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The Theory of Judicial Reasoning—Toward A Reconstruction

By Peter W. Gross*

Experience can enter into awareness only under the condition that it . . . be perceived, related, and ordered in terms of a conceptual system and of its categories.


Philosophers . . . have always paid a great deal of attention to ideas seen as the result of thought and observation; but in modern times all too little attention has been paid to the ideas which form the very instruments [of thought] . . . . Indeed, it is often difficult to become aware of them . . . just as you can see what is outside you, but cannot easily see that with which you see, the eye itself.


INTRODUCTION

Bridging the gulf between "objective" reason and "subjective" value choice is a central problem for theories of law and the social order. Roberto Unger has argued that conceptions of reason intrinsic to contemporary Western thought prevent solution of this problem and that these conceptions are a prison house from which legal theorists can and must escape.¹

This article applies Unger’s theme to the theory of judicial reasoning. Following critical evaluation of contemporary theory in Part One, Part Two suggests an alternative approach—a “decisionistic” perspective—and shows how it can foster reconstruction of the theory of judicial reasoning.

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¹ See R. Unger, Knowledge & Politics (1975); R. Unger, Law in Modern Society (1976).

Though the terms “judicial reasoning” and, where broader reference is warranted, “judicial decision” are used throughout, it should be understood that the subject of this article is appellate, rather than trial, process.
PART ONE: CONTEMPORARY LEGAL THEORY

I. PATTERNS OF EVASION

Contemporary theories of judicial reasoning rest on three explanatory frameworks: formalism, intuitionism, and determinism. These frameworks, and corresponding theories of judicial reasoning, first will be examined individually. Since they intermix in day-to-day thought about judicial reasoning, the mixture then will be evaluated.2

A. Formalism

In its accepted sense, "legal formalism" is the now discredited idea that judicial decision-making requires merely the deductive application of pre-existing rules.3 But by substituting, respectively, the terms "rational" and "principles" for "deductive" and "rules," one arrives at a broader definition of "formalism": "the rational application of pre-existing principles." Far from being discredited, "formalism" in this second sense4 approximates what is meant in current judicial thinking by the term "lawfulness." The concept dominates two of the most important contemporary approaches to the study of judicial reasoning—"analytical jurisprudence" and "the scholarly tradition."

1. Analytical Jurisprudence

"Analytical jurisprudence," the branch of legal philosophy...
centered on the study of legal reasoning, is based on the efforts of John Austin to construct a "science of law." Today, the "new analytical jurists" seek to document the theoretic "fetters," i.e., the pre-existing principles of rational decision, that bind the judges. This attempt to construct a science of judicial reasoning is, in one commentator's terms, an "almost frantic" response to the crisis precipitated when the American legal realists pointed out the ad hoc, value-based character of judicial decision. This crisis can be termed the "value problem." One can see in the work of the new analytical jurists three tactics for the defense of formalism: (a) minimization of value choice; (b) ordering of values; and (c) isolation of value choice.

a. Minimization of Value Choice

Among the leading works of the new analytical jurisprudence is H. L. A. Hart's The Concept of Law. The strategy of minimization is embodied in Hart's position that, while "doubt" and the consequent need for ad hoc weighing of interests are inevitable in judicial decision, the application of subjective value choice represents merely a "fringe of vagueness" surrounding a "core of certainty." Moreover, Hart states that "preoccupation with the penumbra" is a mis-

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*While analytical jurisprudence may be viewed as but one school of thought concerning judicial decision, it also signifies the branch of legal philosophy centered on the study of legal reasoning. See generally J. Stone, Legal System and Lawyers' Reasonings 16-20 (1964) (delineating as the three branches of jurisprudence: analytical jurisprudence, theories of justice, and sociological jurisprudence).

7 See id. at 62-136.


9 See Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges, 75 Colum. L. Rev. 359 (1975).

10 Hyman & Newhouse, Standards for Preferred Freedoms: Beyond the First, 60 Nw. L. Rev. 1, 2 (1965).

11 See text accompanying notes 68-85 infra for discussion of American legal realism.


13 Id. at 119.

14 Id. at 132.

15 Id. at 120.

16 Id. at 119.

take—one that has confused and obstructed the advance of jurisprudence.\textsuperscript{18} This viewpoint signifies a strategy in which "law," and so the science of law, can be understood to refer to a "core of legal rules whose meaning is settled."\textsuperscript{19} However, the concept of minimization evades the reality that the uncertainties giving rise to the need for value choice are not penumbral but endemic to judicial decision.\textsuperscript{20}

b. Ordering of Values

A second major figure of new analytical jurisprudence, Ronald Dworkin, takes the strategy of minimization a step further. While acknowledging a penumbra of "hard cases,"\textsuperscript{21} Dworkin rejects Hart's concession that even a margin of ad hoc, value-based decision need be accepted.\textsuperscript{22} Indeed, much of the energy of the new analytical jurists has been spent in intra-mural dispute as to whether there is or is not a penumbra of "discretion" in judicial decision.\textsuperscript{23}

Arguing that even in "hard cases" judicial decision is to be understood as the rational application of ascertainable principles, Dworkin acknowledges that "hard cases" require refer-

\textsuperscript{18} Id.
\textsuperscript{19} Id. at 614.
\textsuperscript{20} The pervasiveness of conflict and uncertainty among principles of law was a central finding of the legal realists that simply cannot be refuted. See, e.g., Mr. Justice Holmes in Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (judicial decision portrayed as a balancing of opposed principles); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 40 (1921) (one principle or precedent often is matched by another pointing to an opposite conclusion); K. LLEWELLYN, JURISPRUDENCE 339 (1962) (our "authoritatively accepted ways of dealing with authorities . . . is a body that allows the court to select among anywhere from two to ten 'correct' alternatives in something like eight or nine appealed cases out of ten"); Cohen, The Problems of a Functional Jurisprudence, 1 Mod. L. Rev. 5, 11 (1937) (cases often present "a plaintiff principle and defendant principle each opposing the other); Dickinson, The Law Behind the Law: II, 29 Colum. L. Rev. 285, 298 (1929) ("broad general principles of the law have a significant habit of traveling in pairs of opposites").
\textsuperscript{21} See Dworkin, Hard Cases, 88 Harv. L. Rev. 1057 (1975).
ence to concepts of purpose or value (which Dworkin calls "principle," distinct from "rule"), and concedes that these principles may conflict. But Dworkin's response is that such conflicts can be rationally resolved by assessing the "relative weight" of the respective principles. The judge is to identify and give effect to the set of principles that, comprising the community's "constitutional morality," are "presupposed by the laws and institutions of the community" and therefore are inferable from those laws and institutions. The assumed amenability of value principles to ordering *inter se* underlies Dworkin's theory, just as it is implicit in the theory of Hans Kelsen and in other, more recent efforts to construct systematic accounts of judicial reasoning.

The strategy of ordering values exposes limitations inherent in the very goals of the new analytical jurists. Ronald Dworkin posits as the predicate for his theory a judge endowed with superhuman capacities. This postulation is evidently based on the assumption that the relevant question is whether an adequate theory of nondiscretionary judicial decision is theoretically possible. But the value problem arises because the interpenetration of rule and value, and the unattainability of a calculus of value, are givens of human reasoning. The new analytical jurisprudence thus seems to conceive its task in terms that sanction evasion of the very realities, brought to light by the legal realists, that lie at the root of the value problem.

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22 *Id.* at 27.
23 Dworkin, *supra* note 21, at 1105.
24 *Id.*
25 *Id.* at 1106-07.
26 See *J. Stone, supra* note 6, at 125-31.
28 Dworkin, *supra* note 21, at 1083. "Hercules," the judge-protagonist of Dworkin's theory, is "a lawyer of superhuman skill, learning, patience and acumen." *Id.* Accordingly, he is qualified to ascertain and reason from "the community's moral traditions" in fixing the "legal rights" of the parties. *Id.* at 1104.
29 See text accompanying notes 59-61 *infra* discussing this unattainability.
30 As Julius Stone observed in criticism of Hans Kelsen's pure theory of law, "impurities" and uncertainties are intrinsic to the application of law by human beings. *See* *J. Stone, supra* note 6, at 125-31.
31 For a further discussion of these terms, see text accompanying notes 121-25 *infra.*
c. Isolating Value Choice

A third strategy in defense of formalism is to isolate the realm of rule from the realm of value choice, thereby preserving the integrity of the former. This method is perhaps most explicitly developed in Richard Wasserstrom’s *The Judicial Decision*, another major work of the new analytical jurisprudence.

Addressing the value problem, Wasserstrom proposes a two-level model of judicial reasoning. At the first level, a controlling legal rule is applied according to “canons of logic”; the second level requires a demonstration that the rule is “conducive to the production of socially desirable consequences.” Wasserstrom presents this two-level approach as a reconciliation of ad hoc value-based decision posited by the legal realists with the ideal of law as pre-existing principle.

The mechanism of isolation ignores the reality that, as George Christie has written, statements of rule cannot be sharply distinguished from statements of purpose or value. Such a distinction also presents problems of judicial application inasmuch as rules and values must be applied together, not separately.

2. The Scholarly Tradition

While analytical jurisprudence seeks systematic description of the principles which govern judicial decision, the scholarly tradition seeks standards of quality and validity to direct the appraisal of individual decisions. Like the analytical jurists, the scholars view judicial decision as essentially the rational application of ascertainable principle and are therefore equally challenged by the value problem. Their response is a

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35 It has been seen that the distinction between rules, on the one hand, and purpose or value propositions, on the other, is basic to the taxonomy of Hart. See notes 12-19 and accompanying text supra; Sartorius, supra note 19.
37 Id. at 172.
38 Id. at 173.
39 See id. at 91-96, 138-51.
41 Id. at 668. Christie shows the untenability of Dworkin’s distinction between rules and principles. Id. at 655-67. See text accompanying note 24 supra concerning Dworkin’s use of these terms.
defense of formalism that rests on the same three strategies just examined.

a. Minimization of Value Choice

When Herbert Wechsler, in one of the seminal works of the scholarly tradition, issued a call for "neutral principles" of constitutional law, he acknowledged that constitutional decision often is "political" in the sense that it requires choice among conflicting values. However, theories are identified not by all the propositions they acknowledge to be true but by those they choose to emphasize.

The emphasis of the scholarly tradition has been critique of judicial decision according to canons of "reasoned elaboration" whereby quality and validity are functions of "thoroughness, soundness, clarity and internal consistency." This pursuit yields a body of criticism reflecting two assumptions. The first assumption is that if one can logically demon-

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42 Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959). Wechsler notes that the development of "neutral principles" of constitutional law is as necessary for adequate scholarly critique of decision as it is for adequate decision-making itself. Id. at 11.

Throughout this article no attempt is made to distinguish constitutional cases from other kinds of judicial decision. It is assumed that although the subject of Wechsler's article is constitutional law, he expresses conceptions of judicial decision and critique that are part of a scholarly tradition applicable to judicial decision generally. See also note 43 infra for further comment on the underlying similarity of constitutional, statutory, and common law decision.

43 Id. at 15.

It is true that the value problem presented by constitutional cases is particularly acute because courts are left with little guidance from the Constitution—a brief document of long duration. Further, constitutional decisions often involve matters of great social importance, and, in the case of the United States Supreme Court, are not subject to reversal by another branch. However, with respect to the underlying value problem, these are differences of degree and not of kind. The dilemma of rule and value inheres in judicial decision—whether the question involves common law, statute, or constitution. See also Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1314 (1976) (arguing the similarity of the judicial function in constitutional and public law litigation).

44 "Theory," as the term is used in this article, may mean either an explicit and carefully articulated system of explanation, such as the theories analytical jurisprudence seeks to build, or an aggregation of incompletely examined ideas and assumptions. The scholarly tradition is best understood as a theory of the second type.


46 White, supra note 45, at 290.
strate faults in the reasoning of a judicial opinion, the opinion is defective. The second assumption is that having shown an opinion to be defective is to have demonstrated it to be doctrinally incorrect. The meta-assumption, then, is that by rigor of critical analysis doctrinal disagreement can be cut through and resolved.

While obviously an essential enterprise, the limited effectiveness of this approach can be noted even in its own terms. The belief that "a clear dividing line can be drawn between good and bad reasoned elaboration" threatens to "re-bury" the realities of uncertainty and value choice which took "nearly a century to uncover." The assumptions underlying this approach not only minimize the value problem, but, in effect, evade it. Another strategy that minimizes value choice is embodied in the rather widely held assumption that the best response to very hard cases (or issues) may be to refrain from making a decision. While this principle of judicial restraint is no more "wrong" than the standard of reasoned elaboration, it,

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47 See, e.g., note 48 and text accompanying notes 108-09 infra for a discussion of the utility of such critical analysis.

