Stages of Legal Reasoning: Formalism, Analogy, and Realism

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THE STAGES OF LEGAL REASONING:
FORMALISM, ANALOGY, AND REALISM

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In the late 19th Century, legal reasoning was dominated by formalistic analysis. Judges and lawyers reasoned deductively from base principles. Legal historians have persuasively described how leading judges and scholars fomented a revolution in legal thought in the 20th Century. Starting about 1910, legal realism or policy analysis entered legal reasoning, to the point that today it would be unusual to find a judicial opinion or brief that fails to explore the policy implications of an interpretation of the law. This historical shift from formalism to realism suggests that there are stages of legal reasoning.

In this article I argue that formalism, analogy, and realism should be considered to be the stages of legal reasoning. First, psychological research suggests that these methods of reasoning correspond to stages of cognitive and moral development. Second, examination of judicial opinions in hard cases reveals that courts progress from formalism, to analogy, to realism, in resolving difficult questions of law. Third, these three forms of reasoning are necessary components in the evolution of rules and standards.

In characterizing these modes of analysis as “stages” I do not mean to imply that

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1 Horwitz characterizes American legal reasoning of the late 19th and early 20th centuries as “categorical” in nature, in light of the tendency of courts to interpret the law by invoking and defining general propositions of law. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 16-17, 199 (1992) (hereinafter TRANSFORMATION). Gilmore refers to the same period as “the age of faith,” (i.e., faith in legal principles) in contrast to “the age of anxiety” which followed it. GRANT GILMORE, THE AGES OF AMERICAN LAW 41-67 (1977).

2 TRANSFORMATION, supra note 1, at 199.

3 Id. at 199-200.

4 Id. at 18.
analogy is superior to formalism or that realism is superior to them both. In fact, one might reasonably argue, as Justice Antonin Scalia would, that the hierarchy proceeds in the opposite direction, in that one is forced to resort to analogy only where formalism has failed, and that realism is the last resort of all.

It would be even more accurate to reject hierarchy altogether, and the concomitant conceit that one form of legal analysis is superior to another. Rather than levels in a hierarchy, formalism, analogy and realism are all stages of a cycle, each of which is necessary for the law to progress. The ultimate purpose of legal analysis is to create a system of laws that is clear, consistent, and just, a code of conduct that is universally understood and accepted. But this is a task that is beyond human ability. As H.L.A. Hart observed, a perfect system of laws cannot be created “because we are men, not gods.” However, formalism, analogy, and realism each play a critical role in the attempt to create a code of conduct that is logical, predictable, and fair.

Accordingly, Part I of this article defines formalism, analogy, and realism, and describes the psychological theories of James Mark Baldwin, Jean Piaget, and Lawrence

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5 I describe the stages of legal reasoning as “soft stages” that appear or are invoked sequentially, that are structurally distinct, and that “prepare the way” for subsequent stages. They are not the invariant and hierarchical “hard stages” of Piaget and Kohlberg. See supra notes 127-130 and accompanying text.

6 Justice Scalia criticizes realistic analysis as inappropriate judicial “fact-finding,” but acknowledges that it cannot be “entirely avoided.” I have not said that legal determinations that do not reflect a general rule can be entirely avoided. We will have totality of the circumstances tests and balancing modes of analysis with us forever – and for my sins, I will probably write some of the opinions that use them. All I urge is that those modes of analysis be avoided where possible; that the Rule of Law, the law of rules be extended as far as the nature of the question allows; and that, to foster a correct attitude toward the matter, we appellate judges bear in mind that when we have finally reached the point where we can do no more than consult the totality of the circumstances, we are acting more as fact-finders than as expositors of the law.


7 H.L.A. HART, THE CONCEPT OF LAW 128 (1998). Hart traces the ambiguity of legal rules to two human shortcomings: “our relative ignorance of fact” and “our relative indeterminacy of aim.” Id. Larry Alexander concurs with Hart: “Authoritative rules that are promulgated by human beings of finite reasoning and informational capacities and that are meant to improve the moral conditions of human beings of finite reasoning and informational capacities will always fail to capture precisely the requirements of morality.” Larry Alexander, Can Law Survive the Asymmetry of Authority, in RULES AND REASONING: ESSAYS IN HONOUR OF FRED SCHAUER 39, 41 (Linda Meyer, ed. 1999).
Kohlberg, insofar as they shed light upon the cognitive and moral aspects of legal reasoning in general and formalism, analogy, and realism in particular. Formalism represents the “rule-bound” thinking characteristic of the Piagetian stage of concrete operations and the Kohlbergian stage of conventional thought. Realism, whose concern is what the law might be, represents the Piagetian stage of formal operations and the Kohlbergian stage of postconventional thought. Reasoning by analogy straddles both stages; formalist analogies are concrete and conventional, while realist analogies are abstract and postconventional.

Part II illustrates how formalism, analogy, and realism are sequentially invoked to resolve hard cases. When society changes or other unexpected events occur that give rise to unforeseen legal problems, formalist rules fail us, and we rely upon analogies. When these analogies too prove insufficient, we turn to realism, balancing all of the underlying values and interests to develop new rules of law. In hard cases reasoning by analogy serves as a bridge between formalism and realism.

Part III argues that the evolution of rules into standards, and standards into rules, also demonstrates the stages of legal reasoning. Evolution of the law in both directions is achieved by drawing analogies. Realist analogies help turn rules into standards and formalist analogies help turn standards into rules. The law evolves from rules to standards and back again in an unending cycle of assimilation and accommodation.

I conclude that none of the three modes of analysis standing alone is adequate to produce a clear, consistent, and just system of laws. Legal progress depends upon using all three modes of analysis.

I. DEVELOPMENTAL THEORY AND THE THREE STAGES OF LEGAL REASONING

Law comprises both logic and morals. Legal decisions are deduced from rules of law, however to induce obedience these decisions must not only be logical but must also reflect the prevailing mores of society. Thus legal reasoning inevitably attempts to meld the oft conflicting strictures of logical rigor and moral justice. What we know of the development of logical and moral reasoning helps to explain how logic and morality are combined in legal reasoning.

As people mature they adapt their intellectual and ethical systems to meet new challenges. When I was a child, I spoke as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things. Leading psychologists have

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9 1 Corinthians, 13:11.
charted sequential stages in the individual’s patterns of cognitive and moral reasoning. In this article I suggest that legal reasoning, like cognitive and moral reasoning, progresses through certain well-defined stages. Complex forms of legal reasoning evolve from and build upon simpler forms, reflecting our attempts to meet new challenges or to progress beyond current understandings of the law. I propose that the stages of legal reasoning are formalism, analogy, and realism.

A. The Definition of Formalism, Analogy, and Realism

Vincent Wellman, Richard Warner, and Richard Posner have all identified three discrete forms of legal analysis. Wellman calls these forms of legal reasoning “deduction,”10 “analogy,”11 and “practical reasoning.”12 Warner refers to them as “the analogical model,”13 “the deductive model,”14 and “the ideal reasoner model.”15 Posner uses the terms “syllogistic reasoning,”16 “reasoning by analogy,”17 and “practical reasoning.”18 In this article I call these three forms of legal reasoning “formalism,” “analogy,” and “realism.”

Formalism

Formalism is the application of an existing rule of law by its terms to a set of facts.19 Formalists attempt to resolve disputes by defining the terms of legal rules so as to

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11 *Id.* at 80.
12 *Id.* at 87.
14 *Id.* at 1555.
15 *Id.* at 1565.
17 *Id.* at 71.
18 *Id.* at 86.
19 As Frederick Schauer explained:
include or exclude the facts of the case at hand. Formalist arguments are deductive in nature, and conform to the structure of a syllogism of deductive logic: the rule of law is the major premise, the facts of the case are the minor premise, and the legal result is the conclusion. 20

Most formalists favor textual forms of analysis, and rely particularly upon the “plain meaning” of the words of the legal text. 21 This method of analysis aspires to discover an objective definition of the text. But formalism is not limited to textualism. Specific rules may be derived from examination of legislative intent, 22 from specific traditions, 23 and even from policy arguments. 24

“With accelerating frequency, legal decisions and theories are condemned as ‘formalist’ or ‘formalistic.’ But what is formalism, and what is so bad about it? … At the heart of the word ‘formalism,’ in many of its numerous uses, lies the concept of decisionmaking according to rule. … [I]nsofar as formalism is frequently condemned as excessive reliance on the language of a rule, it is the very idea of decisionmaking by rule that is being condemned ….” Frederick Schauer, Formalism, 97 YALE L.J. 509-510 (1988).

20 Hence, Wellman’s and Warner’s description of this type of reasoning as “deductive,” and Posner’s use of the term “syllogistic.” See also Syllogistic Reasoning, supra note 8, at __.

21 Judge Patricia Wald, who is not a formalist, offers the following description of the plain meaning rule: “The Plain Meaning Rule basically articulates a hierarchy of sources from which to divine legislative intent. Text comes first, and if it is clearly dispositive, then the inquiry is at an end.” Patricia M. Wald, The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court, 39 AM. U. L. REV. 277, 285 (1990). In addition to “plain meaning,” the two other textual methods of legal analysis utilize “intratextualism” and “canons of construction.” See Wilson Huhn, Teaching Legal Analysis Using A Pluralistic Model of Law, 36 GONZAGA L. REV. 433, 442 (2000-2001) (hereinafter Pluralistic Model).

22 In Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989), for example, even though the Supreme Court rejected a “plain meaning” approach to interpreting Evidence Rule 609, the court nevertheless arrived at a specific understanding of the meaning of the rule based upon an exhaustive examination of its legislative history. Id. at 509, 515-524.

23 Business traditions (trade usage) frequently define what is permissible under the Uniform Commercial Code. For example, in considering whether a note with variable interest qualifies as a negotiable instrument, one judge argued:

Instruments providing that loan interest may be adjusted over the life of the loan routinely pass with increasing frequency in this state and many others as negotiable instruments. This court should recognize this custom and usage, as the commercial market has, and hold these instruments to be
The leading judicial advocate of formalism in American jurisprudence is United States Supreme Court Justice Antonin Scalia. In *The Rule of Law as a Law of Rules*, Scalia argues that the doctrine of popular sovereignty dictates a formalist approach to legal reasoning, and he offers four reasons why rules should be preferred to standards.

24 For example, in *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court utilized policy analysis to develop a relatively specific timetable limiting the scope of governmental regulation that is constitutionally permissible during each trimester of a woman’s pregnancy. *Id.* at 163-164.

25 William Eskridge has described Justice Scalia as the leader of a school of jurisprudence which favors “an uncompromising application of statutory plain meaning,” that Eskridge calls “the new textualism.” William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. Chi. L. Rev. 671 (1999). For example, Justice Scalia has suggested that in interpreting a federal statute the intent of Congress “is best sought by examining the language that Congress used.” *Moskal v. United States*, 498 U.S. 103, 130 (Scalia, J. dissenting).


27 To make this point Scalia invokes the image of good King Louis IX, listening to litigants and rendering justice under an oak tree. *Id.* at 1175-1176. He then contrasts Louis’ general dispensation of justice with the clarion call of Tom Paine: “For as in absolute governments the king is law, so in free countries the law ought to be king.” *Id.* at 1176. Justice Scalia also quotes Aristotle in support of the proposition that laws should be as specific as possible:

>> Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.

