FROM THE SUBLIME TO THE RIDICULOUS: A STUDY IN LEGAL SYMBOLISM*

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"It is the task of reason" — says Whitehead[1] — "to understand and purge the symbols on which humanity depends."

Briefly, "symbols" are units of thought or of communication, representing certain objects, and enabling us to think and talk about them *in absentia.* The use of symbols that stand for general concepts makes it possible for us to think and talk in terms of concepts, that is, *in abstracto.*[2]

While a symbol is thus, *a priori,* a tool of reference, the history of culture shows that, due to certain irrational processes, men tend to endow it with a degree of independence, to attribute to it an additional meaning or even a separate "existence," and to ascribe to the new entity magical, mystical or value-laden qualities.[3] These

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*This paper presents an attempt at introducing actual case material into the study of jurisprudence. In jurisprudence, of course, "cases" are used in a different sense from that in which they are understood in law. They are not "precedents," actual or potential, but merely examples demonstrating a jurisprudential proposition.

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[1]Symbolism, Its Meaning and Effect 7 (1927).

[2]"Symbols" should be clearly distinguished from "signs." The latter "signal" or "indicate" things, the former "denote" or "represent" things. Suzanna Langer, in Philosophy in a New Key 30-31 (1951), explains the distinction as follows: "Man, unlike all other animals, uses 'signs' not only to *indicate* things, but also to *represent* them. To a clever dog, the name of a person is a signal that the person is present; you say the name, he pricks up his ears and looks for its object. If you say 'dinner,' he becomes restive, expecting food. You cannot make any communication to him that is not taken as a signal of something immediately forthcoming. His mind is a simple and direct *transmitter* of messages from the world to his motor centers. With man it is different. We use certain 'signs' among ourselves that do not point to anything in our actual surroundings. Most of our words are not signs in the sense of signals. They are used to talk *about* things, not to direct our eyes and ears and noses toward them. Instead of announcers of things, they are reminders. They have been called 'substitute signs,' for in our present experience they take the place of things that we have perceived in the past, or even things that we can merely imagine by combining memories, things that *might* be in past or future experience. Of course such 'signs' do not usually serve as vicarious stimuli to actions that would be appropriate to their meanings; where the objects are quite normally not present, that would result in a complete chaos of behavior. They serve, rather, to let us develop a characteristic attitude toward objects *in absentia,* which is called 'thinking of' or 'referring to' what is not here. 'Signs' used in this capacity are not *symptoms* of things, but *symbols.*"

The ability to symbolize is a prerequisite of our capacity to form abstract concepts, to use propositional language, to "describe" things, *etc.* Only man possesses this ability, and Cassirer in An Essay on Man (1944), therefore defines man as an "*animal symbolicum.*"

[3]Note the importance attributed in the Bible to the fact that Adam gave a "name" to each thing. Gen. 2, 19, 20. The "name" seemed to be more than a mere means of communication. It became part of the "nature" of the thing. It added something to it.

Primitive cultures, of course, afford numerous examples of the mental process described in the text. In modern cultures, a "flag" is perhaps the most

new elements are, in turn, projected on the original object of reference; the "meaning" of the symbol is obscured. As the symbol becomes equivocal, its function as a tool of reference is impaired. At the same time, the symbol becomes part of our habit of speech and thought. The response to it is "almost automatic."[4] Men lose sight of the "meaning" behind the symbol. "Labels" and "slogans" become guides of action. "Purging" a symbol consists of eliminating the described superadded qualities, in assigning to the symbol a definite unique meaning, and thus restoring its primary function as a tool of reference. As we find the "meaning" behind the symbol, our actions become rational. They cease to have the character of "rituals."

The significance of purging symbols was first realized in the area of symbolism *par excellence,* that is, in religion.[5] The process is now vigorously applied in science.[6] It has lately become a matter of increasing concern in law and jurisprudence.[7] The symbols of law and jurisprudence are being subjected to critical analysis in an effort to eliminate "slogans" and "rituals" and to restore the rule of "meaning."[8]

representative example. Having originally no meaning apart from that pertaining to the country which it represents, it then acquires a separate significance or value and is held entitled to a special loyalty of the subject. Eventually, it is conceived as having magical powers, *e.g.,* when it is believed to win victories. Of course, there is no objection to a moderate use of symbolism to enhance the value of the object of reference. As to that see Whitehead, *op. cit. supra* note 1, at 60 *et seq.*

[4]Whitehead, *op. cit. supra* note 1, at 60, states: "The response to the symbol is almost automatic but not quite; the reference to the meaning is there, either for additional emotional support, or for criticism. But the reference is not so clear as to be imperative. The imperative instinctive conformation to the influence of the environment has been modified. Something has replaced it, which by its superficial character invites criticism, and by its habitual use generally escapes it."

[5]The Old Testament already rejected the symbolism of the "graven image." The Reformation later challenged the magical view of the sacrament of the mass, according to which the priest, by repeating Christ's words, "This is my body," transforms the bread and wine into the body and blood of Christ. Extremists, such as Carlstadt, objected to any use of the physical as a means of communion with the divine. They tried to do away with all symbolism, such as images and music. See Bainton, Here I Stand, A Life of Martin Luther 138 *et seq.,* 257 *et seq.* (1950).

[6]In science and in the philosophy of science, the tenet has gained recognition that scientific symbols are merely functional tools used for descriptive purposes, and that they are neutral in the controversy of philosophical doctrines, as well as in the struggle of ethical, religious and political values. Indeed, in the realm of mathematical science, symbols are understood to have reached the highest degree of neutrality, in being detached from the world of observational facts. These symbols, such as "energy" or "mechanical mass," are formulas of the highest abstraction, tools of pure science, which is completely self-sufficient, that is, neither concerned with, nor related to, anything beyond its own mental operations. Scientific principles are statements about symbols or about relations between symbols. They are no longer direct statements about observational facts, but may be only subsequently connected with such facts. Obviously, the symbols of such science cannot be asserted to imply any values extraneous to it, or to justify either a materialistic or an idealistic philosophy, either atheism or deism, either communism or capitalism. *Cf.* Philipp G. Frank, *Non-Scientific Symbols in Science,* in Symbols and Values: An Initial Study 341, *et seq.* (1954), discussing the use of quasi-scientific symbolism for non-scientific purposes.

As we abandon the realm of mathematical science and turn to those sciences that make direct statements about observational facts and which use the language of daily life for communication, the task of purging symbols becomes more difficult.

In undertaking the task of "purging" legal symbols, it is important to realize that its scope is different from that of the related task set out in science. Science purports to be purely descriptive, to abstain from evaluation, and to be governed by reason and experience, not by emotions. The most significant phase in "purging" scientific symbols is elimination of elements of evaluation.[9] The law is not a science, but a system of values. Values are the "meaning" represented by legal symbols. Human reaction to values is in a large measure emotional. "Purging" legal symbols obviously does not mean elimination of value and emotion. Such purging rather strikes at the tendency in law to emphasize the symbols over and above the value which they represent, to hypostatize or deify them, and to endow them with magical, mystical and ritualistic qualities. The fallacious "experience," which consists in attributing to the symbols — the words or slogans — a "reality" or a value over and above the reality or value of the meaning that is represented, is shown to be the source of "irrational" attachments to these symbols. Such irrational attachments to symbols — and not the emotional reactions to the values represented by them — are condemned.[10] The meaning of a critical analysis of legal symbols is best conveyed by Sir Frederick Pollock's "great commandment, 'Thou shalt not make unto thyself any graven image — of maxims or formulas to wit.' "[11]

Many important symbols of law and jurisprudence have been successfully "purged" in recent times. Critical analysis has shown, for instance, that there is no magical or mystical significance in the conventional distinctions between "procedure" and "sub-

[7]Bentham was perhaps the first jurist who attempted to "purge" the symbols of ethics, law and political science. His so-called method of "Paraphrasis" consisted in trying to reduce the images of our language to their accurate meaning.

[8]Credit for "purging" legal and jurisprudential symbols in more recent times is due to the school of legal realism, on the one hand, and to the pure theory of law, on the other.

[9]The success of this procedure largely depends on the nature of the science concerned. History, for instance, cannot be completely free from evaluation.

[10]Confusion in law may also result from faulty "scientific" symbolism. The law is fundamentally an instrument of social control rather than a science. It consists of rules or orders rather than of scientific propositions. However, in transmitting its orders, the law makes use of descriptive terminology. If the orders are to be correctly understood, the description must be successfully accomplished. Many difficulties in law stem from incorrect description which may be due to shortcomings of the "scientific" symbols which are used.

[11]Cited in Cardozo, The Growth of the Law 107-108 (9th printing, 1948).

stance"[12] and between "law" and "fact,"[13] and that these symbols have no independent existence or value, but are merely tools of reference pointing to certain legal contexts.[14]

While the law is a system of values, it is not a perfect "system." Its values are often in conflict with one another. Occasionally, they clash with reality[15] and with science. Of course, such conflicts, to the extent that they are inherent in law, cannot be resolved by an analysis of symbols. Frequently, however, conflicts arise or existing conflicts are rendered more acute because symbols representing certain values are hypostatized and surrounded with an aura of magic or mysticism. It is hoped that, in ridding legal symbols of these superfluous elements, the conflicts of values in law may be reduced to their proper dimensions.

