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## The Science of Sociological Jurisprudence as a Methodology For Legal Analysis

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## **THE SCIENCE OF SOCIOLOGICAL JURISPRUDENCE AS A METHODOLOGY FOR LEGAL ANALYSIS**

*Richard Langone*<sup>1</sup>

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## I. INTRODUCTION

Entering law school with a master's degree in sociology, I expected to encounter the same rigorous training in methodology that I encountered in graduate school. I envisioned a scientific approach to the study of law similar to that advocated by Langdell Hall, a late Professor of Harvard Law School, who posited that judicial decisions should be dissected like experiments in a laboratory. Much to my surprise, the great bulk of methodological training I received was based on the Socratic method and how to argue both sides of an issue. Legal Methods class trained us how to *find* the law using the law library, Westlaw, etc., and how to *write* memoranda in conformity with the Harvard Blue Book. However, it offered little formal training in "theoretical" decision-making.

I soon came to realize that most, if not all, law schools today do not teach clearly articulated methodologies for legal analysis. As far back as 1976, Judge Ruggero Aldisert, of the Third Circuit Court of Appeals, addressed his dismay over the lack of formal attention given to the judicial decision-making process in law schools. To bridge this gap, he compiled an anthology of writings from the pinnacles of the legal profession on the bundle of components that go into making a judicial decision. He titled his work, *The Judicial Process*.<sup>2</sup> In his Preface, Judge Aldisert said:

The impetus to prepare this book came to me from teaching a variety of law school courses at the University of Pittsburgh and the University of

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<sup>2</sup> RUGGERO J. ALDISERT, *THE JUDICIAL PROCESS : READINGS, MATERIALS AND CASES* (West. Pub. Co. 1976).

Texas. I found a void, appalling at times, in student understanding and appreciation of judicial dispute settling, error correcting, and law making - at trial and on appeal. I found too much dogmatism: at one extreme, fixed ideas that the law is only what free-wheeling judges say it is; at the other, a naivete that the written opinion represents not only a justification for the stated conclusion, but also a true account of the process by which that conclusion was reached. A source of special concern to me was that many students, perhaps the great bulk of them, candidly admitted having given no thought to many components of the judicial process - even the more controversial ones - notwithstanding that their academic legal training derived principally from the case system. This book seeks to fill the void I found.<sup>3</sup>

Similarly, Justice Antonin Scalia, and Chief Judge Judith S. Kaye and former Associate Judge Richard D. Simons of the New York Court of Appeals, have lamented the inadequacy of legal methods training in law schools. Chief Judge Kaye, echoing sentiments by Justice Scalia, called for more theoretical training in statutory interpretation.<sup>4</sup> And Judge Simons expressed a need for New York State to develop a consistent methodology for interpretation of the New York State Constitution.<sup>5</sup>

Speaking on how she decides cases, Chief Judge Kaye has noted that she "often" refers to, and is guided by, a series of lectures by the late Judge (and Justice) Benjamin N. Cardozo, published in his famous work entitled *The Nature of the Judicial*

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<sup>3</sup> *Id.* at XVII-XIX

<sup>4</sup> Judith S. Kaye, *Things Judges Do: State Statutory Interpretation*, 13 Touro L. Rev. 595, 604-611 (1997).

<sup>5</sup> David E. McCraw, "Doubts about Our Processes": Richard D. Simons and the Jurisprudence of Restraint in State Constitutional Analysis, 13 Touro L. Rev. 613, 614 (1997).

*Process*.<sup>6</sup> In those lectures, Judge Cardozo posited that judges legislate “interstitially” when charting the course of the common law.<sup>7</sup> He believed a value judgment is behind every decision that could be decided either way based on the precedents. Cardozo argued that whenever possible, it is the judge’s duty to repress his or her own subjective values and apply the values and mores of the community at large when choosing which course to follow.<sup>8</sup> He said that judges must think like legislators.<sup>9</sup> And he called upon the legal profession to employ the methods of sociology to objectively determine the values and mores of the contemporary community that are essential in order for courts to properly decide cases.<sup>10</sup>

This article discusses sociological jurisprudence and the application of sociological methodology to legal analysis. Although law is not a pure science, there should be a scientific approach to law study.<sup>11</sup> A scientific approach would have the pedagogical advantages of sensitizing law students to the discreet cognitive elements (whether conscious or unconscious) that comprise the judicial decision-making process and its final product, the decision.

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<sup>6</sup> Judith S. Kaye, “Hugh Jones Remembered,” N.Y.L.J., March 19 2001, at 2 (referring to BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (Yale University Press 1921)).

<sup>7</sup> CARDOZO, *supra* note 6, at 69.

<sup>8</sup> *Id.* at 74, 112-13.

<sup>9</sup> *Id.* at 120.

<sup>10</sup> *Id.* at 65-66.

<sup>11</sup> Legal analysis is not amenable to pure scientific analysis because it can never demonstrate causal relationships. In science, we proceed from the “null hypothesis,” which is a presumption that our hypothesis that “a is caused by b” is wrong. In medical science, experimentation and replication must establish a 99% probability of outcome in order to rebut the null hypothesis; in the social sciences, a 95% probability of outcome is required. However, since case law analysis is always an analysis of the facts *after* the events have occurred, there is no way to manipulate the facts (i.e., the independent variables) to directly measure their affect on the outcome. Only *indirectly* do we “infer” a causal connection by correlating the presence of certain facts to a particular outcome (e.g., “judgment for plaintiff,” or “reversed” or “affirmed”).

## II. HISTORICAL TRENDS IN LEGAL METHODOLOGY

Historically, the evolution of legal training in the United States has corresponded with the scientific and philosophical *zeitgeists* of the time. Early in our Nation's history law students (at that time, guilded into the profession) were taught that judicial decisions were derived from rules of law which were derived from first principles.<sup>12</sup> These "natural law" theorists, such as Blackstone, as he described in his *Commentaries*, believed judges must look up and ponder the heavens to discover the first principles that would guide them to render just decisions.<sup>13</sup> This methodology, not surprisingly, was deeply grounded in Judeo-Christian philosophy.<sup>14</sup>

The natural law theory came into disfavor with the advent of the 18th century's "scientific revolution" and the school of Legal Positivism became the vogue.<sup>15</sup> These empiricists rejected the notion that judicial decisions were components of immutable first principles. Influenced by the philosopher Thomas Hobbes' theory that men entered into a "social contract" because life for man in a state of nature was "short and brutish," the Positivists viewed all laws, whether legislative or judicial, as nothing more than commandments by the sovereign. The threat of force by

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<sup>12</sup> See HAROLD J. BERMAN & WILLIAM R. GREINER, *THE NATURE AND FUNCTION OF THE LAW* 478 (4<sup>th</sup> ed., The Foundation Press 1980).