*Id.*, quoting THE POLITICS OF ARISTOTLE, book III, ch xi, § 19 at 127 (Ernest Barker, trans., Oxford, 1946). James Wilson, on the other hand, has observed that Aristotle also advocated equitable justice:

>> Equity must be applied to forgivable actions. Equity bids us to be merciful to the weakness of human nature.

He states that when a legal standard leaves “a good deal of judgment to be applied,” 28 equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; [and] judicial courage is impaired. 29

This devotion to formalism is the hallmark of Justice Scalia’s jurisprudence. Scalia interprets the plain meaning of text, 30 sometimes with the aid of a dictionary, 31 and he rejects legislative history as a tool of interpretation. 32 Similarly, in construing our constitutional tradition, Scalia embraces the narrowest possible reading of our traditions, rejecting broad statements of principle. 33 He captured the essence of his jurisprudential position in this aphorism: “A rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.” 34

One step removed from formalism is reasoning by analogy.

*Reasoning by Analogy*

Formalism, in law, is to apply a rule of law to a case because the facts of the case are the *same* as the terms of the rule. Reasoning by analogy, in contrast, is the

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28 Scalia, *supra* note 6, at 1182.

29 Id.

30 Justice Scalia describes himself as “[o]ne who finds more often ... that the meaning of a statute is apparent from its text....” Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 Duke L. J. 511, 521 (1989)(hereinafter *Judicial Deference*).


32 See Antionin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 29 (1997). Justice Scalia maintains that legislative history “is much more likely to produce a false or contrived legislative intent than a real one.” *Id.* at 32. He has observed that “to tell the truth, the quest for the ‘genuine’ legislative intent is probably a wild-goose chase anyway.” Scalia, *Judicial Deference, supra* note 29, at 517.


34 *Id.*
application of a rule of law to a case because the facts of the case are similar to the terms of the rule. While formalism is scientific and grounded in logic,\textsuperscript{35} analogical reasoning is an art that is grounded in rhetoric.\textsuperscript{36}

Reasoning by analogy is most closely associated with the invocation of precedent, but it is by no means limited to that modality. Courts frequently invoke statutory analogies, and scholars have studied their powerful impact.\textsuperscript{37}

The leading American authority on analogical reasoning was Edward Levi, who served as Attorney General of the United States and Dean of the Chicago Law School. In the following much-cited passage from \textit{An Introduction to Legal Reasoning},\textsuperscript{38} Levi described the process of analogical reasoning:

The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.\textsuperscript{39}

Over the past decade analogical reasoning has received much attention from legal scholars. In particular, Cass Sunstein,\textsuperscript{40} Scott Brewer,\textsuperscript{41} Emily Sherwin,\textsuperscript{42} and Todd

\textsuperscript{35} \textit{See Syllogistic Reasoning, supra} note 8, at ___.

\textsuperscript{36} “[A]nalogical reasoning is an unscientific practice with imperfect results.” \textcite{Sherwin, 66 U. CHI. L. REV. 1179 (1999)}.


\textsuperscript{38} Larry Alexander refers to this as a “classic” work on legal reasoning. \textcite{Alexander, 73 NOTRE DAME L. REV. 517, 523 (1998)}.

\textsuperscript{39} \textit{EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING} 1-2 (1948).


\textsuperscript{41} Brewer describes two schools of thought regarding reasoning by analogy, which he calls “mystics” and “skeptics”: Theories of analogy differ from each other in the degree of rational force they attribute to analogical argument. In one group are the ‘mystics,’ who
Brower have made important contributions to our understanding of reasoning by analogy. Describing the advantages of reasoning by analogy, Sunstein observes that “analogical reasoning introduces a degree of stability and predictability.” Emily Sherwin identifies a number of other benefits of reasoning by analogy:

In my view, the virtue of analogical reasoning lies in a variety of indirect benefits that are likely to result when judges adopt it as a practice and consider themselves obliged to explain new decisions in terms of their relation to past cases. First, a diligent process of studying and comparing prior decisions produces a wealth of data for decisionmaking. Second, the rules and principles that result from analogical reasoning represent the collaborative efforts of a number of judges over time. Third, analogical reasoning tends to correct biases that might otherwise lead judges to discount the likelihood or importance of reliance on prior decisions. Fourth, analogical reasoning exerts a conservative force on law: by holding the development of law to a gradual pace, it limits the scope of error and contributes to public acceptance of law as a standard of conduct.

But there is a powerful dissenting voice, that of Larry Alexander. In The Banality

place a high degree of confidence in analogical argument even though they neither have nor feel the need for an explanation of its characteristic concepts of ‘relevance’ and ‘similarity.’ In the other group are the ‘skeptics,’ who have rather less confidence in the rational force of analogical argument.


See Sherwin, supra note 35.


Sherwin, supra note 35, at 1186.
Alexander states generally that there is nothing special about legal reasoning to distinguish it from reasoning used in other settings or vocations, and in particular that lawyers do not reason by analogy: “There is no additional kind of reasoning – for example, “analogical reasoning” – that lawyers employ.”

Alexander’s principal contention is that reasoning by analogy boils down to either formalism or realism, and that analogical reasoning therefore should not be treated as a separate category. I disagree. While there is wide agreement that analogical reasoning can be either formalistic or realistic, this does not necessarily mean that there is nothing special about reasoning by analogy. In contrast, I contend that this is precisely what is special about analogical reasoning. Analogy is the link between formalism and realism.

To reason by analogy is to find similarities between the situation at hand and other known situations. In law, the most common form of analogical reasoning is the use

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46 Alexander, supra note 37.

47 Alexander states:
My intention is ... to clear away the mysticism and mumbo jumbo that is usually associated with ‘thinking like a lawyer’ and to claim that thinking like a lawyer is just ordinary forms of thinking clearly and well. More precisely, thinking like a lawyer boils down to moral reasoning, empirical reasoning, and deductive reasoning, and lawyers reason in these ways exactly as everyone else does. There is no additional form of reasoning, special to them, in which lawyers engage. Law schools are well-equipped to teach students how to think like lawyers; but because moral, empirical, and deductive reasoning are taught or refined in other venues, law schools have no monopoly.

*Id.* at 517.

48 *Id.* at 518. See also Sunstein, supra note 39, at 741 fn. 2 (listing a number of other authorities critical of analogical reasoning).

49 Alexander observes:
There are big stakes riding on the success of some defense of ARIL [analogical reasoning in law] as something other than either deduction from rules or RE [reflective equilibrium]. The autonomy of legal reasoning – and with it, the autonomy of law as a discipline – resets on such a defense of ARIL. Sunstein, I believe, has failed to provide such a defense. Given his formidable talent, Sunstein’s failure should give backers of law’s autonomy cause for worry.


50 See infra notes 51-52 and accompanying text.
of precedent. In common law jurisprudential systems like ours court decisions are recognized as a valid source of law.\textsuperscript{51} When a previously decided case is discovered that is “on point,” the rule of the previous case governs the case to be decided. Not infrequently the previous case is not precisely on point with the case to be decided. In this circumstance the court must decide whether the previous case is sufficiently analogous for its rule to govern the case to be decided. It also frequently happens that there is more than one case that arguably applies to the case at hand. In that circumstance courts that reason by analogy must determine which of the previous cases is most similar to the case to be decided.

Several scholars have noted that analogies may be either formalistic or realistic. A formalist analogy is one based upon the similarities between the facts of the cited case and the facts of the case under consideration.\textsuperscript{52} A realist analogy is based upon the similarities between the values served by the rule of law from the cited case and the values that are at stake in the case at hand.\textsuperscript{53} Part III of this article explores the difference

\textsuperscript{51} Lord Chief Justices Edward Coke and Matthew Hale have been credited with investing precedent with the force of law. See Harold J. Berman and Charles J. Reid, Jr.,\textit{ The Transformation of English Legal Science: From Hale to Blackstone}, 45 EMORY L. J. 437, 446-449 (1996).

\textsuperscript{52} Sunstein cites the inherent weakness of purely factual analogies: Formalist analogical thinking is no better than any other kind of bad formalism. Different factual situations are inarticulate; they do not impose order on themselves. Patterns are made, not simply found. Whether one case is analogous to another depends on substantive ideas that must be justified. Sunstein, \textit{supra} note 39, at 756-757 (citing Holmes’ “notorious” opinion in \textit{Buck v. Bell} as an example of bad formalist analogy).

\textsuperscript{53} As one realist explained:
The choice which a judge makes of one analogy rather than another is an expression of ... a value-judgment; and the possibility of competing analogies therefore arises not merely or so much out of the doubtfulness of the factual resemblances among his materials, but rather out of the possibility of differences of opinion as to the comparative value of the different results which one analogy or the other would bring about. John Dickinson, \textit{The Law Behind Law II}, 29 COLUM. L. REV. 285, 289-290 (1929). See also Alexander, \textit{The Banality of Legal Reasoning}, \textit{supra} note 37, at 530, stating that it is the “principle immanent in [past] decisions [that] is the gauge of relevant ‘likeness’ and ‘unlikeness’ in analogical reasoning from the cases.” Richard Warner states, “The salient difference between \textit{Columbia} and \textit{Southern Concrete} is that, in the latter, the two companies had never dealt with each other before. Is this a relevant difference? Courts answer such questions by appeal to the legitimate goals and purposes of the law.” Warner, \textit{supra} note 13, at 1539-1540.
between formalist and realist analogies, and demonstrates how reasoning by analogy serves as a bridge between formalism and realism.

**Realism**

Legal realism, also called policy analysis\(^54\) or practical reasoning,\(^55\) emerged from the British school of utilitarianism and the American philosophy of pragmatism.\(^56\) It is an ends-means analysis that entails a judicial balancing of the costs and benefits of a legal outcome. Legal realism is a method of legal reasoning that determines what the law is not by invoking categorical legal principles, but rather by considering the law’s probable consequences.\(^57\) Law should be interpreted not by consulting a dictionary, but by inquiring into the underlying purposes of the law.\(^58\) The courts should not seek a literal

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57 In distinguishing analogical reasoning from realist analysis, Sunstein notes, “One cannot discover consequences by examining other judicial holdings.” Sunstein, *supra* note 39, at 787.

58 The principle that statutes should be interpreted in light of their legislative purpose, is centuries old. In Heydon’s Case, 76 Eng. Rep. 637, 638 (1584), Lord Chief Justice Coke advised judges to take the following factors into account in the interpretation of statutes:  
1st. What was the common law before the making of the act.  
2nd. What was the mischief and defect for which the common law did not provide.  
3d. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.  
And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add
definition of the terms of the law, but should rather seek to fulfill the values that the law is intended to serve.

The guiding principle of legal realism was expressed by this nation’s most eloquent jurist, Supreme Court Justice Benjamin Cardozo, who observed:

The final cause of law is the welfare of society. The rule that missing its aim cannot permanently justify its existence. ... Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all.59

As noted above, when there are two existing rules of law that arguably apply by analogy to the present case, legal realists choose between them by determining which rule better achieves the underlying purposes of the law in the present case.60 This is realistic analogical reasoning. But what if neither of the existing rules precisely serves the values that are at stake in the case under consideration? In these circumstances it is necessary to construct a new rule of law, taking into account all of the values and interests that will be affected by the new rule. Legal realism is the identification, interpretation and creation of rules of law in light of the intended purposes, underlying values, and likely consequences of the law.