Many problems of legal philosophy may be disclosed to be merely apparent problems by showing that they arise from a continued use of linguistic symbols that have become either meaningless or devoid of definite meaning within the context in which they are used. Since legal philosophy profoundly influences legal judgment and indeed often appears as an integral part of the law, purging jurisprudential symbols is not a merely theoretical but an eminently practical concern.

The purpose of the present paper is to pose the problem of legal and jurisprudential symbolism rather than to solve it. An ultimate solution of that problem is, in fact, impossible, since as some symbols are purged others gain significance. Moreover, it is not proposed to present a profound analysis of legal and jurisprudential symbols. The method chosen consists rather in reporting cases that may bring home to the reader the manner in which symbolism operates and the significance of mankind's attachment to legal symbols. These cases are set forth as parables of the law or narrative symbols of legal and jurisprudential operations. They are believed to illustrate some typical features of symbolism.

Legality or Justice?

The Good King and the Poor Miller

In the Matter of Arnold (Prussia, 1780)

The function of the law is generally assumed to consist in distributing "justice." Lawyers qualify acceptance of this formula by

[12]See Cook, Logical and Legal Bases of the Conflict of Laws 154-193 (1942).

[13]See Silving, *Law and Fact in the Light of the Pure Theory of Law*, in Interpretations of Modern Legal Philosophies 643 *et seq.* (1947).

[14]Formerly, it was believed that the "nature" of a rule as "substantive" or as "procedural" *produced* certain legal consequences. The present position is that these symbols merely stand for certain legal contexts and that rules governing such contexts may be applied, by way of analogy, to similar contexts. Accordingly, the significance of the distinction has been considerably reduced.

[15]"Reality" is also a legal symbol. In fact, as "legal reality," it must always remain distinct from the reality of life.

saying that "justice" must be distributed within the framework of established processes of law, or that "justice" indeed *is* "Justice under the Law" or "legality." To laymen, unfamiliar with legal symbolism, on the other hand, "legality" is often tantamount to formalism, which they regard as meaningless. This is particularly the case when "legality" conflicts — as it often does — with "justice" in the broader, moral sense of the term, or "justice" within the meaning of lay symbolism. The solution of conflicts between legality and justice is largely determined by the "judge's" emotional preference for the symbol "legality" or the symbol "justice" rather than by his conscious choice of one of the conflicting values. Such preference, in turn, is determined by his background. If he is a professional lawyer, "legality" will carry a great weight with him. If he is a layman, "justice" is certain to prevail. The story of such a solution is presented in the case of the poor miller who appealed for "justice" to the "Philosopher of Sans Souci," Voltaire's royal friend, an enlightened monarch, who abolished torture and contributed much to both the glory and the cultural progress of Prussia, Frederick the Great.[16] This story has become part of the German folklore. As a parent would tell an infant child a fairy tale about the good king who rewards the good and punishes the wicked, so he tells the growing youngster the true story of good king Frederick who took a human interest in the plight of a poor miller and gave him "justice."

Christian Arnold of Pommerzig at Zuellichau operated a water mill as a leasehold held by grant from the Count of Schmettau. The adjoining land was owned by the Landrat (title) von Gersdorff, who had diverted the waterflow from the Schmettau area by building ditches for new fish reservoirs. Arnold thus had no water to continue operation of his mill, and soon could no longer pay his rents. He had lost in a suit to dispossess him of his mill, and, in his distress, petitioned King Frederick the Great for relief. King Frederick was a very wise ruler,[17] but not a lawyer, and he immediately suspected that the judges who rendered the decision had been unduly influenced by considerations based on the difference in the social status of the litigants and had prejudged the case of the poor miller. He cited the judges before his royal presence, and, in a great state of excitement, posed to them the following questions.

[16]The account in the text is based on Eberhard Schmidt, Einfuehrung in die Geschichte der deutschen Strafrechtspflege (1947) pp. 246 *et seq.*

[17]In fact, he showed great insight into high moral principles which he thought should be applied in the law. In his statement of reasons for abolishing torture, he relied on a principle formulated by Fortescue (without quoting him, however): "It would be better to pardon twenty guilty persons than to sacrifice one innocent man." Dissertation sur les Raisons d'établir ou d'abroger les lois (Sorli ed. 1751) pp. 69-70.

> "If one wants to render judgment against a peasant, from whom one had previously taken his wagon and his plough and everything, whereby he can acquire food and means to pay his dues, can one do that?"
>
> "Can one take away the mill from a miller, who has no water, and hence cannot grind and earn anything, on the sole ground that he has not paid his rent? Is this just?"

The judges were completely unable to divert the king's attention to the legal considerations involved in the case. They were asked specific questions, and these they were compelled to answer in the negative. The king, thereupon, had criminal proceedings instituted against them. In his Order to the Criminal Senate of the *Kammergericht*,[18] addressed to the Minister of Justice von Zedlitz, he, in effect, instructed the judges of the criminal court that they were "to render judgment against these three people with all the rigor of the laws, and to sentence them at least to loss of office and imprisonment," and he further gave von Zedlitz and the criminal court "warning that, should this not be done with all severity, you, as well as the panel of criminal court judges, will have to face our wrath." At this point, the judges of the criminal court, the unsung heroes of this great saga of justice, went into action. They felt that they were bound by the sacred principles of judicial "justice" to oppose the king's order. They prepared an advisory opinion, stating that the three accused judges were free of any guilt. When the king was informed by von Zedlitz of this judicial action, he repeated: "I order you again to pass judgment in accordance with my instructions." Von Zedlitz refused to transmit the order to the criminal court, saying that it was indeed "impossible" to render a judgment of conviction in the case, and, at the same time, placed his fate in the hands "of Your Majesty's Sovereign Power and Mercy." On January 1, 1780, the king sent his answer to the criminal court: "I am astonished to find from your writing of yesterday's date that you refuse to render judgment in the *Arnold* matter in accordance with my Order. . . . Hence, since you do not want to render judgment, I am herewith doing it myself, and render judgment as follows."[19] The king's judgment sentenced the three judges to loss of office, one year's imprisonment and payment of full damages to Arnold.

What was the fate of von Zedlitz and the judges of the criminal court? Their sole punishment was the censure contained in the royal letter. The wise king was a respecter of "principles," even where he did not quite comprehend their meaning.

[18]Name of court.
[19]Cited in Eberhard Schmidt, *op. cit. supra* note 16.

MEANING OR GOOD FAITH?

The Poet Firdousi v. the Shah of Persia (Tenth Century A.D.)

"Meaning," the object sought in the process of purging symbols, is, at the same time, itself a cherished legal symbol. However, as is well known, "meaning" is deceptive. Language can never fully express unequivocal meaning. Much blood has been shed over the meaning of a brief phrase uttered by Christ, "This is my body."[20] Many controversies have arisen from similar difficulties of interpretation in law. In law, "meaning" is, nevertheless, idolized and injustice done is frequently rationalized under the guise of applying "meaning."

Now, the meaning of "meaning" in law is not quite identical with the meaning of "meaning" in other fields of human endeavor. In law, it is essentially not the object and tool of the eternal human search for knowledge — as is "meaning" in other fields — but a guide of action and standard of evaluation. "Meaning" in law is in the first place a problem of application. Understanding is significant primarily in relation to application; it is thus predicated upon time and space. While the time and place in which the correct meaning of the words of Christ is discovered are of only incidental importance, the time and place at which the meaning of a rule of positive law is established are of paramount significance. It is, therefore, relevant that in law meaning is frequently established *ex post facto*. This gives rise to the problem of reliance in good faith on an apparent meaning and its protection where it conflicts with a subsequently established "correct" meaning — a problem that does not arise in other fields. However significant the purging of symbols and the correct understanding of "meaning" in general, application of legal "meaning" is not an absolute goal. There may be cases in which it is fairer in law to permit "meaning" to yield to other values. But this is frequently overlooked, because — in spite of the indefiniteness of "meaning" — the term "meaning" is a sacred legal symbol. True, in modern times, lawyers have succeeded in purging this symbol in the field of contracts, so that, at present, a promisee's justified reliance upon an apparent meaning is protected. In the field of statutory law, however, "meaning" established *ex post facto* still overrides the interpretation that a person may justifiably place upon the apparent meaning.[21]

The drama of injustice arising from overemphasis of "meaning," in disregard of good faith, is perhaps best presented in the

[20]Matthew *26*, 26; Mark *14*, 22; Luke *22*, 19. In the language that Christ spoke the copula "is" is not expressed.
[21]There are some exceptions to this principle. An evolution in statutory law toward a situation similar to that now prevailing in the field of contract is predicated upon recognition that there is no magic in the symbol, statutory "meaning," just as there is no magic in the meaning of a contract.

true story of the poet Firdousi, poetically reported by another much wronged poet, Heinrich Heine.[22]

In the tenth century A.D., the Shah of Persia, being a lover of both glory and poetry, commissioned the poet Firdousi to write an epic of Persian kings and heroes. And he promised to pay the poet one "toman" for each verse. A "toman" was a Persian coin, and it was made either of silver or of gold. There was a tacit understanding that a promise to pay a "toman" refers to either a silver toman or to a gold toman depending on the social status of the promisor. When a poor man promised a toman, he meant a silver toman; but where a prince, or, indeed, the Shah promised a toman, he obviously meant a gold toman. In fact, society was sharply divided into "golden people" and "silver people," according to the meaning attributed to their promises in terms of tomans. Firdousi, being a great poet and therefore poor, anxiously accepted the offer, and promptly started work on his commission. Writing day and night for seventeen years, he produced the great epic of Persia, the "Shahname" (Book of Kings), which earned him a reputation among Persians comparable to that of Homer among the Greeks. His financial reward, however, was not commensurate with the spiritual one. Instead of sending him an elephant load of gold tomans, the Shah sent him a similar amount of silver tomans. The poet, thereupon, contemptuously distributed the money between the Shah's messengers and the servant who prepared his bath, and left the city. On leaving the gates, he wiped the dust off his feet.[23]

> "Had he only breached his promise, as any ordinary, common man would," — pondered the poet — "I might bear no grudge against him. But it is utterly unforgivable that he should have deceived me by the double meaning of speech and the treachery of silence. Did he or did he not lie to me?"