48 In the same journal issue as that in which Wechsler's "neutral principles" article appeared, supra note 42, Henry Hart offered as a model of more adequate scholarly criticism 20 closely-reasoned pages of critical "laboratory analysis" of the Supreme Court's decision in Irvin v. Dowd, 359 U.S. 394 (1959). Hart, The Time Chart of the Justices, 73 Harv. L. Rev. 84, 101-22 (1959). It seems a sobering indication of the limitations intrinsic to such an effort to transcend doctrinal disagreement by rigor of analysis that an eminent and otherwise sympathetic colleague of Hart's was forced to conclude that the critique was "too labored, too argumentative" to be effective. Griswold, Of Time and Attitudes—Professor Hart and Judge Arnold, 74 Harv. L. Rev. 81, 83 (1960).

Obviously critiques such as Hart's serve a valuable monitoring function. They are the means by which the critics strive to keep the courts "honest." See Preface to The Supreme Court and the Constitution at viii (P. Kurland ed. 1965). On the other hand, one must recognize the extent to which scholarly critiques are like the remonstrances of a tenth justice, whose opinion, while couched in terms of neutral standards of craftsmanship, does not rise far above the doctrinal disagreements that divide the other nine. Cf. notes 61, 104 infra for examples of the impact of this tenth judge.

49 J. Stone, supra note 6, at 317.

50 Id.

51 As demonstrated by Julius Stone, the scholarly tradition imports a search for ways of "minimizing if not eliminating conflicts of policy among judges." J. Stone, Social Dimensions of Law and Justice 679 (1966).

52 Thus, Alexander Bickel's "passive virtues" give expression to the broader precept that "reasoned elaboration" cannot occur, and so judicial intervention is not appropriate, in instances of extreme uncertainty. See White, supra note 45, at 290-92.
too, signifies a strategy for evading rather than confronting the value problem.

b. Ordering of Values

Questioning the adequacy of much scholarly criticism, John Hart Ely argues that scholars have neglected the role of value in constitutional decision. What is needed, Ely states, is criticism identifying "misperceptions" of, and "unjustifiable inferences" drawn from, the "value structure set forth" in the Constitution. Ely thus invokes the strand of the scholarly tradition emphasizing interpretation of rules according to the values or purposes that underlie them.

The charter for such reasoning is set out in Henry Hart and Albert Sacks' *The Legal Process.* Hart and Sacks portray judicial decision as "rational applications of the shared purposes" implicit in the "social order." Tracing these purposes to the particulars of case and statutory law, the judicial process achieves "reasoned resolution" by means which include judgments that express the "validity" and "ranking" of human purposes.

Reasoning from purpose is, of course, an essential of sound judicial decision. However, as Duncan Kennedy has argued, theory predicating a "[value-]neutral calculus" of purpose presents essentially the same problems as does rule formalism. That is, the value problem arises because the sources of law are indeterminate, and the ideal of an order of purposes, no less than the ideal of an order of rules, does not adequately confront that indeterminacy.

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54 See notes 42-43 supra where it is noted that constitutional decision presents a value problem different only in degree, and not in kind, from that present in other cases.
55 Id.
57 Id. at 668-69.
58 Id. at 122.
60 See note 5 supra for a discussion of the similarity between rule formalism and more inclusive formalism.
61 Professor Ely feels safe in asserting that *Roe v. Wade* was wrongly decided
c. Isolating Value Choice

Seeking norms to guide an activist United States Supreme Court, Alexander M. Bickel came 'to stress self-restraint in choice of "whether, when, and how much to adjudicate."' In Bickel's view, such choice is a function not of principled adjudication but of expedience. Broadly developing this principle-expedience dichotomy, Bickel posits a realm of rational principle that the courts apply but must compromise and even contravene when expedience dictates self-restraint.

because he finds it obvious that the purported right there vindicated is based on no "value inferable from the Constitution" and "lacks connection with any value the Constitution marks as special." Ely, supra note 53, at 933, 949. But this assertion does not appear to lift Ely appreciably above the fray of doctrinal disagreement; nor are other efforts to transcend doctrinal disagreement through value analysis any more successful. See, e.g., R. McCloskey, The Modern Supreme Court 290-321 (1972), and Velvel, Suggested Approaches to Constitutional Adjudication and Apportionment, 12 U.C.L.A. L. Rev. 1381 (1965), in which each author posits a value-explicit protocol for analysis and purports to reason objectively to a conclusion. McCloskey's conclusion is that the state aid to religion decisions are wrong; Velvel's that the apportionment decisions are correct.

While attention to value structures and value reasoning provides a very useful critical perspective, assertion of one's own value premises does not address the value problem posed to critics—which is: How there can be agreement about quality or adequacy of reasoning, while there is disagreement on value or doctrine?

Nor would it seem unreasonable to guess that the difficulty of achieving a "calculus of value" explains in part why, despite the immense note it received, Hart and Sacks' The Legal Process, supra, note 56, never was developed beyond a first "tentative" edition. The difficulty seems reflected further in Henry Hart's own apparent ambivalence about opening the doors to judicial concern with policy, see J. Stone, supra note 6, at 318, and in the disappointing outcome of the 1963 Holmes lectures where Hart, having sought to show the relation between fact and value, had to admit on the eve of the very last lecture that the argument failed and that the truth he sought eluded him. See Bok, [In Memoriam to] Henry M. Hart, Jr., 82 Harv. L. Rev. 1592, 1591 (1969).


Id. at 184-98. See also note 64 infra for a further analysis of "expedience."

Such an approach has been termed "100% insistence on principle 20% of the time." Gunther, The Subtle Vices of the Passive Virtues—A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1, 3 (1964). For example, Bickel characterizes the judicial aftermath of Brown v. Board of Educ., 347 U.S. 483 (1954), as an adjustment between "principle," on the one hand, and "expedience," on the other. A. BICKEL, supra note 62, at 187. Bickel asserts that an expedience-based "contravention of [the] principle" of Brown occurred when the courts upheld the constitutionality of race-based pupil assignments aimed at decreasing de facto racial segregation in the schools. Id.

As reflected in this formulation, Bickel steadfastly holds to the need for "principle" susceptible of unconflicted statement and application. In this view, the
What is here explicitly developed in a theory of constitutional review is an assumption basic to conventional perception of judicial decision. This assumption is that "law" and "policy" are two separate realms;\(^6\) that judges are to function in a realm characterized by rational application of principle and shift to ad hoc value-based decision in "emergencies."\(^6\)

Rigorous enough to reflect this assumption expressly in his theory of constitutional decision, and progressively disenchantment with the resulting realm of "principle," Bickel turned increasingly away from that realm, toward the expediency-based ideals of a political jurisprudence.\(^7\)

\(^6\) A principle of Brown must be a general command that the states not discriminate on the basis of race. Thus:

That there should be no distinctions of race ordained by the state—that is a principle. That there should be no distinctions of race ordained by the state 'except when their consequence may be that the racial prejudices of the people are mitigated in the long run—that comes in the end only to this: that the state should try, in the ways best suited to prevailing conditions, to draw the races into a closer relationship. And this, in turn, is not a principled rule of behavior; it is the statement of a goal whose attainment will call for a great many prudential judgments, aimed at the goal, to be sure, but not proceeding immediately from principle.

\(^7\) Id. at 63. Herbert Wechsler’s conception of "principle"—espoused in his "neutral principles" thesis, see note 42 supra—was similar with respect to the rigor and the clarity of meaning judicial "principle" must achieve. See Wechsler, The Nature of Judicial Reasoning, in LAW AND PHILOSOPHY 290, 295 (S. Hook ed. 1964) (discussing Shelley v. Kraemer, 334 U.S. 1 (1948)); Wechsler, supra note 42, at 31-34 (discussing Brown v. Board of Educ., 347 U.S. 483 (1954)).

However, such conceptions of principle misconceive the judicial function. Levi notes that "the value of court action" as opposed to legislative action "is that the matter can be taken one step at a time." Levi, The Nature of Judicial Reasoning in LAW AND PHILOSOPHY 263, 274 (S. Hook ed. 1964). This suggests that the principles enunciated and followed in judicial decision characteristically leave the future course unclear. Furthermore, judicial principles conflict. See Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. PA. L. REV. 473-86 (1962). Finally, despite Bickel’s contrary view, judicial principles intermix purpose and value propositions.

\(^8\) See Hughes, Rules, Policy and Decision-Making, 77 YALE L.J. 411, 427 (1968).

\(^9\) See F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 31 (1959); Cohen, Field Theory and Judicial Logic, 59 YALE L.J. 238, 259-60 (1950). Such dichotomization between rule and value gives rise to a "continual oscillation" between rule application and value-based ad hoc decision in our thought about judicial decision. See KNOWLEDGE & POLITICS, supra note 1, at 99; see also note 142 infra.

\(^10\) See text at notes 86-102 infra in which political jurisprudence is discussed.

Doubting the viability of a lawfulness based on clear principles rationally applied, Bickel turned to the ideal of pluralism—the counterbalancing of competing elements in society. See generally Purcell, Alexander Bickel and the Post-Realist Constitution, 11 HARV. C.R.-C.L. L. REV. 521 (1976). But, as shown in the discussion of political
In these ways, then, both analytical jurisprudence and the scholarly tradition, seeking to defend the formalist assumption that judicial decision is essentially rational application of pre-existing principle, evade the value problem.

B. Intuitionism

In presenting their purpose-based theory of judicial reasoning, Hart and Sacks concede that an intuitive "act of judgment" is an irreducible feature of such reasoning.\(^6\) Though incorporating intuitionism, their theory seeks to minimize it.\(^5\)

This section considers a theory centered on intuitionism—the theory of legal realism. While identified with a movement largely spent by 1940,\(^7\) the tradition of legal realism still influences thought about judicial decision. Attacking the belief that judicial decision requires merely deductive application of pre-existing rules,\(^8\) the realists stressed that precedents are 'an ambiguous, malleable resource for the judge.'\(^9\) The realists' central point was that the formalist myth conceals realities of judicial policy-making,\(^10\) and that the primary goal is to unearth those realities.\(^11\)

\(^6\) See text accompanying notes 97-102 infra. See also Purcell, supra at 559-63.
\(^5\) H. Hart & A. Sacks, supra note 56, at 123; see text accompanying notes 56-58 supra for a discussion of their purpose-based theory.
\(^4\) Intuition occurs in the interstices of a system of common law that, subject only to "limits fixed by established remedies . . .[,] provides a comprehensive, underlying body of law adequate for the resolution of all the disputes that may arise within the social order." H. Hart & A. Sacks, supra note 56, at 669.
\(^7\) See generally W. Rumble, American Legal Realism 238-39 (1968).
\(^8\) See notes 3-5 and accompanying text supra for a discussion of this deductive belief.
\(^9\) For example, Mr. Justice Holmes stated that considerations of purpose and value are central to judicial decision, O.W. Holmes, The Common Law 5 (M. Howe ed. 1963), and that to be blind to such considerations is "to leave the very ground and foundation of judgments inarticulate and often unconscious." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 467 (1897). See also B. Cardozo, supra note 20, at 112.
\(^10\) See note 73 supra for sources which discuss these realities. It has been noted that Judge Cardozo's chief contribution to the philosophy of law was that, as judge, "he brought the articulation of values into his juristic writings and judicial opinions. He not only made explicit the problems of value implicit in legal doctrines; he also showed how making them explicit made the judge more conscious and more worthy of his function." Patterson, Cardozo's Philosophy of Law: II, 88 U. Pa. L. Rev. 156, 165 (1939).
This emphasis on value-based decision led to the view that judicial decision is neither a matter of following rules laid down by past courts nor of enunciating rules for future courts to follow. Instead, the function of judicial decision is to find justice, the right decision, in the particular case. The resulting model accords a central place to judicial intuition conceived as "sovereign prerogative,"" the judicial sense of "Justice-for-All-of-Us," or one of a variety of other intuition-centered constructs.

If a concept as nebulous as "intuition" is an inadequate foundation for a theory of judicial reasoning, the explanation is that the realists were intent not on a constructing but on destroying theory. The legal realists identified theory with the ideology of conventional perception and sought to jettison those orthodoxies in order to see things as they really are. For

Misgivings developed about such an explicit charter for policy-based judicial reasoning. See note 84 infra. See also Karl Llewellyn's evidently normative assumption that "the weak judge" is to be "pened within the walls his predecessors built"—and that only "the strong judge" is to scale those walls. K. LLEWELLYN, THE BRAMBLE BUSH 74 (1960).