Richard Posner observes that people differ as to what the purposes, values, and consequences of the law are, particularly in Constitutional Law, where the fundamental human rights are at stake:

When you think of all those constitutional theories jostling one another — Epstein’s that would repeal the New Deal, Ackerman’s and Sunstein’s that would constitutionalize it, Michelman’s that would constitutionalize the platform of the Democratic Party, Tushnet’s that would make the Constitution a charter of socialism, Ely’s that would resurrect Earl Warren, and some that would mold constitutional law to the Thomists’ version of natural law — you see the range of choice that the approach legitimizes and, as a result, the instability of constitutional doctrine that it portends.61

force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.


60 See supra note 53 and accompanying text.

Thus, legal realism is an analytic tool that can be wielded in service of any ideology.62

Policy analysis comprises a number of subsidiary skills. First, one must imagine the hypothetical consequences of interpreting the law one way or another. Second, one must identify the interest or abstract principle that a rule serves. Third, one must evaluate the weight of that interest or principle. Fourth, one must estimate the likelihood that the rule will accomplish its goal and serve this interest or principle. Finally, one must simultaneously balance the weight and likelihood of all of the competing interests and principles.63 All of these tasks require the skills that are developed at later stages of cognitive and moral development.

The following portion of this article describes three theories of human development that shed light upon the stages of legal reasoning.

B. The Developmental Theories of James Mark Baldwin, Jean Piaget, and Lawrence Kohlberg

In support of the thesis that formalism, analogy, and realism are stages of legal analysis I draw upon three influential theories of human development: James Mark Baldwin’s theory of assimilation and accommodation, Jean Piaget’s stages of intellectual development, and Laurence Kohlberg’s model of moral development.

James Mark Baldwin

James Mark Baldwin was a student of the neo-Darwinian G. Stanley Hall, a founder of modern psychology who had embraced Haeckel’s theory that “ontogeny

62 This is consistent with the neo-Kohlbergian view that postconventional thought “is not defined in terms of any single moral philosophy.” JAMES REST, DARCIA NARVAEZ, MUIREL L. BEBEAU, AND STEPHEN J. THOMA, POSTCONVENTIONAL MORAL THINKING 40 (1999).

63 These skills correspond to the five questions I teach students to ask when attacking policy arguments:
   1. Is the factual prediction accurate?
   2. Is the value at stake one of the purposes of the law?
   3. Is the value at stake sufficiently strong?
   4. How likely is it that the decision in this case will serve this value?
   5. Are there other, competing values that are also at stake?
HUHN, supra note 56, at 131.
Like Hall, Baldwin compared the progress of the individual to the advancement of the human race, and he described this progress as the successive adoption of “new modes of accommodation”:

Here are two great movements, one that of the individual growing constantly more competent to understand himself and to communicate what he understands; and here is society, made up of a series of generations of individuals, doing precisely the same thing and doing it upon precisely the same mass of materials. It is on the surface likely that the series of critical periods in both, marked by new modes of accommodation and due to new crises of a natural, moral, and political sort, would show a general serial correspondence.

In 1894 Baldwin articulated the first theory of intellectual development. The

See A Brief Biological Sketch of G. Stanley Hall, www.ithaca.edu/bein/gsh/gsh_bio, accessed 6/30/02; and ROBBIE CASE, INTELLECTUAL DEVELOPMENT: BIRTH TO ADULTHOOD 9 (1985).

JAMES MARK BALDWIN, HISTORY AND PSYCHOLOGY: A SKETCH AND AN INTERPRETATION (1913), (from Christopher E. Green, Classics in the History of Psychology, psychclassics.yorku.ca/Baldwin/History/chap1-1, accessed 2/2/02). Here is how Baldwin explained his theory of “genetic development:”

To investigate the child by scientific methods is really to bring into psychology a procedure which has revolutionized the natural sciences; and it is destined to revolutionize the moral sciences by making them also in a great measure natural sciences. The new and important question about the mind which is thus recognized is this: How did it grow? What light upon its activity and nature can we get from a positive knowledge of its early stages and processes of growth? This at once introduces other questions: how is the growth of the child related to that of the animals? – how, through heredity and social influences, to the growth of the race and of the family and society in which he is brought up? All this can be comprehended only in the light of the doctrine of evolution, which has rejuvenated the sciences of life; and we are now beginning to see a rejuvenation of the sciences of mind from the same point of view. This is what is meant when we hear it said that psychology is becoming “genetic.”


CASE, supra note 64. “Baldwin … discerned a prelogical phase (based on imagination and memory), a logical phase (based on reasoning; concurrent with language acquisition), and a hyperlogical phase (based on flexible processes of problem solving transcending syllogistic reasoning) in the development of the child’s mind.” 1 ENCYCLOPEDIA OF PSYCHOLOGY 363 (Alan E. Kazdin, ed. 2000).
heart of Baldwin’s theory was that people respond to their environment in two fundamental ways, by means of “assimilation” and “accommodation.” Assimilation is the individual’s habitual use of a behavioral or mental structure (a “schema”) in response to external stimuli. Baldwin suggested that a person assimilates and responds to familiar stimuli just as the body assimilates food. For Baldwin, the process of assimilation explains habit formation, but it was inadequate to explain human development.

Baldwin proposed a second process by means of which the individual adapts to unfamiliar stimuli, a process that he called “accommodation.”

Accommodation is the adjustment of our behavioral and mental schemas in response to new stimuli. Baldwin’s conception of the process of accommodation has been described as follows:

First, the infant assimilates a new situation to an already existing schema. Second, it discovers that this assimilation is not successful. At this point it experiences conflict, and activates whatever other schemas or components of schemas seem of possible relevance. Finally, these schemas are coordinated into a higher order schema. The new schema is then applied, and the process of habit formation begins anew.

I propose that Baldwin’s theory of “assimilation and accommodation” helps to explain the progression of legal reasoning from formalism, to analogy, to realism in hard cases.

Jean Piaget

The Swiss psychologist Jean Piaget is the dominant figure in the field of developmental psychology. He was trained in zoology and epistemology, and in the

67 CASE, supra note 64, at 10.
68 Id.
69 Id.
70 Id.
71 Id.
72 Id.
73 “Developmental psychology owes a great debt to a Swiss thinker named Jean Piaget. Without his contributions, it is fair to say that the discipline would not exist.” Robert L. Campbell, Jean Piaget’s Genetic Epistemology: Appreciation and Critique, hubcap.Clemson.edu/~campber/piaget (accessed 2/2/02).
work for which he is famous he established a link between these fields by creating a stage theory of cognitive development. He also initiated the study of the moral development in children.

Piaget built upon Baldwin’s theories. In particular, Piaget employed Baldwin’s notions of assimilation and accommodation. Piaget’s understanding of those concepts has been described in the following terms:

Assimilation involves the person’s dealing with the environment in terms of his structures, while accommodation involves the transformation of his structures in response to the environment.

Piaget utilized interviews with children to discover their cognitive patterns. Over a period of decades Piaget presented children with a variety of questions, problems and tasks, and observed the strategies that they used to answer the questions, solve the problems, or perform the tasks. Piaget concluded, like Baldwin, that children first attempt to assimilate new stimuli to existing mental structures, and that if this is unsuccessful, children accommodate their mental structures to take account of the new information. Piaget observed that people’s intellectual strategies progress in well-defined steps, and he proposed the following system of cognitive stages:

1. Sensorimotor Period (approximately birth to two years old)
2. Preoperational Period (approximately two to seven years old)

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74 Id. See 6 ENCYCLOPEDIA OF PSYCHOLOGY 193 (Alan E. Kazdin, ed. 2000).


76 CASE, supra note 64, at 13. When James Mark Baldwin lived in Paris, he was “in contact with the young Jean Piaget, whom he strongly influenced.” 1 ENCYCLOPEDIA OF PSYCHOLOGY 303-304 (Alan E. Kazdin, ed. 2000).

77 HERBERT GINSBERG AND SYLVIA OPPER, PIAGET’S THEORY OF INTELLECTUAL DEVELOPMENT 17-18 (1979).

78 Id. at 19.

79 In the sensorimotor period the child “learns how to modify reflexes to make them more adaptive, to coordinate actions, to retrieve hidden objects, and, eventually, to begin representing information mentally.” Development of Intelligence: Jean Piaget’s Work, Encyclopaedia Britannica, www.britannica.com/eb/article?eu=109299tocid=13349 (accessed 5/31/01).
3. Concrete Operational Period (approximately seven to twelve years old)\textsuperscript{81}

4. Formal Operational Period (after approximately twelve years old)\textsuperscript{82}

Piaget observed that as people mature, their reasoning evolves in a number of fundamental yet related ways. First, he discovered that people only gradually acquire the ability to consider more than one aspect of a problem at a time.\textsuperscript{83} As they master concrete operations children develop the ability to manipulate a number of physical or

\textsuperscript{80} During the preoperational period the child “experiences the growth of language and mental imagery and learns to focus on single perceptual dimensions, such as colour and size.” \textit{Id.}

\textsuperscript{81} During the period of concrete operations the child “develops an important set of skills referred to as conservation skills.” \textit{Id.}

\textsuperscript{82} In the period of formal operations the adolescent “develops thinking skills in all logical combinations and learns to think with abstract concepts.” \textit{Id.}

\textsuperscript{83} Ginsberg and Opper note:
Piaget’s studies of reasoning find that the child has a tendency to group together various different events into a loose and confused whole (syncretism); that he sometimes fails to see the relations among separate events (juxtaposition); that he fails to understand ordinal relations; and that he cannot deal with the relations between a part and the whole of which it is a member. All of these types of reasoning reveal a common deficiency: an inability to think simultaneously about several aspects of a situation.

\textsc{Ginsberg & Opper, supra} note 77, at 109. Describing a preoperational child (approximately four to seven years old):
The child tends to focus on a limited amount of the information available. In the conservation of continuous quantity, the child judges two amounts equal when the heights of the columns of liquid are the same and ignores another relevant variable, the density. In the conservation of continuous quantity, the child judges two amounts equal when the heights of the columns of liquid are the same and ignores the width. In the construction of ordinal relations (the problem of ordering ten sticks in terms of height), he succeeds only by considering the tops of the sticks and ignoring the bottoms, or vice versa. In all these problems, the preoperational child deploys his attention in overly limited ways. He focuses on one dimension of a situation, fails to make use of another, equally relevant dimension, and therefore cannot appreciate the relations between the two.

\textit{Id.} at 153.
factual variables simultaneously.\(^{84}\)

Second, Piaget found that younger children lack certain mental operations that would enable them to understand the world in a more comprehensive fashion. At earlier stages children equate changes in appearance with essential changes,\(^{85}\) they fail to anticipate that certain operations may be reversed,\(^{86}\) and they do not understand that certain relations are reciprocal.\(^{87}\) Children slowly acquire these related concepts of conservation, reversibility, and reciprocity.\(^{88}\)

Third, Piaget confirmed that people only gradually develop the ability to engage in abstract reasoning. Children understand the world in immediate and concrete terms, while adolescents acquire the ability to consider abstract ideas. “Whereas earlier the adolescent could love his mother or hate a peer, now he can love freedom or hate exploitation.”\(^{89}\) This marks the transition from concrete operations to formal operations.