Many years later, the poet's fame having spread all over the country, the Shah regretted his action, and sent him a caravan load of gifts, gifts so precious as to be the equivalent of the tribute paid by an entire province of the kingdom. The reward came too late. As the caravan entered the poet's native city of Tus by the West

[22]The following account is based partly on Heine's poem, Der Dichter Firdusi, and partly on the article, *Firdousi*, in the Encyclopaedia Britannica.

[23]Equally celebrated as the Shahname is a satire that Firdousi sent to the Shah before leaving the capital. This satire is now printed together with the Shahname. In it the poet derided the Shah's birth as a slave.

"Had Mahmud's father been what he is now,
A crown of gold had decked this aged brow;
Had Mahmud's mother been of gentle blood,
In heaps of silver knee-deep had I stood."

Gate, there moved by the East Gate the funeral procession carrying Firdousi to his final repose.[24]

Logic or Experience?

Professor Jhering's Judicial Embarrassment

Attachment to symbols is determined by a variety of factors: tradition, indoctrination, fashion, *etc.* At times the pride of authorship will transform a theory into a cherished symbol, which the author will defend at any price. Men are seldom aware of the emotional elements involved in their mental processes. These elements, however, are frequently disclosed in the errors they commit in trying to rationalize the chosen symbol.

An incident in Jhering's career and its account by Radbruch[25] may serve as illustrations of the flagrant disregard of true facts displayed by the most learned and intelligent jurists where tradition operates, where a chosen theory is involved, and where fashion is at stake.

Digest 18.4.21 contains a report of an opinion rendered by the Roman jurist Paul, which may be said to imply that the seller of property, which was sold twice by the seller and was later destroyed by accident, can claim the price from both purchasers. The rule involved was originally clearly decisional. Paul, who was by no means a legislator, set it forth in an opinion prepared for use in an individual case to be adjudged by a Roman judge.[26] Later, this opinion was included in the *Digesta*, which were incorporated in official legislation, the *Corpus Juris* of Justinian. Even then, it was not redrafted to read as a general statute, but reported in the form of a juristic opinion. Nor was the Roman law in Jhering's days in Germany statutory law in the modern sense of the term. It was at

[24]This fact emphasizes the importance of the time element in "meaning" in law.

[25]Radbruch, Vorschule der Rechtsphilosophie (1948) p. 16. The incident is described by Jhering in *Beitraege zur Lehre von der Gefahr beim Kaufcontract*, in III von Gerber and Jhering, Jahrbuecher fuer die Dogmatik des heutigen roemischen und deutschen Privatrechts (1859) pp. 449 *et seq.* See also Kantorowicz, *Jhering's Bekehrung*, 6 Deutsche Richterzeitung 83 (1914).

[26]The position of the jurists, *iuris prudentes* ("learned lawyers"), in Rome was *sui generis*. The Roman judge (*iudex*) was a layman, who did not have, as does our jury, a "learned judge" to instruct him as to the law. The *iuris consulti* or *iuris prudentes* were men who gave free legal advice to those who consulted them. As the custom of deciding in accordance with a *responsum* (the answer of the jurist or his expert opinion) grew, Augustus empowered certain jurists to give *responsa* with the emperor's authority. The *responsa* were given in connection with individual cases, but the opinion became established that the *iudex* was bound to abide by the *responsum* of a jurist who had received the *ius respondendi*. Later, the *responsa* came to be regarded as binding not only for the case for which they were given, but also as precedents for future cases. The extent of the binding force of a *responsum* in Roman law is controversial. See Jolowicz, Historical Introduction to the Study of Roman Law, Appendix, 570, 571 (1952).

best a form of "written case law."[27] Jhering was in no sense "bound" to accept Paul's opinion. Note that this opinion was, upon its face, unreasonable. Can there be any doubt that, if a man sells the same property twice, he should not be allowed to recover the price from both purchasers? There would seem to be no need of a concrete example to demonstrate the fact that the rule suggested in this opinion was wrong. It was "conceptually" erroneous. Jhering, the eminent critic of conceptualism in law,[28] had approved of this rule,[29] probably because to him an opinion of Paul had a significance transcending its inherent merits. A generation later he was confronted with an identical case in practice. The case involved shares of a ship, which had been sold twice. The ship sank, and the seller demanded payment from both purchasers. The trial court rendered a decision based on the passage in the Digests, relying thereby on Jhering's approval of that passage. The appellate court, however, reversed the lower court and dismissed the action. The case was, thereupon, referred to the law faculty of Giessen by way of "transmission of the docket."[30] As a member of that faculty, Jhering was thus called upon to participate in passing upon his own previous interpretation of the Digests. He confessed error. But even at this stage, failing to realize that his original mistake was due to plain fallacious reasoning rather than to excessive conceptualism, he immediately proceeded to utilize this very mistake to support his famous "war on conceptualism":

> "Never in my life has a case caused me such embarrassment, nay, such emotional upheaval, as this one. If theoretical errors deserve punishment, I received ample punishment at that time. It is indeed an entirely different matter to deal purely theoretically with a rule of law, believed to be contained in a legal source or derived from it by way of inference, without regard to its consequences or to the mischief it may produce in life, and to apply it in practice. An unsound opinion cannot stand such test, provided that its (former) holder is still of sound mind."

[27]In Justinian's view, *responsa prudentium* were not statutes, but since they existed in writing, they were classed as written. See Jolowicz, *op. cit. supra* note 26, at 363. The view that later prevailed in Europe as to the authority of Roman sources is perhaps best expressed in Machiavelli's Introduction to the Discorsi (translated in Sforza, The Living Thoughts of Machiavelli 23 (1940)): "The civil laws are in fact nothing but decisions given by their jurisconsults, and which, reduced to a system, direct our modern jurists in their decisions."

Before the adoption of the Civil Code in Germany (1900), Roman law was in force as a subsidiary source. It was applied unless excluded by contrary local provisions. It was certainly not binding in the same sense as are statutes.

[28]See particularly his imaginative and brilliant volume, Scherz und Ernst in der Jurisprudenz (9th ed., 1904).

[29]It may be most pertinent to the following discussion to note that Jhering later found his interpretation of Paul's decision to have been due to an erroneous reading of Paul's view. See von Gerber and Jhering, *op. cit. supra* note 25, at 453 *et seq.*

[30]This was a procedure whereby a law faculty was asked to render an expert opinion regarding the legal correctness of a judicial decision.

Radbruch's comment[31] constitutes a fitting epilogue to the story. It was written at a time when the controversy over "conceptualism" had yielded to a variation upon the same theme, the debate over statutory law versus case law. Under Anglo-American influence, "case law" had become the great fashion in Germany.[32] Radbruch could not resist its strange appeal. His comment on the incident is particularly worth noting, for it sheds light on the type of rationalization encountered in disputes over "common law" versus "codification." Once, the eulogists of the common law insisted that it is a law based on "reason" or that it is "reason itself," whereas its opponents pointed out that it is "reason *ex post facto*." More recently, the argument has been rather favored that the common law incorporates "experience," whereas statutory law is based on "mere" reasoning. Although a scholar of profound learning and great critical discernment, Radbruch completely failed to notice the fallacy of the moral derived by Jhering from his experience. Ignoring the obvious fact that Jhering's original error actually occurred within the framework of the case method and that it consisted in uncritically approving a decisional rule, Radbruch, in the same manner as Jhering before him, utilized the same experience to rationalize a belief in the merits of case law:

> "This event is apt to show the merits of case law, which compels the jurist to give effect to his legal opinion immediately by applying it to a practical case, in contrast to statutory law, which is based merely on imagination or on cases related by memory."

The fact is that sound "conceptual" reasoning is essential both to common law and statutory law. The common weakness of both types of law is that they are — as they must be — ultimately oriented to the past, which is honored by all lawyers, whether they be adherents of the common law or of statutory law.[33] "The law born with us" (Goethe) remains a utopia.[34]

[31]See Radbruch, *op. cit. supra* note 25.