<sup>13</sup> See WILLIAM BLACKSTONE, *BLACKSTONE'S COMMENTARIES* (George Tucker ed., 1803).

<sup>14</sup> See Norman Kretzman, *Lex Iniust A Non Est Lex: Laws On Trial in Aquinas' Court of Conscience*, in JOEL FEINBERG & HYMAN GROSS, *PHILOSOPHY OF LAW* 7-13 (5<sup>th</sup> ed., Wadsworth 1995) ("Morality has an essential connection with Christian Theology . . ."). *Id.* at 7. In England, natural law methodology was employed by the Ecclesiastical Courts which invoked maxims as first principles from which to deduce the desired outcome. The law courts employed a rigid Positivism methodology, which, due to the exacting pleading requirements and limited writs (or causes of action) available, gave impetus for the rise of courts of equity. In the United States, on the other hand, due to the merger of law and equity in courts of general jurisdiction, the natural law theory early on became the dominant methodology for all claims – legal and equitable.

<sup>15</sup> FEINBERG & GROSS, *supra* note 14, at 3.

society is what compels conformance; that is the *sine qua non* of the law.<sup>16</sup> The rejection of value consideration in judicial thinking resulted in decisions that sometimes lacked indicia of fairness. Judicial decisions were read by practitioners with an eye to simply plucking out useful phrases and arguing deductively from them. This led to criticism of Legal Positivism as slot machine justice, and “mechanical jurisprudence.”<sup>17</sup>

The school of Legal Realism, a 19th Century outgrowth of 18th century French Socialist philosophy, modified the Legal Positivists’ position by recognizing that a value choice is implicit in all decision-making.<sup>18</sup> The Realists noted, however, that judges were overwhelmingly from the privileged class; thus, their attitudes reflected the attitudes of that class. Therefore, the Legal Realists perceived justice as incorporating the values of the dominant group in society. Laws are made and enforced to uphold the values of the dominant class. But the dominant class does not necessarily reflect the majority of the population; rather, it reflects the most politically powerful group in society.<sup>19</sup>

The school of Sociological Jurisprudence arose out of the disapproval of the “heartless” justice that was dispensed under

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<sup>16</sup> See John Austin, *A Positivist Conception of Law*, in FEINBERG & GROSS, *supra* note 14, at 31-42; H.L.A. Hart, *A More Positive Positivist Conception of Law*, in FEINBERG & GROSS, *supra* note 14, at 42-56. Holmes echoed this conception of law when he said, “People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared.” O.W. HOLMES, *THE PATH OF THE LAW* (1897), quoted in ALDISERT, *supra* note 2, at 27. He revealed the same positivistic sentiment during a response to a friend who told him to “do justice.” Flabbergasted by the suggestion, Holmes responded that his job was not to do justice, but “to play the game according to the rules.” *Id.* at 185. It seems, therefore, that the commentators who have characterized Justice Holmes as a sociologically oriented jurist, are wrong.

<sup>17</sup> Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 609-10 (1908).

<sup>18</sup> Andrew Altman, *Legal Realism, Critical Legal Studies and Dworkin*, in FEINBERG & GROSS, *supra* note 14, 179.

<sup>19</sup> See JEROME FRANK, *LAW AND THE MODERN MIND* 42-47 (Brentano’s Inc., 1930). See also CARLETON KEMP ALLEN, *LAW IN THE MAKING* 1-6 (Oxford University Press 1964).

the Legal Positivist regime, and the cynical attitude of the Legal Realists.<sup>20</sup> Although Legal Realism had its roots in radical sociological theory, sociological jurisprudence should not be confused with radical sociology. Sociological jurisprudence arose during the heyday of the American sociologist, Emile Durkheim, and the philosopher William James. Durkheim was a structural-functionalist, who explored how social systems function. James explored how the attitudes of society affect our belief systems and shape our behavior.<sup>21</sup>

Thus, there are two aspects to sociological jurisprudence. One is the functional, Durkheimian perspective, which focuses on rule utilitarianism, in the *Kantian* sense.<sup>22</sup> The other is the *mores* aspect, which focuses on value choices implicit in judicial decision-making. It is the latter aspect of this two-pronged methodology that Judge Cardozo alluded to in *The Nature of the Judicial Process*.<sup>23</sup> The functionalist, or rule utilitarian aspect of sociological jurisprudence analyzes the social context in which lawsuits occur and how rules of law can affect social interaction. A decision is good to the extent that it educates its citizens as to appropriate social behavior and thereby helps people avoid social conflict in the future. In this sense, judges and lawyers act as social engineers by fashioning rules of conduct conducive to a more harmonious social existence. The social values aspect of the

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<sup>20</sup> ALLEN, *supra* note 19, at 28.

<sup>21</sup> See Emile Durkheim, *Types of Law in Relation to Types of Social Solidarity*, in *SOCIOLOGY OF LAW* (Vilhelm Aubert ed., Penguin Books 1975), reprinted from EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 68-132 (Free Press 1964). See also Michael Clarke, *Durkheim's Sociology of Law*, in *SOCIOLOGICAL PERSPECTIVES ON LAW* 281-290 (Dartmouth Publishing Company 2001); WILLIAM JAMES, *PRINCIPLES OF PSYCHOLOGY* (Henry Holt 1890).

<sup>22</sup> See HERBERT JAMES PATON, *CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY* (University of Pennsylvania 1999). See also ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 198-202 (Transaction Publishers 1999, originally published by Yale University Press in 1922).

<sup>23</sup> CARDOZO, *supra* note 6, at 65-66.



methodology focuses on identifying community values in judicial decisions.<sup>24</sup>

Today, most law schools teach legal methods from an eclectic perspective, which implicitly recognizes all the schools of jurisprudential philosophy, but does not discretely analyze any particular school of thought.