Fourth, Piaget found that at the level of formal operations children learn the concepts of conservation and reversibility and reciprocity in the manipulation of abstract ideas just as they had earlier learned these skills in the manipulation of physical objects.\(^{90}\) The acquisition of these skills makes it possible to consider hypothetical situations. Just as younger children learn to physically manipulate concrete objects, older children learn to manipulate mental images to consider what is possible:

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\(^{84}\) In contrast to younger children, a child who has mastered concrete operations “tends to focus on several dimensions of a problem simultaneously and to relate these dimensions.” Id.

\(^{85}\) For example, younger children believe that changing the shape of an object makes “more” or “less” of it, because they have not yet acquired the concept of “conservation.” Id.

\(^{86}\) Reversibility of an operation is illustrated by the discovery that a narrow, tall container may contain the same amount of liquid as a short, wide one: “By carrying out the action mentally, that is, by reversing the pouring in his mind, he is able to ascertain that the quantity of water in C (the lower wider glass) is the same as in B.” Id. at 154.

\(^{87}\) An example of a reciprocal relation would be the relation between the height and weight of containers of liquid described in the previous footnote.

\(^{88}\) A child who has mastered concrete operations “focuses on several aspects of a situation simultaneously, is sensitive to transformations, and can reverse the direction of thought.” Id. at 155.

\(^{89}\) Id. at 201.

\(^{90}\)
In the stage of formal thought, the adolescent develops the ability to imagine the possibilities inherent in a situation. Before acting on a problem which confronts him, the adolescent analyzes it and attempts to develop hypotheses concerning what might occur. These hypotheses are numerous and complex because the adolescent takes into account all possible combinations of eventualities in an exhaustive way.  

Fifth, Piaget discovered that children grow in their ability to understand and apply rules. He investigated this by observing how children played the game of marbles. He found that young children had idiosyncratic understandings of the rules of the game of marbles, frequently differing from those of their playmates. He also discovered, paradoxically, that young children believe that the rules of a game are absolute and inviolate. In contrast, by the age of 10 to 12, children not only understand and obey the standard rules of the game, they also understand that the rules can be changed, and they take pleasure in elaborating upon the rules to cover various contingencies. The following story illustrates in colorful fashion the “legalistic tendencies” of children at the stage of concrete operations:

Piaget tells a delightful anecdote about the legalistic tendencies of this stage. He observed a group of boys aged 10 and 11 who were preparing to have a snowball fight. Before getting on with it, they devoted a considerable amount of time to dividing themselves into teams, electing officers, devising an elaborate set of rules to regulate the throwing of snowballs, and deciding on a system of punishments for transgressors. Before they had actually settled on all these legalistic aspects of the game, it was time to return home, and no snowball game had been played. Yet, all the players seemed content with their afternoon.

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91 Id. at 204.
92 Id. at 96.
93 Id. at 97.
94 Id. at 99.
95 Id. at 98-99. Carol Gilligan has observed that girls in general care less about the rules themselves than boys do. One pair of legal scholars drew these conclusions from Gilligan’s findings:

[B]oys’ games appeared to last longer not only because they required a higher degree of skill and were thus less likely to become boring, but also because, when disputes arose in the course of a game, boys were able to resolve the disputes more effectively than girls. . . . In fact, it seemed that the boys enjoyed the legal debates as much as they did the game itself. Perhaps then, the traditionally male-dominated legal profession, which is
Thus, by the end of the period of concrete operations, children have acquired the ability to create and interpret rules in concrete settings.6

Sixth, followers of Piaget have also closely studied the development of the individual’s cognitive ability to draw analogies, and discovered that a fundamental change occurs as the child moves from concrete to formal operations. Researchers found that by age 9 or 10, in the later stages of concrete operations, at about the same age that they master rules, children are capable of identifying analogies using concrete nouns, by nature a dispute-resolving discipline, became male-dominated out of primitive man’s ability to effectively resolve the earliest playground disputes over the last drumstick from Tyrannosaurus Rex.

But while males seem to demonstrate a talent for confrontation and debate, girls, as Gilligan observed, tend to be more pragmatic toward the rules of the game. For while males tend throughout childhood to become “increasingly fascinated with legal elaboration of rules and the development of fair procedures for adjudicating conflicts, [that fascination] does not hold for girls.” Girls regarded rules as good as long as the rule compensated completely for any harm that may have been done by the rule’s violation. Generally, the girls observed were more tolerant about violations of the rules, more willing to make exceptions, more easily reconciled to changes in the game, and more likely to resolve conflicts creatively. Gilligan’s thesis is that care and relationships are largely overlooked by the judicial system’s current methods of analyzing moral dilemmas. But “while they are used by both men and women, women focus on care and relationships considerably more than men do.”


66 One authority notes:
[A]s he grows older the child evolves from a position of submission to adults to one of equality. He is also confronted with beliefs contradictory to those he has been taught. Both of these experiences influence the child to see rules as having a human, and hence fallible, origin, and to agree to participate in their formation and alteration. Since the child now has a hand in the formation of rules, they no longer exist as a foreign entity imposed on his conscience; they no longer exist as a code which may be unquestionably respected, occasionally obeyed, and seldom understood. The child now chooses to follow rules which are his own or at least freely agreed upon.

GINSBERG & OPPER, supra note 77, at 101-102.
verbs, and adjectives. For example, children at this level can complete the following analogies:

1. Black is to white as hard is to ______ (steel, stone, solid, soft, or blue).
2. ________ is to see as knife is to cut (fork, eye, look, shape, or blue).
3. Ink is to pen as paint is to ________ (color, spray, brush, or paper).

But by age 11 or 12 there appears a qualitative shift in children’s ability to draw analogies, in that children acquire the ability to identify abstract relations between concrete terms, as in the following problem:

4. Food is to body as water is to ______ (storm, coat, or ground).

Between the ages of 13 to 15, children acquire the additional ability to solve analogies that involve abstract relationships between abstract entities:

5. Task is to ____________ as problem is to solution (attempt, completion, work, end, or question).

In summary, Piaget and other developmental psychologists have discovered that as individuals master concrete operations, they acquire the concepts of conservation, reversibility, and reciprocity in concrete terms; they develop the ability to follow and formulate rules; they acquire the ability to draw concrete analogies; and they learn to manipulate a number of physical or factual variables simultaneously. As individuals make the transition to formal operations, they become capable of applying the concepts of conservation, reversibility and reciprocity to abstract concepts; they learn to draw analogies involving abstract concepts and relations; they become capable of contemplating hypothetical situations; and they learn to manipulate a number of abstract concepts simultaneously. The transition from concrete operations to formal operations in cognitive reasoning corresponds to the transition from formalism to realism in legal reasoning.

Lawrence Kohlberg

Lawrence Kohlberg, who was a leading figure in the field of the psychology of

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97 CASE, supra note 64, at 217.
98 Id.
99 Id. at 218.
100 Id. at 220.
101 Id. at 221.
moral development. He applied and extended Piaget’s theories in an effort to measure people’s ability to engage in moral reasoning. He adopted Piaget’s research methods by constructing a series of hypothetical moral dilemmas and presenting them to research subjects during interviews. For example, Kohlberg asked his subjects whether a man should steal a drug to save his wife’s life, or whether an older brother should tell his father about a younger brother’s disobedience that was revealed in confidence. Kohlberg categorized and evaluated the type of reasoning the subjects employed to answer these and other moral dilemmas.

Kohlberg concluded that moral reasoning, like cognitive reasoning, could be described as moving through stages of development. Kohlberg found that people solve moral problems by utilizing relatively consistent standard patterns of reasoning, and that an individual’s pattern of moral reasoning progresses through stages that are analogous to, although lagging slightly behind, Piaget’s stages of cognitive development.


Kohlberg’s model has been applied to other fields as well. Kohlberg and others used the theory to design educational programs to stimulate moral development. See F. CLARK POWER, ANN HIGGINS, & LAWRENCE KOHLBERG, LAWRENCE KOHLBERG’S APPROACH TO MORAL EDUCATION (1989). The model has also been utilized by political scientists to account for differences in political belief. See Joseph Wagner, Political Tolerance and Stages of Moral Development: A Conceptual and Empirical Alternative in POLITICAL BEHAVIOR (1986) (correlating moral stage with political tolerance) and Paul Sparks and Kevin Durkin, Moral Reasoning and Political Orientation: The Context Sensitivity of Individual Rights and Democratic Principles, 52 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 931 (1987) (correlating moral stage and political orientation).

Currently, psychologists are considering a competing theory of “information processing” to explain moral functioning. Recent studies explore the effects of deficits in information processing on aspects of behavior such as lack of empathy or aggressiveness. See e.g. Laura A. Thompson, Mohammad R. Aidinejad, Janisse Ponte, Aging and the Effects of Facial and Prosodic Cues on Emotional Intensity Ratings and Memory Reconstructions, 25 J. NONVERBAL BEHAV. 101125 (July 1, 2001); and Ersilia Menesini, Elena Melan, & Barbara Pignatti, Interactional Styles of Bullies and Victims Observed in a Competitive and a Cooperative Setting, 161 J. GENETIC PSYCHOL. 261281 (Sept. 1, 2000).
In addition, Kohlberg, like Piaget, utilized Baldwin’s principles of “assimilation” and “accommodation” to describe people’s reactions to moral problems and to explain their progression from one stage to another. Individuals tend to assimilate moral problems by invoking the schema that is characteristic of their present stage of development. If that schema is inadequate to successfully resolve the moral problem, the individual is influenced to accommodate his or her pattern of moral reasoning.

Based upon his research, Kohlberg identified three levels of moral development, each of which consists of two stages:

Preconventional Level
At this level, the child is responsive to cultural rules and labels of good and bad, right or wrong, but interprets these labels in terms of either the physical or the hedonistic consequences of action (punishment, reward, exchange of favors) or in terms of the physical power of those who enunciate the rules and labels.
Stage 1. The Punishment and Obedience Orientation
Stage 2. The Instrumental Relativist Orientation

Conventional Level
At this level, maintaining the expectations of the individual’s family, group, or nation is perceived as valuable in its own right, regardless of immediate and obvious consequences. The attitude is not only one of conformity to personal expectations and social order, but of loyalty to it, of actively maintaining supporting, and justifying the order and of identifying with the people or group involved in it.
Stage 3. The Interpersonal Concordance or “Good Boy – Nice Girl” Orientation
Stage 4 – Society Maintaining Orientation

Postconventional Level
At this level, there is a clear effort to define moral values and principles that have validity and application apart from the authority of the groups or people holding these principles and apart from the individual’s own identification with these groups.


