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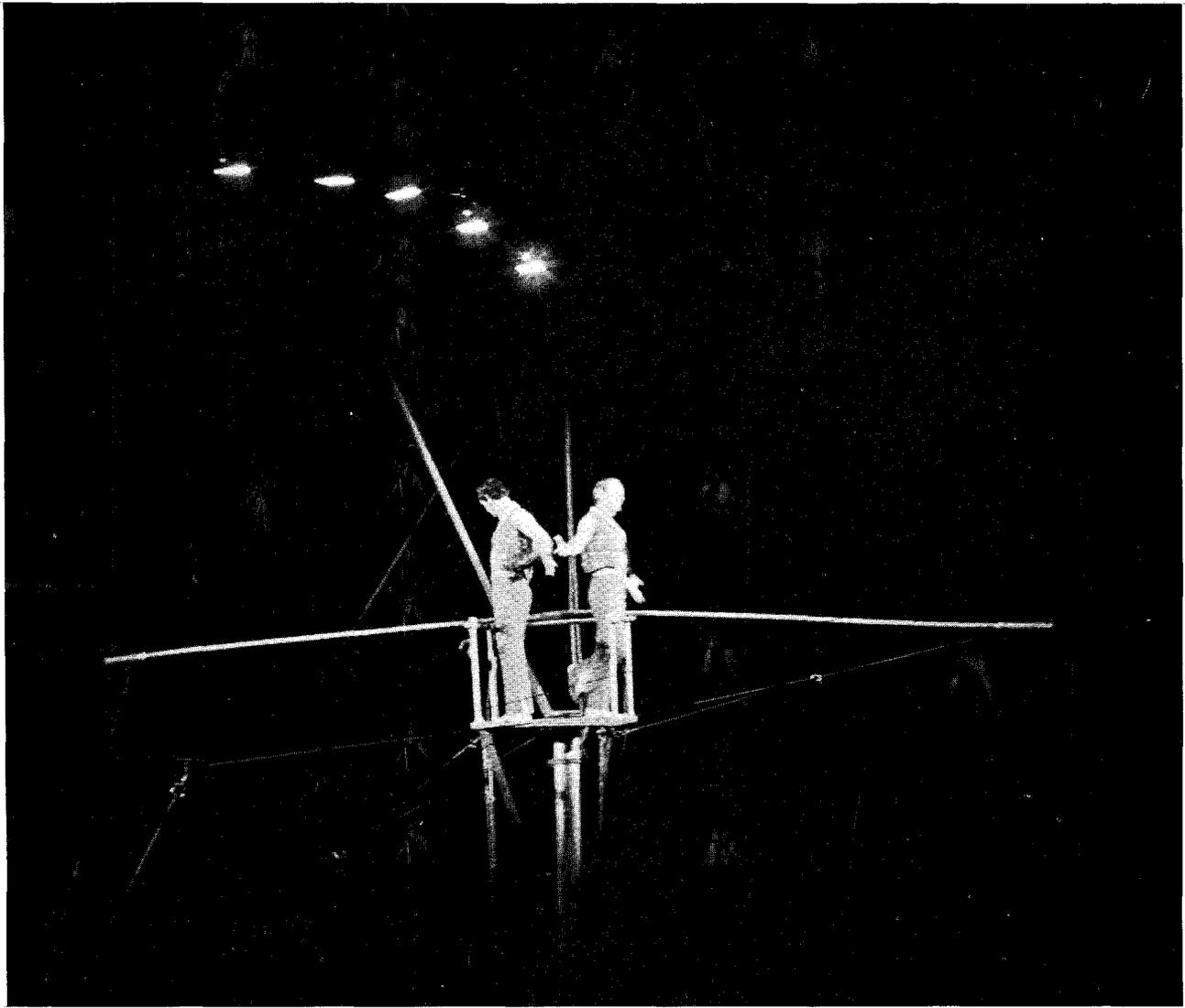
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Once through the Wonderland of Logic, and Back Again

by Harriet E. Lulie



Modern civilization is experiencing the early tremors of a technological revolution which will confuse and unsettle society as it forces the reexamination of those values which form the bedrock of our civilization's world view. We as a society will soon, as history measures time, bring the vital processes of biology under human control as thoroughly as we have

domesticated mechanical devices. History bears the record of what struggles individuals and societies had to endure to develop a *modus vivendi* which allowed man to survive the industrial revolution. Law was called upon to resolve many issues between individual litigants, many of which necessarily involved value judgments about ideologies and

philosophies of life.

