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Michael F. Duggan

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THE LAW AS JUSTIFICATION: A CRITICAL RATIONALIST ANALYSIS

MICHAEL F. DUGGAN*

*“It is easy to obtain confirmations or verifications
for nearly every theory—if we look for confirmations.”¹*

—Karl R. Popper

*“No number of sightings of white swans can prove
the theory that all swans are white, but the sighting of just
one black swan may disprove it.”²*

—Karl R. Popper

ABSTRACT

This article looks at the Problem of Justification in the law by examining the question of whether jurists and trial attorneys present affirmative reasons in support of their positions and theories, or if they attempt to test them critically as with the deductive component of the scientific method known as falsification. If the opinions of judges and the arguments of counsel are merely attempts to verify or justify their conclusions, then what

*Adjunct Professor of Liberal Studies, Georgetown University. I would like to thank David Isenbergh for his insights and comments on this article. I also thank Jill Duffy and Linda Corbelli. The views expressed here are my own and those of individuals I cite.

1. See KARL R. POPPER, CONJECTURES AND REFUTATIONS 36 (Basic Books, Inc. 2d ed. 1965). Several years ago, a satirical television cartoon program, *The Simpsons*, succinctly illustrated the “specious reasoning” of inductive justification in one episode. *The Simpsons: Much Apu About Nothing* (FOX television broadcast May 5, 1996). In that episode, the following dialog occurs between Homer Simpson and his daughter, Lisa:

Homer: Not a bear in sight. The Bear Patrol must be working like a charm!

Lisa: That’s specious reasoning, dad.

Homer: Why thank you, honey.

Lisa: By your logic, I could claim that this rock keeps tigers away.

Homer: How does it work?

Lisa: It doesn’t work; it’s just a stupid rock!

Homer: Uh-huh.

Lisa: But I don’t see any tigers around, do you?

Homer: Hmm . . . Lisa, I want to buy your rock.

Id.

2. See KARL R. POPPER, *The Problem of Induction*, in POPPER SELECTIONS 101 (David Miller ed., Princeton Univ. Press 1985) (1954). To put it another way, “no amount of observed instances can have the slightest bearing upon unobserved instances.” *Id.* at 107.

might be done to remedy this troubling state of affairs? By looking at this issue from a perspective of Karl Popper's Critical Rationalism, Professor Duggan considers some modest suggestions about how the law might be made more rigorous as a system of analysis and discovery.

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I. INTRODUCTION

What is the basis for preferring one explanation, theory, or conclusion in the law over another? What is the dominant method of the law; is it the critical discussion and testing of competing ideas and explanations generally associated with science, or is it the partisan and prejudicial selection and defense of evidence supportive or sympathetic to one's asserted position more typical of purely adversarial activities, such as forensics? In other words, is rhetorical persuasion more central to the legal process than the good faith criticism and analysis of competing views? If it is in fact a sort of competition of *verification* or *justification* that dominates, rather than a dispassionate sorting out of relevant facts, then what might be done to remedy this troubling state of affairs?

The first part of this article reviews how I happened on the question of justification in the law. Parts two and three define the issue as a manifestation of the more general Problem of Induction and frame it as one of inductive justificationism, in contrast to the deductive analysis more typical of science, as spelled out in the critical rationalist³ philosophy of Karl R.

3. Critical Rationalism is a form of rational skeptical philosophy—an “attitude”—framed as such by Karl R. Popper. See KARL R. POPPER, *THE MYTH OF THE FRAMEWORK* 190-91 (Routledge 1994). It is based on, among other things, the idea that we learn by correcting our mistaken beliefs and by testing our ideas, rather than by shoring them up with supporting evidence. *Id.* at 181. The primary focus of critical rationalism has been in the philosophy of science and the scientific method. See generally KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* (Routledge 2005) (1935). Its sophisticated realism has been embraced by some major figures of science to include Albert Einstein and at one time Stephen Hawking. See generally STEPHEN HAWKING, *BLACK HOLES AND BABY UNIVERSES* (Bantam 1993); KARL R. POPPER, *OBJECTIVE KNOWLEDGE* 42 (Oxford Univ. Press 1979); MICHAEL WHITE & JOHN GRIBBIN, *STEPHEN HAWKING: A LIFE IN SCIENCE* (Penguin Books 1992). By his own account, Hawking became discontented with critical rationalism and for a time cautiously embraced instrumentalism. See HAWKING, *supra*, at 44; see also WHITE & GRIBBIN, *supra*, at 102-03. In his latest book, Hawking has adopted a Kantian-like position called Model-Dependent realism. See STEPHEN HAWKING, *THE GRAND DESIGN* 45-51 (2010).

Interestingly, although Popper also contributed significantly to political theory with, *The Open Society and its Enemies*, to the philosophy of history with, *The Poverty of Historicism*, and to the mind-body problem with, *The Self and its Brain*, outside of questions on scientific evidence and scientists as expert witnesses, critical rationalist theory has made little progress in legal circles. Popper's own limited comments on the law do not constitute his best work, but his philosophy taken more broadly has many meaningful applications in and criticisms of the law.

Regarding the use of scientific evidence, see KENNETH R. FOSTER & PETER W. HUBER, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS* *passim* (MIT Press 1999) and Susan Haack, *Disentangling Daubert: An Epistemological Study in Theory and Practice*, J. PHIL., SCI. & L., March 2005, at 1-11. See also *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585-601, 113 S.Ct. 2786, 2792-2800 (1993). In his partial dissent, Chief Justice William H. Rehnquist makes the startling comment, “I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its ‘falsifiability,’ and is suspect that some of them will be, too.” *Id.* at 600 (Rehnquist, J., dissenting). The comment is surprising in that falsification is not a difficult concept to understand and one that is widely embraced by scientists themselves. Moreover, it is a commonly used term of art in the philosophy of science.

Popper. The fourth part discusses adjudication as a sort of creative game of association, and part five looks at how Popper regards jury trials as opportunities for critical analysis. Next, Popper's view on juries is contrasted against the darkly realistic view of human nature based on observations made by Friedrich Nietzsche in the essay, *On the Genealogy of Morals*, in considering whether juries live up to their promise as forums for critical and analytical discussion. Finally, the article examines some of the more apparent implications of the law as justification and concludes with some modest recommendations. To be clear, the perspective outlined here is not a postmodernist, Critical Legal Studies (CLS), or irrationalist critique of "objectivity," but rather a critical rationalist analysis of what I believe is a methodological flaw at the very heart of the law.⁴

II. MAJORITIES AND DISSENTS: WHEN REASONABLE PEOPLE DISAGREE

Visitors to the Supreme Court of the United States on days of oral argument are often struck by how eminently reasonable the opposing positions and explanations of both petitioners and respondents can be. But then, rational minds can and do disagree all the time, and to one degree or another, we should expect this in an enterprise as organic, disjointed, composite, and analytically soft as the law.⁵ Even more surprising is how

My own view is that jurisprudential theory, the philosophy of law generally, and the law itself would benefit greatly if legal scholars would divest themselves of the unfruitful language theory that has played such a large role in discussions on adjudication in recent decades. Rather than a preoccupation with clever word games and paradoxes, or conversely with logical formalism and strict definitions, philosophers of the law would do well to approach the law from a grounding in modern scientific language theory—that is, generative grammar theory—and a rational skeptical take on the law as realistic problem solving.

4. When reviewing a late draft of this article, I looked at a number of old law review articles that dealt with precedent and reasoning from prior authority. From these I noticed that a number of legal scholars, including some who embrace a CLS point of view mention the terms "justify" and "justification," although their usage appears to be closer to the common use of the word than to Popper's more specific philosophical usage referring to a part of a flawed inductive approach. See Richard Warner, *Three Theories of Legal Reasoning*, 62 S. CAL. L. REV. 1523 *passim* (1989); Frederick Schauer, *Precedent*, STAN. L. REV. 571 *passim* (1987); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 551 *passim* (1985). See generally VINCENT J. SAMAR, JUSTIFYING JUDGMENT (1998).

5. Accounts and examples of the imperfection of the law as a system of analysis are legion. See, e.g., OLIVER WENDELL HOLMES, *The Introduction to the General Survey*, in COLLECTED LEGAL PAPERS 301 (1921) (referring to the "rag bag of details"). In *The Hand of Ethelberta*, Thomas Hardy writes, "Like the British Constitution, she owes her success in practice to her inconsistencies in principle." THOMAS HARDY, *THE HAND OF ETHELBERTA: A COMEDY IN CHAPTERS* ch. IX (1876). Although Hardy is certainly being arch here, the idea that the law puts a primacy on practicality over consistency, success over truth is far from capricious and is, in fact, a basis for legal positivism, pragmatism, and realism. It is the idea that the law provides a social-political landscape on which to project better ideas and intuitions. Regarding the multifarious nature of the law, see OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Little Brown 1881) and

powerful the rationale and conclusions of often widely disparate majority, concurring, and dissenting opinions can be, given that they are drawn from the same fact patterns and sets of circumstances, are adjudicated in the same politically moderate system by experts of the highest caliber, and are based on interpretations of the same constituting document. When a justice reads his or her opinion from the bench, it will often seem supremely sensible, unless its conclusions specifically offend our political sensibilities or other moral prejudices, and even then the reasoning may impress us. Then a dissenter will read his or her opinion—and it is dissents and concurrences that tell us the most about a jurist—and this too will seem sensible, well-reasoned, and oftentimes even more impassioned.⁶ This too should not be

Michael F. Duggan, *The Municipal Ideal and the Unknown End: A Resolution of Oliver Wendell Holmes*, 83 N.D. L. REV. 463, 496-503 (2007).

To illustrate the law's analytical softness even with a definitional view of language, we merely have to look at some of the key concepts on which our system is based. What concepts are more fundamental to our constitutional system than the ideas of the *due process of law* and standards of *cruel and unusual punishment*? And yet, what possible definitions of these things could be devised so as to be universally agreed upon and which would lead to wholly uniform results in the case law as with important concepts in the physical sciences? It should be clear from these examples—and one could list any number of others—that the most important concepts in the law lack the precision of similarly important terms in the physical sciences.

6. As the highest court of the land, one would expect a large number of difficult cases embodying conflicts and inconsistencies in the law to come to the Supreme Court. As the Court of last resort, one of its most important functions is to solve these problems. Yet, the large number of divided opinions—to say nothing of partial concurrences and dissents—reveals that even here, the solutions are not always decisive.

An intellect of no less stature than the great seventeenth and eighteenth-century philosopher and polymath genius Gottfried Wilhelm Leibniz actually grappled with the question of the adjudication of hard cases. BENSON MATES, *THE PHILOSOPHY OF LEIBNIZ, METAPHYSICS AND LANGUAGE* 18-19 (Oxford Univ. Press 1986). This, in fact, was the topic of his precocious Juris Doctor dissertation in 1666. *Id.* Of Leibniz's early "tour de force," scholar and biographer Benson Mates writes:

The *casus perplexi* were juristic anomalies, that is, cases in which valid legal grounds exist for both of the opposing sides. The question is: on what basis, if any should cases be decided? Leibniz considers several possibilities: (1) The judge can refuse to make a decision; or (2) he can flip a coin; or (3) it can be left to his free discretion (his "common sense"), independently of law; or (4) it can be settled on the basis of general ethical principles of charity, equity, humanity, utility, and so forth, which are wider than the positive law. Leibniz argues in favor of (4). He argues that positive law has force only by virtue of a contract that, in setting up the state and giving legislative power to the sovereign, limits the applicability of natural law. Where the positive law does not apply decisively, we must therefore fall back on natural law and try to make decisions in accord with it.

Id. All four choices remain real possibilities although none are without criticisms: (1) is an abdication and in an emergency would be as good as useless; (2) is a valid surrender to probability when neither choice is preferred and, therefore, either would be an arbitrary or random choice—a position that in practical political terms would be difficult to justify and in our own system would likely cause a scandal if made public; (3) and (4), although sensible, would be opposed by legal formalists even though they are what judges do anyway, and would not be justified on Leibniz's natural law basis. This also shows that the issue of difficult cases and how to address competing values in the law is not a new one. *See id.* For the primary source, see Leibniz's *Dissertatio de arte combinatorial*.

especially shocking since reasonable people disagree all the time outside of the pure reason of logic and applied mathematics.

The complex human situations that occasion appearances before magistrates or a jury are generally of a nature not so easily reduced as the more narrowly-tailored questions more typical of formal truth. This also underscores the fact that the law is more akin to the social sciences or history than to the reasoning found in chemistry or physics, much less algebra or geometry.⁷ Moreover, the cases that find their way up to the Supreme Court are often the most difficult, or deal with unclear, contradictory, multifarious, or irrational points of law and application of the law.⁸ This level of

Oral arguments do embody what seem to be critical discussion and the testing of ideas, although it is oftentimes difficult to tell whether the discussion is a critical dialog or debate meant to merely attack or defend a position. Popper believes the purpose of discussion is to arrive at better answers and not just to win debates. He writes, “a critical discussion is well-conducted if it is entirely devoted to one aim: to find a flaw in the claim that a certain theory presents a solution to a certain problem.” See POPPER, *THE MYTH OF THE FRAMEWORK*, *supra* note 3, at 160. As with oral argument, an opinion should be a discussion of ideas rather than a list of supporting points.

Some of the most interesting interactions in oral argument in recent years have been the result of the famous Breyer hypotheticals and counterfactuals. These earnest questions seem to be genuine thought experiments—means of testing hypotheses typical of great scientists and which have often led to great discoveries. The most famous of these is probably Einstein’s question to himself of what he would see if he were riding on a beam of light. *Einstein Revealed* (NOVA television broadcast Sept. 9, 1997). And of course, thought experiments in science often lead to real external means of testing, as with Eddington’s corroboration of relativity using a lunar eclipse to confirm the existence of “gravitational lensing,” the bending of light around massive objects, something postulated by Einstein’s theories, in 1919. See *A STUBBORNLY PERSISTENT ILLUSION, THE ESSENTIAL SCIENTIFIC WORKS OF ALBERT EINSTEIN* 126 (Stephen Hawking, ed., Running Press 2007).

Of course, after a case has been decided, subsequent experience and real world consequences may also serve as a means to test the practical effectiveness as well as validity of an argument embodied in an opinion. This is also true of policy decisions in other areas such as international affairs.

7. Logic is often an element of the law, but its primary importance would seem to be discretionary rather than pure logic. If the law was pure deduction, we would not need lawyers and judges at all, but rather logicians and mathematicians. Although, as Holmes and other legal positivists have noted, the law is not synonymous with ethics and morality, there is some proximity, affinity, and even overlap between them. See generally Oliver Wendell Holmes, *The Path of the Law* 10 HARV. L. REV. 457 (1897). As with ethics, the law is by no means a purely rational enterprise. As a friend of mine once said, “the law is like bad mathematics.” It is a set of rules, but there is a far wider range of potential interpretations than allowed for in applied mathematics. As regards the law’s affinity to history and the social sciences, Oliver Wendell Holmes writes, “upon this point a page of history is worth a volume of logic.” *New York v. Eisner*, 256 U.S. 345, 349 (1921).

8. As Holmes notes, “great cases, like hard cases make bad law,” and many cases that come to the Supreme Court are important, hard, or both. *Northern Securities Co. v. United States*, 193 U.S. 197, 364 (1904). Earl Warren seems to have seen disagreement on the bench as both inevitable and even a source of judicial vitality when he wrote:

It is not likely ever, with human nature as it is, for nine men to agree always on the most important and controversial issues of life. If it ever comes to such a pass I would say that the Supreme Court will have lost its strength and will no longer be a real force in the affairs of our country.

the judiciary is exactly where we should expect to find disagreement. Still, assuming that both the majority and dissent are addressing the same narrowly-tailored question framed in similar terms—that excessive baseline variation or manipulation is not an issue—it is disconcerting that multiple plausible conclusions are so common in the law, and that all are the defensible positions of reasonable people. Pure reason tolerates no internal contradictions; yet, human psychology seems to require them and fields that deal with human behavior must take them into consideration. In the language of engineering, the law is a machine with more play in its tolerances and of less precise calibration than systems of pure reason or those that deal with facts of phenomena dictated by or guided by physical laws.