104 See Kenneth E. Goodpaster, Kohlbergian Theory: A Philosophical Counterinvention, 92 Ethics 491, 494 (1982).

105 See Rich & DeVitis, supra note 103.

106 Id.
Stage 5 – The Social Contract Orientation
Stage 6 – The Universal Ethical Principle Orientation

Preconventional thought is essentially egocentric. Right and wrong are defined by the immediate consequences that will result from the individual’s behavior. At Stage 1 of an individual’s development, a person’s concern is with reward and punishment. In response to the question about whether an older brother should tell his father about a

107 LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT 17-18 (1981) (omitting the detailed description of each stage). A more recent description by Kohlberg of each of the six stages of development is set forth below:

Level 1 – Preconventional
Stage 1 – Heteronomous Morality – Avoidance of punishment, and the superior power of authorities.
Stage 2 – Individualism, Instrumental Purpose, and Exchange – To serve one’s own needs or interests in a world where you have to recognize that other people have interests, too.

Level 2 – Conventional
Stage 3 – Mutual Interpersonal Expectations, Relationships, and Interpersonal Conformity – The need to be a good person in your own eyes and those of others. Your caring for others. Belief in the Golden Rule. Desire to maintain rules and authority which support stereotypical good behavior.
Stage 4 – Social System and Conscience – To keep the institution going as a whole, to avoid the breakdown in the system “if everyone did it,” or the imperative of conscience to meet one’s defined obligations.

Level 3 – Postconventional
Stage 5 – Social Contract or Utility and Individual Rights – A sense of obligation to law because on one’s social contract to make and abide by laws for the welfare of all and for the protection of all people’s rights. A feeling of contractual commitment, freely entered upon, to family, friendship, trust, and work obligations. Concern that laws and duties be based on rational calculation of overall utility, “the greatest good for the greatest number.”
Stage 6 – Universal Ethical Principles – The belief as a rational person in the validity of universal moral principles, and a sense of personal commitment to them.

younger brother’s disobedience that was revealed in confidence, a ten-year old child stated:

In one way it was right to tell because his father might beat him up. In another way it’s wrong because his brother will beat him up if he tells.\(^\text{108}\)

Three years later, however, at Stage 2, the same child offered a slightly more complex answer that took into account the possibility that the brothers might agree to keep each other’s secrets:

The brother should not tell or he’ll get his brother in trouble. If he wants his brother to keep quiet for him sometime, he’d better not squeal now.\(^\text{109}\)

As the child moves from the preconventional to the conventional level, the child’s conception of morality evolves from commitment to a “deal” to a sense of “duty.” This sense of duty may run to family and friends or to society as a whole. At Stage 3, the first stage of conventional thought, the individual is principally concerned with how his family would feel towards him, and how their feelings would make him feel. This is the classic “good boy” or “nice girl” approach:

He should think of his brother, but it’s more important to be a good son. Your father has done so much for you. I’d have a conscience if I didn’t tell, more than to my brother, because my father couldn’t trust me. My brother would understand; our father has done so much for him, too.\(^\text{110}\)

At Stage 4, the individual’s reasoning is still conventional, but the subject’s sense of duty is not limited to the family or immediate peer group. Instead, the person values law because it promotes social cohesion. This person, at Stage 4, has assumed the perspective of the “good citizen.” To illustrate this transfer of concern from family to community, here is the answer of a 17-year-old to the question of whether the husband should steal the drug to save his wife’s life:

It’s a matter of law. It’s one of the rules that we’re trying to help protect everyone, protect property, not just to protect a store. It’s something that’s needed in our society. If we didn’t have these laws people would steal, they wouldn’t have to work for a living and our whole society would get out of kilter.\(^\text{111}\)

\(^{108}\) Id. at 291.

\(^{109}\) Id.

\(^{110}\) Id. at 290.

\(^{111}\) Id. at 287.
Seven years later, the same individual took an even broader perspective, marking the transition to postconventional thinking. In answer to the same question, this individual stated:

It is the husband’s duty to save his wife. The fact that her life is in danger transcends every other standard you might use to judge his action. Life is more important than property.  

At the postconventional level, instead of accepting the rules of society, people can question the purposes of the rules, and can balance these purposes against other values. They are able to do this because they have acquired a number of cognitive skills that are characteristic of the Piagetian stage of formal operations. First, people “become able to juggle more things in their minds in more complicated ways.” Second, people can form hypotheses about probable consequences and test them mentally. Third, people can grasp abstract principles and can assign value to them. Fourth, people at the highest stages of cognitive and moral development embrace the concept of “full reciprocity,” that is, that moral rules should be applied universally.

Postconventional reasoning defines right and wrong by evaluating the situation in light of the consequences for everyone concerned and the fundamental values that are at stake. As an individual moves through the stages of development, he or she acquires the ability to consider the effects of a decision within an ever-broadening context, from self, to family and community, to consequences and values that embrace all of mankind.

Kohlberg’s theory has been extremely influential, but it has also been the subject of sustained criticism. Some of the significant critiques of Kohlberg’s work are described in the following section.

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112 Id. at 290.

113 REST, et al., supra note 61, at 137.

114 James Rest explains the difference between the partial reciprocity of conventional thought and the full reciprocity of postconventional thought: Whereas partial reciprocity was envisioned by the maintaining norms schema (i.e., that everyone alike is under the law and protected by the law) [conventional thought], at the postconventional level one realizes that the law itself may be biased; lawful acts may nevertheless favor some over others (e.g., such was the point of Martin Luther King’s civil disobedience). “Full” reciprocity entails not only uniform application of social norms, but also that the social norms themselves not be biased in favor of some at the expense of others.

Id. at 42.
C. Criticisms of the Kohlberg’s Stage Theory of Development

There are a number of significant challenges to Kohlberg’s theory of moral development. Four principal critiques of Kohlberg’s model are discussed below.

1. Kohlberg’s Use of Narrative Responses to Hypothetical Questions

Several researchers have challenged Kohlberg’s research methods, adopted from Piaget, in which subjects are presented with hypothetical problems in a laboratory setting and their responses are recorded and subjectively scored by the experimenters. Some argue that this method puts a premium on intellectual rationalizing, and is a poor way to gauge an individual’s level of cognitive or moral functioning. This criticism has led researchers in two divergent directions. It has impelled some to advocate measurement of cognitive or moral behavior rather than verbal explanation, while other researchers have devised objective tests (multiple-choice or preference-ranking surveys) to measure the stages of cognitive and moral development.

The merits of this first criticism, although important in the field of psychology, are irrelevant to the thesis of this article. The purpose of this article is to describe and sequence the modes of analysis utilized by judges in formal written opinions. These opinions are not answers to hypothetical problems, but are actual cases. Furthermore, the authors of these opinions bear a professional obligation to persuade the parties, the profession, and society that the decisions are dictated by law. The behavior being evaluated in this article is judicial reasoning itself.

2. The Concept of “Stage”

The second important criticism of the developmental theories described above relates to the concept of “stage.” Many scholars, perhaps most, now reject the “hard

115 For a extended critique of Kohlberg’s methods see PETER E. LANGFORD, APPROACHES TO THE DEVELOPMENT OF MORAL REASONING (1995). “The interview is only one of several methods that can be used to study moral reasoning.” Id. at 191.


117 Id. at 36-46.

stage” model favored by Piaget and Kohlberg. The stage concept grew out of Baldwin’s biological orientation, and was embraced by Piaget whose original academic pursuit was zoology. Consistent with this biological perspective, Piaget understood cognitive and moral development to proceed in an “invariant sequence,” and Kohlberg, as one group of scholars explains, “advanced a particularly strong version of the ‘stage’ concept.”

The underlying metaphor for Kohlberg’s notion of development was the staircase: Development consists of moving up the staircase one step at a time. Kohlberg contended that subjects were ‘in’ one stage or another (i.e., on one ‘step’ or another). Every subject would show stepwise, irreversible, upward progression in the stage sequence in longitudinal studies, with no stage skipping or reversals (one moves up the staircase one step at a time, and always forward).

Researchers have challenged this understanding of stages as invariably sequenced discrete steps. Studies indicate that people may exhibit different stages of cognitive or moral development in response to different problems. Rather than assign an individual to a single stage of development, some researchers now seek to measure the degree to which the individual uses various types of thinking. Developmental sequence therefore is not a matter of a person abruptly changing from stage to stage (going up a staircase, step by step), but a matter of shifting distributions of stage use (using less of the lower stages and more of the higher stages of thinking).

Although the invariant and discrete nature of “hard stages” may not be supported by psychological research, there are other aspects of the stage concept that are broadly accepted. First, the stages of development appear sequentially, if gradually. Second, the

119 Ginsberg & Opp, supra note 77, at 1-2.

120 Id. at 158.

121 Rest, et al., supra note 61, at 17.

122 Id.

123 “[T]he child is not always in the same stage with regard to different areas of thought. … Also … the child may display different levels of achievement in regard to very similar areas of thought.” Ginsberg & Opp, supra note 77, at 159. “Certain tasks, which appeared to share the same logical structure, were found to be passed at widely different ages. … [and] correlations among developmental tasks were often low or insignificant.” Case, supra note 64, at 27.

124 Rest, et al., supra note 61, at 55-56.
stages are differentiated in the sense that each stage is characterized by a distinct “underlying structure.”³² The stage theory presented in this article reflects this notion of “soft stages,” mental operations that appear sequentially, that can be distinguished from each other structurally, and that build upon each other to create increasingly complex forms.

3. Multiplicity

Kohlberg originally believed that he could derive fundamental moral truths, i.e., “right answers,” at Stage 6, the highest stage of moral reasoning. However, Kohlberg eventually abandoned Stage 6 as a separate category, finding no evidence for its existence.³² James Rest and his colleagues, self-described “Neo-Kohlbergians,” instead define postconventional thought as follows:

The defining characteristic of postconventional thinking is that rights and duties are based on sharable ideals for organizing cooperation in society, and are open to debate and tests of logical consistency, experience of the community, and coherence with accepted practice.³²

Rest contends that postconventional thought is not characterized by adherence to a single school of moral philosophy, but by the ability to utilize moral philosophy to evaluate society.³² According to Rest, conventional moral thinking is “the morality of maintaining social norms,”⁴ whereas postconventional moral thinking is “the morality that rules, roles, laws, and institutions must serve some shareable ideal of cooperation.”⁴

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³² Ginsberg & Opper, supra note 77, at 158.
³² Id.
³² Paul T. Wangerin, Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education, 62 Tulane L. Rev. 1237, 1276, 1277 (1988). The collapse of Kohlberg’s stage 6 (universalism) into stage 5 (utilitarian balancing) is consistent with John Harsanyi’s conclusion that rational morality is based upon rule utilitarianism. “If we care about the common good, then reason will clearly tell us what moral code to follow: it will tell us to follow the rule utilitarian moral code.” John C. Harsanyi, Does Reason Tell Us What Moral Code to Follow and, Indeed, to Follow Any Moral Code at All?, __ ETHICS 42, 55 (October 1985).
³² Rest, et al., supra note 61, at 41.
³² Id.
³² Id. at 2.
³² Id.
Paul Wangerin addresses this fundamental disagreement about the nature of postconventional thought in his article *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education,* which is the most comprehensive treatment of the developmental theories of Piaget and Kohlberg in legal scholarship to date. Wangerin describes the schism in the field of developmental psychology between those theorists who, like Kohlberg, reject multiplicity and relativism, and those who

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132 Wangerin, *supra* note 127.