[32]Under a recent decision of the Federal Constitutional Court of the Bonn Republic, BVerfG. *3*, 225, rendered December 18, 1953, entire fields of law may be amended by judicial decision. The defense of error of law has been introduced into criminal law by judicial decision. Decision of the Bundesgerichtshof, Great Senate for Criminal Matters, of May 18, 1952, BGHSt. *2*, 194.

[33]As Justice Holmes, the great realist of the law and eulogist of the common law, pointed out, "precedents survive like the clavicle in the cat, long after the use they once served is at an end, and the reason for them has been forgotten. . . ." *Common Carriers and the Common Law*, 13 Am. L. Rev. 608, 630 (1879).

[34]Justice Holmes spoke in this context of "government of the living by the dead." *Address*, 29 Am. L. Rev. 610 (1895).

REASON OR RATIONALIZATION? THE NATURE OF THE JUDICIAL PROCESS

The Last Witch Trial

The Case of Anna Goeldi, 1782.[35]

To all except the parties concerned, the "grounds of decision," whether read from the court's own statement or construed by another court or any student of the law, are paramount to the judgment itself.[36] These grounds show "what the court did in fact." They are the "law of the case," followed as a precedent. This approach necessarily assumes that the "grounds of decision" are the "true" basis on which the decision was reached. Apart from exceptional situations, judicial motives are irrelevant. Decisions may at times appear "unsound" or "unreasonable," but they are, in general, presumed to be "rational." True, in jurisprudence the "rationality of law" has been occasionally questioned. But in law itself, when a case is invoked as a precedent, a court may inquire into the soundness of its reasoning, but cannot open the question of the motives that dominated the judges. This would seem to be a necessity, at least until such utopian time when psychoanalytical studies of the "truer" grounds that motivate judges are discovered and systematized to a degree where they could be used as the basis of a coherent prediction. One might, therefore, question the usefulness of purging the legal symbol of the "rationality of decisions." However, there is an advantage in being aware of the limitations of decisional rationality. Such awareness may promote a more critical approach to the avowed grounds advanced in decisions, particularly in those cases in which prejudice is apt to play an important role.

Judgments rendered in witch trials are not an exception from the "rationality" rule.[37] At the time when these trials were held, people believed in a causal relationship between the forces of sorcery and the effects allegedly produced by them. The crime of witchcraft was based on the belief in such relationship. Conviction of witchcraft was a perfectly logical process. Witches were sentenced as "witches." There was a "method in the madness." Witch trials, in general, are of merely historical interest. One of them, however, constitutes an exception. It has a present bearing on some aspects of "the nature of the judicial process." In this case, the "witch" was not convicted of witchcraft. She was found guilty

[35]The case is reported by Braunschweig, Célèbres Procès Criminels Suisses, translated from the German (1944) (originally published in 1943), pp. 115 *et seq.*

[36]The parties are mainly concerned with the questions, "Judgment for whom?" and "In what amount?"

[37]On "logic" in the process of proof in primitive society see Theodore Reik, The Unknown Murderer (2d printing, 1949).

of "poisoning," a perfectly rational crime. Yet, when we read the account of the case today, we can clearly see its "true" motive. The grounds on which the accused was convicted of "poisoning," on the other hand, although stated by the court, are obscure.

Anna Goeldi was tried and executed in the year 1782, practically on the threshold of the 19th century. It was exactly 60 years after the last witch trials in Scotland and 46 years after repeal of the witchcraft acts in England.[38] Witches belonged to past history. The spirit of the era in Europe may be best conveyed by stating that ten years prior to the trial the last volume of Diderot's Encyclopaedia had appeared. The "age of reason" was in progress. The trial took place in the canton of Glaris, Switzerland, in the vicinity of Zurich.

Anna Goeldi was born of poor parents. She was illiterate. Early in life she took up the profession of a house servant. In 1781, when the facts that led to her trial took place, she was employed as a servant in the household of one Dr. Tschudi, a member of a prominent Glaris family. Anne-Marie, affectionately called Annemiggeli, the younger daughter of Dr. Tschudi, was then 8 years old. She was her mother's favorite. One day, she had a quarrel with Anna, in the course of which she pulled down the maid's bonnet, and in exchange received a minor spanking. Twice, shortly thereafter, the child found a pin in her milk. The maid was dismissed. She protested her innocence and complained to the pastor, without avail. The pastor's name was Tschudi; he was a close relative of Anna's former employer. Anna left for her native city in the Rheintal, and the incident would have remained closed had it not been for a strange development in the Tschudi household. Exactly 18 days after Anna left that household, Annemiggeli began spitting up pins mingled with blood. As this phenomenon recurred, the child became quite ill and was confined to bed, her legs practically paralyzed. The physicians confessed ignorance, and an exorciser was consulted. After his concentrated attempts at curing the child in the ways of his craft had proved useless, he found that only the person who had cast the spell on the child could remove that spell. Dr. Tschudi filed a complaint against Anna with the authorities, and a warrant of apprehension was issued. Due to the persistent efforts of Dr. Tschudi, Anna was found and brought back in chains. While in prison, she was coaxed, by threats and promises, to visit Annemiggeli and try to cure her. She insisted that she had nothing to do with the child's malady and was consequently unable to restore her health. Finally, she consented to see the child. To the amazement

[38]The notorious Salem trials took place in 1692. The last victims in England were executed in 1716, although the witch statutes continued to be on the books until 1736. Black, *Witchcraft*, Law Dictionary (4th ed., 1951).

of those present and of all Glaris, her visit produced a miraculous cure. The child, whom no physician could touch and whom a soothsayer could not affect, responded to the maid's treatment. A simple massage of the child's legs restored her walking capacity, and after several visits by Anna, the child was as healthy and cheerful as ever.[39] In the eyes of the community and of the judges, however, the cure, instead of clearing Anna, confirmed her guilt. She was put on trial.[40] The questioning, conducted for endless hours, was mainly concerned with one alleged incident reported by the child during her illness. The child had told her parents that one Sunday (exactly two months prior to her first spell), when she was alone in the house with Anna, the latter took her to her room. In that room, the child alleged to have seen Rodolphe Steinmueller, an old gentleman, locksmith by profession, who had befriended Anna and given her shelter in days of her unemployment. She also claimed to have seen on the floor of the room a queer creature without arms and legs. She related that, on that occasion, Anna had given her a confection, warning her to keep the entire incident a secret. The questioning of Anna, followed by torture, produced the usual result. Anna confessed everything she was expected to confess. On one point, her confession was particularly inconsistent. She had stated that Steinmueller had given her the ominous confection.[41] Later, she retracted that version and said that it was the devil, and, finally, that it was a dreadful animal, who had given it to her. Steinmueller was arrested, and when threatened with torture, committed suicide. Anna was sentenced and executed.

It might appear, at this point, that there was nothing distinctive or striking in this case, that, indeed, apart from the time of the trial, the case of Anna Goeldi was in all respects similar to dozens of other witch trials in the various parts of the world. In fact, the peculiarity of the case does not become evident until the judgment is read. Anna Goeldi was convicted of "poisoning." Her crime was

[39]Annemiggeli is reported to have attained the age of majority and to have married in Russia. After that marriage, her trace is lost. Braunschweig, *op. cit. supra* note 35.

[40]There was first a major dispute over the question of jurisdiction. Since the Reformation, the canton of Glaris was divided into three population groups, each group being subject to the jurisdiction of its special court. There was a tribunal for Catholics, another for Protestants, and a third one, entitled "Court of Common Justice," for mixed cases and cases involving persons who were strangers in the canton. Anna should have been tried before the last mentioned tribunal, since she hailed from the Rheintal. However, Dr. Tschudi insisted that the proper tribunal was the one having jurisdiction over him, since the crime was allegedly committed in his house. Finally, with consent of the Catholics, Anna was tried before the Protestant tribunal, as Dr. Tschudi suggested. Braunschweig, *op. cit. supra* note 35.

[41]At first, she had not been told what type of food she was supposed to have given the child. When pressed to confess, she said that she had given the child a piece of bread. Later, she was told that she was to confess having given her a confection. She admitted, as she admitted everything she was asked to admit. Braunschweig, *op. cit. supra* note 25.

declared to have consisted in giving the child the confection prepared by Steinmueller. Neither in the judgment nor in the "grounds of decision" is there a single reference to "magic" or "witchcraft." One passage only, dealing with the fabulous cure of the child, speaks of "a supernatural and incomprehensible force."[42]

In convicting Anna of "poisoning," the court completely passed over in silence two most pertinent and significant facts, namely, that judging by the child's account of the date of the confection incident, two months had elapsed between that incident and the first alleged symptom of disease, and that spitting up pins was hardly a symptom of "poisoning." Can there be any doubt that, in the depth of their minds, the learned judges, like the rest of the population of Glaris, somehow believed that Anna was a witch, having herself confessed to a pact with the devil? However, at the time of Anna's conviction, a sentence of witchcraft would have been an oddity, because "reason" had become the order of the day. So, Anna was convicted of "poisoning."