K. LLEWELLYN, supra note 20, at 339.

E.g., "the conviction in the judicial mind" that the decision will have "led to justice," B. CARDOZO, supra note 20, at 41; the "subjective sense of justice inherent in the judge,"

J. FRANK, supra note 75, at 281 (citation and emphasis omitted); or an "intuitive sense of what is right," Hutcheson, The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision, 14 CORNELL L.Q. 274, 285 (1928).


The need was to sweep away the "useless menagerie of metaphysical monsters," Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 829 (1935) (quoting RUSSELL, MYSTICISM AND LOGIC 155 n.50 (1918)), inherent in orthodox ideology about judicial decision, in order to "[s]ee it fresh . . . [s]ee it as it works." K. LLEWELLYN, THE COMMON LAW TRADITION 508 (1960).

A spirit of reductivist dogmatism pervaded the legal realist movement. For example, Justice Holmes, espousing his "bad man" theory of the law, stated that "a contract at common law means a prediction that you must pay damages if you do not keep it, and nothing else." HOLMES, THE PATH OF THE LAW, 10 HARV. L. REV. 457, 462 (1897) (emphasis added). This wish to de-mythologize the law gave rise to a spirit of "corrosive analysis and inspired destruction," MCDougle, THE LAW SCHOOL OF THE FUTURE: From Legal Realism to Policy Science in the World Community, 56 YALE L.J. 1345, 1349 (1947), that did not lend itself to the historicism and the openness to other
the realists, "things as they really are" present to the judge a pluralistic reality—a reality of irreducible conflict among sources of the law that can be resolved only through intuitive decision.81

The legacy of legal realism is strong today. Its perspective is preserved, for example, in the leading law school primer on judicial reasoning—E. H. Levi's *An Introduction to Legal Reasoning.*82 Levi portrays judicial decision in terms of organic growth in the law whereby the "concepts" that express the law change in response to changed conditions in society.83 While Levi does not use the term, it is implicit in his model that judicial "intuition" is validated as the vehicle by which the judge registers and implements in law the changed "concepts" of society.84 The legacy of legal realism is also visible in "rule skepticism"—a predisposition to doubt the importance of rule following and rule formulation in judicial decision.85

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84 The legacy of legal realism is also visible in "rule skepticism"—a predisposition to doubt the importance of rule following and rule formulation in judicial decision.

85 Perspectives that is necessary if new inquiry is to build on old. See Llewellyn, Adler, & Cook, *Law and the Modern Mind: A Symposium,* 31 COLUM. L. REV. 82, 94-95, 107-08 (1931) (attributing to the realists a dogmatism blind to the pluralistic character of inquiry); Yntema, *The American Legal Realism in Retrospect,* 14 VAND. L. REV. 317, 328 (1960) (attributing to the realists "anti-historicism and insularity").

86 E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1948).

87 Id. at 6, 8.

88 Levi's model makes "concepts"—such as "consideration," "trespass," and "fixtures," Levi, supra note 72, at 604,—the main vehicles of the law, rather than rules or principles. In this emphasis he follows the model of Max Radin—a model set out in what Karl Llewellyn called "the most accessible study on judges' thinking that is in print in English." Llewellyn, Book Review (C. MOIUS, HOW LAWYERS THINK), 51 HARV. L. REV. 757, 759 (1938). Radin portrays judicial decision as a selection between "several categories [that] struggle . . . for the privilege of framing the situation before the judge." Radin, *The Theory of Judicial Decision: or How Judges Think,* 11 A.B.A.J. 357, 359 (1925). He asserts that "‘principles’ are not principles at all but aggregations of type transactions, schematized to make them easier to carry in one's memory." Id. at 360. See also the conceptions "type situation" and "situation-sense" basic to the account of judicial decision in K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

The problem, however, is that such a picture of judicial decision affords no normative guidance for judicial deliberation—policy-oriented or otherwise. In some measure, indeed, it seems to presuppose a judiciary unaware of the dynamics of the decision process. Thus, the context gives no reason to think Levi was facetious (nor, for that matter, aware of the enormity of the position to which his theory brought him) when he suggested that judges "should not be particularly bright," lest they become too aware of their opportunity to change law freely. Levi, supra note 72, at 608.

The principal legacy of legal realism, in sum, is a set of antitheoretical, intuitional themes prevalent in modern thought about judicial reasoning. In this aspect, legal realism joins forces with the scholarly tradition of formalism. Each manifests a well-formed branch in the dichotomy of rule and value. Together they are a prodigious force perpetuating the value problem.

C. Determinism

The term "political jurisprudence" describes two deterministic modes of thought about judicial decision.84 These will be called "personalistic determinism" and "institutional determinism."

1. Personalistic Determinism

Intuitionism is one of the legacies of the legal realist movement; "judicial behaviorism" is another.85 Proceeding on the legal realist assumption that judicial decision is a function not of rule but of human value judgment, judicial behaviorism searches for the causes which govern decision. Biographical, ideological, and similar aspects of the life and character of the judge are viewed as cause and the decision as effect.86

Not only is judicial judgment thus rendered "lawful" in the same sense that all causally explicable phenomena are lawful, it is made predictable as well. Moreover, if, as the legal

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86 Although the results often may be couched in terms only of statistical correlation between independent variables (characteristics of the judge) and dependent variables (decision), the implication of cause and effect is generally evident.
realists maintain, the law is what judges decide it to be, the key to systematic statement of "the law" is systematic prediction of what judges will decide.

While judicial behaviorism can help society understand and improve the judicial function, the theory poses profound questions of legitimacy. Thus, basic to the very definition of judicial law is that it transcend the character and prejudices of the deciding judge. For foundations in legitimacy, political jurisprudence depends on its second branch, institutional determinism.

2. Institutional Determinism

Institutional determinism is grounded in political theory—viewing courts as part of a system that subjects all organs of government to public control. The most graphic paradigm for this arrangement is cybernetics, in which information, action, and reaction make the parts of a system one functionally coherent whole.

Legitimation of the judicial function rests on forces that cause courts to reflect public needs and wishes. While the means may be as direct as the selection of judges by election or appointment, there is, especially in the case of constitutional law, a more amorphous set of processes whereby a "dominant alliance" or "successful coalition" of the public keeps the courts responsive to its wishes. These processes may be tied to personalistic determinism, as in the case of "mechanisms of internalization" by which judges come to ab-

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88 See, e.g., Llewellyn, supra note 74, at 12, 52.
89 If nothing else, behaviorist analysis should make judges more sensitive to fact and value assumptions that underlie their thought and decision.
92 The emergence of the Warren Court, for example, is attributed to Presidential politics of the period 1928-1968. G. Schubert, The Constitutional Policy 180 (1970).
93 While much attention focuses on constitutional review and the United States Supreme Court, the resulting picture of the judicial function extends to other courts and other areas of decision as well. See note 43 supra for further discussion.
94 See note 93 supra concerning cases arising outside the area of constitutional law.
sorb the "community consensus" or the "community agenda." 86

Although institutional determinism can contribute to improving the judicial function, 87 it is not responsive to the value problem. For political jurisprudence, quality, and legitimacy in judicial decision is a matter of success in anticipating the needs or wishes of the public. 88 But to rest one's theory on political "success" is to evade the value problem. Political jurisprudence holds that while judicial decisions are to be made and appraised on the basis of instrumental reasonings, published opinions are to be cast in terms of traditional legal principle. 89 The result is theory that provides little guidance for the critique of judicial reasonings. 90 More than this, the assumption that theories of validity and legitimacy can rest on the purportedly value-neutral criterion of "success" covers up the simple fact that there is disagreement about the meaning of "success." 91 The value problem challenges political theory to

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87 Institutional determinism lends itself especially well to important growing conceptions of the role of dialogue among the court, the legislature, and the public. See, e.g., Tribe, Structural Due Process, 10 HARV. C.R.-C.L. L. REV. 269, 302-06 (1975); White supra note 45, at 294-98. It also supports analysis of the allocation of functions between the judiciary and other organs of government. See, e.g., Howard, Adjudication Considered as a Process of Conflict Resolution: A Variation on Separation of Powers, 18 J. PUB. L. 339 (1969).


89 See, e.g., C. Miller, The Supreme Court and the Uses of History (1969). Miller describes at some length value principles that he acknowledges comprise the "human reasons" for decision. Id. at 28-37. But he sharply distinguishes these from the legitimate "principles . . . [of] legal reasoning" in which judicial opinions are to be couched. Id. at 15-20, 28.

Such a failure to reconcile instrumental with rule-based reasoning is but another symptom of the value problem. If one posits that the instrumental reasonings are the decisive ones, then the point of Roberto Unger obtains: Where based only on instrumental reasoning, judicial decision becomes indistinguishable from other political decision-making. See KNOWLEDGE & POLITICS supra note 1, at 99-100. Cf. note 100 infra regarding the criterion of "success" as it relates to judicial decision-making.

90 If the criterion is "success," neither decision-maker nor critic can know the quality of a given decision since neither can know whether it will eventually succeed.

91 For illustration of this point consider the instrumental posture of Alexander Bickel. See text accompanying notes 62-67 supra. Having concluded that the Warren Court did not stray outside a "broad avenue" of leeways open to the Court, A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 42 (1970), Bickel asserts that "the Warren Court's noblest enterprise—school desegregation—and its most popular enter-
seek modes of reasoning that confront, rather than evade, value disagreement.\textsuperscript{102}

II. THE CONSEQUENCES OF EVASION

Contemporary theories of judicial reasoning evade the value problem. But since these theories intermix in the study of judicial decision, may not the whole be greater than the sum of the parts? May we have in fact an adequate composite theory?

To answer this, one must decide what "adequacy" in theory means. What are theories of judicial reasoning supposed to do? In partial answer, I suggest that our theories should provide guidance to the judiciary,\textsuperscript{103} legitimate the judicial function, and provide instruction for advocates. I suggest, further, that the inadequacy of the composite is manifest in its failure to achieve those ends.

A shortcoming of all the theories considered is that they provide limited guidance to judges. This deficiency is true even of the work of the scholarly tradition which purports to speak directly to the judges.\textsuperscript{104}

The reason for this situation is evident. While academics respond to the value problem in large part by evasion, the judges must resolve it daily in decision. The result is academic theory unresponsive to the core problem encountered in judicial practice. Such a gap between theory and practice is the very paradigm of inadequacy in theory.

\textsuperscript{102} See generally E. Purcell, The Crisis of Democratic Theory (1973).

\textsuperscript{103} By extension this includes providing "guidance" to the other branches of government and to private groups whose action may affect the operation of the courts. See note 228 infra.

\textsuperscript{104} The difficulty, as already noted, is that the theory of "reasoned elaboration" receives expression in scholarly critiques that do not greatly transcend the doctrinal disagreements that divide the judges themselves. Two notable judges have had occasion to assert the limited utility of much of this reasoned elaboration critique. See Traynor, No Magic Words Could Do it Justice, 49 CALIF. L. REV. 615, 623 (1961); Wright, Professor Bickel, the Scholarly Tradition, and the Supreme Court, 84 HARV. L. REV. 769, 778-79 (1971).
The value problem—the problem of reconciling law and value choice—is the central challenge for theory seeking to legitimize the judicial function in a democratic society. Evasion of this problem, characteristic of each of the perspectives examined, has gone hand-in-hand with tacit sponsoring of the myth of simple legal formalism. To the extent the public now is presented a theory for the legitimacy of the judicial function, it is the palpable fiction that judicial decision is the application of ascertainable rules.

The best case for our theories can be made in connection with the training of advocates. The precepts of the scholarly tradition, emphasizing rigorous examination of judicial reasoning, prepare students to refute the work of other minds and to lay before the court reasonings that are the “opinion kernels” of favorable decision. The perspective of legal realism prepares students to understand and persuade the judge as a human being. But the consequences of the value problem are manifest also here—as the divorce between published reasonings and the actual grounds of decision presents a barrier to

105 See note 107 infra for further discussion of this myth.
106 In fact, the public doubtless is schizophrenic about the judicial function—in certain contexts cynically assuming that judges decide whatever they wish, while in other contexts embracing the orthodoxy that ours is a “government of laws, not men.”
107 Those engaged in public discourse about the law must choose between the “risks of candor”—the risks of admitting the extent of uncertainty and of value choice in judicial decision—and the “risks of deception.” Van Alstyne & Karst, State Action, 14 STAN. L. REV. 3, 58 (1961). Strategies for evasion of the value problem are subject to the latter set of risks. Indeed, some commentators have been frank enough to advocate deception as the preferable alternative. See, e.g., T. ARNOLD, THE SYMBOLS OF GOVERNMENT 33-45 (1935) (arguing the necessity of preserving public faith in the vision of a judiciary governed by laws, not men); J. FRANK, supra note 75, at 35 (citing disapprovingly an instance of explicit advocacy of perpetuation of the myth); D. WIGDOR, ROSCOE POUND 189 (1974) (citing instance of “several prominent law school deans” advocating continuance of the myth); Shapiro, The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles, 31 GEO. WASH. L. REV. 887, 601 (1963) (“politics is the art of the possible . . . . If the myth of the Court is destroyed in the law schools, the Court loses power. Surely this is an important truth to be taught, perhaps a more important truth than that about the discretionary role of judges.”); Shuman, Legalism: Asset, Nuisance, Necessary Evil or Illusion?, 19 J. LEGAL EDUC. 59-60 (1966). The conflict between deception and the theory of democracy is yet another difficulty presented by the value problem.
108 This circumstance doubtless is related to the fact that education is the principal activity of those formulating the theories.
effective communication, and to the desired partnership, between judge and advocate.