### III. CARDOZO'S SOCIOLOGICAL JURISPRUDENCE

In his lectures on *The Nature of the Judicial Process*, Judge Cardozo identified and analyzed the diverse elements that factor into judicial decisions, which includes history, logic, positivism, realism, and sociology.<sup>25</sup> He posited that sociology was the methodology of choice.<sup>26</sup> "From history and custom, we pass therefore, to the force which in our day and generation is becoming the greatest of them all, the power of social justice which finds its outlet and expression in the method of sociology."<sup>27</sup>

To begin, Cardozo rejected natural law theory, "The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its

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<sup>24</sup> See Durkheim, Clark, *supra* note 21. Sociological jurisprudence should not be confused with the Economic school of jurisprudence. The Economic school views legal rules in terms of their economic costs on society (called "external costs"). It posits that legal rules are efficient when they place all economic costs on the parties – or at least on the transgressor (these are called "internal costs"). See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 11-15 (3<sup>rd</sup> Ed., Little, Brown & Company 1986). Sociological jurisprudence, by contrast, judges the efficacy of rules in terms of their ability to correct or prevent "social disruption," i.e., *teach* people socially acceptable behavior in particular contexts. In other words, it is the *normative* force of law that concerns the sociologically oriented jurist. See LEARNED HAND, *THE CONTRIBUTION OF AN INDEPENDENT JUDICIARY TO CIVILIZATION* (Mass. Bar. Assoc. 1942).

<sup>25</sup> CARDOZO, *supra* note 6, at 112 "Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired."

<sup>26</sup> *Id.* at 30-31, 33, 165-66.

<sup>27</sup> *Id.* at 65-66.

generalizations from particulars.”<sup>28</sup> “Hardly a rule of today but may be matched by its opposite of yesterday.”<sup>29</sup> “It is no longer in texts or in systems derived from reason that we must look for the source of law; it is in social utility, in the necessity that certain consequences shall be attached to given hypothesis.”<sup>30</sup> The meaning of rules must be derived from “the exigencies of social life.”<sup>31</sup>

According to Cardozo, law is “an historical growth, for it is an expression of customary morality which develops silently and unconsciously from one age to another.”<sup>32</sup> “A jurisprudence that is not constantly brought into relation to objective or external standards incurs the risk of degenerating into . . . a jurisprudence of mere sentiment or feeling.”<sup>33</sup> “The constant assumption runs throughout the law that the natural and spontaneous evolutions of habit fix the limits of right and wrong. A slight extension of custom identifies it with customary morality, the prevailing standard of right conduct, the *mores* of the time.”<sup>34</sup> Thus, every high court must periodically “review its precedents and bring them up to date with the mores by a continual restatement and by giving them a continually new content.”<sup>35</sup>

Because a judge is called upon to choose from competing positions, she must think and act as a legislator: “[S]he ought to shape h[er] judgment of the law in obedience to the same aims which would be those of a legislator who was proposing to himself to regulate the question.”<sup>36</sup> In this regard, Cardozo acknowledged a deep tension flowing from “a stream of tendency [in each of us], whether you choose to call it philosophy or not,

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<sup>28</sup> *Id.* at 23.

<sup>29</sup> *Id.* at 26.

<sup>30</sup> *Id.* at 122.

<sup>31</sup> CARDOZO, *supra* note 5, at 122.

<sup>32</sup> *Id.*.

<sup>33</sup> *Id.* at 106.

<sup>34</sup> *Id.* at 63.

<sup>35</sup> *Id.* at 135.

<sup>36</sup> CARDOZO, *supra* note 6, at 120.

which gives coherence and direction to thought and action.”<sup>37</sup> Therefore, a difficult job of the judge is to put aside his or her own subjective feelings,<sup>38</sup> and rule according to “the opinions generally prevailing among the community regarding transactions like those in question.”<sup>39</sup>

The interpreter . . . must above all things put aside his estimate of political and legislative values, and must endeavor to ascertain in a purely objective spirit what ordering of the social life of the community comports best with the aim of the law in question in the circumstances before him.<sup>40</sup>

[S]elf search and reproach must come at moments to the man who finds himself summoned to the duty of shaping the progress of the law. . . . My duty as judge may be to objectify the law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of my time.<sup>41</sup>

According to Cardozo, the method of sociology best enables a judge to perform her legislative function because it provides the tools to help her to identify and measure the contemporary social values that must be understood in order for a judge to make legal rulings conducive to the social welfare.<sup>42</sup>

Sociological thinking is a means-end analysis:<sup>43</sup>

We are thinking of the end which the law serves, and fitting its rules to the task of service . . . This

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<sup>37</sup> *Id.* at 12.

<sup>38</sup> *Id.* at 111.

<sup>39</sup> *Id.* at 74.

<sup>40</sup> *Id.* at 90 (quoting BRUTT, DIE KUNTS DER RECHTSANWENDUNG 57).

<sup>41</sup> CARDOZO, *supra* note 6, at 172-73.

<sup>42</sup> *Id.* at 65-66, 71.

<sup>43</sup> *Id.* at 98.

conception of the end of the law as determining the direction of its growth . . . finds its organon, its instrument, in the method of sociology. Not the origin, but the goal, is the main thing . . . [P]ragmatism.<sup>44</sup>

Sociological jurisprudence is a functionalist methodology in that it alters the emphasis “from the content [conception] of the precept and the existence of the remedy to the effect [function] of the precept in action and the availability and efficiency of the remedy to attain the ends for which the precept was devised.”<sup>45</sup>

Cardozo explains the dilemma a judge faces when in rendering a decision she must choose among legitimate values competing for preeminence. That choice ordinarily presents itself after the judge “extracts from the [cases] the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.”<sup>46</sup> “The problem,” he said, “remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path at the parting of the ways.”<sup>47</sup>

One principle or precedent, pushed to the limit of its logic, may point to one conclusion; another principle or precedent, followed with a like logic, may point with equal certainty to another. In this conflict, we must choose between the two paths, selecting one or other, or perhaps striking out upon a third, which will be the resultant force of the two forces in combination, or will represent the mean between extremes.<sup>48</sup>

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<sup>44</sup> *Id.* at 102.

<sup>45</sup> *Id.* at 73 (quoting Roscoe Pound, *Administrative Application of Legal Standards*, Proceedings ABA, 441-449 (1919).

<sup>46</sup> CARDOZO, *supra* note 6, at 28.

<sup>47</sup> *Id.* at 29.

<sup>48</sup> *Id.* at 40.