Procedure, the Mathematics of Law

The Strange Case of the "Captain of Koepenick" (1906)

As the "age of reason" lost the appeal of novelty, the "age of science" was inaugurated. This age brought with it a new ideology. The scientific approach, the mathematical method, as symbols of perfection, became patterns of comparison in all fields of human endeavor. Jurists began to ponder how they could best approximate their chosen field to the prevailing ideal. As jurisprudence turned from a philosophy to a "science of law," the paramount concern was to find a method for that science. Thus, attention centered on procedure. One began to day-dream that procedure or the "form of law" could — somewhat remotely, to be sure, — do for law what mathematics did for physics. It certainly could transform the law from a loose collection of rules and facts into a coherent and precise system, and thus turn jurisprudence into the most exact of social sciences. It could do that by providing continuity of law in spite of change in content.

The cult of procedure was gravely disturbed by an apparently minor incident: the strange case of the "Captain of Koepenick."[43]

In 1906, in the obscure German city of Koepenick, a cobbler named Wilhelm Voigt rented a captain's uniform under the pretext that he was going to a masquerade. Attired in this uniform, he ordered a company of soldiers, whom his apparent rank deceived, to follow him to the town hall. There he arrested the mayor on a fictitious charge that the latter had falsified accounts. He then

[42]Braunschweig, *op. cit. supra* note 25.

[43]The case is reported in the Encyclopaedia Britannica.

ruled the city for a short time, and finally absconded with a considerable sum of municipal money. The false "captain" was arrested, tried and sentenced. His arrest, trial and conviction, however, were of no particular concern to jurists. Another phase of the incident was more significant to them.

During the "captain's" reign, legal life in the city of Koepenick had gone on as usual. People were married, children were born and their births were registered, taxes were paid. Yet, the legal authority for all the official acts performed during that time seemed to have been lacking. The continuity of procedure was rudely disrupted. Were all these acts then null, void and of no effect? Long after the incident was closed, legal philosophers continued to ponder over its impact on the symbol of "legal continuity."

The law has ways of coping with the problem of "legal discontinuity" resulting from such incidents as that of the Captain of Koepenick. Medieval scholars developed the doctrine of "apparent law," according to which common belief that certain acts were those of lawful authority, although in fact they were not, is protected by the rightful law.[44] The law can also, simply, validate with retroactive power allegedly official acts performed under a doubtful authority. However, where the doctrine of "apparent law" has not been adopted and the validating act has not been passed, the problem raised by acts of the Koepenick style remains open. Nor is this problem merely a jurisprudential nicety, for it affects not only the symbol "legal continuity" but, beyond that, the basic symbol of all law and political science, "lawful authority." It raises issues such as that of obedience to law versus right of resistance to oppression, of natural law and inherent right versus exclusive rule of positive law. The entire history of jurisprudence, of political science, and much law can be taught proceeding from that single minor occurrence, the escapade of the Captain of Koepenick. An only minor moral of this occurrence is the fallacy of an exclusively formalistic approach to jurisprudence, based on the magic of the symbol "procedural continuity."

A Profound Conceptual Distinction: Private Act or Act of Public Authority?

The "Private" Will and Testament of One Adolf Hitler

Decision of the District Court of Duesseldorf (December 4, 1952)

Lay attacks upon the alleged formalism of the law are actually attacks upon its symbolism. Lawyers rather direct their critical

[44]The doctrine that "*error communis facit ius*" developed by way of interpretation of the Roman so-called *lex "Barbatius Philippus"* (Ulp., L. 3, D. I, 14). Both the facts upon which the law was predicated and the substance of the law are much disputed. Apparently, Barbatius Philippus, a fugitive slave, acted as a praetor. He was either elected praetor or pretended to be one. In any event, he was believed to be a praetor. According to medieval scholars, his alleged official acts were valid. See Pater Felix Antonius Vilches, De Errore Communi in Ivre Romano et Canonico, *Spicilegium Pontificii Athenaei Antoniani*, 2, 1940, Pars I, pp. 15-61.

remarks at symbolism under the label of challenging "conceptualism."

What is "conceptualism," the "jurisprudential heaven," at which Jhering had struck such a fatal blow? Did Jhering believe that there can be law without concepts? Surely he believed no such thing, just as Justice Holmes never thought that there can be law without logic. "Conceptualism" to Jhering meant rigid adherence to conceptual categories in disregard of the varied facts of experience. Some such adherence is necessary in a developed jurisprudence. Indeed, as "experience" becomes more complex, the need for legal conceptualism increases. But the term "conceptualism" is often used in a different sense. In their brilliant critique both Jhering and Justice Holmes seem to have particularly aimed at a mental operation that might be best described as "conceptualism without concepts," and which is an outgrowth of symbolism. "Where concepts are missing," said Goethe, "words are readily available." The "words" mislead us to believe that there is some "concept" hidden behind them. Our concern today is with this sort of "conceptualism."

The law suffers from an absence of clear concepts rather than from their abundance. In many instances, familiar legal "concepts" are invoked to label — and thereby, justify — judicial actions that, upon closer analysis, may be shown to lack sound conceptual reasoning. Illustrations of such reasoning in terms of "labels" rather than in terms of meaningful concepts may be found in decisions allegedly based upon the "conceptual" division of acts into "private" acts and acts of "public authority."

The case of the "Captain of Koepenick" is by no means unique. A similar incident, bearing somewhat broader implications, occurred in Europe several decades later. This time the principal figure was not a fake German captain but a genuine Austrian corporal, who, frustrated by the mediocrity of his painting talent, set out to impose his peculiar "taste" in culture upon Europe. In the course of his rise to power, for which science has found no adequate explanation, he brought back the "dark ages of history," which had allegedly come to a final conclusion over three centuries before, with the appearance upon the historical scene of a truly great German, Martin Luther. Perhaps the gravest insult to culture was the parallel that had been often drawn in Germany between Hitler and Luther. As Luther's disciples had once collected the master's "Table Talks," so the spiritual products of Hitler's chronic indigestion were later collected under the title of Hitler's "Table Talks." These

"Table Talks" were the subject of a legal controversy that arose in 1952 before the District Court of Duesseldorf.[45]

The question before the court concerned the validity of Hitler's "private" testament, in which he disposed of all his property, allegedly including a copyright in the said "Table Talks." A major consideration in the decision was the fact that the testament in issue was deemed not to be a "public" enactment but a "private" will, which, as the court emphasized, is governed by the "self-evident equality principle, whereby provisions of private law — in this instance, of the inheritance law — must be applied without distinction, whether the testator's name is Mueller or Hitler." The case sheds an eerie light on the distinction between "private" acts and acts of "public authority," which jurisprudence has elevated to the rank of a sacred symbol. It is most instructive to observe how the court, in spite of its insistence upon that distinction, utilizes considerations based upon Hitler's "Political Testament," in interpreting his "Private Testament;" how it, in substance, gives effect to the political manifesto of the Fuehrer under the guise of effectuating the private will of "one Adolf Hitler;" how readily it switches from construction of the legislative "will" of Hitler, as head of the German government and as Supreme Commander of the German Armed Forces, to the construction of the private "intent" of Hitler, as a private citizen. It is pitiful to watch the court's brave struggle to find a "private," human element, or, as the court puts it, the "family father's care" (*hausvaeterliche Fuersorge*), in Hitler, the totalitarian dictator, to whom nothing was ever private.

Shortly before his death Hitler executed two documents, witnessed to by Goebbels, Bormann and one *"N. v. B.,"* presumably an army officer. Both documents bear a final clause similar to that which appeared on many of Hitler's political and military decrees and orders: "Issued in Berlin, on April 29, 1945, at 4 o'clock." One of these documents is Hitler's so-called "Political Testament," in which he transferred his political and military powers to Doenitz. The second is entitled "My Private Testament," and in it the Fuehrer purported to dispose of all of his private property.

> "Whatever I possess belongs — so far as it is of any value — to the Party. Should the latter no longer exist, to the State; should the State also be destroyed, then a further decision by me is no longer necessary."

The relatives and heirs at law of Hitler sold the copyright in the "Table Talks," and their successor in interest by purchase con-

[45]Decision of the District Court (Landgericht) Duesseldorf, Urt. v. 4.12. 1952 — 4 0 58/52, reported by Pannenbecker, in Neue Juristische Wochenschrift (1953) pp. 508 *et seq.* I am indebted to Dr. M. M. Schoch for drawing my attention to this case.

tested the validity of Hitler's will on various grounds.[46] The court, however, held that will to be valid as a "private will."

During Hitler's 12 years' rule over Germany and his rule of varied duration over occupied territories, innumerable legal acts had been performed under, and by virtue of, his authority. Only a minute portion of these acts could be retroactively annulled after the collapse of the Nazi regime. The vast majority remained in force. Any other juristic solution would have thrown Europe into a state of legal chaos. Hitler's acts were branded as criminal, immoral and unlawful. They could not be made "non-legal." Once again jurisprudence had to learn that an outlaw, a "captain of Koepenick," can indeed make valid law. It would seem, however, that with respect to a single document, such as Hitler's "private" will, jurisprudence is not quite as impotent as it is with respect to the legal system as a whole. One might reasonably expect a German court, sitting in Duesseldorf in the year of the Lord 1952, to declare such will, in which "private" property is transferred to the National Socialist Party, to be violative of German public policy and hence null and void. There can be hardly any doubt that the court would have declared null and void as against "public policy," or, as a German court would say, *"contra bonos mores,"* a will whereby Mueller purported to transmit his property to an avowed gangster band, to an organization "for the extermination of morality," to an association "for the propagation of cruelty to human beings," or the like. Yet, no such consideration ever entered the court's mind in the Hitler case. Instead, its deliberations centered around three questions. (1) Did Hitler's will meet the form requirements of German law on private wills? (2) Did Hitler's will dispose of the copyright in the "Table Talks?" (3) Was the donee, namely, the National Socialist Party, "in existence" at the time of the testator's death? These are questions, of course, that are traditionally pertinent whenever a "private" will is in issue.