PART TWO: RECONSTRUCTION

I. The Roots of the Problem

Drawing on the recent work of Roberto Unger, Part Two presents a two-fold thesis. First, the inefficacy of our theories of judicial reasoning is due to the inadequacy of the modalities of explanation that underlie them. Second, it is necessary and feasible to free ourselves from these modalities, as a major step toward more adequate theories of judicial reasoning.

The "Cartesian revolution" instated two assumptions concerning man and nature which still dominate Western thought. One assumption is that there is an "unbridgeable gulf" between reason and desire. The second assumption is that the way to understand a phenomenon is by analyzing it: identifying and studying its parts.

Both assumptions underpin contemporary thought and technologies. Both assumptions have been challenged, but, as Unger observes, these challenges have been only "partial criticisms"; they have not attacked the "prison house" of Western thought at its foundations.

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110 Knowledge & Politics, supra note 1. See also Law in Modern Society supra note 1.
113 H. Thayer, supra note 111, at 17.
114 The tradition of thought that is the subject of this section, and of Unger's critique, is the "liberal" tradition comprising a set of psychological, philosophical and political beliefs founded on the primacy of the individual and the reason-will split. While this tradition excludes romanticist and collectivist strands of contemporary thought, see Knowledge & Politics, supra note 1, at 82, the liberal tradition sufficiently dominates thought and institutions to warrant identifications as "contemporary" or "modern" Western thought in the text.
115 For example, in the holistic theories of gestalt psychology and structuralism. Knowledge & Politics, supra note 1, at 47. See also id. at 125-29 (structuralism). Such holism receives broadest theoretic expression in L. von Bertalanffy, Perspectives on a General System Theory (1975) (presenting general systems theory as "a new paradigm for the development of theories," id. at 12 (emphasis omitted)).
116 Knowledge & Politics, supra note 1, at 105.
117 Id. at 3. "Thus, the house of reason in which I was working proved to be a
Unger has undertaken "total criticism" of the "deep structure" of our thought. His thesis is that Western thought—psychological, sociological, and political—is riven by antinomy between "universals" and "particulars," and that to escape the prison house we must overcome this fragmentation of our thought.

Unger posits three basal manifestations of the antinomy, in each of which a "universal"—abstract, objective, knowable—is matched by a corresponding "particular"—concrete, variable, ineffable. Thus:

<table>
<thead>
<tr>
<th>UNIVERSALS</th>
<th>PARTICULARS</th>
</tr>
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<tbody>
<tr>
<td><strong>Formalism</strong></td>
<td><strong>Intuitionism</strong></td>
</tr>
<tr>
<td>(order of ideas)</td>
<td></td>
</tr>
<tr>
<td>(logical analysis)</td>
<td></td>
</tr>
<tr>
<td><strong>Determinism</strong></td>
<td></td>
</tr>
<tr>
<td>(order of events)</td>
<td></td>
</tr>
<tr>
<td>(causal explanation)</td>
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</tbody>
</table>

Viewed as the only acceptable objects of thought and language, universals are reified. Paradoxically, while "everyone talks and acts as if [universals] were the only real things in the world," particulars slip from view. Universals of thought lose touch with particulars of human experience, re-

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118 Id. at 106, 118.
119 Id. at 104-06, 137-42.
120 Id. at 137.
121 Id. at 133-38. Unger's Figure 1, id. at 138, sets out structural features and debilitating consequences common to these antinomies.
122 Id. at 136.
123 Id.
124 Id. Thus:
The evisceration of particulars consists in treating particulars as fungible examples of some abstract quality. To be sure, the particulars as parts are recognized as more concrete and therefore more real than the universals as wholes . . . . Nevertheless, as the concreteness of the particulars increases, so does their individuality. Therefore, it becomes impossible to think or to speak about them in general categories, hence, given the nature of thought and language, impossible to think or speak of them at all. That much is implied by the antinomy of theory and fact.

Id.
resulting in an "unbridgeable gulf." In Unger's chilling metaphor, "The ghosts sing and dance on the stage while the real persons sit dumbly in the pit below."125

Unger divides the realm of universals into two main orders. One is the "order of ideas" for which the method of reasoning is logical analysis;126 the other is the "order of events" for which the method is causal explanation.127 This suggests the following arrangement of the three modalities of explanation considered in Part One:

<table>
<thead>
<tr>
<th>In modern conceptions of:</th>
<th>Universals</th>
<th>Particulars</th>
</tr>
</thead>
<tbody>
<tr>
<td>Science</td>
<td>Theory</td>
<td>Fact</td>
</tr>
<tr>
<td>Man</td>
<td>Reason</td>
<td>Desire</td>
</tr>
<tr>
<td>The Legal Order</td>
<td>Rule</td>
<td>Value</td>
</tr>
</tbody>
</table>

The tradition that defines and isolates these three categories of self-conception is the "prison house" of Western thought. "Formalism" and "determinism" express the two orders of systematic thought and language, while "intuitionism" denotes the inchoate world of subjective experience. With respect to judicial reasoning, formalism and determinism reify the universals of rule and causal force, isolating them from the experienced ("intuited") realities of deliberation and choice. The experienced realities are similarly isolated from unifying rule.

Unger's mode of escape is to add to the "order of ideas" and the "order of events" a third order—an order which transcends the antinomy of universals and particulars. This is the "order of mind,"128 for which the method is neither logic nor causality, but rather "symbolic interpretation."129 The "order of mind" posits unity between thinker and thought, between the particularity of individual thought-events and the generality of symbols forming the content of thought. In a similar manner, the "order of mind" overcomes the Cartesian anti-

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125 Id. at 137.
126 Id. at 107.
127 Id.
128 Id. at 107-11.
129 Id. Unger conceives the order of mind as existing "between" the other two orders. Id.
nomy of reason and desire by merging objective description and subjective valuation in "holistic consciousness."\(^{129}\)

The following may be given in illustration of this order of mind—a conception, Unger acknowledges, of which we now can have "only the faintest awareness."\(^{131}\)

In morals, Cartesian thought posits, on the one hand, a universal ethics couched in terms of principles of general application and, on the other hand, an "ethic of sympathy," a response to the concrete situation.\(^{132}\) Seeking roots in human experience for the "order of mind," Unger suggests that the use of parable is an instance of human thought that unites these two aspects of moral reasoning.\(^{133}\) This "image," thus uniting universal principles and particular circumstances, may be drawn upon to understand the "order of mind."\(^{134}\)

Unger's aim is to develop a more adequate theory of society and his explorations of the order of mind are therefore directed to the field of political theory.\(^{135}\) This article's concern, addressed not to political theory but to the theory of judicial reasoning, calls for different explorations. But the starting point is the same as Unger's. That point is a recognition of the need to reconstruct basic categories of self-conception.\(^{136}\) Fur-

\(^{129}\) Id. at 103, 124.

\(^{131}\) Id. at 143. See also id. at 117.

\(^{132}\) Id. at 141.

\(^{133}\) Id. at 143-44.

\(^{134}\) Id. at 144. Two other instances cited by Unger are the combination of universal meaning and concrete particularity manifest in a great work of art, and the conception of Christ as an embodiment of infinite, universal God and finite, particular man. Id.

\(^{135}\) This investigation leads Unger to a conception he calls "organic community." Id. at 236-77. This is a community dedicated to realization of humanness through a process conjoining experience and symbol whereby "[e]ach person and each form of social life represents a novel interpretation of humanity." Id. at 195.

\(^{136}\) The difficulty and unfamiliarity of such an enterprise of reconstruction, see E. SCHUMACHER, SMALL IS BEAUTIFUL 74 (1973), is due in part to the immense investment society has in the established perceptual categories. See generally Fromm, Psychoanalysis and Zen Buddhism, in ZEN BUDDHISM AND PSYCHOANALYSIS 97-104 (E. Fromm ed. 1970).

Arguing there is a need, amounting to a crisis, to restore wholeness to human rationality by bridging the gulf between reason and value choice, Larry Tribe contends that this is the fourth in a series of crises involving major readjustment of Western man's self-conception. See note 192 infra. But, in each of the previous three crises Tribe posits (arising from the discoveries of Copernicus, Darwin and Freud), reconstruction was aided immensurably by the fact that new conceptions were based on incontrovertible empirical data. Since no similarly compelling new "data" underlie this fourth crisis, this task of reconstruction requires an even greater leap of intellectual
ther, it is a belief that the antinomies of modern judicial thought can be transcended by tying theory to an "order of mind." Finally, it is a belief that, although faintly visible now, this is a path that can lead the theory of judicial reasoning into a larger world of self-understanding.

II. A DECISIONISTIC PERSPECTIVE

The antimony between universals and particulars has thwarted development of theories responsive to the experience of the deciding judge. By making this experience the primary datum of theory—through a "decisionistic" perspective—the basis for a new approach is laid. While this entire section considers the consequences of this new approach, three consequences warrant mention at the outset.

The first consequence is that the basis of theory no longer is a system of pre-existing principles; rather, it is the problem situation of the deciding judge. A decision situation becomes a problem situation when it presents two or more arguably correct outcomes, any one of which the judge could choose. To imagination than did the previous three crises. Moreover, Roberto Unger seems correct in arguing that science-based revisions of self-conception—such as that effected by the work of Freud—did not alter the "deep structure" of thought intrinsic to the antimony of universals and particulars and the orders of logic and causality discussed supra. KNOWLEDGE & POLITICS, supra note 1, at 40-41, 118.

As developed in the text and notes that follow, the term "decisionistic perspective" means an approach to the theory of judicial reasoning that focuses on the problem of decision. This perspective is allied to Jerome Hall's "law-as-action," a concept embodying Hall's proposal that the actions of officials be made the primary datum of jurisprudence and that those actions be understood as integration of rule, fact, and value. See note 141 infra. As is true of Hall's "law-as-action," the synthesizing influence of the decisionistic perspective is one of its principal strengths.

It will be noted that the term "decisionistic perspective" is used instead of "decisionism" notwithstanding that the latter term would be simpler and would match in form the primary comparable terms—i.e., "formalism," "determinism," and "intuitionism." There are two reasons for this choice of words. First, the suffix "ism" connotes a fixed, self-sufficient creed or doctrine of explanation quite different from the nascent program of eclectic exploration I describe. Second, while "decisionism" has an inappropriate established meaning, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 585 (1971) (defining "decisionism" as the [positivist] philosophy that "right is what the legislature has determined it to be"), "decisionistic" does not; indeed, the latter term has been used in a sense quite close to the one intended here. See, e.g., Radbruch, Anglo-American Jurisprudence Through Continental Eyes, 52 L.Q.R. 530, 543-44 (1936), quoted in J. STONE, HUMAN LAW AND HUMAN JUSTICE 234 (1965).

See note 165 infra for discussion of the term "outcome."
be responsive to the problem of decision, theories of legal reasoning must be congruent with this reality of choice. To be sure, in the orders of logic and causality a theory of choice—of "discretion"—is impossible; like "lawful lawlessness," the concept is self-contradictory. However, the correct response is not that a "theory of discretion" is absurd but that theorists are captive in a prison house of thought that makes the idea seem absurd.

A second consequence of the decisionistic perspective is emphasis on decision-events, rather than on rule systems, as the seat of coherence in the law. The perspective assigns central significance to the fact that the great dichotomies of legal principle—order and liberty, freedom and equality—are resolved daily. Absent this recognition, theorists are transfixed

There are two kinds of uncertainty in the law. One is curable uncertainty, as when I am uncertain of the time and then consult a clock. Judicial uncertainty curable by legal research is of this order.

The kind of uncertainty that gives rise to a "problem situation," in the sense intended in the text, arises when there are viable arguments on both sides of an issue and uncertainty is therefore incurable. See note 20 supra concerning the legal realists' recognition of the frequency with which this kind of uncertainty occurs.