Having seen a large number of oral arguments, what I have found most startling is how reasonable sounding positions made by counsel can be struck down or called into question, both in argument and in opinions, by what seems to be legalistic quibbling, hair splitting, variations in reading of the same language, or allegiance to a remote and arcane precedent—or conversely, how a position may be defended or upheld on equally narrow technical points of law.⁹ Likewise, questions in oral argument may focus almost perversely on technical minutia while major substantive points languish. To the layman, this may appear to be little more than allowing pedantry and prejudice to prevail and preempt what might otherwise be a sensible exercise in practical problem solving. I may betray myself as a non-lawyer by this observation, but at least one legal heavy-hitter agrees with me, at least in principle. As Justice Holmes famously wrote:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished and long since, and the rule simply persists from blind imitation of the past.¹⁰

Another heavy-hitter in a different field asserts even more economically that “all life is problem solving,” and it is apparent to the casual observer that the conservative temperament of American constitutional law manifests an inflexible, legalistic force of habit that can at times get in the way of more practical solutions.¹¹

DAVID S. SHRAGER & ELIZABETH FROST, *THE QUOTABLE LAWYER* 292-93 (1986).

9. O.W. Holmes, *The Path of the Law* 10 HARV. L. REV. 457, 469 (1897).

10. *Id.*

11. See KARL R. POPPER, *ALL LIFE IS PROBLEM SOLVING* (Patrick Camiller, trans., Routledge 1999). The law is not the most efficient or flexible means of addressing large scale societal issues and is better suited for settling more narrowly tailored disputes or problems. See, e.g., GEORGE F. KENNAN, *AROUND THE CRAGGED HILL* 145 (W.W. Norton & Company 1993).

Yet, most jurists and legal commentators with a realistic grounding in the law acknowledge the importance of *stare decisis*.¹² As Byron White noted, “If you didn’t have some respect for precedent, the law would be in a shambles. No one would have any basis for reliance.”¹³ As with the study of history, without meaningful linkages, the law runs the risk of becoming capricious and arbitrary, or even “activist” when we disagree with the results. Precedent is to the body of case law what memory is to human consciousness and identity, and lends continuity, context, and grounding to a process characterized by flux. Just as consciousness would not be possible without memory, nor is a system of law possible without some degree of reliance on precedent. In this sense, precedent, not as dogmatic adherence to the past, but as a safeguard or element of caution, is important as one of constituent aspects of the law.

This orderly view that the law functions best when allowed to develop in a cohesive way not only underscores its conservative temperament and hints of partial philosophies like originalism or textualism¹⁴—collectively

12. See Friedrich Nietzsche, *Arbitrary Law Necessary*, in HUMAN, ALL TOO HUMAN 219 (Marion Faber & Stephen Lehmann, trans., Univ. of Nebraska Press 1984) (1878). As Nietzsche notes:

But when law is no longer a tradition, it can only be *commanded*, or forced; none of us has a traditional sense of justice any longer; therefore we must content ourselves with *arbitrary laws*, which express the necessity of *having to have* a law. Then, the most logical law is the most acceptable, because it is the *most impartial*, even admitting that, the relationship of crime and punishment, the smallest unit of measure is always set arbitrarily.

Id. This underscores the very important point that the law always involves arbitrary elements. On this point, Albert Camus writes, “[i]f murder has rational foundation then our own period and we ourselves are rationally consequent. If it has not rational foundations, then we are insane and there is no alternative but to find some justification or to avert our faces.” See ALBERT CAMUS, *THE REBEL* 3 (Random House 1991) (1956).

13. *THIS HONORABLE COURT* (WETA 1988) (Supreme Court Visitor’s Film). I think White is at least partially right in this. When reading articles expounding a CLS perspective discussing the authority of the law in purely analytical terms, I have come to realize the problematic nature of legal interpretive theory divorced from practice and historical context—in the same way that postmodern literary criticism is problematic in its lack of modern generative language theory. The law is first and foremost a practical activity, and unlike science, the more theoretical it becomes the less clear and therefore the less useful it becomes. When it comes to constitutional interpretation, rather than embracing extremes that cling uncritically to precedent or else immerse themselves in critical debate devoid of real world experience, I would offer a realistic middle way that address the question: how do we maintain the spirit of the document while adapting it to changing times?

14. Originalism is an outlook advocating a narrow historical reading of the Constitution, where Textualism is the same outlook applied generally to the text of laws. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 116 (Random House 2005). Justice Souter has also made a distinction between “Hard Textualism” and “Soft Textualism,” the latter being a view that merely takes historical views and context into account. Justice David Souter, Panel Discussion at Harvard School of Law (September 2009). Because many judicial outlooks take into account the historical backdrop of a law or constitutional provision, I will refer only to the “harder” sort of literalism. For an example of a non-literalist outlook that takes broader historical purposes into account, see *id.* at 78-80 (explaining the idea of “purposive

“literalism,” except where the more specific terms of originalism and textualism apply—but is also the basis for the gradualistic or incrementalist common law jurisprudence of two of the most careful and sensible justices of the past half century: the second Justice Harlan and Justice Souter.¹⁵ In contrast to a system bound mostly by precedent, an outlook that incorporates both *stare decisis* and a gradualistic evolution allows for tradition and change, order, and development. Such an approach uses precedent and constitutional amendments as a conservative brake on radical change, even when advocating a liberal reading. Likewise, a legal system with traditional elements and historical pedigree, like the common law, is also closer to the customs and normative morality of a people and, therefore, presumably has a greater self-enforcing aspect.¹⁶ Under such a scheme, the primary

reading”). Breyer also elaborated on this concept in an appearance with Pete Williams and Antonin Scalia at the Rehnquist center in October 2009. *America and the Courts* (C-SPAN television broadcast Oct. 31, 2009).

15. See TINSLEY E. YARBOROUGH, DAVID HACKETT SOUTER, TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT (Oxford 2003); TINSLEY E. YARBOROUGH, JOHN MARSHALL HARLAN, GREAT DISSENTER OF THE WARREN COURT (Oxford 1992). Regarding “common law” jurisprudence, see TINSLEY E. YARBOROUGH, JOHN MARSHALL HARLAN, GREAT DISSENTER OF THE WARREN COURT 241 (Oxford 1992).

Incrementalism is in fact a manifestation of traditional—true—conservatism in the mold of Edmund Burke and Peter Viereck. What most people refer to as conservatism these days—the loud, aggressive, argumentative, shrill, and fairly predictable right-wing demagoguery of commentators like Rush Limbaugh—bears little resemblance to traditional conservatism, and, in fact, represents a sort of populist right-wing radicalism. True conservatism is concerned with tradition and history, but also concedes that sometimes change is required even toward progressive ends. PETER VIERECK, CONSERVATISM REVISITED 37-38 (The Free Press 1962) (1949). In this sense, Justice Souter is closer to a Burkean conservative than most present day Republicans who call themselves conservative. Traditional conservatism would today be regarded as a sort of quiet and traditional form of moderate realism. *See id.*

For Souter’s own characterization of the common law approach to the law, see *Washington v. Glucksberg*, 521 U.S. 702, 770, 117 S. Ct. 2258, 2284 (1997) (citation omitted), where he writes:

It is here that the value of common-law method becomes apparent, for the usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and counterexamples. The ‘tradition is a living thing,’ albeit one that moves by moderate steps carefully taken.

The incrementalism of Justices Harlan and Souter might also be seen as a judicial analog to Popper’s piecemeal social engineering that allows for both change or problem solving and tradition. *See generally* KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 159, 162, 167, 185 (5th ed. 1966) (stating that rather than holistic ideologies and political programs, a more modest and realistic model that addresses new and unanticipated problems and issues with more individualized attention is preferable; Popper calls this approach “piecemeal social engineering”).

16. Although not identical with morality, the proximity and overlap of the law with the normative morality, customs, and superstitions of ordinary people may also render it foreign to those who do not subscribe to such beliefs. *See generally* Holmes, *supra* note 7 (Holmes’s view is that as far as its enforcement is concerned, why we obey is less important than the fact that we do obey; by contrast, morality is the internal compulsion of why we act or do not act). Conversely, modern constitutions based on “universal” human rights may embody a broader appeal, but may

question of adjudication would seem to be how to test the case at hand against the law as it has come to exist as an evolving tradition, rather than to merely justify a decision on no better basis than an uncritical appeal to precedent. Given the amalgamated, often non-uniform nature of the law, this is less precise of a process than it may seem to be, underscoring what might be called its *justificationist* nature,¹⁷ and the judge may pick and choose from any number of preexisting points of precedent or even reach back to an older standard as proof—justification—of the legal validity of his or her opinion.¹⁸

The problem with this sort of testing is that no two cases are ever completely identical,¹⁹ and even if a new case is essentially the same as—”on all fours” with—a precedential case, someone at some point still has to make a decision based on interpretation or invention of a rule or precept. There is no infinite regress in the law, nor is there Lockean primordial natural law or an eternal or final standard of reason—no platonic ideal, template, or touchstone—residing in the quiet past against which to test or otherwise base our opinions.²⁰ As Popper writes in his essay *Sources of*

also trample on the older moral traditions within a single country. Regarding the “arbitrary” nature of non-traditional law, see NIETZSCHE, *supra* note 12, at 219.

17. See generally POPPER, *supra* note 1 (characterizing and discussing “justificationism”). See also David Miller, Sokal & Bricmont: *Back to the Frying Pan*, THE WARWICK J. OF PHIL., 2000, at 156-73, available at http://www2.warwick.ac.uk/fac/soc/philosophy/people/associates/miller/miller_pli_9.pdf (characterizing “justification”).

18. For instance, it could be argued the conservative majority in *District of Columbia v. Heller*, 128 S. Ct. 2783 (U.S. 2008), relied on extra-textual sources and that John Paul Stevens’ dissent was drawn more closely from the Second Amendment. See E. J. Dionne Jr., Op-Ed., *The D.C. Handgun Ruling, Originalism Goes Out the Window*, WASH. POST, June 27, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/26/AR2008062603655.html>. Complicating this, as retired Justice David H. Souter so eloquently illustrated in his commencement address at Harvard University, is the fact that the Constitution embodies conflicting values—liberty and equality, and equality and order were examples he gave. Justice David H. Souter, Commencement Address at Harvard University (May 27, 2010).

19. Although many cases may be essentially similar, modern physics tells us that no two things are really equal. Leibniz writes that no two things in the universe are exactly the same, something that Albert Einstein’s idea of non-simultaneity essentially concurs: if no two things can exist in the same time and place they cannot be equal. See G.W. LEIBNIZ, *Monadology*, in MONADOLOGY, AN EDITION FOR STUDENTS 18 (Nicholas Rescher, ed., University of Pittsburgh Press 1991). As regards *simultaneity*, see STEPHEN HAWKING, A STUBBORNLY PERSISTENT ILLUSION: THE ESSENTIAL SCIENTIFIC WORKS OF ALBERT EINSTEIN 5-7, 145-50, 366, 386-87 (Running Press 2007). BENEDICT DE SPINOZA, ON THE IMPROVEMENT OF THE UNDERSTANDING, ETHICS, CORRESPONDENCES 47-48 (Dover Publications 1955) (1883). On a similar note, Oliver Wendell Holmes writes that “[f]acts do not often exactly repeat themselves in practice; but cases with comparatively small variations from each other do.” HOLMES, *supra* note 5, at 124.

20. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT: SECOND TREATISE OF CIVIL GOVERNMENT 8-11 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). By contrast, most modern biologists do not believe there was an original human state of nature but that we evolved from similar animals with similar social habits. See EDWARD O. WILSON, ON HUMAN NATURE 87 (Cambridge & Harvard Univ. Press 1978).

Knowledge and Ignorance, “There are no ultimate sources of knowledge;”²¹ in the law, as elsewhere, there is no foundation we can appeal to beyond our own modest and fallible resources of reason, insight, moderation, imagination, and judgment. In other words, the law is a very open framework—even in the most conservative environments, unprecedented activities and relationships will always crop up—wherein a judge will eventually have to decide a case based on his or her own standards, values, goals, or anything else he or she holds dear. Thus, to one degree or another, all judges are legislators, and even deciding to apply a narrow literalist reading or solution is still a political decision and solution.²²

Justification in the law, then, is often characterized by a reliance on precedent and, in its most severe literalist manifestations, is a willing and even confident abdication of judgment based on the curious idea that the legal views and solutions of lawmakers and jurists of the often distant past are somehow of more relevance than our own.²³ As a practical matter, a slavish adherence to tradition in the law comes at the expense of the “felt necessities of the time.”²⁴ Adjudication as the rigid reliance on and application of precedent does not allow the law to develop along with the

Interestingly, some of the philosophers who most influenced the views of the founding generations disagree on the human state of nature. See DAVID HUME, *A TREATISE OF HUMAN NATURE* Book 3, Part 2, Section 2 (L.A. Selby-Biggeed., Clarendon Press, 2d ed. 1978) (1740); LOCKE, *supra*. David Hume, a primary influence on the federalist perspective—that was embodied in the Constitution itself—and on men like Hamilton and perhaps Madison during this period, regarded the “suppos’d state of nature” to be a mere fiction, while Locke—the leading font for Whig and Libertarian ideas of the anti-federalists—believed in a benevolent state of nature, and this in contrast to Hobbes’ state of nature as universal war and Rousseau’s hypothetical state of nature. See THOMAS HOBBS, *LEVIATHAN* 82-86 (Oxford 1998) (1651); HUME, *supra*; LOCKE, *supra*. See also BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 688 (Simon & Schuster 1945).

21. POPPER, *supra* note 1, at 27. Popper writes elsewhere that although there are no positive foundations for truth, there is a negative criterion. POPPER, *THE MYTH OF THE FRAMEWORK*, *supra* note 3, at 143. He writes that most philosophies “are the result for the mistaken quest for certainty, or for secure foundations on which to build.” POPPER, *OBJECTIVE KNOWLEDGE*, *supra* note 3, at 42. In this sense, critical rationalism combines skepticism of absolute foundations with reason.

22. Robert Bork attributes this point to Ronald Dworkin, but it is a fairly common criticism of Literalism and I came up with it on my own as well. See ROBERT BORK, *THE TEMPTING OF AMERICA* 176-77 (MacMillan 1990).

23. This view in essence concedes that people in the past were more bold, confident, imaginative, and inventive than we, and also had a closer to the proximity to the truth and whose insights somehow have a more authoritative claim to it. The purpose of judicial decision-making is not to draw the closest approximate to a rationalist or natural law absolute, but rather a practical enforceable means of problem-solving and dispute resolution within the values of an evolving tradition. Even Edmund Burke, the great conservative and lover of tradition, who was more than wary of revolutionary change and the violence and instability that often attends it, noted, “[y]ou cannot plan the future from the past.” See EDMUND BURKE, *Letter to a Member of the National Assembly*, in *THE PORTABLE EDMUND BURKE* 507-16 (Isaac Kramnick ed., Penguin Books 1999).

24. HOLMES, *supra* note 5, at 1.

traditions, attitudes, and normative mores of the community. Regarding constitutional interpretation, this is the famous “eighteenth-century straight-jacket” in which a narrow reading binds and limits a modern nation to a framework from a past time. Still, the law cannot exist without precedent, and it is the backbone of traditional conservative jurisprudence.

Even when judges agree on what rule to apply and a precedential frame or basis for its interpretation, the question then becomes—and it may be the central question of adjudication generally—when to apply a rule and when to create a new one in its place and on what basis.²⁵ Implied in this question is another question: what is the basis for preferring one theory to another?²⁶ The extremes of modern American judicial interpretation over the past half century pose serious problems in their approach to the law and, therefore, in their results.²⁷ These extremes are the literalist model of the law as the purely logical extrapolation of narrow transparent precedent to modern questions on one end and Earl Warren’s high-minded but potentially capricious “principled activism” and the idea of knowing what the law says but then asking, “yes, but is it fair?” on the other.²⁸

25. Of course, in a general sense, the point where we adopt a new rule should be when the old rule no longer works. This shows that judgment and discretion are the heart of adjudication and not logic and narrow adherence to the letter of the law, lending some insight into its soft analytical nature.

26. All choices are either based on preference or are arbitrary. One of the more interesting medieval philosophical notions is the view of choice suggested by the allegory of Buridan’s Ass, the idea that without preference there can be no choice. RUSSELL, *supra* note 20, at 213. *See also* 1 MACMILLAN ENCYCLOPEDIA OF PHILOSOPHY 427-29 (1972 ed. 1967). This also suggests that preference, not an objective weighting of facts, decides hard cases.

27. *See* discussion *infra* note 28.