The court held that, while Hitler's "private" will may not have met the form requirements of an ordinary will, it was, in any event, valid as a "military testament" within the meaning of the Law of April 24, 1934, on Non-Contentious Adjudication in the Armed Forces.[47] In order to qualify for the making of such a testament, Hitler had to be, at the time of its making, a "member of the German armed forces or at least an armed forces attendant." In interpreting the Law of April 24, 1934, the court considered Hitler's legislative "intention" as decisive. It said that it had been his "intention," as well as the general understanding in the armed

[46]One of these grounds was Hitler's alleged "insanity." The court held that he was sufficiently "sane" to make a valid will. Were it otherwise — the court pointed out — he could not have been criminally responsible for his acts.

[47]RGBl. 1934.I.335.

forces, that the law should also apply to the Supreme Commander. Was Hitler the Supreme Commander of the German armed forces on April 29, 1945, at 4 o'clock? Indeed, he was, said the court. For he had, even thereafter, issued important orders and thereby asserted his political and military authority. In fact, in his political testament he had issued military orders. Did Hitler not abdicate in this very political testament? By no means. Moreover, he still had the choice of changing his decision to remain in Berlin and of resuming, by air, contact with the remnants of the army. In any event, it was Hitler's "intention" that both the "political" and the "private" wills should become effective *"uno actu,"* after his death.

But — the plaintiff rejoined — Hitler's "private" will is not a "will" at all, for it contains a declaratory rather than a dispositive statement: "Whatever I possess *belongs*. . . ." The court rejected this contention, pointing out that the will speaks of a "decision" being unnecessary should the State disappear entirely. In any event, the court added, the document in issue being a "private" will, it must be interpreted, as all wills under German "private" law, in a spirit of "benevolence," favoring validity.

Finally, the court rejected plaintiff's contention that neither the National Socialist Party nor the Doenitz State were "in existence" at the time of Hitler's death, setting the time of the Party's dissolution as September 20, 1945 and the time of the abolition of the Doenitz State as June 5, 1945. The result seemed, nevertheless, not entirely satisfactory, for the court aimed at establishing title in the German State by means of an orderly chain of succession. The Doenitz State had to survive the Party, and become, in turn, succeeded by the present German State. The chain of title must somehow originate in Hitler's "private" intention. Thus, the court argued that a Party or a State "in form only" was not the true object of Herr Hitler's bounty. Throughout his life, Hitler had "spoken in derogatory terms of lawyers and their formalism." It could not have been "within the intention of the testator" to make the destruction of the corporations which he instituted as his heirs dependent on a formal declaration. Rather, "within the spirit of his thoughts, especially as expressed in the political testament," it would be proper to regard the Party as no longer "in existence" from the moment when it could no longer "function as the driving movement for the realization of political goals." But, said the court, the National Socialist Party was "in existence" at the time of Hitler's death even within this realistic definition of "existence." It was effectively in power in certain parts of Germany that had not been occupied by the Allies until a later period. As to the Doenitz State, the court said, it had been utilized by the Allies as

a tool for the disarmament of the German army. Only thereafter were the members of the "Doenitz government" arrested, and the State dissolved. The destruction of the Party preceded that of the Doenitz State. So, the court concluded, the National Socialist Party became Hitler's heir at the time of his death. After the Party's destruction, the Doenitz State, which had been granted a gift over, acquired title to the property. Thus, the sovereign "will of the testator Hitler" was given full force and effect "at private law."[48]

"Sociology of Law"

Of Pets and Poems

Scharfeld v. Richardson (1942)[49]

Despair over the breakdown of both conceptualism and formalism led to the adoption of another jurisprudential symbol, expected to afford a solution of all jurisprudential problems: "sociology of law." It is argued that, since the law is a social phenomenon, it must reflect and follow social trends; and that inquiry into these trends, as expressed in the law or as prevailing in society and presumably affecting legal development, can supply a guide for prediction of the future course of the law. The "sociological approach" to legal problems has an enormous following. The extent of its ultimate usefulness, however, is not clearly estimable. In the present state of the law, cases are seldom decided on sociological grounds. Where they are, the "sociological method" used by judges is far from scientific.[50] Nor are scientific sociological studies even remotely comparable as to reliability in predicting the outcome of future cases to the established method of stare decisis. Even those cases in which sociological factors would seem to play an important role are mostly decided on technical, legalistic grounds. True, sociological factors may influence a decision; but they are too inchoate to be of real use in deciding groups of cases of the same

[48]The court accomplished what it had obviously set out to do. It rejected the claim of Hitler's natural heirs to the proceeds of the "Table Talks." Nor does this result seem unfair. These "Table Talks" have monetary value only because of the peculiar political role played by Hitler, a role which was responsible for the destruction of the German State. A sense of justice demanded that that value accrue to the present State. But the court was not prepared to admit that course of reasoning, for which, of course, there is no precedent. It, therefore, resorted to the strange rationalization in which the traditional dualism of the symbols, "private" or "public" law, was clearly used as a cloak for the true reasons on which the case was decided. The irony of the situation lies in the fact that it would be difficult to visualize a case to which, by reason of the particular facts involved, that dualism is less applicable than the case of Adolf Hitler.

[49]133 F.2d 340 (D. C. Cir. 1942).

[50]Repouille v. United States, 165 F. 2d 152 (2d Cir. 1947) is a typical example. The issue was whether mercy killing constitutes a crime involving moral turpitude. It was decided on the ground that the majority of "virtuous persons" in this country do not approve of mercy killing, although there was no sociological evidence in the case showing either who are "virtuous persons" or what the majority of such persons actually believes in.

sociological nature. Nor can cases be rationally related to each other on sociological grounds in a manner comparable to that in which they may be related to each other and classified on technical legal grounds. Thus, for the time being at least, "sociology of law" remains a fashionable jurisprudential symbol rather than a useful legal tool.

Let us consider a case in which sociological factors undoubtedly played an important role, and observe the manner in which it was decided. Let us, in turn, try to compare it sociologically with other cases, and, finally, relate the same case legally to another case. We shall thus observe the possibility of comprehending the law systematically on a sociological plane as compared with the possibility of comprehending it on a technical legal plane.

The case selected here involves property rights in dogs, and there can be no doubt that the nature of a man's relation to a dog is a phenomenon growing out of certain social attitudes to that animal.

The issue in *Scharfeld v. Richardson* can be best stated in the words of Chief Justice Vinson (at the time of the decision, Associate Justice of the Court of Appeals, District of Columbia), who wrote the majority decision.

> "A jury in the Municipal Court, after finding appellant's dog, 'Popo,' to have been the perpetrator of a fatal assault upon 'Little Bits,' the pet Pomeranian owned by Mrs. Emily W. Erck, and that the appellant had been apprised of Popo's malevolent propensities, returned a verdict for Mrs. Erck in the sum of $200.00. Since the judgment Mrs. Erck has died, and there has been substituted in her place as appellee William E. Richardson, executor and trustee of her estate. Appellant contends that appellee is not entitled to recover for the loss of Little Bits, relying upon the admitted fact that Little Bits, at the time of its death, was not wearing and never had been provided with a tax tag as prescribed by Title 20, Sections 915 et seq., of the District of Columbia Code (1929). . . . Section 918 declares: 'Any dog wearing the tax tag . . . shall be regarded as personal property in all the courts of said District, and any person injuring or destroying the same shall be liable to a civil action for damages. . . .' "[51]

The appellant contended that Congress, by enactment of the above statute, by necessary implication changed the common law rule which regarded dogs as personal property for the purpose of

[51]133 F.2d 341.

a suit in damages for loss. In the appellant's view, Congress, in effect, provided that for an "untagged" dog no damages can be recovered. The court was in a quandary, for, as pointed out by the dissenting judge (Stevens, Associate Justice),[52] the common law position on the status of dogs was by no means clear-cut. They were regarded as "property" for the purpose of a suit in damages, but not for the purpose of the law on larceny. For the latter purpose, they were treated as living in a state of nature, being essentially *ferae naturae*.[53]

The majority of the court, nevertheless, affirmed the lower court decision and allowed the damages to stand. The grounds of decision were sound. The common law rule, regarding dogs as "property" for the purpose of a suit in damages, cannot be abrogated by mere implication. Also, if the reasoning of the appellant were applied to another section of the statute (Section 919), which allowed recovery to the owner of a "tagged" dog, the result would be absurd.

> "If the roles of the principals in this tragedy had been reversed, with Little Bits the villain and Popo the victim, the appellant might very well have considered that the appellee had not exempted himself from civil liability by failing to provide Little Bits with a tax tag."[54]

Justice Rutledge (at the time, Associate Justice of the Court of Appeals, District of Columbia), concurred in verse.