See Reynolds, The Concept of Objectivity in Judicial Reasoning, 14 W. Ont. L. Rev. 1, 9 (1975) (arguing that we should not "deny the reality" of judicial discretion, but seek a successful "theory of discretion"). As suggested in the text immediately infra, however, we must recognize the extent to which the idea of a "theory of discretion" contradicts basic precepts of modern thought.

This contradiction is the reason that formalism is defended by strategies that minimize, deny, and isolate the discretion inherent in value-based choice.

Jerome Hall has shown the importance of this concept in his theory of "law-as-action"—a theory that makes the purposive, reasoned actions of officials the primary data in one's study of legal institutions. J. HALL, FOUNDATIONS OF JURISPRUDENCE 20, 145-46 (1973). Hall observes that much "current disagreement in moral and legal philosophy is due to the formulation of problems in terms of high abstraction, so that it is impossible to make a rational choice between, say, freedom and equality. . . . [W]hen specific facts and issues are confronted, a rational choice between them is regularly made." Id. at 75. Hall's view of judicial decision is part of an "integrative jurisprudence" based on the insight that "man is distinctive as the integration of thought and fact" and as the "rational-valuing-physical animal." Hall, The Perspective of Integrative Jurisprudence, in SYNTHETIC JURISPRUDENCE 30, 35 (M. Sethna ed. 1962). For Hall, accordingly, the significant thing is that the "actions which express legal ideas and purposes" are a "distinctive coalescence" of "legal ideas, facts, and valuations." Id. at 37. See also J. HALL, FOUNDATIONS OF JURISPRUDENCE 155 n.35 (1973).

Hall's "law-as-action" suggests Unger's vision of a "realm of mind" in which principles of lawfulness and coherence are a function of the integration of universals and particulars in human action. See notes 128-34 and accompanying text supra. See also Cossio, Phenomenology of the Decision, in 3 LATIN-AMERICAN LEGAL PHILOSOPHY 343 (1948). Viewing judicial decision "from within as living," id. at 349, Cossio seeks
by the antinomies of abstraction, attaching no philosophic import to the reconciliations of decision.\textsuperscript{142}

Finally, the decisionistic perspective helps dispel a confusion pandemic in current use of the term "judicial reasoning." It is understood that "judicial reasoning" refers both to product (a judicial opinion) and to process (opinion formulation). Purporting to deal with both process and product, contemporary theories of judicial reasoning in fact give little attention to process and, more significantly, to the very idea of differentiating it from product.\textsuperscript{143} To use Unger's metaphor,\textsuperscript{144} the "ghosts" that sing and dance upon the stage of judicial thought are the conceptions that can render deliberation "an experience of liberty, in which the creation of something original appears every instant," \textit{id.} at 348, and an interweaving of rule, fact and value. \textit{Id.} at 377.

\textsuperscript{142} Duncan Kennedy argues that the rule component and value component of judicial decision are not only inherently antinomous but are also representative of "irreconcilable visions" of what the social order should be. Kennedy, \textit{supra} note 9, at 1685, 1712, \textit{passim}. The order of rules reflects the individualism of the Western tradition. \textit{Id.} at 1685, 1713, 1767-70. \textit{See also} note 114 \textit{supra}. The order of values—manifested in "the use of equitable standards producing ad hoc decisions with relatively little precedential value," Kennedy, \textit{supra} note 59, at 1685, 1688—reflects an ideal of altruism, \textit{id.} at 1685, 1717, 1771-73, and organicism. \textit{Id.} at 1767. In arguing this antinomy, Kennedy denies that the individualist and altruist (that is, the rule and value) ideals can be accommodated "except in the tautological sense that we can, as a matter of fact, decide if we have to." \textit{Id.} at 1775 (emphasis added). The word "tautological" signifies a theoretic framework that shuts out the decisionistic perspective.

\textsuperscript{143} One of the best general accounts of the process of judicial deliberation remains Dewey, \textit{Logical Method and Law}, 10 \textit{CORNELL L.Q.} 17 (1924). Dewey points out that our theories perceive reasoning chiefly as product. They perceive reasoning in terms of "the relations of consistent implication which subsist between the propositions in which [our] finally approved conclusions are set forth." \textit{Id.} at 18. The result is a failure to see that reason in exposition is different from reason in "search and inquiry." \textit{Id.} at 24.

If, with Karl Llewellyn, one says that our ideas of process and of product in judicial reasoning mix in a "Huck Finn stew," \textit{LLEWELLYN, THE COMMON LAW TRADITION} 289, (1960) ideas of process contribute no more than thin soup.

To be sure, the process of deliberation has been extensively explored in terms of decision theory and policy science, for example, in the highly developed "law, science, and policy" system of Lasswell-McDougal. \textit{See, e.g.}, Moore, \textit{Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell}, 54 \textit{VA. L. REV.} 662 (1968). Such approaches, however, have not made their focus the integration of rule-following and policy in decision. One commentator has suggested that the answer is to make rule-ordered (analytical) jurisprudence and purpose-ordered (sociological) jurisprudence "complementary and interacting halves of a legal systems theory." Conant, \textit{Systems Analysis in the Appellate Decision-Making Process}, 24 \textit{RUTGERS L. REV.} 293 (1970).

\textsuperscript{144} \textit{See} text accompanying note 126 \textit{supra} for Unger's statement of the metaphor.
universals of rule and principle applicable to reasoning as product, while the experienced particulars of the process of decision are relegated, silent, to the pit.

Focusing on this duality of process and product, the decisionistic perspective attempts two things. First, it seeks to strengthen understanding of judicial reasoning as process. Second, it seeks to integrate product and process by portraying each as a function of the other. This second quest—a theoretic integration of process and product—comprises the ultimate goal of the decisionistic perspective.

A. A Decisionistic Perspective: Themes for Exploration

If any single paradigm dominates thought about the process of judicial reasoning it is the following three-step model of reasoning from precedent set out by E. H. Levi in *Introduction to Legal Reasoning.* Step one: The judge sees similarity between the case at bar and a precedent. Step two: The judge ascertains the relevant rule of law in the precedent. Step three: The judge applies the rule of law to the facts of the case at bar. This pattern reflects the conventional perception that rational decision process:

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14 Id. at 2.

Essentially the same formulation appears in H. Berman & W. Greiner, *The Nature and Functions of Law* 415-19 (3d ed. 1972); R. Cross, *Precedent in English Law* 182 (2d ed. 1968). While presented in terms only of reasoning from precedent, the model is similar to the three steps proposed by Roscoe Pound for judicial reasoning generally: (a) selection of the material on which decision is to be grounded; (b) development and interpretation of that material; and (c) application to the facts of the case. Pound, *The Theory of Judicial Decision,* 36 Harv. L. Rev. 940, 945 (1923).

While Levi refers to the entire process as reasoning by "example" or "analogy," E. Levi, *supra* note 82, at 5-6 (see also H. Berman & W. Greiner, *supra*, at 416 ("analogical reasoning"); R. Cross, *supra*, at 181 ("reasoning by analogy")), in fact that the three steps correspond to three different processes of reasoning—only one of which is reasoning by analogy. The three kinds of reasoning in Levi’s three-step paradigm are (reversing their order) deduction, induction, and analogy. Deduction is syllogistic reasoning in which ascertained principles are the major premise, the facts of the case are the minor premise, and the result (legal characterization of the facts) is conclusion. Induction is the process of "abstracting" a rule from one (or more) cases. Analogy has been described as a "short circuit" in the process of induction and deduction, whereby a precedent is argued (concluded) similar to the case at hand without an intervening process of abstracting or applying principle. Guest, *Logic in the Law,* in *Oxford Essays in Jurisprudence* 176, 190-91 (A. Guest ed. 1961). Guest suggests that in fact the rule often emerges by a process of induction, the constituents of which are the assumedly analogous precedent and the problem case itself. Id. at 191.
(a) is sequential in that it occurs one step at a time;
(b) is cumulative in that each step determines those that follow;
(c) is posterior to value choice in that demonstrably valid reasoning occurs after value choice (implicit in the initial judgment of “similarity”) is made; and
(d) is consciously directed.

These assumptions are not “wrong,” but they do reflect the limitations of Cartesian self-conception. This section presents four “themes for exploration” in the decisionistic perspective: (1) “conjunction-concurrence”; (2) “telos of form”; (3) “pervasive value valence”; and (4) “subverbal rationality.” These themes are, respectively, complementary opposites to each of the preceding four assumptions of Cartesian thought.

1. Conjunction-Concurrence

Cartesian thought identifies rationality with logic, and logic with deduction. The result of this identification, according to Stephen Toulmin, is that theories of rationality fail to reflect the realities of human reason. Toulmin contrasts deductive reasoning with inductive or, as Toulmin calls it, “substantial” reasoning, and contends that most human reasoning is of the latter kind.

Deduction, in which reasons relate as links of a chain, is linear. Induction is conjunctive; reasons relate as the legs of

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147 For Levi, the perception of similarity between precedent and problem case is the crucial act (“the key step in the legal process”) manifesting injection of the ideals and needs of society into the decision process. E. Levi, supra note 82, at 2, 3-8. This perception of similarity may or may not find support in a developed legal concept. Id. at 8. Only when a similarity becomes “finally accepted” by society, is it given form as a legal concept. Id. See also notes 83-84 and accompanying text supra.

Once similarity is perceived, value-free reasoning may then proceed in accordance with Levi’s final two steps. Exemplifying the “strategy of isolating value choice,” Levi’s model in this aspect is similar to Arthur Miller’s view that the key step in judicial reasoning is choice of the “premises” from which decision logically follows. Miller, On the Choice of Major Premises in Supreme Court Opinions, in The Supreme Court and Public Policy 118, 126 (M. Shapiro ed. 1969).

148 See TREATISE, supra note 112, at 1-4.


150 Id. at 124-25. Toulmin prefers to avoid the terms “deductive” and “inductive” because they come freighted with Cartesian notions about reasoning. Id.

151 See id.
a chair.\textsuperscript{152} Induction may seem a familiar, widely accepted form of judicial reasoning. It occurs, for example, whenever the judge "draws a rule" from a group of precedents. The precedents are a conjunction of "reasons" for the rule.\textsuperscript{153} But, as Toulmin shows generally to be the case, because induction does not conform to Cartesian preconceptions, it is pushed to the fringes of perception and receives little theoretic development.\textsuperscript{154} In judicial decision, moreover, the model of deduction is made even more compelling by the wish to present judicial decision as the application of pre-existing rule. Accordingly, it is no surprise that judicial reasoning struggles to meet the standards of deductive logic.\textsuperscript{155}

Toulmin postulates that the model of inductive reasoning is rejected because the Cartesian conception of rationality does not accommodate a leap from a conjunction of reasons to a conclusion, and views it as irrational.\textsuperscript{156} Toulmin states that this leap must be accepted as a feature of human rationality.\textsuperscript{157} There must be an effort to construct new theories of rationality.

\begin{footnotesize}
\begin{enumerate}
\item See id. This metaphor is used to characterize legal reasoning in John Wisdom’s classic essay, \textit{Gods}, in \textit{Essays on Logic and Language} 187, 195 (A. Flew ed. 1951) (counsel cites "those features of the case which severely co-operate . . . in favour of calling the situation by the name by which he chooses to call it").
\item See note 146 \textit{supra} for discussion of the various processes of reasoning. If, in Levi’s model, a rule is drawn by induction from but one precedent, see text following note 145 \textit{supra}, the several "reasons" that support the rule are facts or reasoning elements within the precedent itself.
\item Aristotle posited a realm of nonapodictic, persuasive reasoning akin to Toulmin’s "substantive reasoning." See L. Cooper, \textit{The Rhetoric of Aristotle} (1932). However, the validity of such "rhetorical" reasoning was undermined by Plato’s demolition of its principal proponents, the Sophists, see note 194 infra, and by the Cartesian revolution. See generally Florescu, \textit{Rhetoric and Its Rehabilitation in Contemporary Philosophy}, 3 \textit{Phil. \\& Rhet.} 193 (1970).
\item The persistence of this effort, and the way it distorts or conceals the problems encountered in judicial decision, is well demonstrated in Julius Stone’s analysis of the \textit{Categories of Illusory Reference in the Growth of the Common Law}. J. Stone, \textit{supra} note 6, at 235-300.
\item S. Toulmin, \textit{supra} note 149, at 231.
\item Id. at 250-51.
\end{enumerate}
\end{footnotesize}
based on the way people actually reason. Such an effort underlies "the new rhetoric," an important new school of study whose aim is to build theories on careful examination of reasonings drawn from many fields. For the new rhetoric, as for Toulmin, a cardinal point is that most human reasoning is not deductive.