28. JESSE H. CHOPPER, *Earl Warren—A Law Clerk’s Memory of the Man and The Court*, in EARL WARREN AND THE WARREN COURT, THE LEGACY IN AMERICAN AND FOREIGN LAW 357, 359 (Harry N. Scheiber ed., Lexington Books 2007). Here Professor Chopper calls Warren a “principled activist.” *Id.* In addition to the “activist” versus “originalist” divide, scholars have also made a related distinction between the perspectives—fallacies, according to Lawrence Tribe—of “dis-integrationist” and “hyperintegrationist” approaches to the Constitution. *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 6-30 (Harvard Univ. Press 1991). In this dichotomy of extremes, the first is characterized by approaches to “the Constitution that ignore the salient fact that its parts are linked into a whole—that it is a Constitution, and not merely an unconnected bunch of separate clauses and provisions with separate histories that must be interpreted.” *See id.* The other extreme includes outlooks “that ignore the no less important fact that the whole contains distinctive parts.” *See id.* On a related note, in his book ACTIVE LIBERTY, Justice Breyer suggests a close reading of a narrow provision devoid of context can actually arrive at conclusions antithetical to the overall spirit of the Constitution. *See* BREYER, *supra* note 14, at 131-32. Similarly, in his graduation address at Harvard University, retired Justice David Souter echoed John Marshall in saying that “it is a Constitution we are interpreting,” adding “that the First Amendment is not the whole Constitution.” Justice David Souter, Address at Harvard University Graduation (May 27, 2010).

The activist bench of the Warren court is distinctive and perhaps unique in American history because it was conspicuously ahead of the democratic branches of government in regard to certain social issues. The judiciary is temperamentally the most conservative branch of government, and, as A.V. Dicey noted, the view of judges is typically about two generations behind the present. *See*

Rationalization and denial in their various manifestations are the twin pillars of human psychology; life outside of pure reason is founded largely on the justification of our prejudices and acts both to us and others. We justify our proclivities, tastes, and loyalties by appeals to authority rather than by critical tests, and this also seems to apply to decision-making in the law.²⁹ Regardless of one's politics or whether one is a conservative literalist or a liberal activist,³⁰ the law as an enterprise of analysis, discovery, and

A.V. DICEY, *LAW AND OPINION IN ENGLAND* 369 (2d ed. 1914); James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 *BYU L. REV.* 1037, 1049 (1993).

Still, when problems are not being addressed by more traditional means and during times of crises, it is appropriate that some estate of the government steps up and address these issues through formal means and with the checks and balances of the other branches. The New Deal is an example of executive experimentation—and bold, large-scale innovations is usually and rightfully the purview of the President—during years of severe crises in which the more orderly processes of gradualism would have been ineffectual. Likewise, the Court of 1953 to 1969 helped enshrine civil rights into the law, while the bold executive government of 1933 to 1945 shepherded the nation through its two greatest crises of the twentieth-century. *See generally* Doris KEARNS GOODWIN, *NO ORDINARY TIME* (1994); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* (1963).

The conservative literalists of our own time have had the beneficial effect of tightening up the law in terms of analytical rigor and have inadvertently improved the analytical quality of liberal opinion writing. But, where a literalist view fails, especially as a theory, is in what it does not tell us about the law. In order to be noteworthy in a historical sense, a theory or a jurist must express an outlook that tells us something new about the law, and Literalism fails to do this and seems to take pride in it.

The law embodies two opposite functions, one conservative, the other progressive, and there is a tension between these. Its conservative function is as a constraint on power, radicalism, caprice, and rapid shifts in moral fashion. This is the role of the law as anchor and stabilizer and as a preserver of the strength and correctness of our institutions. The progressive function of the law is an avenue and even a vehicle for change. The idea here is that no system is perfect and that nothing should be beyond revisiting, and that some ideas and institutions, such as slavery, may be thrown off entirely if attitudes and understanding of these things changes.

29. Among conservative jurists of recent decades, it is William H. Rehnquist who comes closest to admitting what actually happens in judicial decision making. *See* PETER IRONS, *BRENNAN VS. REHNQUIST: THE BATTLE FOR THE CONSTITUTION* 48–49 (Knopf 1994). Rather than a literalist argument, he notes that in discretionary matters, we merely promulgate and then defend our beliefs. *See id.* For a journalistic conservative rejection of the idea of law as pure reason, see David Brooks, Op-Ed., *The Empathy Issue*, N.Y. TIMES, May 28, 2009, available at <http://www.nytimes.com/2009/05/29/opinion/29brooks.html>. In *The Path of the Law*, Oliver Wendell Holmes makes a compelling argument that the law and morality are not synonymous. O.W. Holmes, *The Path of the Law* 10 HARV. L. REV. 457 *passim* (1897). That said, there are large areas that reflect and overlap with normative ethics, and without empathy there can be no ethics. If this is true, then empathy must also be an element of the law. Without human empathy, the law would be an inhuman monstrosity.

30. Terms like “literalist”—including both “originalist” and “textualist”—and “activist” do not always hold up uniformly in regard to political persuasion. Hugo Black was one of the great liberals in U.S. Supreme Court history, yet he was a literalist. *See, e.g.*, ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 593–94 (Fordham Univ. Press 1997). As for conservative activism on the bench, see Geoffrey R. Stone, *The Roberts Courts, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1539–58 (2008). Regardless of whether it is liberal or conservative, self-conscious judicial activism is still a radical position.

The fact that jurists on both the left and right have called themselves “originalists,” “strict constructionists,” and “textualists” should lead us to regard this partial philosophy with some skepticism. *See* NEWMAN, *supra*, at 593–94 (regarding liberal strict construction). *See generally*

truth-finding should make people very nervous, especially given that it is a fundamentally practical set of activities and that any well-ordered society requires not only the enforcement and adjudication of laws, but also punishment for transgressions. That is, the law has real life implications sometimes involving matters of liberty, life, and death, and yet it is not especially rigorous in an analytical sense.

I am not saying that justification overrides logic and analysis in the law. To the contrary, this is a very tricky business, and the fact that analysis does exist in the law is actually a part of the problem in that it may give cover to justification. This problem in turn grows out of the inherent indeterminacy of the law. For even when being strictly analytical, judges can, without serious flaws or errors in logic, arrive at very different conclusions.³¹ Rather than analysis, it is in the valuative aspect of the law that

ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (Princeton Univ. Press 1997) (providing a conservative originalist outlook). Many conservatives who call themselves textualists are also Christians, but Paul's Second Epistle to the Corinthians advocates "[n]ot of the letter but of the spirit: for the letter killeth, but the spirit giveth life," suggesting that one of the key figures of the New Testament opposes narrow, overly legalistic approach to His covenant. 2 *Corinthians* 3:6. This difference between the "letter" and the "spirit" might find modern expression in distinction between literalism and the idea of the "purposive" outlook. Although the "purpose" of the purposive outlook superficially seems to be a lot like the "original intent" or "meaning" of the hard literalist position, there is a distinction to be made, and the two are actually competing interpretive theories. According to the purposive perspective, we must at times look beyond the text, be it to the debates, general intellectual or historical context of the Constitution, or the legislative histories of statutes. It has been argued that at times the court has placed too great a reliance on extra-textual sources like legislative histories, but given that these are records of the political process from which statutes emerge, it seems only logical that they would provide some insight to the ideas or spirit of the law in question. A purpose-oriented approach is also concerned with the likely consequences of interpretations. For a general discussion of a purposive approach, see STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* 92-105 (2010).

Purposive theory goes beyond the U.S. constitutional tradition and also finds expression in British, Canadian, and European statutory interpretation. See *Pepper v. Hart* [1993] AC 593 and *Rizzo v. Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27, 1998 CanLII 837 (S.C.C.). For a discussion of a contextual historical approach to the Constitution versus a "plain meaning" originalist approach, see Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, J. EARLY REPUBLIC, Winter 2009, at 585-606. Justice Breyer actually makes mention of a "purposive concern" in a recent unanimous opinion. See *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (U.S. 2010). Some scholars believe the idea of a purposive approach is itself not a new idea; G. Edward White believes a purposive outlook can be found in Holmes' *The Common Law*. See HOLMES, *supra* note 5, at 154.

The activist idea that there is never a clear meaning of the law or right or wrong answers, and the literalist idea that there is a single, immutable, universally correct reading of a document as general as the United States Constitution that was the compromised result of fifty-four—only thirty-nine of whom actually signed—politically interested individuals, are both problematic positions. Both life and the law are generally too complex for such simple reductions. For additional information on literalism, see *infra* Appendix on Literalism.

31. See Christopher L. Kutz, Note, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997, 997-1030 (1994) (discussing indeterminacy in the law). If indeterminacy did not exist in the law, and hard logic was the primary tool of judges, both their role and how we see them would be vastly changed. The greatest judges would not be powerful and distinctive thinkers but rote practitioners of formal deduction—and not even interesting

guides us to our conclusions—and here, “valuative” often translates to “political.” The logical form of law, therefore, merely conceals justification and gives analytical respectability to results that are essentially personal or political in nature; it may conceal more than it reveals. The law is authority and, at its worst, it is politics masquerading as analysis.

Not only is the law hopelessly limited and disjointed, it is fundamentally flawed in areas that involve constitutional interpretation and adjudication, as well as in *prima facie* cases that make up the majority of criminal and civil law.³² Perhaps most disconcerting of all is that this is a problem so central and intrinsic to the process of the law that there are probably no real alternatives, only modest partial remedies that are themselves both flawed and unlikely to be implemented.

theoretical math or logic in which new theorems and unexpected answers are discovered, but rather something more akin to applied arithmetic and Aristotelian or Thomazine logic. We would not celebrate them for their insight and reason, but would be merely satisfied at getting the correct answer, or perhaps relieved as when a pedestrian piece of architecture does not collapse because the equations were done correctly.

32. I am limiting my analysis to *prima facie* cases and judicial opinions. Again, there are cases in which more rigorous forms of reason and even the scientific method are actually used. Exculpatory DNA testing is perhaps the best example of the latter, although even here there can be a broad range of doubt—was the evidence planted? Does proof of sex also prove rape or murder? See generally KENNETH R. FOSTER & PETER W. HUBER, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS* *passim* (MIT Press 1999). There are also situations where, for instance, an alibi can be corroborated through photographic or other evidence amounting to a sort of falsification. For an example of non-scientific deduction, see Abraham Lincoln’s successful defense of a client, Duff Armstrong, against murder charges in *Lincoln*. See DAVID H. DONALD, *LINCOLN* 150-51 (Simon & Schuster 1995). In *Lincoln*, the author notes a witness said he recognized the accused in the bright light of the full moon. *Id.* Lincoln then produced an almanac showing that the moon was in fact not visible that night. *Id.* Falsification also exists as a historical counterexample. See text referring to a bearded figure photographed in Peterborough, New Hampshire, believed by some to be Lincoln, even though it can be demonstrated by other photos that Lincoln did not have a beard during this period. See STEFAN LORANT, *LINCOLN: A PICTURE STORY OF HIS LIFE* 87 (Bonanza Books 1979). I should note, too, that there are areas of the law and regulation where the range of interpretation is very narrow and therefore is much less of an issue; this might include tax law, rules of accounting, and traffic regulations.

Having worked in a law library for almost twenty years, I have seen the law’s preoccupation with the accuracy of citations and old definitions, which, it might be argued, comes at the expense of practical problem-solving. As Popper notes, definitions add little to our understanding, and eventually we must arrive at non-defined terms—something corroborated by the generative grammar theory of Noam Chomsky. See POPPER, *OBJECTIVE KNOWLEDGE*, *supra* note 3, at 58, 79, 309-310; see also KARL R. POPPER, *Two Kinds of Definitions*, in *POPPER SELECTIONS*, *supra* note 2, at 87-100. See NOAM CHOMSKY, *LANGUAGE AND MIND* 61-62 (3d ed. 2006). After all, we must either assume that we know what some words mean or else look up the definitions of each word in the definition and so on and so on into an infinite regress. This also underscores the often non-progressive nature of the law. See POPPER, *OBJECTIVE KNOWLEDGE*, *supra* note 3, at 58, 79, 309-10; see also KARL R. POPPER, *Two Kinds of Definitions*, in *POPPER SELECTIONS*, *supra* note 2, at 87-100. Far from being merely a set of symbolic communication or an invented technology, Noam Chomsky and advocates of generative grammar theory and psycholinguism have made a powerful case that syntactic language is both a creative process and a fundamental part of our psyches. See generally NOAM CHOMSKY, *LANGUAGE AND MIND* 61-62 (3d ed. 2006).

III. INDUCTION AND DEDUCTION: WHAT WE THINK WE ARE DOING VERSUS WHAT WE ARE ACTUALLY DOING

In science, as with the adversarial process of the law, we must choose between competing critical arguments; the weightiest arguments are ones that can be tested or *falsified*.³³ Science also begins by framing a premise, a conjecture, which is first and foremost a creative endeavor and a product of the human imagination.³⁴ The more narrowly-framed a theory is—the more it forbids—the potentially stronger the test of it may be.³⁵ We then attempt to test or falsify it by setting up an experiment, a sort of true-or-false physicalization of deduction that will refute the premise if it is untrue and corroborate it if it is true. We then submit our findings for rigorous discussion or peer review. The experiment can be explained and then replicated even by people who disagree with the original conjecture. If the conjecture passes this rigorous muster, we can accept it as a conditional truth until it can be further refined or disproved or until a new theory with greater explanatory power is devised and tested.³⁶ Science, therefore, progresses by vigorously testing—essentially corroborating and looking for flaws in a theory, which also underscores the difference between the self-critical attitude of science when done well and the advocacy of the law. Likewise, the most solid

33. See generally POPPER, THE MYTH OF THE FRAMEWORK, *supra* note 3 (explaining falsification is a form of negative reason common in scientific experimentation; the idea is to set up a limited and controlled situation where a theory is eliminated if untrue, thus corroborating it as a conditional truth if it survives such rigor and subsequent review); POPPER, *supra* note 1, at *passim*; POPPER, *supra* note 3, at *passim* (discussing falsification and falsifiability).

34. For the notion that ideas are creative endeavors, see POPPER, *supra* note 11, at 9. On this point, Albert Einstein wrote, “Physical concepts are free creations of the human mind, and are not, however it may seem, uniquely determined by the external world.” BARTLETT’S FAMILIAR QUOTATIONS 683 (Kaplan, ed., 17th ed. 2002). Einstein’s theory of relativity may or may not turn out to be the last word on the physics of the macro levels of the physical universe, but, like Linus Palling’s single helix theory of genetics or Lamarck’s theory of evolution, the theories are, at the very least, wonderful creations of the human mind, beautiful ideas, and important chapters in the history of ideas.

Not only are the ideas of science beautiful in their own right, but very often so are the objects of its study. The great American physicist of light, Albert Abraham Michelson, famous for the Michelson-Morey experiment that disproved the idea of ether and set the stage for Einstein and special relativity, was one of them. In the first of his collection of lectures, *Light Waves and Their Uses*, Michelson writes, “If a poet could at the same time be a physicist he might convey to others the pleasure, the satisfaction, almost the reverence, which the subject inspires. The aesthetic side of the subject is, I confess, by no means the least attractive to me.” ALBERT ABRAHAM MICHELSON, LIGHT WAVES AND THEIR USES 1 (Nabu Press 2010) (1903). See also, NORMAN MCLEAN, *Billiards is a Good Game; Gamesmanship and America’s First Nobel Prize Scientist*, in THE NORMAN MCLEAN READER 78, 78-92 (Univ. of Chicago Press 2008).

35. See POPPER, *supra* note 1, at 36. The narrowness in terms of limiting or framing a conjecture should not be confused with the narrowness of a sample under investigation.

36. See generally POPPER, *supra* note 3, at *passim* (discussing falsification and falsifiability).

knowledge of the external world is that which describes phenomena based on, or guided by, physical laws that can be tested intersubjectively.³⁷

By contrast, in *prima facie* cases, attorneys present competing theories—for example, that a defendant is guilty or innocent—and then make arguments that mix reason and rhetoric, including arguments that may appeal for emotional or other non-rational reasons such as appeals to authority, in support of their theory or position. The advocates go back and forth in making their arguments, and presumably the most compelling argument will win. In cases tried before juries, the gallery of peers listens to both sides of the case, debate the facts, evidence, and arguments presented by both sides, and deliver a verdict.

The problem is that the most compelling or persuasive arguments are not always the truest. Aggravating this further is that in most cases, lawyers look for and proffer verifications, or facts and characterizations of facts sympathetic to their interpretation. In philosophical terms, this sort of justification embodies something akin to an inductivist outlook that ultimately has more to do with shoring up beliefs or a position than it does the critical testing of facts, even when couched in factual terms. If the twin pillars of human psychology are denial and rationalization, then these irrational human tendencies find analog in legal justificationism. So much of the adversarial process—and among disagreeing judicial opinions—boils down to the assertion “my justification is better than your justification.” What makes this even more problematic, in methodological terms, is that when a lawyer summarizes a case for a jury, or when a judge explains a holding, he or she may give a characterization of the facts of a case as premises of a syllogism or enthymeme leading necessarily to their specific conclusion. In this sense, commentators on adjudication regard deduction to be a fundamental part of jury trials and judicial opinions.³⁸

The fact that the “syllogisms” derived from the facts of a case—their “premises”—can and do lead to widely differing interpretations, and therefore diverging conclusions, suggests that it is not pure logic but rather discretionary logic that is at work in the law and more likely simple justification in logical form.³⁹ In other words, the analytical flexibility of the law

37. *Id.* at 44 (Popper notes that as it concerns scientific statements, objectivity “lies in the fact that they can be *inter-subjectively tested*.”)