> "This saga of Popo, malevolent pooch,
> And Erck's Pomeranian pet;
> Your etymological-legal approach
> To canons of dog etiquette,
> Persuade me that canines are property still
> Whether licensed, unlicensed or tagged;
> Not *ferae naturae*, or fair game to kill
> So long as there's tail to be wagged."[55]

It is not disputed that the result reached in the case may have been to some extent influenced by the fact that Chief Justice Vinson and Justice Rutledge liked dogs, or that their affection for dogs may be related to the custom of keeping dogs as pets prevailing in our society. But in what manner would this observation help in predicting the outcome of a future case involving property rights

[52]133 F.2d at 344 *et seq.*

[53]It also appeared from the legislative history of the tax statute in issue that the "intent" of the legislature was clearly directed at such dogs, living in the state of nature. Said Mr. Morrill (quoted in 133 F.2d at 350, note 10):

> "I hope the Senator from Delaware will allow this bill to pass. This District seems to be the paradise of dogs, and all the dogs that are emancipated."

[54]133 F.2d at 343.

[55]133 F.2d at 344.

in cats which are also kept as pets? It may not even be an aid in predicting the fate of a future case again involving property rights in dogs, for there undoubtedly are judges who do not like dogs. From a technical legal point of view, per contra, the case does afford guidance; it lays down a rule on "property" rights in dogs in the District of Columbia, a rule that will be followed as a precedent.

As members of the Supreme Court, Chief Justice Vinson and Justice Rutledge later participated in rendering a decision again involving the interpretation of the term "property," also under a revenue statute: *Crane v. Commissioner*.[56] They held with the majority that "property" did not include "equity."[57] They arrived at this conclusion after consulting dictionaries on the meaning of the decisive term. On purely legalistic grounds the two cases can be compared. One might point out that in the first case, the term "property" was interpreted broadly, while in the second case, the same term was read to have a narrow meaning; that in the first case the source of interpretation was the common law while in the second case a dictionary afforded the answer; *etc.* An attempt to compare the term "property" — undoubtedly, also a sociological term — sociologically in the light of the two cases would be obviously ridiculous.

The Socratic Method

The Trial of Socrates (399 B.C.)

"Trial strategy," "the power of argument," "the art of cross-examination," all these cherished symbols of the legal profession have a pattern in the Socratic method of dialectical reasoning.[58] And the highlight of this reasoning is believed to have been reached in the defense of the man after whom the method is named, Socrates.[59] However, by a strange irony of history, this very trial

[56]331 U.S. 1 (1947).

[57]In issue was equity in realty.

[58]Law teachers in this country regard the so-called "Socratic method" as a most adequate method of legal education. Trial attorneys consider it the most reliable device of arriving at truth. There can be hardly any doubt that these views are, in a large measure, justified. In teaching common law, the development of which is largely dialetical, a dialetical system of education may contribute to the understanding of the nature of the subject of instruction. It also trains the law student in the art of argument, which, as a lawyer, he will have to command. And the system of cross-examination, based on the Socratic strategy of questioning the bases of an assertion, indeed does in many cases help to elicit the truth by confronting witnesses with inconsistencies in their testimony. However, the method also has its weaknesses, which are being often overlooked. It should certainly not be regarded as an exclusive method either in trial strategy or in education.

[59]Thus, Wellman, The Art of Cross-Examination 7-8 (rev. ed. 1931), states: "Indeed, to this day, the account given by Plato of Socrates' cross-examination of his accuser, Meletus, while defending himself against the capital charge of corrupting the youth of Athens, may be quoted as a masterpiece in the art of cross-questioning."

demonstrates the exact opposite of that for which it is deemed to stand. As a symbol, Socrates' defense is particularly inapplicable to law. The tragedy of his trial lies in the dualism and conflict of the values on the basis of which it was conducted, philosophical, on the one hand, legal, on the other. And, in this conflict, philosophy, not law, was ultimately victorious. As a lawyer, Socrates lost, and probably rightly so. The trial proves the superiority of philosophical and scientific method over legal method, the virtue of "true" issues, as contrasted with the narrow "issues of the law,"[60] and, in a sense, the advantage of jurisprudence over law.

The case itself can be reported in very few words. In 399 B.C., at the age of 71, Socrates, a then well-known philosopher, was tried in Athens on charges of impiety and corrupting the youth. He acted as his own defense attorney, and cross-examined adverse witnesses. In so doing, he invoked the protection of established Athenian law requiring the accusers to answer questions put to them by the accused. He made an elaborate closing statement. He was, nevertheless, convicted by a majority of the tribunal. Having been given an opportunity to propose his own penalty, he did propose the imposition of a fine of 30 minae, but was sentenced to death by a duly constituted tribunal in the procedure prescribed by law. During the time between the trial and the execution,[61] his friends made arrangements for his escape, but he refused to avail himself of that opportunity on the ground that such escape would constitute disobedience to law, which is unethical. He was executed by being given a poison which he drank courageously and without offering resistance.

Socrates' trial and conviction have been presented throughout the ages as a case of convicting the innocent, an outrageous miscarriage of justice, a "judicial murder" of the worst sort. Was it? It undoubtedly was, if judged *sub specie aeternitatis*. For the "true" issue in the case was the philosopher's freedom to hold and express opinions, the individual's freedom to believe or disbelieve,

[60]Legal "method" differs from scientific method in that it does not serve as a means of understanding intrinsic relationships objectively but rather tends to "prove" something to someone. Its foremost aim is to gain an admission, and it does not seek to establish the real issues, but moves strictly within the limits of a previously formulated issue. In education, the Socratic method requires response to specific questions, and thus does not ultimately encourage independent thinking. In cross-examination, it leads, and takes no account of the peculiar nature of psychological operations that bring about the response of a particular witness. It disregards the fact that often a truthful, and indeed over-conscientious, witness may be easily confused, whereas many a pathological liar can withstand an attack by a most astute cross-examiner.

Socrates did utilize admissions, but merely as a stage in the process of his own reasoning. For his purposes, the admission might as well not have been there. Thus, he did not actually "prove" anything to the tribunal, but rather established "truth" to himself, and, perhaps, in a broader sense, also to mankind.

[61]On the significance of this period of time, see note 62 *infra*.

as he chooses. In fact, the "true" issue on trial was "philosophy" itself. Socrates was indicted because his method and approach had become unpopular rather than because the legal issue was of interest to his accusers. But the "legal issue" was totally different from the philosophical one. The charges against him were "corruption of the young" and "neglect of the gods worshipped by the State [city] and the practice of religious novelties." Speaking in modern terms, he was, in effect, charged with subversive activities, with undermining the foundations of the Athenian State, namely, its State religion, and, moreover, with doing so by perverting the minds of the youth. We may criticize this particular conception of subversion from the point of view of contemporary political science. But we should not lose sight of the fact that such criticism is in essence directed not to the "crime of subversion" but to the allegiance of Church and State upon which the criminality of that particular subversion was predicated. Socrates was, in effect, charged with subversion against the State. Such charge would be perfectly valid under contemporary law. It is hardly apposite to challenge that charge by arguing that the Athenian concept of State was naive, in that the Athenian State gods were not at all divine and thus afforded a somewhat dubious foundation of that State. The fact remains that these gods were identified with the State and that rebellion against them was rebellion against the State.[62]

The manner in which Socrates met the accusation was not, and would not be today, likely to secure his acquittal. For his arguments were not addressed to the facts of the accusation or to their conformance with the terms of the law under which he was indicted,[63] but were rather aimed at the lack of wisdom in the law itself. He argued, in substance, that since no one wishes to live in a corrupt society, it would be absurd for anyone to mislead or corrupt the youth. This, of course, amounted to saying that the law was meaningless. Were such argument advanced today in the United States otherwise than within the scope of an attack upon the constitutionality of a statute, it would be doomed to failure. Now, in Athens there was no procedure for an *ad hoc* judicial annulment of a law on the ground of its unreasonableness.[64] Since the law had to stand, at least so far as Socrates' trial was concerned, Socrates' defense lacked legal logic. As a general proposition, it may have been correct. As a legal proposition, it was a *petitio principii*.

[62]This identification of State and religion is evidenced by the character of the grace period accorded to Socrates between conviction and execution. The length of this period was due to the fact that, according to Athenian tradition, the city was not allowed to be polluted by public execution during a holy season, the time of the voyage of a ship to and from Delos, beginning when the priest of Apollo crowned the stern of the ship. This tradition was a religious one, based on a vow to Apollo in connection with the saving of Theseus and his companions. See Plato's *Phaedo*, in 2 The Dialogues of Plato 157 *et seq.*, 195-196 (Jowett tr., 3d rev. ed. 1892).

[63]The record of the trial is contained in Plato's *Apology*, in The Dialogues of Plato, *op. cit. supra* note 62, at 95 *et seq.*

Only in one point did Socrates address himself directly to the accusation. He pointed out the inconsistentcy in the affidavit of the accuser describing him as an atheist and at the same time as a believer in spiritual agencies. Plato, *Apology*, *supra* p. 119. However, since, from the point of view of the Athenian State religion, belief in gods other than the State gods was equally as criminal as atheism, the inconsistency was not a fatal defect of the accusation. It could merely bear on the veracity of the accuser. In this respect, however, the challenge sounded very much like a merely semantic argument.