The development of product liability law is often quoted as an area where the balance in favor of manufacturers has been slowly tipping in favor of the ultimate consumer. The legal system has only grudgingly admitted its growing role as arbitrator between competing lifestyles. The law has been and will be re-

quired to evaluate the permissibility of actions taken by individuals who have embraced the new technological possibilities. These new alternatives will allow the development of life styles which were physically impossible before science gave man the capability to make choices in structuring the fundamental organization of life processes. This capability is limited at the moment to the relatively simple procedures such as abortion, euthanasia, and some organ transplants. However, there is no reason to believe that the technological revolution is losing momentum or that future development will not perfect a more complete guidance of life systems.

The burden of resolving conflicts between individual litigants necessarily falls upon the courts. The procedure, the very habits of rational thought, by which the courts organize this flood of new information and adapt to the new focus on life will in part determine with what measure of respect society will regard its legal system. The courts have an opportunity to reevaluate their values — indeed those of society — in order to help society deal with its growing pains in as calm an atmosphere as possible.

The methods by which courts dealt with conflicts between life styles in Victorian and earlier times were laden with presuppositions and attitudes which are no longer acceptable. The traditional rationalizations were so deeply rooted that a member of the Supreme Court was able to proclaim: "The constitution of the family organization, which is founded on divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . This is the law of the Creator." *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

Modern life has placed a great deal of practical emphasis on protecting individual worth and freedom of choice. When social values conflict, there must be a forum available which will structure the debate in a responsible manner and focus the issues. A distinguished modern jurist, Edward H. Levi, Attorney General of the United States, has addressed the need:

In a broadly based, vocal and literate society, susceptible to the persuasion of many tongues and pens, and with inadequate structuring of relevant debate the Court has a useful function not only in staying time for sober second thought but in focusing issues. It is sometimes the only forum in which issues can be sharply focused or appear to be so. E. LEVI, *THE NATURE OF JUDICIAL REASONING, LAW AND PHILOSOPHY* (Sidney Hook ed. 1964), as reprinted in *JURISPRUDENCE* 967-77 (G. Christie ed. 1973).

The legal system is called upon to arbitrate when the existing authority of the state enforces a certain standard of behavior which is the subject of reevaluation by a substantial cross section of contemporary thought. The usefulness of habits of thought, generally lumped under the label of *stare decisis*, does not extend to this area, which arbitrates between opposing philosophies. *Stare decisis* can preserve what the law was, but is insensitive to what is, should be, or will be. Thus, another formula for a rational process is needed to replace the discredited, formalistic thought process which underlay the classic approach. The formal approach of classical philosophy and its use of syllogistic reasoning from first or necessary principles is too rigid, too idealistic an approach for a pragmatic system of courts and procedure.

A judicial branch of government must relate to the people as a living part of society's experience; it must be perceived as a source of useful and appropriate solutions. The Supreme Court has dealt with opposing philosophies in the past and has acknowledged the complexity and magnitude of the task: "We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires." *Roe v. Wade*, 410 U.S. 113, 116 (1973).

A closer look at two of the "vigorous opposing views" would deepen the understanding of the nature of the beast that the courts have been tasked to tame. The natural law tradition, whether in its classic formulation by Thomas Aquinas or utilitarian approach of Jeremy Bentham, was chosen as gener-

ally familiar to students of philosophy. Furthermore, both of these ethical theories have exerted a strong shaping influence on modern thought and the literary traditions in which judges function. A system of comparison is more interesting when the subjects are sufficiently dissimilar so that any areas of agreement appear all the more startling. Both of the theories chosen are objective in the sense that they accept the existence of independent standards which make it possible to determine which actions are necessary and appropriate if people are in fact to do what they ought to do.

Jeremy Bentham gave this: "[F]undamental axiom, it is the greatest happiness of the greatest number that is the measure of right and wrong . . ." J. Bentham, *A Fragment on Government*, reprinted in *A BENTHAM READER* 45 (M. Mack ed. 1969), (hereinafter cited as BENTHAM). Is [the Greatest Happiness Principle] susceptible of any direct proof? It should seem not: for that which is used to prove everything else, cannot itself be proved: a chain of proofs must have its commencement somewhere. To give such proof is as impossible as it is needless. *Id.* at 87.