38. RUGGIERO ALDISERT, *OPINION WRITING* 161-63 (1990).

39. This lack of agreement not only casts doubt on the idea that legal reasoning in the law outlined in judicial opinions and the summations of lawyers are akin to the pure logic of syllogisms, but also on the nature of facts in the law. *See* ALDISERT, *supra* note 38, at 161-63. In the law, we pick our syllogisms from facts in a way that would be impermissible in formal reasoning. Even when we think we are reasoning syllogistically—deductively—we are actually building justifications. Logic is a powerful explanatory tool. As A.J. Ayer notes, “many incompatible

allows us to pick and choose among syllogisms and to tailor these selectively to best suit our purposes. The law in such instances is induction, or the social science equivalent of it, masquerading as deduction. Rather than a single program, method, or activity, like falsification in the scientific method, the law is an organic aggregate or whole; it is a naturalistic, composite enterprise of often-jostling constituent elements. Nonetheless, even in the law, the only real method is critical analysis and testing, which I will discuss in the next section.⁴⁰ Rather than analyze the historical patchwork of the law, I will analyze the part of the law most familiar to the popular mind: litigators pitching their client's interest to a judge or jury and the resulting decisions.

A. INDUCTION

When we observe the world around us, we seem to be taking it in directly, literally. In fact, we are testing our ideas, expectations, and assumptions of them.⁴¹ To a large degree, we even learn how to see. Induction in its most common form is perhaps best expressed by the simple empiricist cognitive model of Locke, stating that the mind is a blank slate, a *tabula rasa*, and that all of our knowledge comes to us as unmediated information via the senses.⁴² Patterns and facts of the external world, usually expressed as law-like repetitions typical of laws of physics, impress themselves directly on our consciousness as pure experience and without theory, interpretive, or cognitive frames.

The biggest problem with the inductive method and one of the greatest sources of confusion surrounding it is the fact that it does not really exist, even though for most of us it seems to.⁴³ The fact most people intuitively believe in induction is referred to by Popper as "the Psychological Problem of Induction," or H_{Ps} in his formulaic shorthand; the fact that induction does not really exist as a method is referred to by Popper as "the Logical

systems of sentences could be internally coherent." A.J. AYER, PHILOSOPHY IN THE TWENTIETH CENTURY 135 (Random House 1982). Thus, logic can equally be a powerful tool in polemics and politics and can be used to mislead. Anyone who has taken a course in logic knows that one can be very logically wrong depending on the truth or falsity of one's premises. Ayer's point is that rationalists often believe reason to be a tool to enhance or even discover truth, yet in fact it, as with language generally, can equally be used to mask the truth and further falsehoods. *See id.*

40. Popper's solution to the problem of induction shows that there is no such thing as unmediated perception and therefore that all observation involves the testing of assumptions—deduction. POPPER, *supra* note 11, at 95-97.

41. *See, e.g.,* POPPER, *supra* note 11, at 95-97. The idea that all observation is theory-laden is a central concept in Popper's philosophy. *See id.*

42. POPPER, *supra* note 1, at 40.

43. *See* POPPER, *supra* note 32, at 1-31.

Problem of Induction,” or H_L .⁴⁴ Induction in logical terms means the process of deriving generalities from specific instances.⁴⁵

Post-behaviorist cognitive theory tells us there is, in fact, no unmediated perception.⁴⁶ Our perceptions are routed through cognitive networks of the brain before we are even aware of them. Therefore, all knowledge is interpretive, informed by existing knowledge and theories processed through psychological matrices, even when the interpretations are very narrow, as with logic, applied math, and simple sensory observations like seeing three pebbles in a jar.⁴⁷ As Popper writes in his essay, *On the Sources of Knowledge and Ignorance*, “Knowledge cannot start from nothing—from a *tabula rasa*—nor yet from observation. The advance of knowledge consists, mainly, in the modification of earlier knowledge.”⁴⁸ In other words, theory and theoretical frameworks always precede observation.

The mind is made up of various cognitive and linguistic matrices, and as Popper notes, just by considering a thing or an idea means we are testing it and already have “opinions and expectations” of it.⁴⁹ Strictly speaking, there is no literal interpretation of the law or any other text. Therefore, deductive reason—whether it is the hard reason of formal systems of truth, the soft reason of simple open-mindedness⁵⁰ and good faith discussion, or the intermediate form of falsification in science and, in limited instances, in activities such as history and the law—is the only real method of obtaining

44. KARL R. POPPER, *The Problem of Induction*, in POPPER SELECTIONS, *supra* note 2, at 117. Popper shows this traditional inductive model of perception—what he calls “the bucket theory of the mind”—in fact leads to an infinite regress. *See id.*

45. PATRICK J. HURLEY, LOGIC 537 (3d ed. 1988).

46. *See* POPPER, *supra* note 11.

47. If knowledge was merely about pure and unmediated observation without psychological matrices to interpret and test such information, then animals with greater senses, such as dogs and cats, would presumably have a much greater understanding of the world. It would be they who dominate the world with science and abstract ideas like the law, but this is quite obviously not the case. Regarding theories of Generative Grammar, see CHOMSKY, *supra* note 32. For Popper’s theory of the mind, see generally KARL POPPER & JOHN ECCLES, *THE SELF AND ITS BRAIN* (Routledge 1986) (1977). The foregoing establishes that even the most simple and straightforward texts are open to interpretation.

48. *See* POPPER, *supra* note 1, at 28.

49. *See* POPPER, *supra* note 11, at 45. Popper writes, “[y]ou cannot start from observation: you have to know first *what to observe*. That is, you have to start from a problem. Moreover, there is no such thing as uninterpreted observation. All observations are interpreted in light of theories.” *Id.*

50. Popper gives a good definition of what might be called soft rationality, as opposed to the hard reason of logic and math: “Rationality as a personal attitude is the attitude of readiness to correct one’s beliefs. In its most highly developed form, it is the readiness to discuss one’s beliefs critically, and to correct them in light of critical discussions with other people.” *Id.* at 181. One area of the law where deduction in a moderately strong sense exists is legal research, where we either find the correct cite of a source or not—and similarly, a citation is either correct or it is not. *See* Michael F. Duggan & David W. Isenbergh, *Postmodernism and the Brave New World of Legal Research*, 86 LAW LIBR. J., Fall 1994, at 829-35 (Fall 1994).

knowledge. All methods, despite their distinctive disciplinary trappings and various natures, involve the trying and criticism of ideas—and the question of disciplines is *how* to test, given the character and dictates of the various disciplines and their subjects.⁵¹ They are all forms of testing and, therefore, are deductive.

B. DEDUCTION

How, then, do we come to truthful knowledge?⁵² Although there is no such thing as non-theory-laden observation, empiricism still plays a role, and the critical rationalist answer is that our truthful knowledge of the physical world—especially scientific knowledge—comes from the proper amalgam of inspiration—including intuition and the creative counter-intuition that is the source of such great ideas as relativity and quantum mechanics—reason, theory-laden empirical observation, and testing.⁵³ From this, we can see that the historical distinction between the empiricism of the Anglo-American philosophical tradition and the rationalism of the Continental tradition is an artificial one. In terms of practice and analysis of the external world, both reason and observation are required.⁵⁴

51. On the topic of methodologies based on academic disciplines, Popper writes:

The belief that there is such a thing as physics, or biology or archaeology and that these “studies” or “disciplines” are distinguishable by the subject matter which they investigate, appears to me to be a residue from the time when one believed that a theory had to proceed from a definition of its own subject matter. But subject matter, or kinds of things, do not, I hold, constitute a basis for distinguishing disciplines. Disciplines are distinguished partly for historical reasons and reasons of administrative convenience (such as the organization of teaching and of appointments), and partly because the theories which we construct to solve our problems have a tendency to grow into unified systems. But all of this classification is a comparatively unimportant and superficial affair. *We are not students of some subject but students of problems.* And problems may cut right across the borders of any subject matter or disciplines.

POPPER, *supra* note 1, at 66-67.

52. “True” and its variations used here according to Tarski’s definition of truth as correspondence: “a true sentence is one which says that a state of affairs is so, and the state of affairs is indeed so and so.” See ALFRED TARSKI, *LOGIC, SEMANTICS, METAMATHEMATICS* 155 (J.H. Woodger ed., Hackett Pub. Co. 1986) (1956). See also POPPER, *supra* note 11, at 174-75. Aristotle and even the great skeptical empiricist David Hume also give definitions of truth as correspondence. See ARISTOTLE, *METAPHYSICA* 7, 27 (W.D. Ross trans., Oxford 1908); HUME, *supra* note 20, at 3. In *Objective Knowledge*, Popper holds that correspondence is the only real theory of truth. See POPPER, *supra* note 11, at 308-09.

53. Regarding Popper’s idea that scientific theories are ineffable products of the human imagination, see POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY*, *supra* note 3, at 32-33 and POPPER, *CONJECTURES AND REFUTATIONS*, *supra* note 1, at 54-55.

54. Popper quotes Russell’s famous defense of empiricism as “[i]t is therefore important to discover and answer to Hume[’s problem of induction] that is wholly or mainly *empirical*. If not, *there is no intellectual difference between sanity and insanity*. The lunatic who believes he is a poached egg is condemned solely on the ground that he is in a minority.” POPPER, *supra* note 11, at 5. This not only explains Hume’s despair at the end of his *Treatise* but Popper’s apparent pride

We do not learn by justifying what we already believe; we learn by correcting our mistaken ideas and beliefs through critical analysis and discourse in light of more powerful explanations.⁵⁵ Likewise, we do not “prove” a point by finding a sufficient amount of evidence to support or verify our position, but rather may corroborate a theory by rigorously testing it and disproving it if it is not true. Although some cases and positions in the law are stronger than others on their face, as Popper famously notes, no number of confirmations will ever prove a universal claim, while a single instance to the contrary may disprove it.⁵⁶ Accordingly, as Popper describes:

There is no criterion for the truth, but there is something like a criterion of error: clashes arising within our knowledge or between our knowledge and the facts indicate that something is wrong. In this way, knowledge can grow through the critical elimination of error. This is how we can get nearer to the truth.⁵⁷

More broadly, deduction is defined as a form of reason in which a specific conclusion must necessarily follow certain specific premises.⁵⁸ In pure reason, deduction includes logical syllogisms and enthymemes, equations in mathematics, and in terms of physical testing, scientific falsification.⁵⁹ A useful rule-of-thumb distinction between induction and deduction is that as a methodological process, the former is retrospective or

at the beginning of his essay, *Conjectural Knowledge*, where he claims to have solved the problem of induction. See also RUSSELL, *supra* note 20, at 698.

55. See, e.g., POPPER, *supra* note 11, at 5.

56. For Popper’s famous black swan, see POPPER, *supra* note 1, at 100. By contrast, the view that we can justify beliefs is a form of simple empiricism sometimes called positivism, and the view that we cannot justify our knowledge is called skepticism. See Miller, *supra* note 17, at 3. Critical rationalism is a form of sophisticated realism and rational skepticism. On positivism as justification, see also POPPER, *supra* note 1, at 109. Admittedly, some realist, as opposed to phenomenalist, positivists embrace forward-looking experimentation and therefore—whether they knew it or not—falsification. DAVID MILLER, CRITICAL RATIONALISM: A RESTATEMENT AND DEFENCE 102 (2003). The American philosopher Chauncey Wright may serve an example. Michael F. Duggan, Chauncey Wright and Forward-Looking Empiricism (2002) (unpublished Ph.D. dissertation, Georgetown University) (on file with author). Wright’s student, Charles Sanders Peirce, actually articulated the concept of falsification, and Hillary Putnam suggests that Peirce anticipated falsification decades before Popper. See HILLARY PUTNAM, PRAGMATISM, AN OPEN QUESTION 71 (Blackwell 1996) (citing CHARLES SANDERS PEIRCE, *Pragmatism and Pragmaticism*, in COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 443, 443 (Charles Hartshorne, Paul Weiss, & Arthur W. Burks eds., Harvard Univ. Press 1943)). Economist and historian Nassim Nicholas Taleb also notes that Peirce hit on the idea of negative rationality in empiricism, but believes that Victor Brochard happened on it even earlier, in 1879 to be precise. See NASSIM NICHOLAS TALEB, THE BLACK SWAN 57 (Random House 2007).

57. See POPPER, *supra* note 11, at 143.

58. See *infra* note 59.

59. A deductive argument is defined by Patrick J. Hurley as one “in which we expect the conclusion to follow necessarily from the premises.” See PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC 535 (Wadsworth Pub. Co. 1999).

backward-looking, while the latter is forward-looking to often unexpected results.⁶⁰

As Popper points out in his book, *The Myth of the Framework*, analysis and criticism may progress even in areas of investigation where the harder analytical reason of science is not possible through softer means of testing.⁶¹ In this sense, even non-scientific knowledge may progress by testing premises via rigorous critical discussion, a process he spells out in a simple formula he calls the *tetradic schema*.⁶² On the progress of knowledge generally, Popper writes:

In both [science and non-science] we start from myths—from traditional prejudices, beset with error—and from these we proceed by criticism: by the critical elimination of errors. In both the role of evidence is, in the main, to correct our mistakes, our prejudices, our tentative theories—that is, to play a part in the critical discussion in the elimination of error. By correcting our mistakes, we raise new problems, we invent conjectures, that is, tentative theories, which we submit to critical discussion directed to the elimination of error. The whole process can be represented by a simplified schema which I may call the tetradic schema:

$$P_1 \rightarrow TT \rightarrow CD \rightarrow P_2$$

This schema is to be understood as follows. Assume that we start with some problem P_1 —it may be either a practical, or a theoretical, or a historical problem. We then proceed to formulate a tentative solution to the problem: a conjectural or hypothetical solution—a *tentative theory*, TT . This is then submitted to *critical discussions*, CD in light of evidence, if available. As a result, new problems, P_2 arise.⁶³

Where science differs from non-science in respect to this process is with the addition of falsification between the tentative theory (TT) and critical discussion (CD), although discussion may be a part of testing a scientific theory at all points in the process. Falsification as a less formal type of negative rationality or critical elimination comes into play in conjunction with historical discussion—for example, a photograph of Lincoln on a known date in Washington, D.C., used to refute the claim that he was

60. For a definition of forward-looking empiricism and the forward-looking nature of deductive processes, see Edward H. Madden, *Max Fisch: Rigorous Humanist*, in THE TRANSACTIONS OF THE CHARLES S. PEIRCE SOCIETY 381-82 (Indiana Univ. Press 1986).

61. See POPPER, *supra* note 11, at 141-42; see also POPPER, *supra* note 3, at 106-52.

62. See POPPER, *supra* note 11, at 141-42; see also POPPER, *supra* note 3, at 106-52.

63. See POPPER, *supra* note 11, at 141-42; see also POPPER, *supra* note 3, at 106-52.

somewhere else at that time—and in the law—Lincoln’s use as a defense attorney of a lunar table in an almanac to discredit a witness’s claim that there was a full moon on the night of a murder. Nonetheless, while historical discussion and the law are logical and empirical, they are obviously not based on testable physical laws like physics or chemistry.⁶⁴

IV. THE LAW AS BAD SCIENCE: ADJUDICATION AS THE GAME OF JUSTIFICATION

A. INDUCTION IN NON-SCIENCE

What are the implications of the critical rationalist critique of induction on the law? After all, unlike science, the legal process does not look empirically to law-like patterns of the physical world in order to form its conclusions, although views advocating the use of precedent hope that new cases will sufficiently resemble a precedential case so as to make its application justified are akin to inductive empiricism. As Popper notes in his essay, *On the Sources of Knowledge and Ignorance*, there are numerous non-scientific programs that also justify their tenets “by *positive* reasons,” and which—like the law—are just as likely to be rationalist in nature as they are to be empirical.⁶⁵ Some of these programs are in the social sciences and include Freudian psychoanalysis, feminism, and Marxism. On this score, Popper quotes Bertrand Russell, saying “that no man’s authority can establish truth by decree; that we should submit to truth; that *truth is above human authority*,” presumably to include appeals to precedent.⁶⁶

“The Problem of Induction,” then, is manifest in non-scientific programs, bodies of thought, and activities such as justification. Unlike scientists, adherents to such programs do not look for repetitions of physical laws; human behavior has no such regularity. When social scientists look to what they perceive to be determinist or rationalist regularities and

64. Regarding falsification in the law and history, see sources cited *supra* note 33. The examples regarding Lincoln are akin to Popper’s famous illustration of the black swan in showing that negative rationality can be meaningfully used even in endeavors outside of science.

