded in precedent rests on sand.

Nietzsche was not the only nineteenth-century genealogist, of course; the "higher criticism" of the Bible, indeed the descent of man from monkeys, are other examples of the nineteenth century's penchant for using history to challenge essentialist or transcendental notions. But the "job" that Nietzsche did on Christianity may be the closest parallel to what Holmes did to the common law, even though their attitudes toward their subject matter were different.

More than the genealogical method connects these two great nineteenth-century skeptics. They are both sub- or anti-mentalists. Nietzsche's will to power animates not just man and animals but the rocks and the stars,⁹⁶ and Holmes, as we have seen, reduces law to force. The illiberal aspects of Holmes's thought, notably his fondness for war, struggle, and eugenic breeding of human beings (*i.e.*, man as animal), have close parallels in Nietzsche;⁹⁷ and it is perhaps natural that people who are skeptical about reason should celebrate its antitheses. Today's skeptic is unlikely to embrace these values but likely to embrace a behaviorist (*i.e.*, determinist) rather than voluntarist model of human activity; and behaviorism — for example, in the form of the economic model of human behavior and social interaction — is a source of widespread disquiet.

But what is the alternative? Today's anti-skeptics in law are more likely to be conventionalists than formalists. The new legal conven-

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96. See the excellent discussion in A. NEHAMAS, *NIETZSCHE: LIFE AS LITERATURE* (1985); and consider this typical Nietzschean remark: "He who possesses strength divests himself of mind . . . ." F. NIETZSCHE, *TWILIGHT OF THE IDOLS AND THE ANTI-CHRIST* 76 (R. Hollingdale trans. 1968).

97. On Nietzsche, see, *e.g.*, J. STERN, *A STUDY OF NIETZSCHE* (1979); R. POSNER, *supra* note 4, ch. 3. On Holmes, see, *e.g.*, E. WILSON, *Justice Oliver Wendell Holmes*, in *PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR* 743 (1962); *Buck v. Bell*, 274 U.S. 200 (1927) (Holmes, J.). Typical is Holmes's statement in *Missouri v. Holland*, 252 U.S. 416, 433 (1920): "It was enough for . . . [the Framers of the Constitution] to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation."

tionalism, as thoughtfully articulated by Kronman, for example,⁹⁸ finds in Aristotle and Burke models for a conception of legal reasoning as being rooted in the special traditions of the legal profession rather than in principles of abstract reason. But the intellectual currents that feed this conventionalism or traditionalism constitute not a rejoinder to, but a form of, skepticism — a revolt against the Enlightenment, as can be seen even more clearly in such Continental thinkers as Heidegger and Gadamer.⁹⁹ The conventionalist is skeptical of the power of reason and therefore insists that the judge approach his task with humility, reverence for professional tradition, and faith in the wisdom of the past. Such a judge may employ a formalist rhetoric (as an aspect of his traditionalism), but if he knows what he is about he will harbor no formalist illusions. So perhaps today we are all skeptics.

I thus disagree with the argument in an interesting recent article that what the authors call practical reason, but what is closer to what I am calling conventionalism, is the antidote to legal skepticism.¹⁰⁰ They argue that the futile quest for “foundations” for ethical, political, or legal norms turns aspiring foundationalists into skeptics; but what they offer in the place of foundations will not reassure anyone who would like to think that the decisions in tough cases reflect more than the judges’ personal values. They offer “a concern for history and context; a desire to avoid abstracting away the human component in judicial decisionmaking; an appreciation of the complexity of life; some faith in dialogue and deliberation; a tolerance for ambiguity, accommodation, and tentativeness, but a skepticism of rigid dichotomies; and an overall humility.”¹⁰¹ Give me these leeways, and I will move the world; there is no decision that cannot be rationalized with the aid of such open-ended concepts as “appreciation of the complexity of life.” Farber and Frickey have described an ad hoc, discretionary method of judicial decisionmaking; how this can be an antidote to skepticism baffles me. I add that I am not sure why we should want an antidote to skepticism.

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98. See note 34 *supra*.

99. And Aristotelian deliberation has a nonrational component. See M. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 307-10 (1986).

100. Farber & Frickey, *supra* note 34, at 1644-45.

101. *Id.* at 1646. (Notice that the list contains none of the methods of *reasoning* that I discussed in Part I under the rubric of practical reason.) Compare this recent statement by the Chief Justice of the Supreme Court of New Jersey: “How then *should* a judge decide cases? . . . [T]here seems to be no steadfast rule as to what method to apply to a case nor how a case should be decided. It is as complex as life itself.” Wilentz, *Judicial Legitimacy — Finding the Law*, 8 SETON HALL LEGIS. J. 221, 246 (1985) (emphasis in original). To similar effect, see B. CARDOZO, *supra* note 57, at 113.