### A. Methods Of Identifying Social Values

Legal scholars and practitioners have utilized three techniques to search out and identify social values to assist judges in choosing the path to follow: use of the “Brandies brief,” which incorporates social science studies; resort to analogous statutes, which evidence societal value choices; and distilling the value choices inherent in prior reported judicial decisions.<sup>49</sup> The efficacy of this last technique depends in part on the analyst comparing decisions of judges from different racial and ethnic backgrounds. Inclusion of the value choices of diverse groups within the community will increase the likelihood of correctly identifying broad-based value-consensus on the particular subject.

### B. Development Of Principles

Social considerations provide bases for reasons, and reasons stated in sufficiently general terms are called principles. Cardozo found that the “implications of a decision may in the beginning, be equivocal. New cases by commentary and exposition extract the essence. At last there emerges a rule or principle which becomes a datum, a point of departure, from which new lines will be run, from which new courses will be measured.”<sup>50</sup>

### C. Application To Statutes

Statutes are to be viewed, not in isolation or *in vacuo*, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the frame-work of present-day conditions, as revealed by the labors of economists and students of the social sciences in our own country and abroad.<sup>51</sup>

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<sup>49</sup> ALDISERT, *supra* note 2, at 317-18 (citations omitted).

<sup>50</sup> CARDOZO, *supra* note 6, at 48.

<sup>51</sup> *Id.* at 81.

Sociological jurisprudence does not inquire into what a legislator thought a century ago, but what she would have thought had she been aware of the present conditions.<sup>52</sup>

#### D. Application To Constitutional Law

In the context of constitutional law analysis, sociological jurisprudence requires an interpretivist jurisprudential philosophy. Contemporary community mores and values implies an “evolving standards of decency” philosophy. Accordingly, the meaning of the words in a Constitution must evolve as we evolve.<sup>53</sup>

#### IV. CASE LAW EXAMPLES

An example of sociological jurisprudence is evidenced in *McPherson v. Buick*, where Cardozo, writing for the New York Court of Appeals, held an automobile manufacturer liable for injuries resulting from a defective wheel.<sup>54</sup> Plaintiff had purchased the vehicle from a retailer; as such, there was no privity of contract between plaintiff and the manufacturer.<sup>55</sup> Prior cases had created an arbitrary classification distinguishing items deemed “imminently dangerous” from items deemed “inherently dangerous” (i.e., items which could be made imminently dangerous by a negligent act).<sup>56</sup> For example, a

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<sup>52</sup> *Id.* at 84. For examples of this sort of *post hoc* statutory construction, see *Braschi v. Stahl Associates*, 74 N.Y.2d 201 (1989), where a plurality of the Court interpreted the term “family member” in a rent control statute drafted in 1946 to include a deceased tenant’s homosexual partner. (Certainly the Legislature in 1946 did not contemplate that result!)

<sup>53</sup> Obviously, followers of the “noninterpretivist” school of constitutional law, which presently dominates among Justices of the United States Supreme Court, strenuously disagree that the meaning of the words of the United States Constitution should evolve as we evolve. They also eschew interpretation of a statute beyond its “plain meaning.” See ANTHONY SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Princeton University Press 1997).

<sup>54</sup> 217 N.Y. 382, 394 (1917)

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 385.

loaded gun, mislabeled poison, defective hair wash, scaffolds, a defective coffee urn, and a defective aerated bottle were considered imminently dangerous; whereas a defective manufacture of a carriage, a bursting lamp, a balance wheel for a circular saw, and a boiler, were deemed inherently dangerous. The older cases allowed third parties, not in privity with the manufacturer, to sue the manufacturer only if the item was considered "imminently dangerous."<sup>57</sup> Cardozo rejected the distinction as reflecting a misguided jurisprudence of conceptions (mechanical jurisprudence), calling the distinction mere "verbal niceties."<sup>58</sup> Rather, he fashioned a functional rule designed to protect people living in a modern society: "If danger was to reasonably certain, there was a duty of vigilance, regardless of whether the danger was characterized as inherent or imminent."<sup>59</sup> Therefore, "[i]f the nature of an item is such that it is reasonably certain to place life and limb in peril, when negligently made, it is then an item of danger."<sup>60</sup>

When Cardozo wrote the decision in *McPherson*, automobiles were traveling farther and faster than ever before; automobiles had become the transportation of choice for most Americans; and injuries resulting from automobile accidents were dramatically rising. Cardozo later contrasted the legal method of analysis he employed with the method employed in the prior cases, as a "struggle" between "utility" and blind adherence to "logic."<sup>61</sup>

Another good example of Cardozo's sociological jurisprudence at work is *Hynes v. New York Central Rail Co.*<sup>62</sup> That case involved an attractive nuisance, where a plank extended into the Harlem River on property owned by the railroad. The plank was used as a diving board by trespassing children. Electrical wires hung overhead that were attached to a wooden

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<sup>57</sup> *Id.* at 386.

<sup>58</sup> *Id.* at 394.

<sup>59</sup> *McPherson*, 217 N.Y. at 394.

<sup>60</sup> *Id.* at 389.

<sup>61</sup> BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 77-80 (Yale University Press 1924).

<sup>62</sup> 231 N.Y. 229 (1921).

poll (the wires had been placed there by the railroad). A child was struck and killed when an electrical wire came loose and struck the child as he was preparing to dive; the child was plunged to his death in the water below.<sup>63</sup> The railroad argued that it did not owe a duty of care to the child because he was a trespasser. The railroad admitted that if the child's feet had not been on the plank at the moment the wires struck him, he would have been in the public waterway and the railroad would have been liable. But the child was technically a trespasser because he had not yet commenced his dive.<sup>64</sup> Nonetheless, the court found the railroad liable.<sup>65</sup> Speaking for the Court again, Judge Cardozo said,

Rights and duties in systems of living law are not built upon such quicksands . . . . This case is a striking instance of the dangers of a "jurisprudence of conceptions" (Pound, *Mechanical Jurisprudence*, 8 Col. L. Rev. 605, 608, 610), the extension of a maxim or a definition with relentless disregard of consequences to "a dryly logical extreme."<sup>66</sup>

## V. OTHER SEMINAL MATERIALS ON LEGAL METHODS

### A. Karl Llewellyn, *The Bramble Bush*<sup>67</sup>

In *The Bramble Bush*, Karl Llewellyn stated:

The practice of our case law, however, is I think fairly stated thus: it pays to be suspicious of

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<sup>63</sup> *Id.* at 231.