Legal scholars have made fruitful use of Carol Gilligan’s model of moral development, the “ethic of care,” which has provided a scientific basis for feminist critical scholarship. See infra notes 154-161.
embrace it,\textsuperscript{134} and he observes a similar schism in the field of legal education.\textsuperscript{135} Drawing on educational theorists, Wangerin argues persuasively that “the transition between dualistic and relativistic thinking is the most difficult instructional moment faced by students,”\textsuperscript{136} and that “studies suggest that as students move through law school, they rapidly develop an increased ability to see various sides of an issue and increased tolerance for ambiguity.”\textsuperscript{137}

4. The Ethic of Care

A related criticism of Kohlberg’s theory, and one that has similar implications for the substance of his model of moral development, is that because Kohlberg relied so much on the cognitive aspect of moral reasoning, his theory fails to account for the emotional nature of morality. Many leading scholars have persuasively argued that Kohlberg ignored the role of empathy in favor of a cognitive approach that emphasizes individual commitment to abstract rights.\textsuperscript{138}

\textsuperscript{134} Wangerin explains: An enormous schism that divides the various school of developmental psychology can now be clearly seen. Lawrence Kohlberg does not accept multiplicity or relativism as the underlying epistemological stance that climaxes moral development, nor do Professors Kitchener and King, the originators of the cognitive development theory of reflective judgment. These theorists insist that certain universally applicable and objectively true ideas and principles do exist. For them, development involves movement toward acceptance of that fact. Thus, they follow in the tradition of Plato. Conversely, William Perry for the cognitive development psychologists and Norma Haan for the moral development psychologists believe that objective truth does not exist and that development principally involves the ability to live with that uncomfortable fact. In a sense, therefore, they follow in the tradition of Protagoras.

Wangerin, \textit{supra} note 127, at 1287-1288.

\textsuperscript{135} \textit{Id.} at 1288.

\textsuperscript{136} \textit{Id.} at 1255.

\textsuperscript{137} \textit{Id.} at 1254-1255.

James Rest argues that Kohlberg, like Immanuel Kant\(^{139}\) and John Rawls,\(^{140}\) attempted to “[construct] a moral point of view solely from rational imagination.”\(^{141}\) Rest observes that “Critics of Kohlberg claim that his stage sequence favors abstract, impartial principles over loyalty, friendship, and close relationships.” In contrast, for many people, the essence of morality is to fulfill their responsibilities to the people who depend upon them: their spouses, their children, their co-workers, patients, clients, students, customers, neighbors, and friends. The advocates of empathy and caring contend that Kohlberg undervalues the importance of responsibility and emotional concerns.\(^{142}\)

This critique, denominated “the ethic of care,” was forcefully articulated by Kohlberg’s onetime student and colleague Carol Gilligan,\(^{143}\) whose groundbreaking work *In a Different Voice* argued that Kohlberg’s analysis was flawed because it was drawn solely from a male perspective:

Kohlberg’s six stages that describe the development of moral judgment from childhood to adulthood are based empirically on a study of eighty-four boys whose development Kohlberg has followed for a period of over twenty years.\(^{144}\)

According to Gilligan, Kohlberg relegated women’s moral orientation to Stage 3, characterizing caring and attentiveness to personal relationships as less mature than

\(^{139}\) One formulation of Kant’s categorical imperative is: “Act as if the maxim of your action were to become through your will a general natural law.” MSN ENCARTA, *Immanuel Kant*, at http://encarta.msn.com/find/Concise.asp?z=1&pg=2&ti=761560445&cid=6#p6 (accessed February 20, 2002).

\(^{140}\) Rawls’ ingenious metaphor, the “veil of ignorance,” invites us to construct rules of morality with perfect knowledge of the human condition, but without particular knowledge of our own station in life. See JOHN RAWLS, A THEORY OF JUSTICE 136 (1971).

\(^{141}\) REST, et al., *supra* note 61, at 17.

\(^{142}\) *Id.* at 5.


\(^{144}\) GILLIGAN, *supra* note 95, at 18. “She [Gilligan] suggests that Kohlberg’s scoring system may be biased against women because of the disproportionate numbers of males in research samples and that the developmental theories themselves tend to be formulated by men.” RICH & DEVITIS, *supra* note 103, at 96.
Prominent among those who thus appear to be deficient in moral development when measured by Kohlberg’s scale are women, whose judgments seem to exemplify the third stage of his six stage sequence. At this stage morality is conceived in interpersonal terms and goodness is equated with helping and pleasing others. This conception of goodness is considered by Kohlberg and Kramer to be functional in the lives of mature women insofar as their lives take place in the home.\textsuperscript{145}

Under Gilligan’s model of moral development, people progress from conventional to postconventional thought not solely because they have advanced cognitively, but because they have acquired a deeper and broader sense of empathy. The “good boy” or “nice girl” of Stage 3, who desires to please his or her family and friends may evolve into a person who is sensitive to the interests and the values of others generally. In a similar manner, the “good citizen” of Stage 4, who identifies with the social norms of the community, may evolve into an autonomous citizen capable of evaluating the effect of the laws and institutions of his or her society on all persons.\textsuperscript{146}

Gilligan asserts that Kohlberg, by focusing entirely on rational analysis, missed the “heart” of moral reasoning.\textsuperscript{147} Gilligan contends that moral problems arise “from conflicting responsibilities rather than from competing rights.”\textsuperscript{148}

This conception of morality as concerned with the activity of care centers moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights and rules.\textsuperscript{149}

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\textsuperscript{145} \textit{Gilligan, supra} note 95, at 18. “Gilligan notes that Kohlberg found women, in light of their strong interpersonal orientation, to favor Stage 3, a stage he held to be functional and adequate for them. She laments that the traits that have conventionally defined the ‘goodness’ of women – their care and sensitivity to the needs of others – are those that mark them as deficient in moral development.” \textit{Rich \& Devitis, supra} note 103, at 96.
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\textsuperscript{146} This conception of the transition from conventional to postconventional thought is consistent with the influential “domain theory” of Elliott Turiel, who contends that conventional and postconventional thinking belong to separate domains, and that they evolve on parallel tracks. \textit{Rest, et al., supra} note 61, at 146.
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\textsuperscript{147} \textit{Rest, et al., supra} note 61, at 10.
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\textsuperscript{148} \textit{Gilligan, supra} note 95, at 19.
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\textsuperscript{149} \textit{Id.}
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In her signature work, Gilligan analyzed women’s approach to resolving a number of moral decisions with interpersonal dimensions, such as whether to have an abortion, whether to marry a boyfriend, and how to react to a family member’s suicide. Gilligan determined that in these contexts women analyzed the problems in terms of the effect that their decision would have on themselves and their loved ones, and not on the basis of legal rights and rules.

Gilligan’s theory has spawned an outpouring of scholarship on feminist legal theory. As a result, the role of empathy in the interpretation of the law has received

150 Id. at 71-105.
151 Id. at 134-135.
152 Id. at 137-138.
153 Gilligan relies on research studies showing that “the moral judgments of women differ from those of men in the greater extent to which women’s judgments are tied to feelings of empathy and compassion ….” Id. at 69.
increased attention from legal scholars.  

Researchers have investigated Gilligan’s thesis that preferences for “justice” versus “caring” correlate with gender, but the results of these studies are divided. Whether or not the “ethic of care” is gender-based, there are powerful arguments to support the conclusion that the ability to empathize with others is a powerful constituent of moral reasoning. There is now substantial evidence to support the conclusion that small children have the capacity to empathize, that people’s ability to empathize with others develops over time, and that empathy may be conceived as an ever-widening and ever-deepening phenomenon. At the most advanced levels of development, the ethic of caring may encompass a number of philosophic outlooks, because the essence of caring is the ability to see a problem from many different viewpoints. Myra Bookman describes Gilligan’s contribution as “a moral stage that transcends both the impediments of conventional ethical life and the empty formalisms of abstract reason and replaces both with an awareness of need and avoidance of detachment.” For these reasons, the “ethic of care” is a powerful component of postconventional moral reasoning.


One author, summarizing these studies, concludes: Using measures designed to investigate more interpersonally oriented forms of moral reasoning, a number of studies have found gender differences, with males primarily focusing on issues of justice and females primarily focusing on interpersonal issues. However, other studies have not found significant differences.

Wangerin notes that the caring voice “is abstractly related to multiplicity and relativism.” Wangerin, supra note 127, at 1293.

Carol Gilligan & John Michael Murphy, Development from Adolescence to Adulthood: The Philosopher and the Dilemma of the Fact, in INTELLECTUAL DEVELOPMENT BEYOND CHILDHOOD 85, 86 (Deanna Kuhn ed., 1979).

See Bookman, supra note 133, at 982.
Accordingly, Kohlberg’s stage theory of moral development must be adjusted in three principal ways that are relevant to a theory describing the stages of legal reasoning. First, the stages of reasoning should be described as “soft stages” which are sequential, structurally distinct, and increasingly complex, but not as “hard stages” which are invariant and hierarchical. Formalism, analogy, and realism appear sequentially, are structurally distinct, and are increasingly complex, but all are necessary for the law to evolve, and none of these methods of reasoning is inherently superior to the others.

Second, postconventional thought is not characterized by the adoption of a single philosophic outlook such as the philosophy of Immanuel Kant or John Rawls. Instead, postconventional thought, like realist analysis, is characterized by the ability to critique laws and institutions by reference to any one of a number of philosophic tools, including the consideration of consequences and fundamental values.

Third, postconventional thought utilizes not only increasingly complex cognitive functions, but also draws upon an increased capacity for empathetic awareness, which grows out of the more parochial desires for acceptance and identity that emerge at the level of conventional thought. Both logic and empathy play a fundamental role in the postconventional ability to evaluate laws and institutions.

With these three clarifications or modifications to Kohlberg’s developmental theory in mind, we now return to a description of the stages of legal reasoning.

D. The Stages of Legal Reasoning

In light of the fact that both cognitive and moral reasoning exhibit distinct stages of development, we should expect legal reasoning, which is the confluence of logical and moral reasoning, to exhibit a similar stage structure. We should not expect to find, in a judicial opinion, childish forms of reasoning reflective of preoperational or preconventional thought. However, we should not be surprised to find a combination of concrete and formal operations, as well as conventional and postconventional thought. I suggest that formalism, analogy, and realism may be characterized as the stages of legal reasoning for the following reasons.