65. See POPPER, *supra* note 3.

66. See POPPER, *supra* note 1, at 27 (“[t]here is no ultimate sources of knowledge.”). This tenet of Popper’s seems similar to Oliver Wendell Holmes’ observation, “Certitude is not the test of certainty.” Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918). As with advocates in the law, adherents to various ideological programs read observed evidence and interpret such information as support of, or justifications of, their theories and when the evidence contradicts the theories; they simply modify them to accommodate such information. See POPPER, *supra* note 1, at 33-65. Needless to say, we should only accept truth as the result of testing and criticism and not by the command of authority. After all, power is a characteristic of truth rather than a synonym; all truth is powerful, but not all power is truthful.

patterns—often represented by misled attempts to apply probability and frequently ratios to human behavior—as analogs to physical laws, they err badly.⁶⁷ They look for past examples of behavior upon which to base present conclusions, as if the past truly is a historicist, or historically determinist, prologue.⁶⁸ As with inductivists in science, they look for confirmations and dismiss or explain away contradictions or inconsistencies, thus *insulating* their position from criticism rather than inviting it when it calls their outlook into question—even though in related activities such as the study of history, the inconsistencies, outliers and deviations may at times turn out to be more important than the mean. Under such a scheme, evidence is seen as “proof” of what one already believes, or else it is rejected or minimized.⁶⁹ Needless to say, this approach to analysis has huge ramifications on the processes of the law.

The non-scientific nature of the law is not in itself a fatal flaw. As Popper notes in, *Conjectures and Refutations*, just because something is not science does not mean it cannot be important as an activity, theory, or body of ideas;⁷⁰ it simply means the law is not a scientific means of discovery.⁷¹

67. Various rationalist schools in the social sciences—“rationalist” here meaning an assumption that reason is a dominant human trait, and as opposed to the “weak” rationalist claim that it is better to be reasonable than unreasonable, but that reason is not a dominant human trait—make the curious assumption that people will generally act in their own perceived self-interest. Human acts may or may not fall into very general patterns of species-based behavior, but this tells us very little about how individuals will act, which also may vary somewhat on a cultural basis. What it does tell us has nowhere near the predictive or explanatory power as the patterns of the physical world that can be tested in science. See EDWARD O. WILSON, ON HUMAN NATURE 171-77 (Harvard Univ. Press 1978). In frequency ratios in science, outliers can often be factored out, where in human events, outliers—Albert Einstein, Napoleon, Thomas Edison, John Wilkes Booth—are often more influential on the course of history than individuals within the relative mean of behavior.

68. See generally KARL POPPER, THE POVERTY OF HISTORICISM (Routledge 1991) (1957) (refuting the age-old idea that there are determinist laws, cycles, or a plot to history).

69. Popper gives Marxism and Adlerian psychoanalysis as examples of programs that utilize non-scientific justification. POPPER, *supra* note 1, at 37.

70. See KARL POPPER, *The Problem of Demarcation*, in POPPER SELECTIONS, *supra* note 2, at 118-30. Popper specifically notes that Freudian and Adlerian psychoanalysis may contain true ideas, even though they are not scientific programs. *Id.* at 128.

71. Although Popper believes that disciplinary lines are largely artificial, there is a real demarcation between science and non-science. See POPPER, *supra* note 1, at 66-67. For references to “demarcation” see generally *id.* and KARL POPPER, *The Problem of Demarcation*, in POPPER SELECTIONS, *supra* note 2, at 118-30. Popper also believes—correctly, I think—that some disciplines may straddle this demarcation between science and non-science and fall into both categories. POPPER, *supra* note 1, at 67. Biology, if defined broadly enough to include both genetics and the study of animal behavior, would encompass activities that include hard science and something closer to the social sciences. Popper likewise notes in, *The Poverty of Historicism*, evolution is an overarching meta-theory, organon, or “historical statement” that characterizes the development of life on Earth and not one characterizing a singular “law of evolution” to be tested, although aspects of evolutionary theory as it now stands—laws of heredity, the existence of genetic mutations, etc.—can be tested and corroborated scientifically. POPPER, *supra* note 1, at 106-07.

Popper believes that non-scientific programs, such as Freudian psychoanalysis or Darwinian evolution prior to later discoveries in genetics, are oftentimes of great importance and perhaps even true, but they are not science.⁷²

B. THE GAME OF ADJUDICATION

Adjudication as precedent following decision making might be analogized to a sort of creative justificationist game that is often either consciously or unconsciously result-oriented.⁷³ A judge or justice reaches a conclusion that is formalistically validated by extrapolating from a narrow reading of a statute, a precedential case, or a constitutional provision—if a conservative—or by a wider field of “felt necessities”—if a “liberal activist.”⁷⁴ Justices have historically founded important rights in the supposed implications of vague constitutional language and the “penumbras, formed by emanations from” its guarantees.⁷⁵ Rather than a dispassionate form of analysis, precedent is most often used as a basis to verify, and thus justify, a position or an opinion. When the judge gives his or her verdict or opinion, he or she will spell out the relevant facts and factors that went into determining the outcome. It is not unreasonable, however, to ask which came first, the reasoning or the conclusion.⁷⁶

It is not inconceivable that some opinions over the history of American constitutional law had more to do with supporting conclusions a judge or justice had already arrived at than an honest attempt at a good faith process

72. POPPER, *supra* note 1, at 37. In addition to the amenability to testing via falsification, there are other differences between science and non-science. Most prominent of these, as we have seen, is that the objects of study in the law and history are generally not phenomena subject to and guided by physical laws, but rather situations subject to the ultimate disordering factor in history: the interaction of human volition and, therefore, caprice.

73. See BREYER, *supra* note 14, at 115-32. Breyer's point is that even if one claims to be a literalist, adjudication is always, in part, result-oriented—the possible consequences of an opinion are one of several considerations a judge or justice may take into account, according to Breyer. *Id.* Regarding the literalist, the pragmatic criteria may simply be that a resulting opinion must be in line with the original meaning of a constitutional provision or statute in question.

74. HOLMES, *supra* note 5, at 1.

75. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

76. In a panel discussion at Harvard Law School in September 2009, retired Supreme Court Justice David Souter responded to a question by Professor Noah Feldman on precedent and the development of values in the Constitution by saying, “What one has to remember, is that maybe we are at the point at which the line of precedent has developed as far as it should be developed, and there should be in effect a counter-line drawn. If an appellate judge will not accept that as a possibility, then the fix is in before he goes on the bench.” Justice David Souter, Panel Discussion at Harvard School of Law (September 2009). Souter's approach to adjudication is “bottom up,” or rather, reasoning from the facts of a case rather than from a “top down.” Although it is far better to reason “upward” from the facts, than “downward” from a presupposed conclusion, the weakness of the law as a system of analysis in many cases allows us to accentuate or downplay certain facts, thus allowing us to choose our syllogisms.

of discovery, thereby putting the cart before the analytical horse and calling the whole process into question. At the risk of sounding cynical, it would be easy for an experienced judge with a seasoned understanding of an issue before the bench to have a result in mind prior to actually hearing a case, and then by perusing the case law friendly to his or her perspective, come up retrospectively with an analytical or historical pedigree for the resulting opinion. This is sometimes known as “backfilling” the rationale of an opinion.

Given a group of people with sufficient knowledge of the history of the common law tradition and constitutional case law, one could make a sort of free association parlor game out of the justificationist process of adjudication—in other words, one requiring its players to defend any legal or constitutional position by finding some justification, *any* justification of it in the historical record no matter how obscure, remote, obsolete or backward. As Popper notes, it is possible to find supporting evidence, confirmations, and verifications for virtually any position “if we look for verifications.”⁷⁷ I would argue it is possible that much of the case law tradition is nothing more than an official, enforceable version of this game.

This view of the law and, more generally, of knowledge suggests several things. First, far from being an objective weighing of fixed, immutable, and universally agreed upon facts and values, or the application of universal rules, principles, standards, and a common baseline starting point, judicial decision-making is an *inherently creative affair*.⁷⁸ Rather than a hard deductive system of discovery, in which only the origin of the original conjecture and the devising of a means to test it are creative devises, judicial decision-making is in fact a sort of creative game of historical links and associations with a highly subjective level of discretion on the part of the judge in choosing these links and associations.

To illustrate the flaws with this sort of process, we merely have to imagine a modern scientist who does not test his ideas in physics by modern experimentation, current knowledge, theories, and peer review, but rather appeals to existing information derived by the ancient Greeks or some other baseline in the near or distant past. This also underscores the retrospective—backward-looking—nature of induction and the forward-looking

77. See POPPER, *supra* note 1, at 36.

78. There is an elaborate frieze on the west wall behind and over the public gallery in the courtroom of the Supreme Court. In the center are two angelic figures representing elemental components of the law in allegory. The winged figure to the viewer's right of center holds a balance—a scales of justice—and is *Divine Inspiration* (the other is *Justice*, but looks more like the enforcement aspect of the law, reaching for a sword to protect the *good* against the less numerous *evil*). This depiction is right in part: judgment is based on inspiration, although most likely, it is the product of human cognition rather than the divine.

nature of deduction as found in scientific experimentation. We have seen how justification works in the opinions of judges and justices, but how is it manifest in regard to jury verdicts?

V. POPPER ON JURIES

The process of decision-making by juries is an amalgam of two opposite tendencies: one formalistic, narrow, and rule-oriented; the other naturalistic, expansive, and subject to manipulation. As Popper notes in his early masterpiece, *The Logic of Scientific Discovery*, the methodology of the jury process is closer to the testing of pure reason than the type of reason usually found in judicial opinions, which he regards to be justificationist in nature.⁷⁹ Popper writes:

The important distinction, between a *justification* and a *decision*—reached in accordance with a procedure governed by rules—might be clarified perhaps with the help of an analogy: the old procedure of trial by jury.

The *verdict* of the jury (*vere dictum* = truly spoken), like that of the experimenter, is an answer to a question of fact (*quid facti?*) which must be put to the jury in the sharpest, most direct form.⁸⁰

Thus, Popper regards jury trials as opportunities for critical discussion bound by specific rules toward a narrow either/or question, the verdict of which “plays the part of a true statement of fact,” while admitting the fallibility of juries.⁸¹ In this sense, the law could potentially be like the critical discussion component of the scientific method, albeit with weaker initial states and less rigorous means of testing. Because of what he perceives to be greater analytical rigor, Popper prefers the process of juries to that of judges, which he sees as justificationist in nature.⁸²

Popper makes two mistakes in his assessment of juries and judges in practice: the first is his overestimation of the efficacy of juries in practice as a forum of analysis, and the second is his view of the nature and role played by facts in the law. As we will see in the next section, the sort of persuasion that goes on in courtrooms, even within the parameters of rules of procedure and narrowly framed questions, is often designed to draw the jury process away from purely dispassionate critical discussion. In other

79. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY*, *supra* note 3, at 110.

80. *See* POPPER, *supra* note 11, at 109-10.

81. *See id.* at 110. To be fair, Popper probably saw juries in the law to be akin to peer review in the sciences—a sort of ongoing jury of scientists, which is a very important part of the scientific method.

82. *See id.*

words, juries are expected to arrive at good analytical results despite much of what goes on in courtrooms rather than because of it. Therefore, it is not the non-scientific nature of the jury process *per se*, but rather the fundamental character of legal discourse that undermines the possibility of greater rigor. Popper's view of juries expressed in, *The Logic of Scientific Discovery*, seems to be overly optimistic when we see how juries actually function.⁸³

VI. JUSTIFICATION AND JURY MANIPULATION: NIETZSCHE IN CONTRAST TO POPPER

"The law is a sort of hocus-pocus science."

—Charles Macklin, *Love a' la Mode*, Act II, Scene 1

"And what is the purpose of jury selection?

*To find 12 people who are fair, impartial and open minded
to reach a just decision? Any lawyer who does that should quit.*

*What you try to do is select people who will see things
one way—your way. But remember,*

*the other lawyer is trying to do the same thing."*⁸⁴

—Irving Younger

If the split decisions of our highest court represent some of the most clear-cut examples of legal justification, it is the populist implications of the jury system where it arguably manifests its greatest and most insidious potential for mischief. We have seen Popper's argument in favor of juries over judges.⁸⁵ The question then becomes whether jury trials live up to their hypothetical potential as opportunities for critical discussion.

The rationale behind trial by jury is that if both sides of a case are allowed their say, allowed every relevant weapon at their disposal, the resulting discussion will be analogous to the give and take of a marketplace of ideas from which the truth of the matter will emerge or will be rigorously sorted out. The problem with this optimistic view is fourfold: (1) it runs afoul of certain aspects of human nature that are susceptible to the manipulation of lawyers; (2) the role of facts in the law is not analogous to the role of facts in the physical sciences; (3) the idea that a jury or any other group can have singular will is a fallacy; and (4) huge disparities exist in the law,

83. See POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY*, *supra* note 3, at 109-10.

84. Irving Younger, Address at the Mid-Winter Meeting of the Federation of Insurance Counsel (1985).

85. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY*, *supra* note 3, at 109-10.

especially regarding quality of representation. And, while perfect equality in representation is an impossible standard, in some trials there are considerable disparities in the abilities of counsel that preclude the possibility of a fair hearing.

A. NIETZSCHE ON PUNISHMENT AND HUMAN NATURE

*“The man who wants a jury has a bad case . . .
I think there is a growing disbelief in the jury as an
instrument for the discovery of truth. The use of it is to let
a little popular prejudice into the administration of law
—(in violation of their oath).”⁸⁶*

In the second essay of *On the Genealogy of Morals*, Friedrich Nietzsche makes a compelling argument that the trial and punishment of transgressors by the law is a formal expression of an organic, atavistic anger of group psychology.⁸⁷ It is the idea of primitive justice as vengeance and that the higher motives presumably to include rehabilitation and clemency are actually a form of effete over-domestication and soft decadence.⁸⁸ Although Nietzsche certainly overstates the point—makes it more clear than it really is—and although we must always be cautious when citing him as an authority, there is clearly some truth to the idea that criminal law is a reflection of what offends a community as much if not more than what it embraces positively as normative values—in this sense, Holmes and Nietzsche stand like bookends on the issue of the law as a historical reflection of popular attitudes.⁸⁹

Where Nietzsche is probably most correct is in regard to the reflexive prejudices and primitive revenge instincts of both the individual and the mob. If a heinous crime is committed that profoundly offends a community’s sense of justice, its outraged members may demand justice,

86. OLIVER WENDELL HOLMES, JR., *THE HOLMES-POLLOCK LETTERS* 74 (Mark DeWolfe Howe, ed., 1942).

87. See FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 44-45 (Douglas Smith trans., Oxford Univ. Press 1996) (1887).

88. *Id.*

89. In aphorism 43 in *The Gay Science*, for example, Nietzsche writes:

What laws betray.—It is a serious mistake to study the penal code of a people as if it gave an expression to the national character. The laws do not betray what a people are but rather what seems to them foreign, strange, uncanny, outlandish. The law refers to the exceptions to the morality of *mores*.

FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* 109 (Walter Kaufmann trans., Random House 1974) (1882). Compare and contrast this to Holmes in *The Path of the Law*: “The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men.” O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

punishment of *someone*, an impulse captured in the Charles Dickens' sarcastic quote that it is "far better [to] hang [the] wrong [fellow] than no [fellow]." ⁹⁰ Nietzsche notes—and period accounts and photos corroborate—that public executions and acts of corporal cruelty often attracted huge crowds even into the twentieth-century and were occasionally features of holiday entertainment.⁹¹ More recently, ultimate fighting and "reality" television programs illustrate human nature has changed very little over time. An innate predilection for voyeuristic sadism and *shadenfreude* is alive and well in the psyches of modern human beings, and appealing to it can generate huge sums of revenue. In matters related to their perceived interests and safety, people will at a certain point channel these impulses into often irrational action and violently take matters into their own hands.

The history of vigilante mob acts is more than suggestive of the irrationality produced by the demoralization and subsequent anger of a community in the wake of a recently committed or unresolved crime. More shocking to the dispassionate outsider is the seeming lack of concern over obtaining the right person or standards of establishing guilt. Even when the safety of the community is at issue, punishment may take precedent over process in the righteous psychology of the mob. Needless to say, if the suspect is an unpopular member of the community or a minority, an assumption of guilt emerging from racist irrationality or other manifestations of chauvinism and ignorance may be a foregone conclusion regardless of actual guilt. Any number of racially motivated lynchings of innocent people during the reign of Jim Crow will serve as example.