<sup>64</sup> *Id.* at 235.

<sup>65</sup> *Id.* at 236.

<sup>66</sup> *Id.* at 235. See also FRANK, *supra* note 19, at 70-72 ("Formal logic is what its name indicates; it deals with form and not with substance. The syllogism will not supply either the major or the minor premise. The 'joker' is to be found in the selection of these premises." *Id.* at 66.)

<sup>67</sup> KARL. N. LLEWELLYN, *THE BRAMBLE BUSH* 42-53 (New York, 1951) (quoted in BERMAN & GREINER, *supra* note 12, 487).



general rules which look too wide; it pays to go slow in feeling *certain* that a wide rule has been laid down at all, or that, if seemingly laid down, it will be followed.<sup>68</sup>

*[N]o case can have meaning by itself!* Standing alone it gives you no guidance. It can give you no guidance as to how far it carries, as to how much of its language will hold water later. What counts, what gives you leads, what gives you sureness, *that is the background of the other cases* in relation to which you must read the one. They color the language, the technical terms, used in the opinion. But above all they give you wherewithal to find which of the facts are significant, and in what aspect they are significant, and how far the rules laid down are to be trusted.<sup>69</sup>

1. Development of Principles: According to Llewellyn, principles emerge from generalization of the common facts taken from cases decided the same way, from which lawyers and judges synthesize a rule that will encompass those cases. Generalization is accomplished when the language (i.e., concept formation) is broad enough to fit the cases, but not broader than necessary.<sup>70</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> BERMAN & GREINER, *supra* note 12, at 491. See also Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. Miami L. Rev. 409, 449 (1986) ("to create an use a synthesis, students or lawyers must formulate a single proposition and then support it by reference to two, three, or more previously decided cases or legal authorities. In short, a synthesis is a single legal idea followed by a listing of several authorities. Individual past cases, by themselves, are not important in the context of that skill. They are important only because groups of them lend support to an overall proposition or idea.").

<sup>70</sup> LLEWELLYN, *supra* note 68.

2. Two types of Principle Construction: Llewellyn speaks of a two step process to developing principle: “intuitional correction of hypothesis;” and “experimental test of whether an hypothesis is sound.” Experimental is case law analysis. Intuitional correction of hypothesis, is often the beginning of legal problem solving; it involves hypothetical reasoning. It requires analyzing the implications of the holdings in judicial decisions from the narrowest to the broadest implication of each holding. Next, set the maximum against the minimum; that will suggest how far a court may go in extending the precedents.<sup>71</sup>

3. Understanding the *Raio Decidendi*: According to Llewellyn:

The third thing that needs saying as you set to matching cases, is that on your materials, often indeed on all the materials that there are, a perfect working out of comparison and difference cannot be had. In the first case you have facts a and b and c, procedural set-up m, and outcome x. In the second case you have, *if* you are lucky, procedural set-up m, but this time with facts a and b and d, and outcome y. How, now, are you to know with any certainty whether the changed result is due in the second instance to the absence of fact c or the presence of the new fact d? The court may tell you. But I repeat: your object is to *test* the telling of the court. You turn to your third case. Here

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<sup>71</sup> *Id.* at 60-69 (quoted in ALDISERT, *supra* note 2, at 822). Speaking on the same method of analysis in the social sciences, WALTER L. WALLACE, *THE LOGIC OF SCIENCE IN SOCIOLOGY* 50 (Aldine de Gruyter Pub. 1971), described the process as follows:

At first we operate only with thought abstractions, mindful of our task only to construct inner representation-pictures. Proceeding this way, we don not as yet take possible experiential facts [case law] into consideration, but merely make an effort to develop our own thought pictures with as much clarity as possible and to draw from them all possible consequences. Only subsequently, after the entire exposition of the picture has been completed, do [we] check its agreement with experiential facts [i.e., case law]. (citations omitted).

once more is the outcome x, and the facts are b and c and e; but fact a is missing, and the procedural set-up this time is not m but n. This strengthens somewhat your suspicion that fact c is the lad who works the changed result. But an experimentation crucis still is lacking. Cases in life are not made to our hand. A scientific *approach* to prediction we may have, and we may use it as far as our materials will permit. An exact science *in result* we have not now. Carry this in your minds: a scientific approach, no more. Onto the green, with luck, your science takes you. But when it comes to putting you will work by art and hunch.<sup>72</sup>

**B. Edward Levi, An Introduction To Legal Reasoning<sup>73</sup>**

In *An Introduction to Legal Reasoning*, Edward Levi echoed Llewellyn's sentiments, stating: "the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process."<sup>74</sup>

Looking at a court's stated rule of decision, Levy says,

The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior

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<sup>72</sup> BERMAN & GREINER, *supra* note 11, at 494. Uncovering the *ratio decidendi* can be difficult. But a simple example is *Row v. Wade*, 410 U.S. 113 (1973), where the Supreme Court ruled that a woman has a right to a abort a pregnancy prior to the third trimester, when it is "viable" that the fetus could live outside the woman's body. The decision that the fetus is not a "potential person" (entitled to legal protection from the State) until that time is the controversial *ratio decidendi* upon which the holding depends.

<sup>73</sup> EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (The University of Chicago Press 1948).

<sup>74</sup> *Id.* at 2

judges thought important. It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification . . . [T]he rules are discovered in the process of determining similarity or difference.<sup>75</sup>

But the problem for the law is this: "When will it be just to treat different cases as though they were the same?"<sup>76</sup>

1. Community Values: It is because the law forum is a "moving classification system"<sup>77</sup> that "the ideas of the community and of the social sciences, whether correct or not, as they win acceptance in the community, control legal decisions."<sup>78</sup>

2. Legal Principles As Generalization Tools; Beware of Misuse Of Words: According to Levi,

The first stage is the creation of the legal concept [principles] built up as cases are compared. The period is one in which the court fumbles for a phrase. Several phrases may be tried out; the misuse or misunderstanding of words itself may have an affect. The second stage is the period when the concept is more or less fixed, although reasoning by example continues to classify items inside and out of the concept. The third stage is the break-down of the concept, as reasoning by example has moved so far ahead as to make it clear that the suggestive influence of the word is no longer desired.<sup>79</sup>

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<sup>75</sup> *Id.* at 2-3

<sup>76</sup> *Id.* at 3.

<sup>77</sup> *Id.* at 4.

<sup>78</sup> *Id.* at 6.