Socrates' cross-examination of one of his accusers, Meletus, was, from the standpoint of trial strategy, a failure. In it, Socrates tried to demonstrate that the subject-matter of the accusation was not the "true" issue of the trial, that, indeed, Meletus, as representative of the accusers, had no real interest in the problem of youth education. Since the tribunal was concerned with the "legal" rather than with the "true" issue, this line of defense could be legally useful only if it succeeded in showing that the accusers' evidence bearing on the legal issue was sham and that the defendant was framed. It was a challenge of Meletus' credibility as a witness. Did Socrates discredit Meletus in the eyes of the tribunal? Did he show that Meletus had no interest in youth education? The answer must be that he did not.[65] He forced Meletus to admit by implication that everybody except Socrates was an improver of youth, indeed, that Socrates was its only corrupter.[66] This position of Meletus must have appealed to the tribunal. In the eyes of the law, Meletus was right in setting the "criminal" apart from the rest of society, in assuming crime to be not the rule but an exception. This jurisprudence would seem to be acceptable even in modern times.

An entire body of ethical and juristic doctrine has been built on Socrates' refusal to escape in order to save his life,[67] a refusal justified by the celebrated tenet that obedience to law is virtue even

[64]There was a formal procedure in Athens for "trying a statute." The law which governed such trials is not preserved. It is known, however, that in order to challenge a statute under that law, certain formal requirements had to be observed, and that this could not be done within the framework of a particular criminal trial against an individual accused of crime. See Lipsius, Das attische Recht und Rechtsverfahren 385 *et seq.* (1908-1915).

[65]The burden of the examination was: "You accuse me of corrupting the youth. But you have no real interest in this matter. If you have, tell me who are the improvers of youth?" In this, Socrates started as a good lawyer, but finally failed in the manner in which he continued the examination. For he left us with the impression that he was proceeding from the fallacious assumption that mankind is divided into improvers and corrupters of youth.

[66]See Plato, *Apology*, *op. cit. supra* note 62, at 116-118.

[67]*Crito*, in The Dialogues of Plato, *op. cit. supra* note 62, at 137 *et seq.*, 140 *et seq.*

where the law itself is unjust.[68] However, in the very case that gave occasion to the formulation of this tenet there was no legal need for its application. For the Athenian law in Socrates' times already recognized, though to a moderate extent only, the new trial procedure.[69] Yet, Socrates did nothing to secure a new trial.

When analyzing Socrates' defense against the background of the atmosphere of the court room and the psychology of the tribunal, the conclusion is compelling that Socrates, though a brilliant philosopher, was a remarkably inefficient lawyer. Indeed, he seemed to lack one of the most essential virtues of a lawyer, namely, diligence. In reading the record of the trial, the suggestion occurs that this man, who was more interested in proving a philosophical proposition than in establishing his innocence, should not have been allowed to act as his own defense attorney.[70] Yet, his acting in that capacity would be proper even in contemporary American law. The rule permitting an accused person to conduct his own defense is presumably based on a tacit assumption that such person has a natural interest in his own acquittal. This, as many legal presumptions, does not always conform to psychological — or, as Socrates would say, philosophical — reality. In this respect again, the discrepancy between the generalizations of the law and the variable facts of experience is demonstrated by Socrates' case. For Socrates' inefficiency as an attorney seems to have been based not on ignorance but on intention, of which intention he may not have been fully aware. Socrates was not really interested in his own acquittal. On the contrary, he had a profound desire to be convicted and executed.[71] This desire, in fact, seems to have been the dominant mo-

[68]This theory can be traced to primitive roots. As shown by Melland, In Witch-Bound Africa 130 (1923), the savage, although innocent, believes that he is guilty, "because he had been convicted in a manner sanctioned by custom." He does so, because he has a personal relation to that custom, as represented by ancestral tradition, in the last instance, by the "ancestor," and because he knows of no other, especially of no scientific causal relation that might contradict this belief. Similarly, Socrates justified his tenet on the ground of the close relationship that exists in a democratic society between the citizen and the law. He disregarded, however, two important elements of that relationship in a democracy, namely, the fact that democracy implies, next to certain specific procedures, also an ideal of justice, and the fact that it respects the freedom of the individual to criticize government action.

The Socratic view on the ethical value of absolute obedience to law ultimately leads to modern legal formalism: an individual is guilty because a crime is ascribed to him by law; "just" is what is declared to be "just."

[69]See Kohler, *Das materielle Recht in Urteil*, in I Festschrift Fuer Franz Klein 6 (1914).

[70]Of course, because the Greeks were "a nation of lawyers," this was the regular procedure in Athens.

[71]Xenophon (*Apol.* 1-8) very wisely remarked that Socrates deliberately provoked his own execution in order to escape the infirmities of old age. This remark has been described by A. E. Taylor in Plato, The Man and His Work 166 (4th ed. 1934), as "absurd." I am inclined to believe that Socrates did not consciously seek his own execution. However, he undoubtedly did everything in his power to promote it, and considering Socrates' great intelligence, this

tive throughout the trial. Socrates was avowedly trying to vindicate philosophy. But to him, philosophy was a search for death. In his own words, he had been "always pursuing death and dying," and he "has had the desire of death all his life long," but was reluctant to commit suicide, since this was both irreligious and unlawful. When reading these passages in *Phaedo*, one cannot help but feel that Socrates actually committed what Theodor Reik[72] might call "suicide performed with the active cooperation of law enforcement agencies."

Socrates was a powerful personality, and he received the response that he sought. He won in the respect in which he wanted to win, namely, as a philosopher; but lost in the respect in which he did not truly desire to win, namely, as a lawyer.[73] And, in the story of his trial and death there is an implied criticism of legal symbols. This story teaches lawyers a lesson in humility. For it shows that, however relative the values of philosophy, those of the law are even more relative. That Socrates' trial is being now used as a specifically legal symbol is one of the ironies of culture.

The Lawyer on Trial

The Fable of the Fire Serpent and the Eagle

In the midst of the struggle over the superiority of the various legal symbols stands, apparently unperturbed, the practicing attorney. As an advocate, he is neither making law nor deciding legal issues.[74] He may represent one position in one case and another position in another case. By virtue of his function within the administration of law, he is, in the last analysis, a spokesman not for an absolute, but for a possible solution, not for a horizon but for a point of view. Although in each case he is the most ardent exponent of some symbol, no one more than he stands for the relativity of legal symbols in general, the puzzle of the law, the realistic element in its administration. Yet, it is at him that mankind's resentment against legal symbolism is primarily directed. The Gospel of Luke ranks lawyers with the "Pharisees" and beneath the "tax collectors."[75] It depicts them as representing a narrow semantic view and thus as peculiarly unqualified "to inherit eternal life."[76] Luther

can be explained only on the assumption that he unconsciously desired to be executed.

[72]Reik, in Dosenheimer, Fuer und wider die Todesstrafe, *Eine Sammlung von Aeusserungen* 51-53 (1926).

[73]Socrates' attitude toward the law was rather cynical. This appears from his critical reaction to Meletus' statement that the laws are improvers of youth, as well as from his reference to the court as "This court, which is a place not of instruction but of punishment." Certainly, Socrates, the educator, did not, in these passages, express the same veneration of the law which he later enunciated in refusing to disobey it.

[74]Of course, he indirectly influences legal development.

[75]Luke, *7*, 29, 30.

[76]Luke, *10*, 25-37.

called lawyers "bad Christians," "enemies of Christ," accusing them of representing the "justice of works" rather than of "the Word," and of forcing judges to sentence in accordance with the letter of testimony even though they know that the defendant thereby suffers an injustice. He exclaimed: "A lawyer who is not more than a lawyer is a pitiable thing."[77] In fiction, the lawyer is hardly ever portrayed as anything but a narrow-minded formalist.

The lawyer's "martyrdom" is perhaps best depicted in a fable that is part of the folklore of the people of the White Sea region.[78] This is the only story in the present collection which is not "true," if by "true" we refer to an historical occurrence. However, there is perhaps a higher, generalized "truth" in a folk tale grown out of the experience of a group. In this sense, the story is true.

A mouse invaded a nest frequently visited by a sparrow. There arose a controversy between them over the number of grains each had brought into the nest. They agreed to divide the grains equally. There being an odd grain left, the sparrow ate it. The mouse was outraged, and she filed a complaint with the fire serpent, who ordered the parties to appear before his tribunal. The sparrow admitted having eaten the grain. The fire serpent defended the mouse. A bird, the eagle, defended the sparrow. In spite of the fact that justice in this case was obviously partisan, the fire serpent acting in the dual capacity of a judge and of an advocate, it was decided that the sparrow could have brought more grains than the mouse. However, while the decision was in favor of the sparrow, the fire serpent burned the wings of the eagle for having defended the sparrow. Justice was done. Only the eagle was abandoned in the forest without wings.

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[77]Luther threatened his son: "If you should become a lawyer, I'd like to hang you on the gallows."

[78]Sokolowi, Les Contes et Chansons de l'Arrondissement du Lac Blanc (1915) nº 66, pp. 107 *et seq.* For comment see Sinaiski, Folk-Lore Juridique (Publications de l'Université Latvienne, 1931) pp. 566-7.