What does this dour historical reminder of the dark side of human nature have to do with justification in the law? First, it underscores the instincts that should be resisted and ideally restrained both by the substance and process of the law if the more enlightened ideals of fairness, equality before the law, and justice are to prevail or at least be approximated. Passion expressed as anger may be understandable as an emotion in visceral reaction to a heinous act, but it is hardly admirable, much less a sound basis

90. CHARLES DICKENS, *BLEAK HOUSE* 441 (Oxford Univ. Press 1998) (1853).

91. See generally V.A.C. GATRELL, *THE HANGING TREE, EXECUTION AND THE ENGLISH PEOPLE 1770-1868* 80-89 (Oxford Univ. Press 1994) (providing a complex historical-sociological study of British attitudes toward executions from the 1770s through the 1860s). One is impressed by the myriad of emotions of the execution crowd. *Id.* Among the more interesting parts are the rituals, theater, and superstitions that surrounded hangings, such as the popular belief that the touch of a hanged man had curative powers. *Id.* See also HARRIET C. FRAZIER, *DEATH SENTENCES IN MISSOURI, 1803-2005* 87 (McFarland 2006) ("[a] statute required a fence higher than the gallows be built to exclude the view of persons on the outside. Nonetheless, surrounding hill tops and roofs overflow with men, women, and children spectators."); CAMUS, *supra* note 12, at 18 ("This kind of happiness [that of resentment] is also experienced by good people who go to executions.").

for analysis of any kind. This sort of populist emotionalism should be minimized or eliminated as a part of the analytical process and contained through the rigor of the system.⁹² In other words, legal rules should limit or contain and counterbalance the passion of juries by rules and not allow it to distract analysis. The whole point of an independent judiciary in the minds of men like Alexander Hamilton and James Madison is to avoid conflicts of interest in the making of judgments and to stand aloof from the passions of the people and even the “encroachments” of the democratic branches of government.⁹³

Second, it also reveals the prejudices lawyers play up to in jury trials, even within the narrow bounds of jury instructions and narrowly-framed questions of guilt or innocence. Of course, democratic passions may cut both ways, and if prosecutors play on the prejudices and predilections of a jury in order to secure a guilty plea regardless of guilt or innocence, it is also a basis for jury nullification. Additionally, a defense lawyer may play on the rigid and uncritical sympathies of a jury to mitigate charges or even gain an acquittal for a guilty, but popular, defendant.

Here we must ask: what is the difference between a lynch mob and a jury? Although we would hope a jury is less angry than a mob, both are drawn from a community that in various degrees sees itself as violated. By drawing juries from the community, we have violated a fundamental rule of dispassionate analysis: an investigative body that is consciously immersed and personally interested in the question to be addressed, for as with science, the investigator has to care enough to ask the question and even champion a particular theory, and he or she should not have a private stake in the outcome—a good advocate may be a bad analyst and a court victory that would bring a trial attorney great fame would hopefully get a scientist fired and discredited.⁹⁴ Above all, what sets the jury apart is the external fact that it functions within legal parameters and is guided by narrow rules.

Regarding the efficacy of juries in practice, even with narrow procedural rules on specific factual questions of guilt or innocence, juries

92. Nietzsche was a conservative of sorts, but he regarded community outrage and revenge instincts to be the primordial grounding of the law, and, therefore, presumably beyond reform or revision. NIETZSCHE, *supra* note 87, at 44–45. By contrast, conservatives like Alexander Hamilton and Peter Viereck also saw people as flawed and non-perfectible and, therefore, their passions as individuals or en masse had to be contained by the law, customs, and institutions for there to be a well ordered society. PETER VIERECK, CONSERVATISM REVISITED 32–33, 41, 45, 47 (The Free Press 1949). In a broader sense, there is always a tension between liberty and order. *See* VIERECK, *supra*.

93. *See* THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., Signet 1999). Here, Hamilton’s concern is against “legislative encroachments.” *Id.*

94. Having said this, and as Popper himself notes, passionate advocacy in science is actually a means toward more rigorous debate and testing and, therefore, better results.

and the whole process of jury decisions are extremely vulnerable to the partisan and demagogic manipulation by counsel and appeals to the primitive anger of which Nietzsche writes.⁹⁵ Realistically speaking, lawyers in criminal and civil cases are not paid to discover the truth, but to represent clients. Lawyers may exaggerate, mitigate, or discredit the truth depending upon what is necessary to produce the most favorable outcome to their side. To the prosecutor, there are always aggravating factors; to the defender, there are always mitigating factors. Increasingly, lawyers—and I say this without moral judgment—are the modern analog of Greek sophists; they are professional liars trained to represent any position regardless of whether they believe it—although in practice, many lawyers are true believers and even zealots.⁹⁶ It may not be an exaggeration that the ideal universal litigator would be an amoral stage actor or a sort of voluntary sociopath in his or her own ability to lie convincingly, to smile or grimace on cue, and passionately argue points with which he or she may not agree. This also underscores the legal positivist distinction of the law from morality.

Likewise, jurors may be accepted or rejected by counsel for the precisely wrong reasons—not because of impartiality, but on the basis of sympathy toward or prejudice against their client's position. In this sense, advocates not only oppose their adversary's interests but may also put the interests of his or her client above the overall purpose of the law as a system of analysis, discovery, and justice. The purpose of a lawyer in a jury trial, then, is to manipulate the jury, to bring them around to his or her perspective, or else minimize the damage of an opponent's argument. Certainly hard and fast facts may play a part and may even be presented in an impartial way, but the primary function of the attorney is to play up to and manipulate the outlooks of members of the jury and play up to their

95. NIETZSCHE, *supra* note 87, at 44-45.

96. Given that the functions of lawyers and judges are largely antithetical—the first being manipulators of the truth and the latter being finders of the truth—the United States might do well to consider a system more like that of the British where the two are separate and not drawn from the same pool. Any number of treatises on advocacy will illustrate the true role of arguing counsel. While never advocating lying to a judge or jury, the preoccupation with these books seems to be more with convincing a judge or jury rather than discovering the truth. As David C. Frederick notes in his treatise, “[t]he advocate’s mission is to persuade the court to adopt the rule her client seeks” DAVID C. FREDERICK, *SUPREME COURT AND APPELLATE ADVOCACY* 91 (2d ed., West 2010). In her foreword to this book, Justice Ruth Bader Ginsberg characterizes advocacy as “an art.” Ruth Bader Ginsberg, *Foreword* to DAVID C. FREDERICK, *SUPREME COURT AND APPELLATE ADVOCACY* (2d ed., West 2010). In this, she is certainly right. *See* DAVID C. FREDERICK, *SUPREME COURT AND APPELLATE ADVOCACY*, 91 (2d ed. 2010). With regard to the law of jury selection or voir dire and preemptory challenges, see NANCY GERTNER & JUDITH H. MIZNER, *THE LAW OF JURIES* 158-59 (2d ed. 2009).

prejudices through emotionally inspiring rhetoric and the selective use—the accentuation or discrediting—of facts.

Popper may be correct in respect to the way questions are framed and given to juries, but he seems unaware that the purpose of advocates in the adversarial system of the law has come to swaying the jury to a sympathetic perspective, justifying his or her client's position, and the minimizing or neutralizing of evidence, arguments, and witnesses to the contrary, rather than to purely solve the question at hand. The role of the attorney in jury trials is to *maximize manipulation of the jury toward greater sympathy within the tolerances of the rules*. He is correct that the narrower the framing of the question and the more the process is guided by rules, the more solid its conclusion.⁹⁷

I am not saying juries never get it right or even that they usually get it wrong. Regarding my own extremely limited anecdotal experience from serving jury duty, I believe the jury on which I served arrived at a very good verdict, and I know many people with similar experiences. There are experts with far greater knowledge than mine who believe that juries are a healthy and vital component of our legal system.⁹⁸ I also know from my own experience how tenuous it all seemed at the time and how easily we could have arrived at a vastly inferior verdict and that we probably did not arrive at an ideal verdict. More than anything, I remember how sobering the experience was and feeling almost shaken at its conclusion.

There are certainly communities and jurisdictions where juries are well-instructed and take their responsibilities very seriously. Here the system still works fairly well and close to the way in which it was intended, thus illustrating its localist nature.⁹⁹ But David Hume reminds us that “reason is the . . . slave of the passions,” and it is clear that in order to work, jury members must suppress their prejudices and impulses in a way that seems increasingly difficult to maintain across the nation.¹⁰⁰ As the population of the United States continues to grow and become more diverse, and in a time when even scholars are calling reason itself into question, one can only wonder if the standard of dispassion necessary for juries to function is a realistic one.

97. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY*, *supra* note 3, at 109-10.

98. *See generally* VALERIE P. HANS & NEIL VIDMAR, *THE VERDICT ON JURIES* (2008).

99. *See* AKHIL REED AMAR, *THE BILL OF RIGHTS, CREATION AND RECONSTRUCTION* 88-90 (Yale Univ. Press 1998).

100. HUME, *supra* note 20, at 415. For an interesting popular account of problems with juries, see Hiller B. Zobel, *The Jury on Trial*, *AMERICAN HERITAGE*, July/Aug. 1995, at 42-51.

B. FACTS AND THE LAW

As with his appraisal of juries, it seems likely that Popper's characterization of the role and nature of facts as a basis for jury decisions is overly optimistic.¹⁰¹ What is the role of facts in the law? After all, facts in popular usage are supposed to embody indisputable, immutable, and universal truths.¹⁰² Facts in the law, such as they are, are quite different from facts in science.

Popper's characterization of facts before a jury, in *The Logic of Scientific Discovery*, is close to his views of the discussion of theories by scientists and that such discourse is susceptible to both human fallibility and a sociology of science.¹⁰³ Science as the testing of theories via the deduction of experimentation, however, is closer to the pure reason of logic and math. Therefore, his faith in the analysis of juries seems to honor his own views related to the demarcation of science and non-science in the breach rather than in the observance.¹⁰⁴ But the explanatory power of Popper's overall outlook, and especially his critique of non-scientific activities and analysis, provides a sound basis by which to criticize facts in the law.

Facts as observation statements have a different role in the world of business, psychology, culture, economics, politics, and the law, than they do in the realms of purely physical interaction. In science, facts represent quantifiable patterns based on or governed by physical laws that can often be demonstrated inter-subjectively, which is not the case in the law, where "facts" purport to represent alleged events that in many cases cannot be replicated. Consequently, so much of legal argumentation is characterized by clever sophistry, linguistic skills, the ability to cajole or bully, personal charm or dominance, appeal to vested authority, and manipulating and spinning facts. Without reading and presenting facts objectively, we see that the law can be bent almost any direction.¹⁰⁵ It is arguable that a skillful defense team could win any case, or at least manipulate it toward the most favorable possible outcome, assuming they could determine the choice of venue and whether the case goes to a judge or jury.

101. Although not so dark as Nietzsche, perhaps, it should be noted that Popper too has a realistic view of human nature. See POPPER, *THE OPEN SOCIETY AND ITS ENEMIES*, *supra* note 15.

102. BLACK'S LAW DICTIONARY 668 (9th ed. 2009) (defining fact as "[s]omething that actually exists: an aspect of reality. Fact not only includes actual occurrences and relationships, but also states of mind An actual or alleged event").

103. POPPER, *THE MYTH OF THE FRAMEWORK*, *supra* note 3, at 69-70.

104. POPPER, *The Problem of Demarcation*, in POPPER SELECTIONS, *supra* note 2, at 118-39.

105. See JOHN NICHOLAS IANNUZZI, *TRIAL: STRATEGY AND PSYCHOLOGY* (Prentice Hall 1992). On the benefits of a jury versus a judge from the attorney's perspective, see *id.* at 117-47.

C. JURIES AND THE FALLACY OF THE GROUP WILL

There is another common fallacy that law distorts our view of jury decisions, which can be called the “Fallacy of the Group Will.” Quite simply, no group, no matter how cooperative, cohesive, or communitarian, has a singular will, and the belief that we can forge a group into a single seamless opinion is a falsity. The idea of groups having a singular will—be it the thirty-nine men who signed the Constitution, a populace voting on a referendum, or a jury delivering a verdict—is, therefore, a bogus concept.¹⁰⁶

Individuals may compromise, acquiesce, or come around—be seduced, fooled, cajoled, pressured, threatened, or convinced—to a similar opinion or group mean, but there is no singular state of mind. Even lynch mobs and cults do not represent a singular will, but rather a surrender of individual volition to the dominant views or a similar abdication to the pressure of charismatic or otherwise strong personalities. One could plausibly argue that even within an individual, there is not always a single will, but rather a tangle of competing motivations. A person’s mind may embody doubt, ambivalence, emotional chaos, uncertainty, and other forms of self-conflict and countervailing emotions, rather than a clear, single-minded purpose.¹⁰⁷

106. See BENJAMIN FRANKLIN, *An Address to the Constitutional Convention September 17, 1787*, in WRITINGS OF BENJAMIN FRANKLIN 607-08 (Albert H. Smyth ed., MacMillan 1906). In his speech on September 17, 1787, at the Constitutional Convention, Benjamin Franklin said:

I doubt, too, whether any other Convention we can obtain, maybe able to make a better constitution; for when you assemble a number of men, to have the advantage their joint wisdom, you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an assembly can a *perfect* production be expected? It therefore astonishes me, Sir, to find this system approaching so near to perfection as it does.

Id. This underscores not only the Constitution’s impressive but imperfect nature, but also its origins in political compromise and, therefore, its vagueness. Interestingly, the political nature of the Constitution has been generally recognized by leading historians on the period of the framing. See, e.g., E.J. Dionne, Jr., Op-Ed., *David Souter vs. the Antonin Scalia*, WASH. POST, June 3, 2010, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/02/AR2010060203496.html>. As columnist E.J. Dionne, Jr. wrote:

The core problem with originalism is that it overlooks what the historian Gordon Wood has observed about the Founders’ work: that it is exceedingly difficult to discern the “true meaning” of the Constitution since it is the product not of closet philosophizing but of contentious political polemics. As a result, “many of our most cherished principles of constitutionalism associated with the Founding were in fact created inadvertently.” The historian Joseph Ellis offered in a parallel argument in the Post last month.

Id.

107. Numerous psychologists, philosophers, and existentialist writers have expressed the idea that behind the calm masks we present the world—even those of the seemingly most confident people—is a tangle of conflicting emotions. See FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 35-39 (Helen Zimmern trans., Penguin 1990) (1886); ALBERT CAMUS, *The Almond Trees*, in LYRICAL AND CRITICAL ESSAYS 134, 135 (Philip Thody ed., Ellen Conroy Kennedy trans., Vintage 1970); Letter from Hannah Arendt to Mary McCarthy (Aug. 8, 1969), in *BETWEEN FRIENDS; THE CORRESPONDENCE OF HANNAH ARENDT AND MARY MCCARTHY, 1949-1975*, at

The fact that there is no such thing as a group will or intent not only undermines the idea of a jury, but also “original intent,” as opposed to

241-43 (Carol Brightman ed., Harcourt Brace 1995). Nietzsche’s dichotomy of the *Dionysian* and *Apollonian*—or Schopenhauer’s Will and Representation, or the more conventional terms of passion and reason or Romantic and Classical—characterizes a fundamental distinction of opposites, often in the same mind. See FRIEDRICH NIETZSCHE, *THE BIRTH OF TRAGEDY* (Cambridge Univ. Press 1999) (1872); ARTHUR SCHOPENHAUER, *THE WORLD AS WILL AND IDEA* (Everyman 1995) (1819). Even the great skeptical philosopher, and font of the Federalist perspective, David Hume, is at a loss to identify the singular human self, much less a singular volition. See HUME, *supra* note 20, at 251. William James’ characterization of an infant’s mind as “[o]ne great blooming, buzzing confusion” probably holds true for adults more than he would admit. See WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 488 (Harvard Univ. Press 1983) (1890). And of course, Walt Whitman wrote “Do I contradict myself? Very well then . . . I contradict myself; I am large . . . I contain multitudes[.]” which also ties in with the earlier point that human psychology seems to require contradiction. WALT WHITMAN, *LEAVES OF GRASS* 85 (Malcolm Cowley ed., Viking Penguin Inc. 1959) (1855). By contrast, the idea of a general will originates with Rousseau.