<sup>79</sup> LEVI, *supra* note 73, at 9.

Walter Wallace (*The Logic of Science in Sociology*), a social scientist, offers this advice on choosing the appropriate word. First, (determinacy) does it lead to hypothetically logical inconsistencies or contradictions. Second, (universality) the word should be clear and unequivocal and not contain culture-bound implications. Third, (flexibility) the word should be flexible in its ability to be used in varying contexts. And fourth, (abstractness) the word should be rich in content.<sup>80</sup>

And C. Robert M. Emerson (*Contemporary Field Research*), another social scientist, states that descriptions and definitions are situational and depend on context for their meaning. A key question in understanding a definition is what motivating forces or intention the definer or describer had in giving his or her rendition. From what perspective is the description or definition being made?<sup>81</sup>

## VI. CASE STUDY USING SOCIOLOGICAL METHODOLOGY

### A. Establishing Functional Equivalence

The heart of the case law method is reasoning by analogy. The lawyer's primary responsibility is to demonstrate that the relevant historical facts of her case are similar to the ultimate facts in the decided case(s), and therefore justify the same outcome. The initial determination of similarity is a search for facts in common. The more facts the cases have "in common," the greater the perceived similarity. However, in searching for similarities among cases, the same level of analysis must be employed. That is what the sociological literature refers to as functional equivalence. Functional equivalence requires demonstrating the interdependent relationship among the attributes (independent variables) that are being used to measure their effect on the matter under investigation (the dependent variable). Prezeworski and Teune define functional equivalence

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<sup>80</sup> WALLACE, *supra* note 71.

<sup>81</sup> ROBERT M. EMERSON, *CONTEMPORARY FIELD RESEARCH* 34-35 (Waveland Press 1983).

as the “mutual interdependence” of the indicators: “The criterion for inferring the equivalence of measurement statements is the similarity in the structure of the indicators.”<sup>82</sup>

The following example taken from sociology is illustrative.

Suppose a researcher is investigating the correlation between mental illness and aggression across cultures. She would first have to define aggression and then search for indicators of it in various societies. Suppose several societies which have high incidences of mental illness also have high incidences of street fighting. But in another society with a high incidence of mental illness there are hardly every any street fights. This negative case might suggest that aggression is not a causal indicator of mental illness. But let's further suppose that society is a highly litigious one. Here we have found functionally equivalent indicators (independent variables) that affect (presumably measure) the dependent variable (mental illness), i.e., street fighting and litigiousness are both indicators of aggression. Now the researcher might next think of replacing the variable “aggression” with a definitionally more accurate-- i.e., more inclusive -- term that encompasses both street fighting and lawsuits; e.g., *adversity* or *adverserialness*.

That is precisely how a functional approach to legal reasoning should proceed. A party argues that the facts of his or her case fit within the relief provided in a prior decision. The rule of law that is allegedly implicit in the prior decision is a mere conception, and can only be indirectly tested by comparison to other cases, where the principle was presumptively applied. But the historical facts of all the cases are different. It is the identification and explication of their functional equivalence, by employment of a more general, inclusive, concept that demonstrates why two cases should be treated the same.

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<sup>82</sup> ADAM PREZEWSKI & HENRY TEUNE, *THE LOGIC OF COMPARATIVE SOCIAL INQUIRY* 129 (John Wiley & Sons, Inc. 1970).

## B. Use Of Analogy To Demonstrate Functional Equivalence

Replacement of terms with more inclusory concepts broaden the classificatory schemes. This is the process by which principles and theories are constructed from case law. The method of analogy is used for that purpose.

Let's analyze Aristotle's analogy: "Old age is to life as evening is to day." Aristotle establishes functional equivalence of "old age" and "evening" by describing them both as being part of the "sunset of life." Notice that Aristotle's technique of establishing functional equivalence in this analogy is by classification and then deduction.

Notice, also, that analogies have meaning only when individuals share a common frame of reference. For example, if you believed that the concept "sunset" represented significant qualities not present in old age, you might reject Aristotle's comparison as inappropriate.

To guard against vicious abstraction in the employment of more generalized concepts to take into account more than one factor, abstraction should be limited to low range propositions. Wangerin, in *Skills Training in "Legal Analysis": A systematic Approach*,<sup>83</sup> provides a legal example:

[To demonstrate an analogy,] the lawyer must show that the facts of that case, although appearing to differ from the facts of the present dispute, do not differ at all. . . . Joint statements of facts can be prepared by identifying in the several cases what might be called the "lowest common denominator" of facts. [For example, i]f one case in a pair of cases involved a liquor store and the other a grocery store, a common denominator of fact would be that both cases dealt with stores involved in the sale of "goods." However, the term "goods" is too broad because most stores sell goods, and a lower common denominator of

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<sup>83</sup> See e.g., Wangerin, *supra* note 69.

fact should be found. Such a lower common denominator would be if both stores sold “consumer goods.” Use of this term eliminates many types of stores, however, both the liquor store and the grocery store fit in this category. An even lower common denominator of facts would be that both cases involved stores that sold “consumable” consumer goods. Use of this term eliminates virtually all stores except those involved in the two cases. Thus, the term is a very low, or may be even the lowest, common denominator of fact.<sup>84</sup>

Low level abstraction essentially means abstraction closely related to the types of situations discussed in the cases. Its necessity is based on finding justice for the case at hand. The more simple the theory, the more likely it will be held valid. It is preferable to take a step back from the facts, and draw as many inferences as possible. Each inference should be predicated upon a fact or combination of facts. When analyzing two cases, look to the variation in time or place of occurrence. (Think of *McPherson* (p. ante) and the change in circumstances that arose with the invention of the automobile.) Similarly, in analyzing two different interpretations of the same set of facts, or presumed causal factors, first determine whether the antagonists are operating from the same point of reference.

The method of analogy is a force constantly pushing courts to expand their holdings and include new categories of cases within the context of a legal precept. The process usually continues until the jurisdiction’s highest court pushes the pendulum in the opposite direction. But the process is cyclical as the unending dimensions of life continue to unfold.

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<sup>84</sup> *Id.* at 451.