I have similar reservations about Peter Teachout's recent plea on behalf of the new conventionalism.¹⁰² His best illustration is a brace of passages from Robert Jackson's opening statement at Nuremberg¹⁰³ — an eloquent and moving document indeed. The problem with using it as exemplum is that powerful analytical tools were not required to demonstrate that the Nazi leaders were evil men who ought to be punished (the passages quoted by Teachout do not discuss the problem of retroactivity, an obviously important issue, and in the Nuremberg setting quintessentially one of policy). Teachout is shooting fish in a barrel. There is no evidence that the methodology of the new conventionalism can decide a *difficult* case in any area of law.

III. "A CAPTIVE OF A THIN AND UNSATISFACTORY EPISTEMOLOGY"?

The quoted words are from Paul Bator's review¹⁰⁴ of a book in which I sketched some of the ideas explored in this article; and in closing I want to consider the justice of his criticism in light of the more complete presentation of these ideas in the present article. In describing me as "a captive of a thin and unsatisfactory epistemology," Bator ascribes to me the logical-positivist view

that there exist [only] two sorts of questions: those that are "scientific" on the one hand; on the other those that involve "value judgments," where decisions are "not scientific and therefore not readily falsifiable or verifiable" and therefore not "profitably discussable." Human rationality is exhausted when it crosses from the first to the second sort of question: the realm of reason consists either of empirical verification or mechanical ("formalistic") deduction. Judicial decisions quickly exhaust these activities unless they falsely pretend to be engaging in them; we are then in an "open" area where "will" is inescapable.¹⁰⁵

There is merit to the ascription, because in the book that Bator is discussing I both exaggerate the distinctiveness of scientific methodology and unduly belittle the contributions of practical reason to knowledge, thus giving my analysis indeed a logical-positivist cast. But these errors are to some extent offsetting. Today I would say that the potential of science to yield, even in principle, definitive answers to legal questions is smaller than I thought when I wrote *The Federal Courts* but that some of the slack is taken up by practical reason. The "open

102. Teachout, *The Burden of the Liberal Song* (Book Review), 62 IND. L.J. 1283, 1326-48 (1987).

103. *Id.* at 1329, 1331.

104. Bator, *The Judicial Universe of Judge Richard Posner* (Book Review), 52 U. CHI. L. REV. 1146, 1161 (1985) (reviewing R. POSNER, *THE FEDERAL COURTS*, *supra* note 43).

105. *Id.* at 1161-62 (citation omitted).

area" (equivalently, the number of "indeterminate cases") may be no smaller in the revised analysis.

Bator goes on to note that

there are vast areas within which human reason and human language can combine to persuade and be persuaded on reasoned grounds even though no "scientific" or logically entailed answer is available. The fact that interpretation does not admit to some mechanical procedure of validation is not a fatal objection to the concept of interpretation; a profoundly significant and *successful* network of intellectual and linguistic practices enables us to try to understand each other's meanings, to enter into each other's purposes, and to understand, interpret, apply, and follow rules, all with no (or only infrequent) resort to mechanical deduction.¹⁰⁶

All this is true; and it is right to emphasize, against the facile skepticism that is merely the opposite (and equally untenable) pole of syllogism-mongering, that even though interpretation is neither a logical nor a scientific process it yields true understandings in most cases, including most legal cases. Yet one is still left with the open area, and what is to be done about it?

Bator proposes to close it by changing the subject from law to political theory. His illustration is the question (examined at length in my book) of judicial self-restraint in the structural or separation-of-powers sense of deference to other branches of government. I had said that although I believe in judicial self-restraint I consider it a political principle rather than a directive found in the Constitution.¹⁰⁷ Bator agrees but believes that the soundness of the principle can be established by argumentation, and he sketches a series of arguments such as "the Constitution is presumptively committed to representative government" and "the courts' decisions improperly or erroneously increasing their own power over that of the other branches are hardly at all policed."¹⁰⁸ Although these are good arguments, the advocates of activism can adduce all sorts of contrary arguments that sound just as good to the impartial ear; and there is no algorithm for balancing off opposing arguments and deciding who has won the debate. Worse, one doubts whether that particular debate will ever be won, so deeply entangled is it in the fundamental value conflicts of our ethically diverse society. It has the quality of interminability that distinguishes so much political, ethical, and legal debate from most scientific debate.