These insights signify recognition of the conjunctive character of reasoning product; they lead also to a more adequate conception of process. Cartesianism not only overstresses a linear, deductive model of product, but also erroneously assumes that the same model is to be applied, woodenly, to process. Conjunction, by contrast, leads to a process-oriented conception called here "concurrence"—meaning that the individual reasons which comprise the final product are held to emerge not one at a time, but through simultaneous, correlative development. A unified theory of product and process can thus be expressed in a conjunction-concurrence model. The model posits that judicial opinions (product) conjoin propositions of many different kinds. These propositions may include:

(a) rules or policies derived from statute;
(b) rules or policies derived from an aggregate of precedent;
(c) rules or policies derived from the language or holding of an individual precedent;

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158 Id. at 240, 248, 257-58.
159 The seminal work is TREATISE, supra note 112. With respect to the program of the new rhetoric, see id. at 9-10.

The bulk of TREATISE is devoted to systematic description of reasoning drawn from literature, politics, and the law. The authors treat "techniques of argumentation" under five headings: (a) "Quasi-Logical Arguments"; (b) "Arguments Based on the Structure of Reality"; (c) "The Relations Establishing the Structure of Reality"; (d) "The Dissociation of Concepts"; and (e) "The Interaction of Arguments." Id. at viii-X.

160 See TREATISE, supra note 112, at 1-4. A major limitation of the new rhetoric is that it addresses reasoning chiefly as a tool of persuasion, rather than as deliberation. See generally text following note 142 supra for discussion of the importance of treating reason in terms that join the process of deliberation with its product.

161 It must be stressed that deduction and induction both occur in judicial reasoning. It has been suggested that judicial reasoning is best understood as inductive reasoning in which there are "ancillary deductive steps." J. STONE, supra note 6, at 331-32.

162 See note 143 and accompanying text supra for discussion of the failure to differentiate process from product.

163 Cf. Dewey, supra note 143, at 23-24 (positing that the propositions of the final reasoning product emerge "tentatively and correlatively" in deliberation).
(d) considerations of justice or social utility applicable to the parties at bar;
(e) considerations of justice or social utility applicable to persons to be affected by future applications of the decision.\footnote{Considerations of policy, justice, social utility, etc., are a legitimate basis for decision only when made relevant by a statute, precedent, or other authority. In proposition types (a), (b), and (c), the term "policies" means value or purpose tied closely to, and an element in the interpretation of, authority. On the other hand, policy often is tied to authority by nothing more than an assumption that the court or legislature intended to do justice and serve the ends of social utility. Proposition types (d) and (e) posit the functional independence in deliberation of "policy" loosely attached to a case or statute.}

The judge starts with a tentative conclusion (hypothesis) comprised of a result\footnote{It should be kept in mind that the problem element—the disputed outcome—in a case often is not which side should win, but the rationale and rule that will emerge from the court's reasoning.} plus one or more supporting propositions. The hypothesis may be, for example, that a given statutory rule, common law rule, or individual precedent dictates a certain result, and that the result is supported by considerations of policy corresponding to proposition types (d) or (e). On the other hand, the initial hypothesis may reflect uncertainty concerning proposition types (a), (b), and (c), and be dominated by a proposition of type (d) or (e).

Whatever the starting point, deliberation centers on a changing, developing pattern of propositions. The more dominant a given pattern becomes, the more it determines to which "realm"\footnote{Cf. note 190 and accompanying text infra for the "new rhetoric" notion of topos—the place or resource from which arguments are derived.} of proposition type the judge's deliberation is directed, and the more it establishes a criterion of "fit" that influences the judge's resolution of ambiguity or conflict encountered in each realm. Difficulty in deliberation is characterized by (i) conflict among the realms; (ii) rejection and reformation of hypothesis patterns; and (iii) contention among alternative patterns.\footnote{The conjunction-concurrence model can be illustrated in terms of a line of cases interpreting the Mann Act, 18 U.S.C. § 2421 (1970) (prohibiting transportation in commerce of any woman "for the purpose of prostitution or debauchery, or for any other immoral purpose") discussed in E. Levi, supra note 82, at 33-57. Drawn at random from the reasoning in those cases, examples can be given of each of the five proposition types posited above:}
Assuming the sequential (step-by-step) character of deliberation, the legal realists asserted that in fact judges often begin with their "conclusion" and reason backwards to their "premise."\textsuperscript{168} Reasoning by means of a syllogism turned backwards is by definition illegitimate.

For the realists, "conclusion" signified the impact upon the litigants of a particular resolution;\textsuperscript{168} "premise" signified the principles of law which justify that resolution. The conjunction-concurrence model suggests, however, that "conclusion" and "premise"—as thus conceived—define but two among a number of "realms" of proposition, the development of which proceeds correlative, not sequentially, in deliberation.

The argument for such a conjunction-concurrence model rests in part on the way this conception supports and is supported by other themes of decisionistic exploration.

\begin{itemize}
  \item[(a)] Rule: definition of "debauchery" based on common understanding of that term; Policy: the purpose of the Mann Act to stamp out "white slave traffic."
  \item[(b)] Rule: precedential consensus extending the Act to instances of prostitution and concubinage lacking characteristics (e.g., involuntariness) of white slavery; Policy: precedential consensus that the Act's purposes extend beyond prohibition of the white slave traffic.
  \item[(c)] Rule and policy propositions like those in (b), but couched in terms of the result or reasoning of a particular precedent.
  \item[(d)] The perceived degree of fit between the gravity of a felony conviction, on the one hand, and the character of the defendant and of the acts of immorality at bar, on the other.
  \item[(e)] The consequences of the Act's broad reach, including the character of the defendants and of the actions it would punish.
\end{itemize}

The conjunction-concurrence model suggests that the judge begins with a "hypothesis" dominated by several propositions of this type. Thereafter, the judge's attention, in deliberation and research, plays over the realms—perceptions and conclusions in others (for example, perception of social consequences in realm (e) may influence interpretation of precedents in realm (b))—as the judge works toward a self-consistent, conjunctive pattern of reasons. Contention among alternative patterns arises when opposing propositions, and hence conflicting paths to reconciliation among the realms, are seen. For two such opposing patterns of Mann Act reasoning product, see the majority and dissenting opinions in Mortenson v. United States, 322 U.S. 1037 (1944) (employee prostitutes taken on vacation trip by their employer, engaging in no illicit sexual conduct during the trip; \textit{held:} Mann Act inapplicable) (5-4 decision).


\textsuperscript{169} See note 75 and accompanying text supra for the doctrine of "particular justice."
2. Telos of Form

Tied closely to the model of sequentiality in reasoning is the idea that each step in the chain of reasoning determines those that follow—as in mechanical causation. The conjunction-concurrence model, however, suggests that goal-determinedness may be an equally important concept—deliberation being determined by the goal of reconciling evidently inconsistent propositions.

The most useful application of the concept of goal-determinedness may be in relation to the goal of constructing a conjunctive pattern of reasons conforming to one from among a number of normative patterns. The more clearly a stock of such patterns is formulated, the more a coherent telos of form could guide deliberation. Developing this stock, then, is a second theme for efforts to unify process and product in judicial reasoning.

In what terms might such patterns of reasoning product be formulated? They might be generated from recurring patterns observed in judicial reasoning, from noteworthy instances of judicial reasoning, and from more generalized principles of

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170 See, e.g., the patterns posited in M. RomBauer, Legal Problem Solving 27 (1973). In illustration, two of these patterns are that the judge:

- States a principle
- Explains underlying reasoning
- Finds no decisions refusing to apply principle
- Discusses decisions which applied principle—very similar facts
- Applies principle
- States generally accepted rule
- Discusses criticism of rule by secondary authorities
- Considers impact of rule in business community
- Considers contrary alternative rule
- Rejects generally accepted rule
- Adopts alternative rule

It must be emphasized that failure to distinguish between process and product in judicial reasoning, see note 143 and accompanying text supra, has led to failure to differentiate models of process from models of product. Thus, for example, the conventional assumption would be that a product pattern of the kind contemplated here is also a process pattern in the sense that it defines steps through which the judge would proceed in deliberation. However, the conjunction-concurrence model, reflecting the non-linear character of reasoning process, challenges such simple identification of process with linear product.

171 See, e.g., the majority opinion in United States v. Nixon, 418 U.S. 683 (1974), in which the analysis progresses through constitutional rule, constitutional value, and then competing interests.
reason formulation. A stock of normative patterns could not dictate the correct form for a given decision. "Correct" and "dictate" in this context are part of the baggage of Cartesian rationality. Rather, "guidance" is the operative concept here. With respect to product, the paradigms would provide one standard for judging the quality of judicial opinions; in terms of process, they would provide a goal of form to guide deliberation.

3. **Pervasive Value Valence**

In the conjunction-concurrence model, rule and value propositions coalesce in the process of judicial reasoning. In some measure, then, the model helps overcome the value problem by showing the connectedness of rule and value. But to confront the value problem fully requires value to be seen not merely as "proposition" but also as force—as a set of "can't helps" which give rise to undeliberated value choice.

Cartesianism suggests a paradigm in which value determinations precede rational deliberation. But, because this model isolates value choice, it encounters all the problems of reason-value antinomy. Furthermore, it is incompatible with concurrence in reason formulation.

How can one accept value preference in judicial reasoning without resort to a strategy of isolating value choice? I suggest a model whereby every proposition that enters the deliberating judge's perceptual field is understood to have a value

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172 See, e.g., Perry, Moral and Judicial Reasoning: A Structural Analogy, 22 BUFFALO L. REV. 769 (1973). Seeking a "mode of rationality which is available even when uniquely correct arguments and results are not," id. at 795, Thomas Perry suggests a certeris paribus model of rules (in the form "this rule controls, all things being equal") in which reasoning is centered on the conditions argued to make the rule inapplicable. Id. at 781.

173 See note 185 infra in which the need to overcome Cartesian precepts is discussed.

174 See note 185 infra for non-Cartesian conceptions of deliberation.

175 Cf. note 185 and accompanying text infra where this connectedness is discussed.

177 Holmes, Natural Law, 32 HARV. L. REV. 40, 40-41 (1918). But see note 185 infra.

178 See note 147 and accompanying text supra for appreciation of the paradigm.

179 See, e.g., text accompanying notes 35-39, 62-67 supra for discussion of "isolating value choice."

180 See, e.g., notes 40-41 and accompanying text supra for reference to these problems.
valence. Whether the object of perception be a rule proposition or a value proposition, perception and valuation conjoin in one action as the judge’s valuations give each proposition a “valence”—positive, negative, or neutral—that influences commensurately the weight accorded the proposition in perception and deliberation. The more an issue is in doubt, the more the choice between competing propositions will be influenced by their respective value valences.

This notion of value valence, like others presented here, can help one understand the realities of deliberative experience. Chiefly, it embodies recognition that value choice is not an isolated step or stage in deliberation—as it is portrayed by theories that implement the “strategy of isolating value choice.” On the other hand, the idea of value valence is not a license for judicial subjectivism. In the Cartesian system, true choice is impossible. Rules dictate results by logic while value dictates results by deterministic force; the rationally deliberating “I” is lost. But in the experienced realities of the “order of mind” there is a controlled freedom that throughout the process of deliberation fuses value choice to rule. “Pervasive value valence” is offered as one conception

\[168\] Cf. Cohen, Field Theory and Judicial Logic, 59 Yale L.J. 238, 248-51 (1950) (proposing a model whereby a value force field created by the judge determines the perceived “shape of precedent as well as its size”).

\[181\] See text accompanying notes 35-39, 62-67 supra for discussion of the assumption that value choice comprises a distinct step or phase in judicial reasoning.

\[182\] Cf. note 195 and accompanying text infra (“collective deliberation” reduces the subjectivity of individual deliberation).

\[183\] See note 185 infra regarding non-Cartesian precepts of rational choice.

\[184\] See text accompanying notes 128-34 supra for a discussion of the “order of mind.”

\[185\] The proponents of “the new rhetoric,” see note 159 and accompanying text supra, have shown that only by overcoming Cartesian precepts will we be able to conceive reasoning in terms such that “a reasonable choice can be exercised”; only then can theories embrace “human community in the sphere of action.” Treatise, supra note 112, at 514. Cf. Recasens-Siches, The Logic of the Reasonable as Differentiated from the Logic of the Rational (Human Reason in the Making and the Interpretation of the Law), in Essays in Jurisprudence in Honor of Roscoe Pound 192, 209 (R. Newman ed. 1962) (arguing the need for theories of reasoning that give significance to choice).