Thomas Aquinas posited that "[t]he extrinsic principle moving to good is God, who both instructs us by means of His Law, and assists us by His Grace. . . ." T. Aquinas, *The Summa Theologica*, reprinted in *JURISPRUDENCE* 89 (G. Christie ed. 1973) (hereinafter cited as AQUINAS).

These standards are seen as self-evident truths and free from personal feelings, opinions, or prejudices.

"Systems which attempt to question it [the principle of utility], deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light." BENTHAM, *supra* at 85.

"[S]ince the speculative reason is busied chiefly with necessary things, which cannot be otherwise than they are, its proper conclusions, like the universal principles, contain the truth without fail." AQUINAS, *supra* at 112.

While they agree to this point, they differ strongly on the content of the standards by which the detailed application of moral judgments are to be made.

Thomas Aquinas and Jeremy Bentham both agreed that man understands the principles of law directly from its source.

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as determine what we shall do. . . . *The principle of utility* recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. BENTHAM, *supra* at 85.

The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally. AQUINAS, *supra* at 94.

They also agree that the will plays a part in the rational workings of a systematic body of law, but sharply disagree as to the nature of that participation.

There is, or rather there ought to be, a *logic of the will*, as well as of the understanding. . . . Aristotle saw only the latter. . . . Yet so far as a difference can be assigned between two branches so intimately connected . . . is in favor of the logic of the will; since it is only by this faculty, that the operations of the understanding are of any consequence. BENTHAM, *supra* at 84.

Reason has its power of moving from the will . . . for it is due to the fact that one wills the end, that the reason issues its commands as regards things ordained to the end. But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. AQUINAS, *supra* at 91.

The basic moral principles of both systems operate in much the same way as mathematical and logical principles. The philosopher deduces the correct answer in the particular case from the general principles. Such a classical approach would not normally be cause for comment. However, in examining the use of such methods in the legal system, it is significant that neither of these philosophers hesitated to apply such principles of logic to the practical workings of judicial systems. Law is identified with logic in general and with such deductions as are found in accordance with the principles of logic. Such deductions are then considered necessary and not merely contingent truths.

Of this logic of the will, the science of law . . . is the most considerable branch. . . . It is, to the art of legislation, what the science of anatomy is to the art of medicine: with this difference, that Logic is what the artist has to work *with*, instead of being what he has to operate *upon*. . . . [T]ruths that form the basis of political and moral science are . . . to be discovered by investigations as severe as mathematical ones, and beyond all comparison more intricate and extensive. BENTHAM, *supra* at 84-85.

As regards the general principles of speculative or of practical reason, truth or rectitude is the same for all, and is equally known by all. . . . Consequently we must say that the natural law, as to general principle, is the same for all . . . AQUINAS, *supra* at 112.

That private ethics and general legislation are ruled by the same considerations and principles is integral to both of these theories. The principle or purpose of law is universal happiness, as well as individual happiness. At the same time, laws are not mere definitions of abstract principles, but describe the real nature of actual experiences.

Now private ethics has happiness for its end: and legislation can have no other. Private ethics concerns every member of society . . . and legislation can concern no more. BENTHAM, *supra* at 136.

Now the first principle in practical matters, which are the object of the practical reason, is the last end: and the last end of human life is bliss or happiness. . . . [T]he law must needs regard principally the relationship to happiness. Moreover . . . since one man is a part of the perfect community, the state, the law must needs regard properly the relationship to universal happiness." AQUINAS, *supra* at 92.

These two brilliant minds came so close, yet in the end one can no more hope for a final reconciliation between them than expect two highly charged particles of opposite polarization to bond without loss of identity or energy. However fascinating such theories are, practical decisions must still be made under the pressures of the adversary system.

The American legal system thrives on the rough and tumble clash of opposing theories vigorously pressed by talented adversaries. Those systems with greater organizational and theoretical precision do not seem to offer in practice any dra-

matic improvements over our system of individual action and diffused authority. Indeed, could an amalgam of peoples and attitudes which prides itself that power flows from the roots (the people) to the instrument of that power (the government) tolerate a legal system whose basic thought processes and prejudices lie in the opposite direction? That is to say, can formal systems of philosophy, which demand stern allegiance to the first principles of social organization, such as were briefly explored above, successfully relate to a people whose only fundamental, unchangeable and necessary principle of official social organization is that no such principle can ever be allowed to exist? Mr. Justice Douglas' answer would clearly be a firm "no" if his opinion in *Roe v. Wade*, *supra*, is to be believed.