First of all, the cognitive elements of formalism, analogy, and realism appear sequentially in correspondence with stages of development described by Piaget and Kohlberg. Formalism – the understanding and application of rules – is mastered at the level of “Concrete Operations” under Piaget’s theory, and represents “Conventional Reasoning” in Kohlberg’s model of moral development. Children also acquire the ability to construct concrete analogies (formalist analogies) at the level of Concrete Operations, and can draw analogies based on abstract relations and abstract terms (realist analogies) later in adolescence as they master Formal Operations. To engage in realist analysis a person must be able to understand abstractions, frame hypotheses, and consider multiple abstract aspects of a problem at the same time. These are same cognitive operations that are characteristic of Formal Operations and Postconventional thought. Kohlberg observed the same progression:
Paralleling evidence on universal moral levels, the development of individual orientations vis-à-vis legal or rule systems shows consistent movement from a preconventional law-obeying, to a conventional law-maintaining, to a postconventional law-making perspective.\textsuperscript{162}

Second, not only do reasoning by analogy and realistic analysis emerge sequentially in the individual because they call upon increasingly complex cognitive skills, but they also require a broader and more sensitive ability to empathize with others\textsuperscript{163} that is emblematic of the Kohlbergian notion of “full reciprocity”\textsuperscript{164} or Gilligan’s “postconventional ethic of care.”\textsuperscript{165} A critical component of reasoning by analogy is identifying the similarities and differences among cases, and a crucial step in realist analysis is imagining how people will be affected by the interpretation of the law. Todd Brower eloquently explains how judges’ lack of empathy has hampered their ability to fairly apply precedent to gays and lesbians:

An important component of the study of case precedent and reasoning by analogy is the ability to recognize when things are meaningfully similar or dissimilar and to treat them accordingly. As gay rights issues proliferate in the courts, however, judges and lawyers seem to have forgotten how to determine similarity and difference. Cases that are otherwise similar are decided differently when they involve lesbians and gay men.\textsuperscript{166}

Empathetic awareness – the “ethic of care” – plays a central role in realist analogies and realist analysis.

Third, each stage of legal reasoning is incorporated into and “prepares the way” for the succeeding stage. One must be able to apply a rule according to its terms before one can apply it to analogous cases. One must be able to identify factual similarities between one situation and another before one can identify similarities in the values or interests that are at stake. Finally, one must be able to identify the relevant values that are at stake in a situation before one is able to evaluate their relative likelihood and weight. Thus, formalism, formalist analogies, realist analogies, and realism represent an

\textsuperscript{162} June Louin Tapp and Lawrence Kohlberg, \textit{Developing Senses of Law and Legal Justice}, in [AUTHOR] \textit{THE PATTERN OF LEGAL DEVELOPMENT} 89 (19\textsuperscript{__}).

\textsuperscript{163} As one author states, empathy “is a device for learning about what matters and why.” D’Arms, \textit{supra} note 138, at 1470.

\textsuperscript{164} \textit{See supra} note 114 and accompanying text.

\textsuperscript{165} \textit{See supra} note 160 and accompanying text.

\textsuperscript{166} Brower, \textit{supra} note 42, at 66.
evolution of successively more complex modes of reasoning.

Fourth, according to the theory of “assimilation and accommodation,” we progress from one stage to another when an existing schema is inadequate to resolve the case at hand. I argue in the following portion of this article that this is precisely what happens in hard legal cases. When a court is faced with a novel fact situation, or in cases where the values of society are in flux, the courts of necessity tend to employ all three methods of legal reasoning. First, the courts attempt to apply existing rules of law to new facts; this is the deductive, formalistic approach. Under this approach the courts try to clarify any ambiguities in an existing rule by defining the terms of the rule. If the ambiguities in the rule cannot be resolved through the definition of terms, courts turn to the second approach, and attempt to apply existing rules of law by analogy to the case under consideration. If the facts of the case under consideration are so novel that the analogies break down, courts turn to the third approach in order to decide the case. Through an inductive, realist approach, the courts devise new rules of law by balancing the relevant values and interests.

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167 As Richard Warner notes, the problem with a deductive approach is that the minor premise of a legal syllogism is frequently in question:

The question is whether “the cumulative effect of a series of connected, or independent negligent acts” add up to recklessness. It is difficult to cast the court’s reasoning about this point in deductive form for the relevant rule seems not to exist.

Warner, supra note 13, at 1553.

168 Scott Brewer states the first step of analogical reasoning occurs:

in a context of doubt about the extension of some predicate or the meaning of some text; probably the most typical “contexts of doubt” in legal arguments are instances in which a legal concept or term is actively vague – that is, instances in which a judge or lawyer is undecided about whether to apply the concept to a given object or event.


169 Todd Brower suggests:
the most opportune time for change appears to be when the existing schema ceases to function adequately; that is, when the schema does not properly represent factual circumstances or generate legal outcomes consistent with appropriate precedent.

Brower, supra note 42, at 145-146.

170 As Larry Alexander has observed: “[I]n the uncontrolled case, where no canonical legal norm or precedent governs … lawyers employ moral or policy arguments.” Alexander, The Banality of Legal Reasoning, supra note 37, at 517.
In the following section, I present evidence to support the argument that in hard cases the reasoning of the courts progresses from formalism, to analogy, to realism.

II – THE STAGES OF LEGAL REASONING IN HARD CASES

Technological capability and social understanding are advancing at ever-increasing rates, and the law must adapt to each new state of affairs. As Justice William Brennan stated:

The mists which have obscured the light of freedom and equality for countless tens of millions are dissipating. For the unity of the human family is becoming more and more distinct on the horizon of human events. The gradual civilization of all people replacing the civilization of only the elite, the rise of mass education and mass media of communication, the formulation of new thought structures due to scientific advances and social evolution – all these phenomena hasten that day.¹⁷¹

Like James Mark Baldwin, Brennan believed in human progress and attributed this progress to the development of “new thought structures” that have been and are being evolved. Changes in the patterns of legal reasoning have become apparent because the “hydraulic pressure” that technological and social change exert on the law works to reveal the underlying structure of legal thinking. As new facts force changes in legal paradigms, the different types of legal reasoning are thrown into bold relief. In particular, judges progress from formalism, to analogy, to realism, to resolve difficult questions of law.

David Friedman has observed that:

Technological change affects the law in at least three ways: (1) by altering the cost of violating and enforcing existing legal rules; (2) by altering the underlying facts that justify legal rules; and (3) by changing the underlying facts implicitly assumed by the law, making existing legal concepts and categories obsolete, even meaningless.¹⁷²

In a similar vein, Steven Quevedo has identified three ways in which a rule or an analogy can “age,” and require revision or replacement: (1) When “new cases have materially different facts;” (2) “if the factual assumptions upon which the analogy is based become more and more suspect as time passes;” and (3) “if the value or policy assumptions governing the selection of the relevant similarity or difference are called into

¹⁷¹ WILLIAM J. BRENNAN, JR., AN AFFAIR WITH FREEDOM 319 (Steven J. Friedman, ed., 1967)

question.”

During the last half of the 20th Century, technological advances in two fields have had a particularly significant impact on the way we live. The telecommunications revolution has opened up a new world of information and entertainment, while innovations in reproductive technology have created new ways to conceive and bear children. The social changes created by these technological advances have in turn generated a host of new legal problems. I examine below how changes in telecommunications have required a reexamination of the First Amendment, and how the new reproductive technology has affected the law of parentage.

A. The First Amendment and Telecommunications: From Doctrine to Balancing

In recent years the Supreme Court has decided a number of cases applying the First Amendment in the context of new forms of communication, including cable television,174 the internet,175 and computer-generated images.176 Over a half century ago, Justice Robert Jackson noted that First Amendment doctrine is particularly sensitive to technological change, because each new form of media has different characteristics. He stated:

[the moving picture screen, the radio, the newspaper, the handbill, the sound truck, and the street corner orator have differing natures, values, abuses, and dangers.]177


175 See Ashcroft v. A.C.L.U., 122 S.Ct. 1700 (May 13, 2002) (considering whether it is constitutional to evaluate whether postings on the internet are “harmful to minors” on the basis of “contemporary community standards”); and Reno v. American Civil Liberties Union, 521 U.S. 844 (1977) (invalidating provisions of the Communications Decency Act of 1996, which attempted to protect minors from “indecent” and “patently offensive” speech in the internet).


177 Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J. concurring). Two scholars conclude, however, that technological change may be simply an excuse, and not a reason,
Has the rapid change in communications technology had an effect on First Amendment jurisprudence generally? In the past two terms of court alone, the Court has decided eleven First Amendment cases.\(^\text{178}\) The most striking aspect of the Court’s recent jurisprudence in this area is the increasing tendency of the Court to reject established doctrine in place of a balancing approach. Of course, balancing approaches are nothing new to First Amendment jurisprudence generally. The “clear and present danger” test developed by Oliver Wendell Holmes,\(^\text{179}\) and Learned Hand’s standard which took into account “the gravity of the ‘evil,’ discounted by its improbability,”\(^\text{180}\) both call for judicial balancing. What is different about the Court’s recent cases is its abandonment of standard balancing formulas such as strict scrutiny and intermediate scrutiny in favor of \textit{ad hoc} balancing tests.

Until recently, the classic paradigm for First Amendment analysis had been for the court to address a number of threshold issues, and, depending on the how these questions were answered, to set a standard of review. The principal threshold issue under the First Amendment is whether the law under review is “content based” or “content neutral”.\(^\text{181}\) If the law under review is content based,\(^\text{182}\) then the standard of review for changing the law: “the rhetoric of technological change provides freedom – a freedom that can be exploited to advance their particular jurisprudential agendas.” Monroe E. Price & John F. Duffy, \textit{Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court}, 97 COLUM. L. REV. 976, 1009 (1997).


\(^{181}\) As Daniel Farber explains:
The content distinction is the modern Supreme Court’s closest approach to articulating a unified First Amendment doctrine. Government regulations linked to the content of speech receive severe judicial scrutiny. In contrast, when government is regulating speech, but the regulation is unrelated to content, the level of scrutiny is lower.
depends upon the value of the category of speech that is being suppressed; high value speech is protected by strict scrutiny review, while laws affecting mid or low value speech are judged by lower standards of review such as intermediate scrutiny or rational basis. If the law is content neutral, then the standard of review depends upon whether speech is being suppressed in a public forum or a nonpublic forum; content neutral laws limiting speech in a public forum are judged by a form of intermediate scrutiny, while laws regulating nonpublic fora are reviewed under a form of the rational basis test.

But recent cases have not followed the standard doctrine. For example, in Bartnicki v. Vopper, a radio station had repeatedly played a tape of a cellular telephone conversation that had been illegally recorded. The participants to the conversation sued the radio station under the Omnibus Crime Control and Safe Streets Act, which prohibits the interception of electronic communications, and imposes civil and criminal liability on anyone who discloses a conversation knowing that it was illegally intercepted. Justice


A law is content based if the intent of the lawmaker was to suppress the idea or content of the expression. A law is content neutral if the intent of the lawmaker was to restrict the time, place, or manner of the expression.

“[A] content-based regulation of political speech in a public forum is valid only if it can survive strict scrutiny.” Burson v. Freeman, 504 U.S. 191, 197 (1992).


The Supreme Court implicitly applied the lenient rational basis test to evaluate the constitutionality of a law regulating obscene speech:

“[T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity ….” The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973).

“[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny….” Turner Broadcasting System, Inc., v. F.C.C., 512 U.S. 622, 641 (1994).

Regulation of speech on public property that is not a traditional or a designated public forum “need only be reasonable.” International Society for Krishna Consciousness v. Lee, 505 U.S. 672, 679 (1992).