The model of pervasive value valence suggests an order of mind in which the deliberator is conceived as neither process-controlling nor process-controlled, but as process-entering. Compare the concept of “middle voice,” familiar in some grammars but rare in English, which refers to action without differentiating whether the actor is subject or object. See Dictionary of Language and Linguistics 251-52 (R. Hartmann
by which to unify valuation and the application of rules.

4. Subverbal Rationality

What results if, breaking with Cartesian precepts, rational process is viewed as in part consciously directed and in part subverbal? What follows, in short, if conscious rationality is rooted in "subverbal rationality"?

One result is to magnify the importance of conceptions of reasoning that are congruent with such a view. An example is the "new rhetoric" precept of topoi, reflecting the idea, echoed in the "situationism" of Christian ethics, that the premises of reasoning can be understood not only as propositions but as a resource, or place, from which reasons emerge.
The precepts of "structuralism," as recently shown, provide a second means of tying product to subverbal process in judicial deliberation.

A second contribution of "subverbal rationality" is to put the theory of judicial reasoning in touch with a host of explorations in humanistic thought—supporting a holistic conception of judge as rule-following, valuing self. In addition to positing a gulf between verbal rationality and nonverbal "will."

\[\text{\textit{supra}}, \text{the foundation for argument is not a set of propositions but is a resource (locus) from which arguments are derived. See J. Stone, \textit{supra} note 6, at 330-32.}\]

Julius Stone, suggesting that the new rhetoric may be the best new avenue toward better understanding of judicial reasoning, \textit{id.} at 335-37, observes with respect to the notion of \textit{topoi} that "the data from which judges begin to reason (the premise of their purported logical [deductive] argument, as it were) is often not a legal proposition, but is some sort of composite of such propositions with notions of justice or policy."

\textit{Id.} at 333-34. If such a "composite stands uneasily as a premise" in deductive reasoning, "we can think of it easily and fruitfully as a 'place of argument' or 'topos' for the more open argument and testing characteristic of rhetorics." \textit{Id.} at 334.

Stone observes further that the notion of \textit{topoi} illuminates the nature of reasoning from precedent. Thus,

\[\text{[W]hen we call a case "a leading case," what we really mean is that that case is, for the time being, a seat of argument. What [precise propositions] the case stands for can rarely . . . be determined by analysis of either of the facts or the judgments. Yet some composite of these is still where argument tends to start, once it becomes common ground that the case is a leading case, and so long as it remains so. In that sense a leading case is a topos of legal argument.}\]

\textit{Id.} at 334-35 (emphasis omitted).

\[\text{\textit{11} See Hermann, \textit{A Structuralist Approach to Legal Reasoning}, 48 S. Cal. L. Rev. 1131 (1975) (stressing the "cognitive" role of the unconscious, \textit{id.} at 1141, and presenting a model in which judicial decision is partly unconscious "mediation" between binary opposites, \textit{id.} at 1150-53).}\]

\[\text{\textit{12} By the phrase "put in touch," I mean that the themes of human wholeness and of the tragedy of modern fragmentation in socially important works such as M. Buber, \textit{I and Thou} 7-17, 43 (1958); R. Pirsig, \textit{Zen and the Art of Motorcycle Maintenance: An Inquiry Into Values} 234, 351, 371-72 (1974); and P. Tillich, \textit{The Courage to Be} 137-39 (1952), should not merely be remarked with interest, but incorporated into our theories.}\]

\[\text{\textit{See also Tribe, \textit{Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality}, 46 S. Cal. L. Rev. 617 (1973). Tribe argues that the great need now is to build thoughtways that can encompass a vision of human existence in which wanting and knowing—desire and reason—present integrated facets of a common reality rather than opposing poles of an inexorable dichotomy [and which will] embrace an idea of rationality that is more personal and more deeply rooted in the life history of the individual than is true of abstract, universal reason.}\]

\textit{Id.} at 654. Tribe notes that history has seen other crises requiring reconstruction of our conceptions, \textit{id.} at 617, and argues that the unfamiliarity of the needed new thoughtways must not cause us to dismiss the quest as empty or absurd. See \textit{id.} at 654.
Cartesianism assumes that rationality is a function of autonomous mind. Subverbal rationality, by contrast, suggests conceptions of deliberation that show the deliberator dependent and incomplete—thereby increasing the theoretic import of collegiality in judicial deliberation, as of judicial

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183 The doctrine of autonomous mind is a principal feature of the legacy of Plato, E. Havelock, Preface to Plato 204 (1963), though it reaches full flower in the Cartesian conception of rationality.

184 With respect to the doctrine of autonomous mind, it may be correct to speak of a “prison house,” see notes 111-34 and accompanying text, supra, of 2000 years duration. It is well to gain perspective on the inception of this doctrine.

In establishing the precept of autonomous mind, see note 193 supra, Plato overthrew a conception of interdependence in deliberation central to the philosophy of sophistry. Plato not merely deposed that conception, but his writings fundamentally distorted sophistry—reducing it to the ethos of opportunistic, fallacious argument by which it is known today.

In order to establish his vision of a stable world knowable to reason, Plato had to overthrow a philosophy for which human opinion was central. Sophistry defined “reason” ( logos) as “the flexible discourse of human beings,” and “sought to rationalize the process by which opinion is formed and then effectively expressed.” E. Havelock, The Liberal Temper in Greek Politics 156 (1957). For sophistry, the “good” was discoverable only by community process, and “political judgment . . . [was] hardly distinguishable from communication.” Id. at 193. As a philosophy, then, sophistry was concerned with the formation of judgment; of only secondary importance was the technology of persuasion. Id. at 220, 241. In portraying as demagogic the ethos of the elder Sophists, see id. at 156, Plato denied the central tenet of their philosophy—an ideal of “social and political responsibility,” id. at 230, and of group deliberation characterized by “sincerity and total involvement.” Id. at 221. See generally id. at 215-22.

Also important to one’s perspective on the origins of our 2000-year conception of autonomous mind is Plato’s similarly successful overthrow of the poetic tradition. See E. Havelock, supra note 193. Indeed, for Plato’s theory of autonomous mind, the “arch-enemy” was “poetic experience”—the “over-all state of mind[,] let us call it the Homeric,” id. at 47, 236, inherent in openness to a narrative. Such surrender of self was anathema to Plato. Id. at 207. Plato saw in it the “chief obstacle to scientific rationalism, to the use of analysis, to the classification of experience to its rearrangement in sequence of cause and effect.” Id. at 47. Poetic was rooted in the realm of “acts-and-events” ( pragmata), id. at 237, 244, alien to truth, beauty, and goodness—the static concepts, knowable to reason, that comprise essential reality. Plato assigned to the realm of poetic the term “doxa”—meaning opinion or belief. Id. at 235, 248. Doxa, embracing “contradiction almost as a principle,” represented for Plato the “pluralization and the concreteness and the confusion of the poetised statement.” Id. at 246.

185 Although obeisance is paid to the virtues of collective deliberation, see, e.g., 1 Wigmore on Evidence § 8a, at 246 (3d ed. 1940); Brennan, Working at Justice, in An Autobiography of the Supreme Court 299 (A. Westin ed. 1964); it has received little attention in the judicial reasoning literature. Note, for example, the paucity of reference to it in the excellent recent compendium, L. Aldisert, The Judicial Process (1976). The overriding point is that theories of judicial reasoning, centered on the idea of autonomous mind, assign a peripheral role to deliberative interdepend-
“dialogue” in other forms.196

Does subverbal rationality carry theorists too far from the proper sphere of law academics? Can the implicated teachings of psychology, philosophy, and religion be mastered? These are troubling questions.197 But one should respond with full awareness that fragmented self-conception is basic to the Cartesian prison house198 and that wholeness of self-conception depends on synthesis of these various views of self. Moreover, judicial decision is the phenomenon in society which, more than any other, challenges one to understand the combination of rule and value. It therefore seems a suitable focus for eclectic study of rational, valuing self.

B. Application of the Decisionistic Perspective: The Problem of Constitutional Review

Having been presented in a set of “themes for exploration,” the decisionistic perspective can now be developed more concretely by application to a perennial problem of judicial scholarship—the problem of defining standards of constitutional review under the equal protection clause. It generally is understood that while purporting to apply a “two-tier” standard of review,199 in fact the courts apply a multiplicity of stan-

ence—reducing it chiefly to a set of aids for the autonomous deliberator. See, e.g., K. Llewellyn, The Common Law Tradition 31 (1960). By contrast, the sophistic tradition of thought considered in the preceding note accords great theoretic significance to interdependence. See also Hardwig, The Achievement of Moral Rationality, 6 PHIL. & RHET. 171 (1973). Hardwig, in an essay published as part of the literature of the new rhetoric, argues that moral rationality “necessarily includes a public, cooperative enterprise;” “we” can be ethically rational but “you cannot and I cannot” separately. Id. at 171. Moral rationality, Hardwig argues, is “essentially an achievement of a multi-person encounter,” id. at 179, carried on through dialogues in which the participants open themselves to growth and change. Id. at 181-83.

196 Regarding another form of dialogue, see note 97 supra.

197 See, e.g., the bibliography in A. Koestler, supra note 186, at 717-25 for only one part of the appalling breadth of ground potentially relevant to theories of judicial reasoning.

198 See generally sources cited in note 192 supra for discussion of this fragmentation. Commenting on the problem of fragmentation in human knowledge, Stuart Hampshire observed that “[k]nowledge . . . diffused among different minds cannot be put together, in a single act of mind, to generate further thought; it can be and I believe often now is, sterilized by this separation.” Hampshire, The Future of Knowledge, N.Y. REV. BOOKS 14 (Mar. 31, 1977).

199 One “tier” is the normal (“rational basis”) standard of review that asks only whether the governmental action at issue is rationally related to a permissible end.
The roots of the problem, however, run deeper. Characteristically couched in all-or-none terms, legal rules provide limited guidance for resolution of conflict among rules or of continua within rules. This inadequacy presents a special problem in the case of the “all-or-none” rules that express the standards of constitutional review, since these standards purport to guide the review process. Thus, the key to more adequate standards of constitutional review lies in better conceptualization of the process of review rather than in the number, or even the substance, of the tests devised.


See generally McCoy, Logic Versus Value Judgment in Legal and Ethical Thought, 23 VAND. L. REV. 1277 (1970). See also note 20 supra suggesting the frequency with which rules do conflict.

The first tier of review consists of two binary (all-or-none) determinations: (i) that a rational purpose is or is not discernible, and, if discernible, (ii) that the government action is or is not rationally related to achievement of that purpose. In the second tier the comparable determinations are: (i) that a compelling purpose is or is not discernible, and, if discernible, (ii) that the government action is or is not the least restrictive means of achieving that purpose.

Under the two-tier model, the purported procedure is that one first ascertains which tier is appropriate, and then one scrutinizes the proof and makes the all-or-none determination called for by the indicated test.

Varying the all-or-none formulae may not provide the answer. See, e.g., Gunther, A Model for a New Equal Protection, 86 HARV. L. REV. 1, 20 (1972) (proposing the single test whether “legislative means . . . substantially further legislative ends”).

See generally McCoy, Logic Versus Value Judgment in Legal and Ethical Thought, 23 VAND. L. REV. 1277 (1970). See also note 20 supra suggesting the frequency with which rules do conflict.
A mode of conceptualizing review that escapes the trap of all-or-none rule is that proposed by Justice Marshall, dissenting in *Dandridge v. Williams*. Rejecting review based on a two-tier dichotomy between "fundamental rights" and other important interests, Justice Marshall asserted that concentration must be placed [instead] upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.

This approach, however, is subject to the opposite objection that it has too little structure; that it signifies the "lawlessness" of ad hoc balancing.

The two modes considered for stating a standard of constitutional review present the dilemma seen in judicial decision generally: the dilemma requiring choice between formalism and ad hoc decision. Suppose, as in the decisionistic perspective generally, a "middle way" is sought?

The response suggested here is to develop from the conjunction-concurrence model more adequate factor-based conceptions of constitutional review. While the delineation of relevant "factors" in the course of judicial reasoning is a familiar idea, a theory of "factors" adequate to provide a foundation for standards of constitutional review is lacking. The underlying reason for this absence may be that such theory would cut across the formalist-intuitionist polarity that, as seen, structures the prison house of Western thought. This section suggests three strategies for constructing a theory of factors upon which more adequate standards of constitutional review may be based.