### C. The Logic Of Science In The Social Sciences

The development of social science theory (including law) involves an intuitive back-and-forth between theory and facts. Theory is constantly being modified to take into account new factual insights. Because of this constant tension between theory and fact, every theory is tentatively. And the greatest causes of misapplication of an existing theory are lack of understanding of its definitions or the scope of its concepts. Thus, a primer on theory development, as it can be applied in the legal context, is in order

#### 1. The Tentative Hypothesis: Intuitional Correction:

[T]he first formulation of a hypothesis deduced from a theory may be ambiguous, imprecise, logically faulty, untestable, or otherwise unsatisfactory, and it may undergo several revisions before a satisfactory formulation is constructed. In this process, not only will the deduced hypothesis change, but the originating theory may also be modified as the implications of each trial formulation reveal more about the theory itself.<sup>85</sup>

At each step, “new observations are at least imagined and often actually made; and from them the investigator judges not only how relevant to his hypothesis the final observations and empirical generalizations are likely to be, but how appropriate his hypothesis is, given the observations and generalizations he can make.”<sup>86</sup> The researcher must be on guard against “the fetishism of the concept.”<sup>87</sup> In this regard, note Judge Cardozo’s admonition to guard against blind adherence to logic.<sup>88</sup>

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<sup>85</sup> WALLACE, *supra* note 71, at 20

<sup>86</sup> *Id.* at 21.

<sup>87</sup> *Id.* at 22 (citation omitted).

<sup>88</sup> See CARDOZO, *supra* note 12.

Another social scientist states: "This moving back and forth between observations and theory, modifying original theoretical statements to fit observations and seeking observations relevant to the emerging theory, characterizes the analytic process in [case study] research."<sup>89</sup>

2. Identifying The Material Facts: Deciding which facts are relevant and material to the legal issues is based, in part, on preconceived notions of the legal significance of the chosen facts. "Any descriptive utterance, any observation statement is already a hypothesis."<sup>90</sup> (citation omitted). Thus, the more knowledge a lawyer or judge has in his or her legal arsenal on a given subject, the more sensitized she will be regarding the legal significance of the facts. In doing research, expect that the tentative hypothesis will need to be modified (perhaps several times) as the cases tell the lawyer which facts are material. This is what appellate lawyers call the "back-and-forth" process of legal research and writing.

3. Measuring the Significance of the Facts Found in the Reported Cases: "Measurement permits an estimate of sameness among observations made on different 'kinds' of phenomena (for example, a pound of feathers equals a pound of iron filings)."<sup>91</sup> When identifying similar facts appearing in more than one case, consider assigning values to the significance placed on each fact by the courts, and the number of times the fact appears in the decided cases. The more often a fact deemed relevant or dispositive by one court is found in other cases similarly decided, the greater the assurance that the facts identified are the reason for the court's ruling.<sup>92</sup>

Qualitative coding is a technique used by social scientists to create categories to measure data and describe the type of

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<sup>89</sup> EMERSON, *supra* note 81, at 95.

<sup>90</sup> WALLACE, *supra* note 71, at 34.

<sup>91</sup> *Id.* at 38 note 6.

<sup>92</sup> *Id.* at 40.

activity involved.<sup>93</sup> The codes should fit the data; the data should not be forced to fit a code. Codes may be based on any number of considerations, including institutional processes or social or business situations. View the events objectively. The purpose of the code is a descriptive classification of the actions of the parties. In practice, coding can be used to categorize facts appearing in the cases and thereby facilitate comparison. This approach can also be used to set up analogies between cases by demonstrating that two or more factors are penumbras of a more general concept.

#### 4. Converging Principles Into Theory:

"[T]heories may be viewed as emerging by making the terms and relationships in empirical generalizations more abstract, and also by introducing other abstract terms that refer to nonobservable constructs."<sup>94</sup>

The conversion of empirical uniformities [similarities in facts among cases] into theoretic statements [principles] . . . increases the *fruitfulness* of research through the successive exploration of implications. By providing a rationale, the theory introduces a *ground for prediction* which is more secure than mere empirical extrapolation from previously observed trends.<sup>95</sup>

It is through building upon the cases to derive a theory of the law that counsel "may ascend, via an interpretive string [inductive], to some point in the theoretical network, thence proceed, via definition and hypotheses, to other points, from which another interpretative string permits a decent [deductive] to

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<sup>93</sup> Kathy Charmaz, *The Grounded Theory Method: An Explication and Interpretation*, in EMERSON, *supra* note 81, at 111.

<sup>94</sup> WALLACE, *supra* note 71, at 53. This is the process of selecting only the material facts that appear in the cases and describing them by use of more general terms.

<sup>95</sup> *Id.* at 56 (citations omitted).

the plane of observation.”<sup>96</sup> (Note that Cardozo opined that it is during the “definition and hypothesis” phase of the analysis that judges legislate (“interstitially”).<sup>97</sup>

Furthermore, “[t]heory is generated in two main ways: First, through *constant comparison* of the data the researcher develops conceptual categories and identifies their properties. Second, additional data are collected using *theoretical sampling*, where new observations are made in order to pursue analytically relevant concerns rather than to establish the frequency or distribution of phenomena.”<sup>98</sup>

### 5. Analytic Induction:

Proponents of analytic induction . . . begin with a rough formulation of the phenomenon to be explained and an initial hypothesis explaining the phenomenon, then go to a small number of cases (even a single case) to see if the hypothesis fits that case. If not, either the hypothesis or . . . [case] to be explained is reformulated so that the case is accounted for. The procedure then continues, with the researcher examining cases and producing reformulation of these sorts whenever negative cases are encountered, until *all* cases can be explained.<sup>99</sup>

It is helpful to begin with an argument, and take a step back and generalize it slightly. Determine if the argument is viable under the hypothetical testing. If so, the principle is probably correctly applied. (This test is routinely employed during oral arguments by appellate courts.)

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<sup>96</sup> *Id.* at 59.

<sup>97</sup> See CARDOZO, *supra* note 12.

<sup>98</sup> EMERSON, *supra* note 81.

<sup>99</sup> *Id.* at 97.

6. The Importance of Negative Cases: A method for dealing with negative cases is the “concomitant variation and most different systems” design. Under this methodology, cases are designated into two groups; i.e., those that found the appropriate legal rule was applied, and those that found it did not apply. Categories depicting recurring fact patterns are constructed based on the presence or absence of the dependent variable (e.g., in case law analysis, the outcome).<sup>100</sup>

Aside from the occasional wrongly decided case, it is through studying dissimilar cases that enables learning the more perfect definition of the subject matter. Theories are altered as we find negative cases. The goal is to fit the negative case within the paradigm of the new theory or principle; this is the incremental step toward greater inclusion.<sup>101</sup>

## VII. A PROPOSED “TENTATIVE HYPOTHESIS” FOR LEGAL RESEARCH

The following is a prototype scientific approach to legal research and case law analysis.