It is understandable to desire fixed and absolute rules in the law, and these based on confident and definitive decisions of the human will. But, as intelligent animals, we are far from singular, much less predictable, and the more one studies human behavior, the more difficult it becomes to make definitive statements about human nature—beyond generalizations like “human beings are capable of reason, charity, and benevolence, but such traits are not dominant.” The fact is that compared to other social animals—and Nietzsche’s deriding of the “herd instinct” in *The Gay Science* and *On the Genealogy of Morals* aside—we are more individualistic, are not especially cooperative with one another, and there is frequently tension between the group and individual. As Edward O. Wilson notes in, *On Human Nature*, there is a general realm of human behavior, but this tells us little about individual acts. See *supra* note 20 and accompanying text.

Hannah Arendt’s point of view, although very different from both, seems to amalgamate concepts of Camus and Popper. Letter from Hannah Arendt to Mary McCarthy, *supra*. She states correctly that the mind—Popper’s World 2—is how we interact, interface, and access the realm of pure ideas—Popper’s World 3. POPPER & ECCLES, *supra* note 47, at 36-50. Ideas have a sort of autonomy, something that is often apparent to people who work with them, even in the law. Ideas in the abstract have an aesthetic and structural clarity that sometimes gives the illusion that the creative and cognitive processes by which we devise and process them are also orderly, which Camus correctly sees as chaotic. It is a very common mistake to conflate our access to a world of ideas with the mechanism by which we access them and to impose an order and clarity on our psyches that does not exist. It is probably from such an illusion that views like literalism emerge. While it is true that in hard analytical enterprises, statements that wave away factual inconsistencies—for example, Emerson’s statement that “[a] foolish consistency is the hobgoblin of little minds”—should be opposed, we must admit that when dealing with individual wills, inconsistencies are inevitable. RALPH WALDO EMERSON, *Self-Reliance*, in RALPH WALDO EMERSON, *SELECTED WRITINGS* 151 (1940).

Those who believe there is a singular general will, whether it be an individual or a group, are probably conflating access to the world of ideas with ideas themselves. Some of the existentialist philosophers, like Jean Paul Sartre, believed that in a world devoid of intrinsic meaning, we assert our choices, then embrace them and try to live up to them. See 2 *DICTIONARY OF THE HISTORY OF IDEAS* 194-95 (1968). Camus, by contrast, is less sure of our choices and believes that we make them and afterwards justify them with reasons that are flimsy at best. See 2 *MACMILLAN ENCYCLOPEDIA OF PHILOSOPHY* 15-16 (1972 ed. 1967). See generally ALBERT CAMUS, *THE MYTH OF SISYPHUS* (Justin O’Brien trans., 1955). See also ALBERT CAMUS, *NOTEBOOKS 1942-1951* 70 (Justin O’Brien trans., 1955). On page 70 of *Notebooks*, Camus writes, “One must have the strength to choose what one prefers and to cling to it. Otherwise it is best to die,” while on page 80, he writes, “he who has hope for the human lot is a fool.” CAMUS, *NOTEBOOKS 1942-1951*, *supra*, at 70, 80.

original meaning or purpose, interpretations of the Constitution.¹⁰⁸ We do not read intent, which is a function of the will, nor do we read text; we read language in an attempt to construe ideas made unclear by compromise and competing views and interests.

D. DISPARITIES

It is obvious to anybody who follows criminal trials that disparities exist in the law, and the most obvious of these are the result of disproportionate representation. There is a popular view that the law unduly favors the rich over the poor, and given that the law is a part of the power enterprise to forward the interests of those who possess power, this has certainly often been true—there are also numerous instances of the law being generous.¹⁰⁹ In our own time, the reason why the rich generally prevail in the law may have less to do with the fact it is always stacked in their favor than the fact they know how the system works and can afford better representations. The case of William Kennedy Smith¹¹⁰ might serve as an example of the rich winning due to superior representation.¹¹¹

In order for legal discourse to approximate critical discussion, both sides must have something approximating equal representation. Both sides would have to be represented in a way that characterizes their positions in

108. The idea of original intent has fallen away from the vanguard of literalist thought in recent years; it still looms large in conservative legal sensibilities. The literalist perspective has come to adopt a position of “original meaning,” “original understanding,” or “original public understanding.” See SCALIA, *supra* note 30, at 38-39; Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83, 84 (2010).

109. Examples of the law being generous are legion. The Bill of Rights, which enumerates important rights and places limits on governmental power, is a paragon example, as are the fundamental concepts of habeas corpus, due process, and equal protection. Other examples of high-mindedness in the law would include the Social Security Act of 1935, the Civil Rights Act of 1964, and the Voting Rights Act of 1965. The case law too can be altruistic and closely tied to issues of fundamental fairness, as witnessed in the majority opinions of *Frontiero v. Richardson*, 411 U.S. 677 (1973), *Plyler v. Doe*, 457 U.S. 202 (1982), and of course, *Brown v. Board of Education*, 349 U.S. 294 (1955).

110. The William Kennedy Smith case of 1992 is a good illustration of disparity of representation in a criminal case. Smith’s defense was headed by Roy Black, a serious and seasoned veteran attorney, while the prosecution was handled by Moira Lasch, whose inexperience was apparent in her questioning of the defendant. See generally Donald F. Paine, *The Ten Commandments of Direct Examination*, 36-MAR TENN. B.J. 20 (2000); Victoria Toensing, *High Stakes Q and A, Cross-Examining Smith: What’s Wrong with This Picture?*, 4/1992 AM. LAW 92 (1992).

111. JAMES E. HERGET, *AMERICAN JURISPRUDENCE, 1870-1970* 131-34 (Rice Univ. Press 1990). James E. Herget notes that Brooks Adams believes the law has historically been shaped by the dominant classes of people, often in furtherance of their own interests. *Id.* Adams also believes that when it works well, the law has built into it a certain flexibility that allows for change and the incorporation of normative values of the larger community. *Id.* This evolutionary process of the law acts as a sort of safety valve and prevents popular uprisings and revolutions. This outlook, as far as it goes, seems to be a fairly accurate encapsulation of the generalized social nature of the law as a reflection of interest, and draws together oddly complimentary elements of realism, social Darwinism or naturalism, and a sort of determinism not unrelated to Marxism. See *id.*

the best and most accurate light. Admittedly, this is probably an impossible goal, and even if it was possible, it would require seismic changes in our legal system that are unlikely to be implemented.

VII. SOME MODEST PROPOSALS

Popper may overestimate juries in practice, but his perspective is suggestive of a correct prescription, even though the law is not science and never will be.¹¹² That said, there may be remedies to be tried that might ameliorate the most obvious manifestations of justification in the law, even though the system as it now exists offers little opportunity to affect such change. The fact that this is a subtle methodological problem rather than an outright crisis makes the chances of meaningful reform even more remote than it might otherwise be.

The two general elements that could be improved to minimize the negative consequences of justification in the law are: (1) reform of the judicial selection process in order to depoliticize it, and (2) stricter discourse and rules for lawyers and juries that would hopefully result in greater analytical rigor and soundness of verdicts and opinions. These are the two most obvious solutions, but even these are not silver bullets and carry with them serious concerns of their own. Moreover, these are generalities, and solutions that sound fine in the broad and nebulous abstract often pose insurmountable problems when we pencil in the details.

A potential emollient for the problem of justification is found in the federalist ideal of a professional, elite judicial branch—and conversely, the anti-federalist suspicion of judicial professionals and enthusiasm for the populist democratic tendencies embodied in the jury are a part of the problem. With their amalgam of realism and liberalism—the balance and practicality of Hume and Montesquieu, with the high ideals of English Whigs like Locke—Hamilton and Madison do not suggest getting rid of juries of peers drawn from the community and, in fact, note that even ideological opponents at the convention believed the jury system to be either “a valuable safeguard to liberty” or “the very palladium of free government.”¹¹³ At the same time, *The Federalist* publications make an even more powerful case for a capable, independent judiciary.¹¹⁴ Although

112. By this I simply mean the law is dependent on human situations that are not reducible to the parameters of physical laws as with science. Given this, it is only reasonable to expect analysis of the law to be of a less conclusive nature than that found in science.

113. Regarding juries see THE FEDERALIST NO. 83, at 489, 501 (Alexander Hamilton) (Clinton Rossiter ed., Signet 1999). On the judiciary more generally, see THE FEDERALIST NOS. 78-82 (Alexander Hamilton) (Clinton Rossiter ed., Signet 1999).

114. See THE FEDERALIST, *supra* note 113, at 464-74.

the law is a part of the same overarching enterprise of power and its manipulation that includes politics writ large—and, therefore, it cannot be completely divorced from such activities—for the purpose of professionalism and analytical rigor, there are important parts of the legal system that should never be allowed to become consciously political in the more common usage, and the selection of judges is one of them.¹¹⁵

Judges should be career professionals—highly trained elites and aristocrats of merit drawn from all levels of our society—who come up through and are selected by the profession, rather than by political partisans of the legislative and executive branches, often on the basis of ideological rather than judicial concerns.¹¹⁶ They should be chosen on the basis of judicial temperament and related criteria, rather than the political leanings of an administration in power and ideological “litmus tests,” such as up or down questions on abortion or the Second Amendment. They should not be political operatives, self-consciously conservative or liberal “voices on the bench,” much less elected judicial representatives of the people.

Our government is predicated on balance. We have separation of powers, a multi-tiered system of adjudication, and individual temperaments, all of which help balance the system and secure judicial independence. As long as there is representative oversight of the judicial branch, there is no reason why we cannot distance judicial opinions from the passions of the moment more typical in the other branches. Quite simply, intelligent, principled, well-trained magistrates are preferable to juries in difficult cases and with difficult rules, perhaps even in all cases. When juries came into use during the early days of the common law, trials were fairly simple affairs with uncomplicated rules that were close to the ethos of the people.¹¹⁷ In large, modern nations, this is often not the case on either count, and a professional body of judges would mitigate popular zeal and anger while being able to weigh the severity of a crime and the culpability of a defendant more dispassionately. It could even be argued that to the

115. In *The Federalist* number 39, Madison regards judges to be but “a remote choice of the people.” THE FEDERALIST NO. 39, at 242 (James Madison) (Clinton Rossiter ed., Signet 1999). As regards the law as a manifestation of power, the realistic understanding of it as Hobbes’ “command of a sovereign,” seems on the mark. HOBBS, *supra* note 20, at 145. In this sense, it is a manifestation of condign power, or rather than which threatens consequences for lack of compliance. But, the law does more than forbids; it also enjoins and permits. For a discussion of the three overarching modes of power—condign, compensating, and conditioned—see generally JOHN KENNETH GALBRAITH, *THE ANATOMY OF POWER* (Houghton Mifflin 1983).

116. Hamilton speaks of natural aristocrats in *The Federalist* number 36. THE FEDERALIST NO. 36, at 217 (Alexander Hamilton) (Clinton Rossiter ed., Signet 1999). No doubt Hamilton regarded himself to be such a person.

117. For an excellent overview of the common law, see generally JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW* (Aspen Publishers 2009).

extent the federal bench has been undemocratic historically, it has usually been a good thing.¹¹⁸

VIII. THE HEISENBERG PRINCIPLES OF JUDICIAL REFORM

These proposed partial solutions present their own paradoxes and ironies. Regarding the first—reform of the judicial selection process—is the fact that the realm where professionalism is greatest is also where much of the justification occurs: the appellate courts. Split decisions weaken judicial holdings, come at the expense of respect for the judiciary, insofar as Americans follow judicial issues at all, and underscore the law's potential caprice and analytical softness. A cadre of judges selected by the profession rather than through a political process of self-interested political operatives would conceivably cut down on badly divided opinions. After all, in recent decades, judicial nominations for the highest court have often been made on a political or ideological basis, advised by political strategists, and confirmed by politicians.¹¹⁹ Ideally, the goal of such reform would be a more centralist, less ideological judiciary.

Likewise, stricter rules of discourse would do much to bolster the analytical rigor of the law, so long as they reinforce and not come at the expense of judicial discretion and, therefore, independence.¹²⁰ The question

118. For example, most Americans today would agree that forced segregation was wrong, and yet it was the Supreme Court rather than the democratic branches that outlawed it nationally. *See generally* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Americans tend to confuse and conflate the terms “democracy” and “liberalism.” But where democracy is a form of government, liberalism is an outlook, a sensibility, and it is likely that a democratic system with an illiberal electorate will reflect that illiberality. The Court should not be the primary engine of social change in the United States, but when big questions were not being addressed through the democratic processes, it was certainly a good thing that the judiciary stepped up to the challenges during the 1950s and 1960s. Needless to say, a cautionary argument of the Court's undemocratic nature can be made and was made among the founders of the Jeffersonian outlook. For example, see Jefferson's letter to Thomas Ritchie dated December 25, 1820, expressing concern over the subversive nature of the judiciary in THOMAS JEFFERSON, *WRITINGS* 1446-47 (1984). More recently, the “counter-majoritarian difficulty” has been made by Alexander Bickel. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (Yale Univ. Press 1986).

119. Ideological, political, sectional, and demographical factors are nothing new as considerations in the selection of a Supreme Court justice. At different times there have been a New England seat, a New York seat, a Maryland-Virginia seat, and a Jewish seat. Sometimes demographic or sectional considerations have trumped purely ideological factors and foiled the nominating President in terms of effecting the makeup and leanings of the Court. It is well known that Eisenhower's decision to put a Catholic from the Northeast on the bench resulted in the thirty-five year Supreme Court career of liberal Justice William J. Brennan. *See* DAVID G. SAVAGE, *GUIDE TO THE U.S. SUPREME COURT* 4TH ED. 906-11 (CQ Press 2004). For a discussion of politics and the selection of Supreme Court justices, see Joel B. Grossman, *Paths to the Bench: Selecting Supreme Court Justices in a “Juristocratic” World*, in *THE JUDICIAL BRANCH* 142, 142-73 (Kermit L. Hall & Kevin T. McGuire eds., Oxford Univ. Press 2005).

120. It is even doubtful whether stricter jury instructions can overcome popular prejudices. As Justice Robert H. Jackson noted, “The naïve assumption that prejudicial effects can be

here is whether greater analytical rigor by more narrow parameters would run afoul of some of the criticisms of literalism. In fact, there is little to object to in limiting the questions and discourse before the bench, so long as both sides are able to make their points. Rather, it is in limiting our reading of a broad document like the Constitution where problems crop up in the literalist model.¹²¹

Stricter rules for lawyers and for non-professional juries are, therefore, desirable, although stricter rules for judges would create an unavoidable conundrum. In order to guarantee an independent judiciary and the flexibility to adjudicate each case with the attention it deserves, judges should retain discretion and should not be hamstrung or overly burdened with rules. But, what are the implications of discretion on the uniformity of judicial decision-making? Clearly there is an inevitable tension between uniformity in the law and the discretion of judges, a sort of judicial Heisenberg Principle: uniformity comes at the expense of judicial discretion and flexibility. Yet, in the name of fairness, similar cases should be tried and judged similarly. This tension, though unavoidable, can be healthy so long as it is closely managed and fine-tuned. Rules governing discourse in legal proceedings should not come at the expense of judicial discretion or the irreducible, un-definable intricacy of judgment.¹²² They should limit the question involved, but not the judge's purview. "Three strikes" rules—although dealing with sentencing rather than discourse—and the consequentially disproportional results, admittedly, are an example of rules that both limit judicial discretion and result in disparities.¹²³

overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." See *Krulewitch v. U.S.*, 336 U.S. 440, 453 (1949).

121. As Justice Breyer notes, when we narrow the reading of a constitutional provision, there is a chance we may go against the broader spirit of the document as a whole. See discussion *supra* note 49.

122. There are certain fundamental categories—time, space, matter, and energy might all serve as examples—that we understand intuitively or as experience—the taste of salt, or the qualitative aspects of color, consciousness generally—and about which additional definitional elaboration does little if anything to expand or increase our understanding. Modern physics, especially relativity and quantum mechanics, has shown that our intuitions are often wrong in regard to the true nature of time, space, matter, and energy and that our senses are extremely limited and tend to lead us toward misleading conclusions.

Judgment as a basis or facet of conscious decision-making—how we actually make decisions—is another such category, and further discussion will probably tell us little more about this mysterious cognitive function. Moreover, our intuitions about the nature of judgment are similarly mistaken. Rather than an objective weighing of invariable facts, judgment is first and foremost a creative endeavor that emerges nonspecifically from the depths and murk of the human unconscious. For a brief philosophical account of the irreducibility of human consciousness, see LEIBNIZ, *supra* note 19 at aphorism # 17.