As Jerome Hall noted in his exposition of "law-as-

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206 See note 199 *supra* for this dichotomy.
207 397 U.S. at 520-21.
208 See generally Kennedy, *supra* note 59.
209 See text accompanying notes 148-69 *supra* where this model is presented.
210 Surveying the literature and cases that reflect the problems inherent in two-tier review, see, e.g., note 200 and accompanying text *supra*, one is impelled to seek explanations for the absence of alternative formulations that avoid the trap of ad hoc balancing.
judicial decision is a fusion of rule, fact, and value. This suggests that the "factors" of judicial reasoning should be deliberately fashioned so as to embody such a fusion. It would follow that the tendency to identify factors solely with "interests" is misguided, and thus Marshall's interest balancing model is justly open to the charge of "lawless ad hoc" balancing. Instead, factors should be framed in terms that merge rule, fact, and value—as in the "definitional balancing" model suggested by Emerson and Nimmer in the context of first amendment rights.

Between the models of rule application and of ad hoc balancing, "definitional balancing" means that while decision is governed by rules, the operative terms of the rules are defined in relation to "factors" responsive to contending constitutional values. The court can articulate its definitional factors at a level calculated to strike an accommodation between the particularity needed for the situation at bar and the generality needed for effective case-by-case development of rules.

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211 See note 141 supra for discussion of this concept.
212 Constitutional review often is conceived as the analysis and "balancing" of contending "interests." See, e.g., Dowling, Interstate Commerce Power and State Power, 24 VA. L. Rev. 1 (1940) (setting out the conceptual foundation for a balancing of interest approach in cases involving commerce clause restrictions on state power); P. Kauper, Civil Liberties and the Constitution 117 (1962) ("balance of interest approach" termed the dominant reality in constitutional review); Gunther, supra note 204, at 1, 7 (giving primacy to effective balancing of interests in constitutional review).
214 While in ad hoc balancing the competing interests are weighed anew in each case, "definitional balancing" identifies interest-responsive factors that define rules of general application. In the context of free speech and the right of privacy, for example, instead of ad hoc balancing between the speech and privacy interests implicated in each case, rules (governing the scope of first amendment privilege) are defined in terms of factors (e.g., whether the speaker knew the utterance was false and defamatory) in terms of which generalized balances of interest are struck. See Nimmer, supra note 213, at 944-45, 951-52.

The approach of definitional balancing is not novel; on the contrary, it underlies much judicial reasoning. The point, however, is that conventional perceptions of judicial reasoning have failed to accord this process the central place, and the theoretic development, it warrants. "Definitional balancing" remains simply one school of thought concerning first amendment rights, see Lange, The Speech and Press Clauses, 23 U.C.L.A. L. Rev. 77, 88 (1975), while it ought to be a developing conceptual foundation for more adequate factor based theories of judicial reasoning.
It also follows that judicial opinions should delineate factors that explicitly tie the major facts supporting decision to the values and purposes made relevant by rule. This point can be illustrated in terms of one of the classics of factor-based reasoning, Burton v. Wilmington Parking Authority. Finding government involvement in private enterprise sufficient to make private discrimination "state action" for purposes of the fourteenth amendment, the Court centered its reasoning on an itemization of the incidents of government involvement. In dissent, Justice Harlan accused the majority of merely "throwing together various factual bits and pieces." Justice Harlan's criticism has merit in that the majority should have presented the operative facts of government involvement in a way that achieved greater generality, and tied them more clearly to the purposes that underlie the mandate of the fourteenth amendment—thus fusing rule, fact, and value.

A second strategy, suggested by the preceding discussion of conjunction-concurrence, is to search for generalized principles for organizing reasons that can give guidance to factor-based reasoning. The third strategy involves the idea of cooperation between academics and judges. Consider, for example, Gerald Gunther's assessment of the work of Justice Powell. Finding Powell's performance "especially noteworthy," Gunther saw marked resemblance to the craftsmanship of Justice Harlan. For Gunther, balancing that manages to "conjoin the particular with the general" is central to the

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116 Id. at 728.
117 This end would have been served, for example, had the facts of participation been grouped, and their gravamen expressly defined, in terms of the government (a) benefiting by the enterprise; (b) playing a major role in creation of the enterprise; and (c) failing to use its proprietary authority to prohibit the acts of discrimination.
118 See text accompanying notes 148-69 for this discussion.
119 One approach would be to examine generalized formulations of constitutional review, see, e.g., the ceteris paribus model, supra note 169; Sharpio, Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis, in The Supreme Court and Public 22 (M. Sharpio ed. 1969). The insights of each of the formulations could be drawn into one's theory of factor-based reasoning.
121 Id. at 1002.
122 Id. at 1003.
123 Id. at 1027 (citation and emphasis omitted). See also id. at 1004-14.
“Harlan Model.” The key to this conjoining, and a chief criterion in Gunther’s assessment of Powell’s performance, is that one must “draw out all the concerns in a balancing analysis—weaving those concerns into unified principles to guide decision.”

Granted, no clear conclusions emerge from Gunther’s analysis. The nature of conjoining remains shadowy and Justice Powell’s execution is deemed that of a “novice” whose mastery is far from complete. But the point is this: Can one see in Gunther’s assessment of the work of Justice Powell the seeds of fruitful partnership? The traditional scholarly imperative is to formulate and advocate new standards of constitutional review. The decisionistic perspective, however, suggests that if Gunther’s assessment of Justice Powell could be conceived as true dialogue between the two, it might contribute more to development of constitutional review than all the proposed new standards. Indeed, it could be said that the aim of the decisionistic perspective is to join theoretician and practitioner—bringing to judicial explorations the voice of theory and of dialogue.

In sum, the decisionistic perspective signifies pursuit of theory congruent with practice—a congruence essential if the

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221 Id. at 1004.
225 Id. at 1015.
228 Id.
227 See, e.g., Gunther, supra note 204, at 1.
228 The possibility of such dialogue has a significance greater than improvement of our models of constitutional review. It has been observed that an essential task of constitutional law scholars is to “keep the Court honest.” Preface to The Supreme Court and the Constitution, supra note 48, at viii. Beyond the chastisements of scholarly critique, means to this end are suggested by Charles Frankel’s analysis of how to hold accountable the complex institutions of modern government.

[T]he area or groups who conduct the examination of the [institutions of] government in question . . . have to know the right questions to ask, and they also have to be able to tell a good answer from a bad one. [Also] there must be effective communication between those who perform and those who judge the performance . . . . The standards of judgment by the critics must have some relation to the realities of the performers’ tasks.


It has been suggested that, to square the Court with democracy, we should open to public scrutiny methods of judicial deliberation, even making public the substance of the deliberations themselves. Miller & Sastri, Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain, 22 BUFFALO L. REV. 799 (1973). It would seem, however, that disclosure of actual deliberations would be acceptable only after we have narrowed the present gulf between theory and reality in judicial reasoning.
theory of judicial reasoning is to fulfill the three functions which, as earlier suggested, comprise "adequacy" in theory. Thus, the congruence of theory and practice embodied in the decisionistic perspective signifies theory that (a) is useful to judges, as by providing theories of factors that guide process as well as product; (b) provides norms that delimit, and so help legitimate, the judicial function; and (c) permits the advocate more accurate perception of, and hence more effective partnership in, judicial decision-making.

It will be noted that "theory" is used here in the generally accepted sense of a model, or picture, of judicial reasoning. Thus, the preceding pages have addressed the decisionistic perspective chiefly in terms of models of judicial reasoning it may produce.

But such a conception of "theory" is static and therefore incomplete. Thus, it is crucial that our understanding of judicial reasoning—as our understanding of all phenomena we study—constantly is unfolding. A "theory" is responsive to this temporal dimension of our thought to the extent it guides the process of inquiry. This suggests that a fourth criterion of adequacy in "theory" is its fruitfulness as a guide to inquiry. In terms of this criterion, the significance of the decisionistic perspective lies in its suggesting routes of exploration toward major uncharted areas in our understanding of judicial reasoning.

III. RECONSTRUCTION AS A HUMAN ENTERPRISE

In what we have called its "temporal" aspect, then, theory signifies an enterprise of inquiry. This suggests, in turn, that in conceiving reconstruction of the theory of judicial reasoning we should look not merely "outward" at the sought-for products of reconstruction, but also "inward" at ourselves as theory formulators. Such an inward view suggests three points about the enterprise of reconstruction.

First, since the orthodoxies of Platonic-Cartesian conception continue to blind us to realities of human experience,
reconstruction requires that careful observation of the processes and products of judicial reasoning be performed with the explicit aim of changing the way we conceive those phenomena. This means accepting the difficulty and trauma of basic change in one's concept system.

It was noted that reconstruction requires synthesis of presently fragmented perspectives. In its "inward-looking" aspect this synthesis signifies attitudes of cooperation among adherents of the various perspectives. The enterprise of reconstruction, like the enterprise of judicial decision itself, accordingly must be seen as a "public, cooperative enterprise"—as a "multi-person encounter" characterized by "true dialogue" in which the participants expect to be changed. Reconstruction thus requires openness not just to the phenomena studied but to the diverse perspectives of other participants in the enterprise as well.

While the problem of fragmented perspectives commonly is perceived in terms such as the parable of the blind Hindi who each feel different parts of a single elephant, a more accurate metaphor is one in which all inquirers see the entire elephant but disagree as to which part is the most important. These determinations of importance, in turn, are largely a function of

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231 See note 136 and accompanying text supra for earlier development of this point.
232 See note 198 and accompanying text supra for statement of this point.
233 Such attitudes of cooperation contrast sharply with prevailing attitudes of competition among adherents of particular perspectives, who, as Felix Cohen suggested to be true of legal philosophers, "are generally right in what they affirm of their own vision and generally wrong in what they deny of the vision of others." Cohen, Field Theory and Judicial Logic, 59 YALE L.J. 238, 269 (1950).
234 See note 195 supra for the above-quoted phrases, used in describing interdependence in moral deliberation.
236 For such a metaphor see Cohen, The Relativity of Philosophical Systems and the Method of Systematic Relativism, 36 J. Of PHILOSOPHY 57, 57 (1939) (parable of two Hottentot hunters, one of whom counted a rank of elephants from left to right and the other from right to left—leading to bloody dispute over which was "Elephant No. 1").
237 The same truth is seen in the observation that legal writing is not discovery, but emphasis, Editors' Preface, supra note 98, at 1555, and in Karl Llewellyn's statement that none of the legal realists' ideas were new but that what "is as novel as it is vital . . . is to pick up such ideas and set about consistently, persistently, insistently to carry them through." Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222, 1238 (1931).
value judgment. This leads to a third inward aspect of the enterprise of reconstruction, tied to the problem of subjective valuation in academic work.

One consequence of recognizing the pervasiveness of valuation in judicial reasoning, it was earlier observed, is to give increased theoretic significance to the "gyrocompass" of collegial deliberation. This applies equally to valuation in the work of reconstruction. That is, the "public, cooperative" character of the reconstruction enterprise signifies a means not merely of joining diverse modalities of explanation, but also of mediating—through mutual self-disclosure and open dialogue—the values that underlie our work.

2 While the aim of the legal realists was to free the judge to do justice in the case at hand, see notes 74-75 and accompanying text supra, the program of analytical jurisprudence is to forge the "fetters" that will restrain judges. See notes 9-11 and accompanying text supra.

Value judgment in jurisprudential thought is central to the analysis of Duncan Kennedy in Form and Substance in Private Law Adjudication, supra note 59. The ideal of formalism, Kennedy argues, corresponds to an "individualist" social order that strives to maximize the realization of individual goals and minimize judicial intervention in the affairs of society. Id. at 1776-81. By contrast, Kennedy argues, non-formalist acceptance of value-based judicial decision—which is implicit in the decisionistic model developed herein—rests on the ideal of an "altruist" social order in which each individual, willing to compromise his desires with those of others, accepts a judicial role that is by definition less circumscribed and more interventionist than under the formalist model. Id. at 1771-74. Kennedy's altruist-individualist polarity doubtless marks only one of a number of value judgments concerning the social order and the proper role of the judiciary that underlie espousal of the decisionistic perspective.

While the proposition that valuation influences scholarly work is not an unfamiliar one, it is largely eclipsed by the ethos of value-neutral technology that dominates academia as it dominates other institutions of modern society. Indeed, one should understand that the academic's prison house, see text accompanying notes 111-34 supra, is not a prison but a haven. Its ethos of value-neutral study is the source and sanctum of our professional identity. To leave this faith, as Unger's analysis suggests we must, see Law in Modern Society, supra note 1, at 266-68, and come to terms with the union of perception and valuation in our work, is a difficult and frightening prospect.

2 See note 195 supra for development of this point.

John Kenneth Galbraith has argued that the Western world now faces the question of how democracy can be reconciled with the increasingly important role necessarily played by an "educational and scientific estate" in technological society. J. GALBRAITH, THE NEW INDUSTRIAL STATE 387 (1967). The synthesizing and checking of valuations through disclosure and dialogue in a community of academic inquiry seems to provide at least part of the necessary answer.