Modern commentators generally agree that the law exerts a strong influence on the patterns of relationships individuals experience as members of groups. See generally, JURISPRUDENCE, ch. 4, at 51 (American Legal Realism) (G. Christie ed. 1973). The impact of the civil rights cases emphasizes the broad area of impact legal reasoning can have on personal relationships. The formalistic approach is evident in the *Civil Rights Cases*, 109 U.S. 3 (1883), wherein Mr. Justice Bradley divided classifications of rights into logical, formalistic categories and then drew the conclusions made obvious from the nature of the logical construct. The majority opinion rested "upon grounds entirely too narrow and artificial . . . [T]he substance and spirit of the Civil Rights Amendments have been sacrificed by subtle and ingenious verbal criticism . . ." *Id.* (Harlan, J., Dissenting) The logical deduction of conclusions from principles used by the majority did not save it from the pressures for reform which arose from the very nature of our pluralistic society.

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1968), was a *de facto* escape from the rigidity that the formalistic reasoning of the earlier Court had enshrined through the principle of *stare decisis*. The facts of the case were fundamentally on point; both involved blacks who were systematically

excluded from public accommodations. The earlier *Civil Rights Cases*, *supra*, turned on strictly construed principles of public power and private rights, the latter case sketching in the broad outlines of governmental power under the Commerce Clause without apology or overelaboration. The basic policy considerations were allowed to speak in their own loosely termed language of social concern and probable consequences. The significance of the comparison is that the steady pressure from a pluralistic society's expectations broke judicial reasoning from its mold and brought it into closer harmony with principles that have often been ridiculed, but never abandoned. The essence of those principles holds that government, in any of its forms, should not attempt to fix the scales between competing life styles and personal evaluations of a proper social order. The modern Court restated its commitment to this policy decision, which grew from the philosophy of our revolution, in *Roth v. United States*, 354 U.S. 476 (1957), the so-called "obscenity case".

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees, [of the Constitution] unless excludable because they encroach upon the limited area of more important interests. *Id.* at 484.

The old Court of Justice Bradley ignored its duties as an agent for the calm analysis and balancing of conflicting interests which arise as a result of change. The Court should not sanction certain life styles, but it does have the duty to encourage as fair a competition as possible. Similarly, the old Court followed the stern dictates and condemned society to endure the pains and dangers of a breach birth of full citizenship for blacks.

The Court cannot escape its power as a force in society and should not be allowed to abdicate its duties by falling back on the seductive and deceptive security of the classical paradise of syllogistic logic and demonstration. If the simple approach of deductive logic, i.e., a one dimensional pattern of development, is

not acceptable, must society then wholly depend on the inaccessible hunches of individual judges? Some commentators would cheerfully answer "in many cases, yes" and pass on to the next subject. See generally Hutcheson, 14 CORNELL LAW Q. 2, 74 (1929), reprinted in JURISPRUDENCE 683 (G. Christie ed. 1973). However, those who want a bit more would probably conclude that what is needed is a pragmatic approach which would allow reason to be applied under conditions of rapid flux and where final answers are not available.

The modern world would be wise to reevaluate its policy choices and search for new insights to guide the priorities we set for the use of our new powers over life processes. What is needed is a tool of thought which would be useful in private decision making and judicial analysis of private decisions. It would appear that in order to free our thoughts from the webs of the old approach it may be profitable to reexamine a few truly ancient thoughts. They at least will have the advantage of bringing a little sorely needed perspective into the heated arguments over where mankind should take life from here, if indeed we should take it anywhere at all.

The old approach of the Court to social issues has been quietly scrapped and a new vehicle for thought is slowly maturing in its place. A brief look at our common cultural heritage may help bring the shape of things to come into focus.

Aristotle's pragmatic approach to the task of applying reason in situations where knowledge is unavailable is singularly adaptable to the judicial system. See generally, Aristotle, THE TOPICS, THE OXFORD TRANSLATION OF ARISTOTLE (W.D. Ross ed. 1928), reprinted in JURISPRUDENCE 839 (G. Christie ed. 1973) (hereinafter cited as ARISTOTLE). Practical reasoning deals with matters which are not proven in an absolute sense, but which are shown to be the most probable means of choosing the better solution from those available.