A systematic approach to this methodology is as follows: For every legal issue, create a “tentative hypothesis” based upon the facts of the case at hand and your knowledge of the applicable law. The hypothesis should be placed in syllogistic form. The major premise is a general proposition of law. The minor premise consists of the presumed dispositive facts. The conclusion is the outcome you desire; it must follow from the premises.<sup>102</sup> The tentative hypothesis should be short (keep it under 100 words). Limiting its length forces the researcher to

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<sup>100</sup> Charmaz, *supra* note 93.

<sup>101</sup> Jack Katz, *A Theory of Qualitative Methodology: The Social System of Analytic Fieldwork*, in EMERSON, *supra* note 81, at 131. See also Wangerin, *supra* note 69, at 449 n. 83 (“If a case truly can be distinguished, it can also be shown to be consistent with a related point and thus supportive of a proposed argument.”).

<sup>102</sup> Remember, in logic, the answer you get depends upon the question you present. Stated more generically, the way you come out depends on the way you go in.

think more critically by choosing the presumed operative facts more carefully. A tentative hypothesis is often critical for counsel to find cases on point early in the research process.<sup>103</sup>

Begin your research reading the old seminal cases first. Only by understanding the historical development of the law will you develop a sense of how it will likely develop in the future. Group the cases into two piles labeled favorable and unfavorable (outcome is the dependent variable). Then read each pile separately, looking for common factors affecting the outcome. You will often find that facts you thought were important, courts have found are unimportant; and facts you thought were unimportant, courts have found important. This is why the hypothesis was only tentative, and as such will have to be modified, possibly several times during the course the research.

Be careful to avoid vicious abstraction when drawing analogies. Your search is to identify and explain the *functional equivalence* among the noteworthy factors in the decided cases. You do this by employing low level abstraction. Determine whether systemic factors are present. Consider scaling (measuring) the material facts in the reported decisions based on their importance to the outcome in the cases, and how often they are present. Employing this structural-functional perspective will enable the advocate to find similarities and make connections between the cases that otherwise would not be seen.

Note that sometimes the cases do not fit within one category. If that occurs, the cases must be grouped into categories based on similarity of factual settings, and more than one general proposition of law or principle, derived from low level abstraction, will have to be made. When this is done, consolidate in an attempt create a more inclusive explanation of the body of law. This is the manner in which theories are developed. Segregating the principles may persuade the court not to adopt the interpretation of the cases urged by the opponent. If necessary, you should broaden your research to include analogous

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<sup>103</sup> This idea is taken from BRYAN A. GARNER, *THE WINNING BRIEF* 10-11(2<sup>nd</sup> Ed., Oxford University Press, 1999). Garner advocates limiting the issues to 75 words apiece.

or similar statutes as a means to identify social value judgments on the issue.

When reading several cases, attempt to categorize the human interactions. Abstraction should try to identify the causes of social conflict and systematic dysfunction. Analyzing the conflict from an institutional or systemic perspective will often expose a social dysfunction that needs to be addressed, which will often suggest which way a court will decide. That is because principles should be formulated in an effort to prevent future social conflict and alleviate the social dysfunction. As Justice Holmes said, "Think things and not mere words, for the latter are the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which they are used."<sup>104</sup> Therefore, in addition to searching for factual similarities, try to understand the ramifications implicit in each holding and its social utility. Assume that operating in the subconscious of every judge is a value choice, based on what the court is trying to accomplish, and decide whether it conforms to social mores. Be aware that the court's decision may be right but its analysis wrong. A court may make an artificial construction merely to effectuate a perceived just result.

The tentative hypothesis method of research is also helpful during brief writing. First, the advocate's final hypothesis statement can be used as both the "Question Presented" and the "Point Heading" in the brief. Second, by inverting the premises, the final hypothesis can constitute the first two paragraphs under the point heading. Specifically, the minor premise can be the first paragraph after the point heading, while the major premise can be the first sentence of the next paragraph. By this method, the framework for the rhetorical structure of your argument can easily be set up.

A sociological approach to the study and practice of law is equally useful at the trial level. As cases come to court, the parties present conflicting versions of the historical facts. The fact-finders must *imaginatively* place themselves in the positions of the parties, and from the parties' perspectives, decide

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<sup>104</sup> *Towne v. Eisner*, 245 U.S. 418, 425 (1917).

who was right and who was wrong. The job of the trial lawyer is to identify to the jury a shared pattern of understanding (a common ground that everyone can relate to) and to demonstrate how his or her client acted based on the common understanding. In other words, the lawyer must try to make sense of, and provide a good reason -- a reason good to the factfinders -- why the client acted in a particular manner. Studying law from a functional, sociological perspective will enhance lawyers' abilities to identify and explicate those shared patterns of social understanding.

### VIII. CAVEAT

In concluding, a few caveats are in order. There are flaws in the courtroom process that frustrate scientific analysis. First, there is no passive-observation of events. Witnesses testify about historical facts. As such, memories are dimmed and distorted by time or rumor, and unfortunately, perjury does occur. Second, evidence is limited to what is admissible under the rules of evidence. These rules limit admissible evidence to that which is relevant to the claims and defenses raised by the respective parties. Evidence rules also prevent introduction of hearsay evidence because of its presumed untrustworthiness. As such, "thick description" of the events, which is vital to field-study research, is often lacking in court proceedings and in judicial decisions. In his classic book, *Courts on Trial*, the late Judge Jerome Frank said that the jury system removes the risk of error from the government by placing it on the citizens so that the government is not held responsible when injustices occurs.<sup>105</sup>

Those flaws are also an enigma on appeal. Because of the vagueness and subjectivity inherent in the fact-finding process, appellate courts review the evidence in the light most favorable to the prevailing party, and tend to report the facts in that light.

But notwithstanding the foregoing difficulties in applying scientific models to legal research and analysis, as both Judge Cardozo and Karl Llewellyn said, we should nevertheless strive

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<sup>105</sup> FRANK, *supra* note 19.



toward a scientific approach to the study and practice of law. Only in that manner will better analytical tools be developed to assist the profession in helping the public discover the “truth” and expose and correct social dysfunction.