123. For disparities in California's three strikes rule, see Emily Bazelon, *Arguing Three Strikes*, N.Y. TIMES MAGAZINE, May 21, 2010, http://www.nytimes.com/2010/05/23/magazine/23strikes-t.html?_r=1. See also *Cases Show Disparity of California's Three Strikes*

There is also an unavoidable tension between redressing community feelings, the attempt to impose greater judicial professionalism, and the subsequent stricter judicial analysis removed from those passions that might be called the dilemma of judicial-popular proximity: the farther we remove adjudication from hands of the community, the more we distance the law from the redress of injury. The federalist view that judges distance the law from passions of the people was a good thing, and taken to its logical conclusion, the greater the distance of decision-making is from the democratic mob, the better. There is clearly some merit to this position, although here too, it is a matter of balance and of finding the proper calculus. Little or no distance gives us lynch mobs and jury nullification; too great a distance runs the risk of imposing a “krytocracy,” or “juristocracy,” where all-powerful judges hand down laws that are foreign and remote from the popular ethics of the nation, thus divorcing an estate of the sovereign from the populace.¹²⁴

IX. CONCLUSION

The problem of justification in the law is a fundamental one. It is a problem with the very methodological nature of the process of the law, arising from the open-ended character of human society and the often irreducible character of human interaction and the complex problems arising from it. Justification is a manifestation of the law’s weakness as a system of analysis and truth-finding. Any proposed solution should be geared toward tightening up its analytical rigor. The most we can hope for are modest reforms to mitigate its effects, rather than its complete eradication. The law is not science, much less math or logic, and our goal should be to merely limit legal discourse to stricter parameters, while minimizing mistakes and being aware that many legal opinions and verdicts are rationalizations. The best we can hope for is a highly professional judicial establishment, not unlike our current appellate court system—

Rule (National Public Radio radio broadcast Oct. 30, 2009); *Crime Locale is Key in California’s Three Strikes Rule* (National Public Radio radio broadcast Oct. 29, 2009); *Two Torn Families Show Flip Side of Three Strikes Law* (National Public Radio radio broadcast Oct. 28, 2009).

124. It is common for people to confuse “democracy” with “liberalism;” the two do not always go together, as our own judicial history suggests. Would a minority or outsider rather face a democratically-elected judge in a backwater district or an unelected federal judge? The term “krytocracy” was used by Stanley Reed to characterize a system of governing dominated by jurists. See John D. Fassett, *A Plea for the Demise of a Stubborn Myth*, in BLACK WHITE AND BROWN: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT 117, 117-49 (Clare Cushman & Melvin I. Urofsky eds., C.Q. Press 2004). This usage presumably comes from “kritarchy,” referring to the “rule or period of rule, of the Judges in ancient Israel.” 8 OXFORD ENGLISH DICTIONARY 539 (2d ed. 1989). The term “juristocracy” is used by Joel B. Grossman in *Paths to the Bench: Selecting Supreme Court Justices in a “Juristocratic” World*. See GROSSMAN, *supra* note 119, at 142, 167.

unelected and highly trained only with no direct connections to popular politics. Ideally, the selection of judges should be a professional process rather than the vulgar mud fights and political theater that confirmation hearings have at times become.

Even with greater professionalism and analytical rigor, there is no guarantee this problem will be remedied in any final sense. After all, the federal appellate courts may be the pinnacle of judicial professionalism in our system, but the existence of justification at the highest level can be seen in every non-unanimous Supreme Court opinion. There will always be hard cases, and opinions will always be characterized by verifications. But, even though the goal should be greater unanimity and less ideology, in the end, an *opinion* is just that. The solutions to this problem are partial and not likely to be implemented. Moreover, they present problems of their own. We might just have to accept the fact that the law as analysis is by its nature flawed beyond repair, and there is nothing we can do about it—a truly frightening prospect. Relative to the extremes of political solutions, these are indeed modest proposals. That said, few contemporary readers will recognize these as solutions likely to be considered, much less implemented. Still, this is a rather abstract methodological problem that is probably not even on the policy radar screen of most lawmakers; even if it were more widely known, it is doubtful the political will would exist to do anything about it. As George Kennan suggests in, *American Diplomacy*, when necessary measures are deemed unrealistic because they are politically impracticable, it is in fact the system that is unrealistic, not the proposed solution.¹²⁵ To shrug off such a failing as a foible of our system is far more of a condemnation than we realize; it is to wink at a serious flaw with our republican form of governance.¹²⁶

Ultimately, it is the jurists themselves who are responsible for the critical nature of oral argument and the reasoning embodied in the opinions of case law. Here, the concern should be on the testing and criticism of ideas through vigorous questioning and the judicial equivalent of thought experiments by the presentation of hypothetical questions and scenarios such as those of Justice Stephen Breyer and Retired Justice David Souter

125. GEORGE F. KENNAN, *AMERICAN DIPLOMACY* 73 (Univ. of Chicago Press 1984).

126. In an interesting parallel development regarding foreign policy, George F. Kennan has made a similar appeal to make the State Department into a depoliticized, semi-independent branch not unlike the judiciary or Federal Reserve. See KENNAN, *supra* note 125, at 73. His rationale is that policy should be consistent and should not shift every four to eight years. *Id.* Moreover, policy makers should be professionals—area specialists and diplomats, not political operatives. See *id.* Kennan has also suggested the idea of a non-political board of advisors. See GEORGE F. KENNAN, *AROUND THE CRAGGED HILL* 235-49 (W.W. Norton & Co. 1993). The logic here seems to be along the same lines of an independent judiciary, away from the distractions of popular politics. See *id.*

during oral argument—hypothetical questions are also useful in ferreting out the unintended consequences of a decision. In one respect, the differing ideological perspectives on the bench have had the beneficial effect of stimulating critical discussion in oral argument, as witnessed in the often spirited interactions of the Justices Breyer-Scalia dynamic.

Finally, in the law, as elsewhere, it is our insight and not our theories or ideology that is interesting. If we are to bridge the “Problem of Justification” in the law, it will have to come from a perspective utilizing creative problem-solving within our traditions, not the increasingly bitter ideological struggles, resentment, and the aggressive careerist adversarialism that have more and more come to characterize the law and politics of our times. The law is a fiction, but it is a useful and even necessary fiction. As a system of analysis and discovery, it is an imperfect instrument. But, the law is indispensable as a flexible venue for problem solving, an arena in which political battles and civil disputes can be fought. In this function, some scholars have suggested the British Constitution may be superior to our own.¹²⁷

In sum, the method of the law presents a problem without a definitive solution, and we are all subject to it and its potential caprice, but there is no alternative: the legislative and executive branches make the rules, and the judiciary interprets them, thus creating its own realm of case law. Whereas in science, and especially in the pure deduction of logic and math, the rules are mostly clear, precise, and circumscribed, leaving little if any room for interpretation. The same does not apply to large and important areas of the law. Many laws and constitutional provisions—the Second Amendment comes to mind—have multiple plausible interpretations with real life implications and remain subject to the whims and prejudices of magistrates and the fears and passions of juries. So much of the law will continue to remain opaque and thorny. Still, even with all of its flaws as a system of analysis and conflict resolution, it is preferable to the alternative of outright violence.¹²⁸

127. In a recent article, James Grant astutely describes how Americans regard their Constitution and the law as immutable, apolitical absolutes and how this attitude actually leads to acrimonious political fights and an over-reliance on judicial solutions to political and social problems. James Grant, *The Scourge of Juristocracy*, WILSON QUARTERLY, Spring 2010, <http://www.wilsonquarterly.com/article.cfm?aid=1566>. By contrast, the British, who see the law as politics by other means and their Constitution in more practical terms as a frame for solving problems, may be more flexible.

128. The idea that the law is how we resolve domestic conflict in lieu of violence is a common theme among realists going back to time immemorial. The succinct law versus violence dichotomy was suggested to me by the late Professor Max Isenbergh, a former law clerk to Hugo Black and a friend of Felix Frankfurter.

APPENDIX ON LITERALISM

Some readings are closer to the mark than others, some answers in the law are patently wrong, unlikely, or more or less accurate, and sometimes it is best to read a law or constitutional provision as narrowly as possible. To be sure, when the law and its application are clear and unambiguous, it should be respected, read, and applied directly, otherwise we choose intuitively. In such instances, if the judge does not respect the letter of the law, the law can become personalized—something that can be used capriciously for good or bad. The problem is that the law is often less clear than literalists believe it to be, and it is altogether possible that the political conflicts that the Bill of Rights was intended to bridge or ameliorate are not only reflected in, but built into, the law. As Joseph Ellis, a leading historian of the founding period notes, the Constitution is “an artfully ambiguous document.”¹²⁹

The preference of one theory to another on an un-admitted subjective basis that is justified in quasi-analytical terms suggests an inherent but unintentional corruption in the practice of judicial decision-making. The law is not set in stone, but there are limits beyond which it cannot be bent, and in many cases a narrow reading of clear language is the right thing to do. Nonetheless, all analysis is theory-laden, and, therefore, to one degree or another, all judges are legislators. As such, the law is a species of politics in analytical guise. Power is an underlying currency of most human interaction, and it may seem unfair to single out the law as a part of the political or power enterprise. The reason it is necessary to make this point explicit is because there are so many scholars who deny it.¹³⁰

Perhaps the greatest problem with Literalism comes from the fact that the law is a part of the political process, and although a statute or a constitutional provision may represent a convergence or compromise, neither represents a singular will or intent. The law is an ongoing, organic process, and we should have no illusions that its source is *politics* and that we cannot

129. See *Founding Brothers* (The History Channel television broadcast 2002). As regards the ambiguity and compromise nature of the Constitution, see also JOSEPH ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 9 (Vintage 2002) and EDMUND S. MORGAN, *AMERICAN HEROES: PROFILES OF MEN AND WOMEN WHO SHAPED EARLY AMERICA* 242 (W. W. Norton & Co. 2009).

130. Although a complete list of those scholars, jurists, and policy makers who subscribe to a literalist outlook would be too long to include here, some of the leading proponents of this position are Larry Alexander, Randy Barnett, Raoul Berger, Robert Bork, Steven G. Calabresi, Richard S. Kay, Gary Lawson, John Harrison, Michael McConnell, Earl M. Maltz, Edwin Meese III, Michael Stokes Palsen, Saikrishna Prakash, Antonin Scalia, and Keith E. Whittington. See STEVEN G. CALABRESI, *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 199 (2007); MICHAEL G. O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS* 217 (2005).

completely disengage it from history or politics. In other words, the law, far from being a detached, platonic ideal, emerges from and is the result of the very process from which literalists try to disassociate it. The literalist approach, then, becomes obsessed with the well-intended but potentially pernicious idea that the law as written is always sacrosanct, that there is a singular, definitive reading of the Constitution, and that theirs is always closest to it. It is even questionable that there is always a distinctly better or best position or solution among the contending perspectives and values of difficult legal questions. We cannot escape the political nature of the law, and even when we chose to apply a law directly, we are still making a political decision. Rather than a system of pure deduction, the law merely lends a sense of formal orderliness and dignity to political questions and discourse.

The idea of hard literalism is a philosophical antique and the approximate interpretive equivalent of Lockean empiricism in science. The primary issue with this outlook is that there is no *tabula rasa*; all knowledge is theory-laden, and to think about something is to test it. Thus, the method of induction and the philosophy of literalism, like the *tabula rasa*, are remnant fictions of a rationalist age.

Likewise, to say there is a singular “correct” reading of a document of a general composite nature as the United States Constitution, and to assert that one knows what that meaning is, is also problematic. It is probably this that led Justice Brennan to characterize the outlook of original intent as “arrogance cloaked as humility.”¹³¹ It is specifically the very nature of political debate and compromise that led to the final language of the Constitution and statutes—which also contributes to their lack of clarity.

A hard literalist outlook also flies in the face of the language of the text of the Constitution itself, especially the Ninth Amendment—disparagingly called “an ink plot” by some of the judges and scholars who curiously revere the rest of the document as singular and definitive.¹³² It is likely that what literalists take to be the clear intent of those who drafted or voted on the Constitution is not nearly as obvious as they think. The confidence of the literalist position suggests they regard their opinions not to be interpretations, but literal extensions from insight into transparent truth. No serious philosopher of the mind or linguistics would abide by such a theory of interpretation.

131. See *TRIBE & DORF*, *supra* note 28, at 106.

132. *Nomination of Robert H. Bork: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 117 (1989).

With the exception of James Madison, no individual was as central in creating the United States Constitution as Alexander Hamilton, and those essays of *The Federalist* dealing specifically with the judiciary—numbers 78, 79, 80, 81, 82, and 83—were written by him.¹³³ The fact that Hamilton argued against a Bill of Rights in *The Federalist* number 84 must cast doubt on a view arguing for an overly narrow and legalistic understanding of the rights outlined in the Bill that was adopted as a political measure to assuage the anti-federalists.¹³⁴

Admittedly, in *The Federalist* number 78, Hamilton speaks out against the courts substituting “their own pleasure to the constitutional intentions of the legislature,” that the courts role is to exercise “judgment” rather than “will.”¹³⁵ The problem with this view is that all human expressions are subject to interpretation and indeed must be in order to be accessed. There simply is no bright line distinction between “will” and “judgment.”

In his own life, Hamilton is known to have chosen expansive or unlikely readings of plain language. His notes to Aaron Burr from June 1804 famously suggest the possibility of multiple readings of even the most simple and direct language, specifically the words “*a still more despicable opinion*,” further suggesting that one of the authors of *The Federalist* and the man most singularly responsible for calling the Constitutional Convention did not believe in strict construction.¹³⁶ In these letters, Burr—the offended party—favors a plain meaning reading, while Hamilton prevaricates by noting the language is vague, thus allowing a range of readings.¹³⁷

As numerous historians have noted, important men of the founding generations used an elaborate ritualistic vocabulary and etiquette concerning duels, “interviews,” that allowed them, among other things, to plausibly deny knowledge or having witnessed such events, or avoid getting caught in the first place.¹³⁸ Thus, through the careful choice of words, euphemistic expressions, and actions, they consciously deceived—lied—by omission, concealment, guile and evasion while technically not incriminating themselves in a literal sense. This also underscores Chomsky’s point

133. The Rossiter edition of *The Federalist* gives the author of each essay. See THE FEDERALIST NOS. 78-82, *supra* note 113.

134. See THE FEDERALIST NO. 84, at 513-15 (Alexander Hamilton) (Clinton Rossiter ed., Signet 1999). See also RON CHERNOW, ALEXANDER HAMILTON 260 (Penguin 2004).

135. See THE FEDERALIST NO. 78, at 468-69 (Alexander Hamilton) (Clinton Rossiter ed., Signet 1999).

136. JOANNE B. FREEMAN, AFFAIRS OF HONOR 132, 176-77 (Yale Univ. Press 2001).

137. Letter from Alexander Hamilton to Aaron Burr (June 20, 1804), in ALEXANDER HAMILTON: WRITINGS, at 1010-12 (Joanne B. Freeman ed., Library of America 2001).

138. FREEMAN, *supra* note 137, at 132, 176-77.

that language is not solely a means of communication and may equally be used to cloak, obscure, and mislead.¹³⁹

As both its supporters and detractors have noted, strict construction itself is not a new idea and finds its early champions in the Jeffersonian Republicans as a means of limiting governmental power in opposition to the bank, and their conservative Democratic heirs who used narrow readings of the Constitution as a form of obstruction to progressive change in the years and decades prior to the Civil War.¹⁴⁰ As historians Stanley Elkins and Eric McKittrick note, Madison, contradicting his position in *The Federalist*, articulated the idea of strict construction, although the idea had certainly been around before.¹⁴¹

Finally, it would make for an interesting comparative study to see to what degree literalist jurists live up to their principles across the board. It is easy to live up to fair reading ideals in cases where the Constitution is clear and unambiguous and to be high-minded and loyal to principle in cases on trivial issues and especially to go against one's political leanings on passionate "red button" issues with not much to gain or lose either way. The important question is: how often do literalist jurists go along with interpretive principle when the subsequent result would go squarely against their political sensibilities in cases of enormous import?

139. See FREEMAN, *supra* note 137, at 132, 176-77; JOSEPH ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 23 (Vintage 2002); RICHARD BROOKHISER, ALEXANDER HAMILTON, AMERICAN 211 (Simon & Schuster 1999). As regards the many functions of language beyond simple communication and definitions, see NOAM CHOMSKY, LANGUAGE AND MIND 61-62 (3d ed. 2006).

140. See WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR 99-100 (1965).

141. See STANLEY ELKINS & ERIC MCKITTRICK, THE AGE OF FEDERALISM 224, 229-32, 276-77 (Oxford Univ. Press 1993). See also GORDON S. WOOD, THE EMPIRE OF LIBERTY 485 (Oxford Univ. Press 2009).