The types of problems the dialectic may deal with are those which demand practical answers based upon considerations which are probable and may be acted upon by a reasonable person. The

dialectical approach is useful when people are involved as members of groups which desire to use reason as part of the decision making process. Aristotle specifies that in areas where groups of society are in conflict and there are convincing arguments for both sides, the dialectical approach of searching for the problem is especially suitable.

The modern Court, as noted above, no longer relies upon formal logic to justify its conclusions as Justice Bradley did when he was "forced to the conclusion" that simple logic was responsible for voiding an Act of Congress and not the Court's social prejudices. *Civil Rights Cases*, *supra*. Again, the more realistic approach of the modern Court recognizes that judges are persuaded to answers, not forced into them by some artificial and rigid system of didactic logic. An analysis based on the probable is as reasoned as one derived from necessary truths and has a greater chance of allowing "people of fundamentally differing views" to share a constitution. See *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting). There is no need for the modern Court to hold to the position that logic forces final conclusions which must be valid for all time in order to uphold the judicial duty of rendering judgment from reasoned argument. However, an approach which will allow consensus must, as does the dialectic, avoid reliance on principles arrived at by closed systems of logic dependent on prior assumptions about the nature of truth. ARISTOTLE, *supra* at 841.

A judicial system which hopes to have a respectable future must keep in touch with its society, no matter how difficult and painful that process may be at times. As our society is forced to an ever stronger realization of the dynamic force of science, its basic principle, the scientific method, will color every aspect of our society and indeed of the world civilization. The influence of the scientific method is already being felt by legal scholars:

In this approach to legal reasoning, the scientific method, a conclusion is accepted as plausible not because of any intrinsic characteristics, but because its justification conforms to certain accepted standards for evaluating

empirically given legal materials. In law as in science we proceed by using a previously agreed upon method of arriving at the conclusions on the basis of the evidence available. G. Christie, *Still Another Model of Legal Argument*. 78 YALE L.J. 1311 (1969), reprinted in JURISPRUDENCE 1005-16 (G. Christie ed. 1973).

In the emerging climate of general opinion and legal thought any legal analysis which is not subject to challenge through experience and newly discovered facts will be unacceptable. The dialectical approach shares many characteristics with the scientific method; they are both processes which help to predict future probable occurrence on the basis of what has been shown to have occurred, or probably occurred, in the past. But every process must eventually find a subject, and the subject of the law is often a dark cave.

The projected object of the law when it must, as a process, deal with the subject of man's control over life, is a corner of that dark cave. Life is itself a process which has never followed any logic, but rather its own continuously evolving process. No one has ever succeeded in proving to the general satisfaction of philosophers or mankind that life in the raw has any purpose beyond existence

and reproduction. Thus any purpose we, as humans, find in life must be based on our experiences and policies. It would then be fair to say that the purpose of humanity is best stated in terms of policies, such as the policy which favors individual development and choice.

The Anglo-American system of jurisprudence has taken as one of its fundamental policies that judges are not competent to unilaterally declare facts which are not accepted as such by those experts in the best position to verify them as probable. See *Roe v. Wade, supra*. Therefore, in those areas where objectively accepted facts are not available, the courts must fall back on the general policy considerations as a basis for decision. Their refusal to speculate as to the proper answer to the question of when life begins was in accordance with the modern developments of the role of the judiciary. As the Supreme Court noted, when those experts trained to arrive at the most probable answer in a field of knowledge cannot do so, the Court must not presume to create facts from the thin fabric of deductive logic and first principles. As there does not appear to be a reasonably probable factual basis on which to judge the nature of life itself, the

Court must restrict itself to an examination of the concept of life. However, the Court is restricted in its power to interfere with an individual's right to relate to concepts and will only invoke the governmental sanctions when that government or society is itself seriously threatened. It would be a strange argument to say that where the nature of a concept, such as life, holds so many unexplored possibilities that the Court should have the right or the power to judge them in advance. The Court should not prohibit personal initiative where there is no direct threat to those human lives as proven to exist to the satisfaction of those competent to make such a finding, the same scientists and doctors who have given us such control over that life.

Therefore, the judicial system will not be avoiding the issues if it performs the valuable function of providing a forum in which the experts can come before the general audience of society and account for their actions in terms of fact and not social prejudice. The courts will have the opportunity to help society sort through the maze of scientific jargon, sift out those facts helpful in weighing our choices, and decide which alternatives will improve the quality of life for all.