Bator has taken an indeterminate legal issue (What shall be the presumption in close cases involving a challenge to the authority of

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106. *Id.* at 1163 (emphasis in original).

107. R. POSNER, *THE FEDERAL COURTS*, *supra* note 43, at 198-222.

108. Bator, *supra* note 104, at 1164.

another branch of government?) and restated it, quite properly, as an indeterminate political question, although it should be noted that in doing this he — somewhat incongruously in view of his aim of defending legal reasoning — undermines the claim of lawyers to be able to answer the question. I have no desire to shut off the debate over activism versus restraint; as Bator emphasizes, my book on the federal courts is a contribution to that debate. But the fact that I want to articulate and defend my particular social vision is not, as Bator supposes, an acknowledgment that legal reasoning can answer the tough questions in law. It cannot, and once this is recognized all sorts of puzzles about the legal system, a number of which I have discussed in this article, begin to fall into place.

CONCLUSION

This article is already so long that it requires to be made even longer by the addition of a conclusion that will tie together some of its themes. I have explored two types of legal skepticism. One is skepticism about the possibility of arriving at demonstrably correct answers to difficult legal questions. The other is skepticism about the existence of a distinctive analytical method called “legal reasoning.” I am more of a skeptic about “legal reasoning” than I am about the determinacy of legal outcomes, but the two forms of legal skepticism are closely related; the lack of a distinctive methodology for answering legal questions makes it less likely that the most difficult legal questions can be answered with a high, or even moderate, degree of certainty. Fortunately, most legal questions are not difficult. Most can be answered syllogistically — that is, by the application of a general rule to particular facts in a setting where the meaning, the applicability, and the validity of the rule are all clear. But a significant fraction of the disputes that enter the judicial system cannot be resolved syllogistically, or by other methods of exact inquiry (whether methods of logic, or mathematics, or empirical science). Many lawyers believe they can be resolved by the use of distinctive methods of legal reasoning, notably reasoning by analogy; but I argued that legal reasoning is just reasoning, period, and in particular that reasoning by analogy is neither special to law nor especially cogent.

A logical positivist would deny that a proposition that is neither analytic (and therefore true by definition) nor verifiable (by accepted scientific methods) can have any truth value. I disagree, and accept that “practical reason” — a grab bag of reasoning methods that includes deliberation, interpretation, reliance on authority, tacit knowledge, and much else besides — can be used to establish the truth of

many propositions with a reasonable (sometimes a very high) degree of certainty. Law relies very heavily on practical reason, often to good effect. But sometimes a legal question will not yield to methods of practical reason. There is thus an area of indeterminacy, which, of necessity, judges fill with contestable judgments of ethics or policy. The more heterogeneous the judiciary, the larger the area of indeterminacy; and the modern American judiciary, like the society it mirrors, is extremely heterogeneous.

All this can be summed up in the proposition that the goal of the careful judge is nothing more pretentious than a *reasonable* decision. If only one of the possible outcomes would be reasonable, it can fairly be described as the correct outcome — the “right answer” to the legal question posed by the case. But often two or more outcomes will be reasonable, and the choice among reasonable outcomes is an open one, though not, I argued, precisely a legislative one. I explored some of the implications of indeterminacy, and suggested a four-stage model of judicial decisionmaking in the indeterminate area.

My demonstration of the strengths and weaknesses of the various methods of reasoning drew heavily on epistemology and on philosophy of mind. Later I drew on philosophy of mind and on ontology to argue for a skeptical attitude toward certain entities (mental or conceptual) that play an important role in legal analysis. These include legislative intent, criminal premeditation, and “law” itself. Ontological skepticism complements epistemological skepticism both in exposing weaknesses in Ronald Dworkin’s “right answer” thesis and in dimming the prospects for resolving difficult legal questions with the help of such familiar crutches as legislative intent and the idea of justice. It also enabled me to examine the validity of behavioral approaches to the law; I argued that ontological skepticism supports the economists’ project of trying to explain legal practices without reference to mental or conceptual phenomena such as intent and causality.

Ontological skepticism also helps us to understand that law is not a set of concepts but simply the activity of judges — and once this is understood such old chestnuts as whether the Nazi racial laws were “really” law are exposed as pseudo-questions — and to make surprising connections, for example between Holmes and Nietzsche. I hope that I have convinced the reader at least that a jurisprudence of skepticism grounded in contemporary analytic philosophy can stimulate debate, cast traditional jurisprudential problems in a new light, connect seemingly unrelated legal phenomena, and, in short, generate fresh insights.