Stevens traced the difficulty of the case to the fact that “[t]he Framers of the First Amendment surely did not foresee the advances in science that produced the conversation, the interception, or the conflict that gave rise to this action.”\textsuperscript{189} Justice Stevens determined that the law was content neutral,\textsuperscript{190} which would normally require that the law merely satisfy the “intermediate scrutiny” test.\textsuperscript{191} However, Justice Stevens did not apply intermediate scrutiny. Instead, the Court simply balanced the competing interests that it found to be at stake:

[T]hese cases present a conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech. … Having considered the interests at stake, we are firmly convinced that the disclosures made by respondents in this suit are protected by the First Amendment.\textsuperscript{192}

The dissenting Justices took the majority to task for failing to apply intermediate scrutiny to what was admittedly a content neutral law.\textsuperscript{193}

Similarly, in \textit{F.E.C. v. Colorado Republican Federal Campaign Committee},\textsuperscript{194} the Court applied an \textit{ad hoc} balancing test to determine the constitutionality of a spending limits contained in the Federal Election Campaign Act. The Court held that the appropriate standard to evaluate the constitutionality of a spending limit imposed on a political party’s coordinated spending is whether the law is “closely drawn” to serve “sufficiently important” governmental interests.\textsuperscript{195} The dissent insisted that this type of campaign finance law is a content based restriction on political speech, and as such should be subjected to strict scrutiny.\textsuperscript{196}

\textsuperscript{189} \textit{Id.} at 518.

\textsuperscript{190} \textit{Id.} at 526.

\textsuperscript{191} The lower court held that the law was content neutral, and it applied the “intermediate scrutiny” test. 200 F.3d 109, 123 (3rd Cir. 1999).

\textsuperscript{192} 532 U.S., at 518. \textit{See also id.} at 529-535, where the Court expressly balanced these interests.

\textsuperscript{193} \textit{Id.} at 544-549.

\textsuperscript{194} 533 U.S. 431 (2001).


\textsuperscript{196} \textit{Id.} at 465-466.
Another challenge to existing First Amendment doctrine lies in the difficulty that the Court has in drawing the line between content based and content neutral laws, exemplified by the Court’s decision this term in *City of Los Angeles v. Alameda Books, Inc.* In that case the Court considered the constitutionality of a municipal ordinance that in effect prohibited multi-use adult business establishments by requiring each separate type of adult business (arcades, bookstores, massage parlors) to be located 1000 feet from each other. While the plurality of the Court found this law to be “content neutral,” Justice Kennedy, concurring, found the plurality’s designation of the law to be “imprecise,” but nevertheless applied “intermediate scrutiny” in determining its constitutionality.

In summary, the Supreme Court has moved from applying doctrine to a balancing approach in resolving First Amendment cases. This represents a progression from formalism, to analogy, to realism. This progression is demonstrated in the various judicial opinions from a single First Amendment case: *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*

B. The Stages of Legal Reasoning: The *Denver Area* Case

The recent tendency of the Court to blur the distinction between content based and content neutral laws and to utilize *ad hoc* balancing tests in place of standard formulas in First Amendment cases can be traced to the 1996 decision of the Court in *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.* In that case

197 The line between content based and content neutral laws is not always an easy one to draw. Compare United States v. O’Brien, 391 U.S. 367 (1968) (federal law that prohibits knowingly destroying or mutilating a draft card is content neutral) with United States v. Eichman, 496 U.S. 310 (1990) (federal law that prohibits knowingly mutilating, defacing, physically defiling, burning, maintaining on the floor or ground, or trampling upon the American flag is content based).


199 *Id.* at 1731-1732.

200 *Id.* at 1737, relying on Renton v. Playtime Theatres, 475 U.S. 41 (1986).

201 *Id.* at 1739.

202 *Id.* at 1741.


204 *Id.* For a description of this case see generally Diana Israelashvili, *A Fear of*
the United States Supreme Court reexamined First Amendment principles as applied to the medium of cable television. By vastly increasing the flow of information into our homes, cable television has generated a number of issues centered on access to the cable platform. 205 In addition, cable television presents the court with novel problems of interpretation because it has “the unique communications role of being both a First Amendment ‘speaker’ and a conduit for the speech of others.” 206 While the opinions of the lower court and the Supreme Court offer examples of all three stages of legal reasoning, the novel aspects of the cable television communications medium made formalistic analysis impossible and strained analogistic reasoning to the breaking point. The plurality of the Court decided the case utilizing a flexible, balancing approach. What makes the case particularly instructive is that in separate opinions justices of the United States Supreme Court vigorously debated the relative merits of reasoning by analogy and realist analysis in order to resolve the issues before the court. 207

The Denver Area case concerned the constitutionality of three provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the Cable Act or Act). 208 By means of this Act Congress sought to regulate and limit the dissemination of

Commitment: The Supreme Court’s Refusal to Pronounce a First Amendment Standard for Cable Television in Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 71 ST. JOHN’S L. REV. 173 (1997); Charles Nesson and David Marglin, The Day the Internet Met the First Amendment: Time and the Communications Decency Act, 10 HARV. J.L. & TECH. 113, 118-119 (1996). In addition to demonstrating how legal reasoning progresses from formalism, to analogy, to realism, this case also illustrates the clash between reliance on two different sources of law, precedent and policy. See HUHN, supra note __, at 171-175.

205 See Norman M. Sinel, Patrick J. Grant, Stephanie M. Phillipps, William E. Cook, Jr., and Timothy A. Stelzig, Recent Developments in Cable Law, 642 PLI/P at 9 (2001).


207 Jonathan Beemer observed:
Perhaps the most salient aspect of the Court’s decision in Denver Area is the disparity of judicial approaches used to analyze a First Amendment question within the context of a relatively new communications medium. Beemer, supra note 175, at 965.

208 106 Stat. 1486, Secs. 10(a), 10(b), and 10(c); 47 U.S.C. 532(h), 532(j), and note
indecent programming via cable television. The provision of law provoking the sharpest division among the justices was Section 10(a) of the Act, which authorized cable television operators to refuse to carry indecent programming on leased access channels.

1. The Formalist Approach of the Court of Appeals

The lower court, the United States Court of Appeals for the District of Columbia Circuit, issued an en banc decision upholding the constitutionality of Section 10(a) of the Act. The Court of Appeals concluded that this case was governed by existing law. Specifically, the Court found that there was no “state action” present in this case. The Court of Appeals held that cable television operators, as private actors, were not subject to First Amendment constraints, and that the law in question, Section 10(a), merely authorized them to do what they were in any event entitled to do under the Constitution – that is, to exercise editorial control over the programming disseminated over their privately owned cable system. In short, the Court of Appeals found this to be an easy case, squarely governed by existing state action doctrine.

2. The Supreme Court’s Rejection of the Formalist Approach

following Sec. 531.

“Indecent programming” was defined in Section 10(a) of the Act as programming that the “operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner.”

47 U.S.C. 532(h).

Since 1984, federal law has required cable operators to reserve 10 to 15 percent of their channels for lease to unaffiliated producers. 47 U.S.C. 532(b). These reserved channels are the “leased access” channels.


56 F.3d at 123.

The Court of Appeals relied principally upon the case of Blum v. Yaretsky, 457 U.S. 191 (1992), in which the Supreme Court had held: “Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives.” Id. at 1004-05, quoted at 56 F.3d 105, 116, 118.
Six justices of the Supreme Court authored opinions considering the constitutionality of Section 10(a), but no single opinion received five votes, and no single line of reasoning commanded the support of a majority of the court.\textsuperscript{215}

The Supreme Court affirmed the Court of Appeals’ decision upholding the constitutionality of Section 10(a) of the Act, but on grounds different from that relied upon by the Court of Appeals. The Supreme Court found “state action” to be present in the enactment of Section 10(a), which altered the legal relations of private parties.\textsuperscript{216}

Justice Thomas, who wrote the concurring opinion, and Justice Kennedy, who dissented, agreed that the Denver Area case was governed by established First Amendment doctrine, and reasoned by analogy to previously decided cases. They disagreed, however, as to which previous cases were analogous to the case at hand, and this led them to different conclusions regarding the constitutionality of Section 10(a) of the Act. Justice Breyer, who wrote the plurality opinion, rejected both the formalism of the Circuit Court and the analogistic approach of Justices Thomas and Kennedy, and instead crafted an opinion dominated by the third method of legal reasoning: a realistic, balancing approach.

3. The Analogistic Approaches of Justice Thomas and Justice Kennedy

As noted above, cable television is unlike other communications media in one important respect: it is both a speaker and a conduit for the speech of others.\textsuperscript{217} This dual role made it difficult for the Supreme Court to draw a clear analogy between cable television and other media. In reasoning by analogy, Justice Thomas and Justice Kennedy each perceived only one aspect of television’s dual role. Justice Thomas characterized cable operators as “speakers,” while Justice Kennedy conceived of cable

\textsuperscript{215} In upholding the constitutionality of Section 10(a) of the Cable Act, Justice Breyer, writing for the plurality, was joined by Justices Souter, Stevens, and O’Conner, each of whom wrote a separate concurring opinion. Justice Thomas, joined by Justices Scalia and Rehnquist, concurred in the judgment. Justice Kennedy, joined by Justice Ginsburg, dissented.

\textsuperscript{216} Justice Breyer observed:
Although the court [of appeals] said that it found no “state action,” it could not have meant that phrase literally, for, of course, petitioners attack (“as abridg[ing] speech”) a congressional statute – which, by definition, is an Act of “Congress.” 518 U.S., at 737. (Breyer, J.). Justice Kennedy added: “The plurality at least recognizes this as state action, avoiding the mistake made by the Court of Appeals.” Id. at 782 (Kennedy, J.)

\textsuperscript{217} See text accompanying note \textsuperscript{1} supra.
operators as “conduits.”

Justice Thomas, in his opinion concurring in the judgment, voted to uphold Section 10(a) of the Act on the ground that cable operators have the First Amendment right to exercise editorial control over the programming they carry, and that this statute did nothing more than reaffirm that right. He first observed that the court, in *Red Lion Broadcasting Co. v. F.C.C.*[^218^] had distinguished the broadcast media from the print media in respect of freedom of expression in light of the scarcity of broadcast frequencies, and declared the First Amendment rights of broadcasters to be more limited than the rights of publishers[^219^]. In the opinion of Justice Thomas, the principal issue to be decided was whether cable television is more analogous to the print media or to the broadcast media. Reasoning by analogy, Justice Thomas concluded that cable operators were entitled to the full First Amendment protection of publishers, rather than the more limited First Amendment protection due to broadcasters[^220^].

Justice Thomas drew three analogies between cable operators and the print media; specifically, he equated a cable television operator with the owner of a bookstore, the editor of a collection of essays, and a newspaper publisher. Justice Thomas stated:

> Drawing an analogy to the print media, for example, the author of a book is protected in writing the book, but has no right to have the book sold in a particular book store without the store owner’s consent. Nor can government force the editor of a collection of essays to print other essays...


[^219^]: *Id.* at 389. *See also* C.B.S. v. D.N.C., 412 U.S. 94, 117-118 (1973), where the court stated, “A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper.”

[^220^]: In support of his conclusion that *Red Lion* was inapplicable to cable operators, Justice Thomas cited Turner Broadcasting System, Inc. v. F.C.C. (*Turner I*), 512 U.S. 622 (1994) (concerning the constitutionality of the “must carry” provisions of federal law):

> In *Turner*, by adopting much of the print paradigm, and by rejecting *Red Lion*, we adopted with it a considerable body of precedent that governs the respective First Amendment rights of competing speakers. In *Red Lion*, we had legitimized consideration of the public interest and emphasized the rights of viewers, at least in the abstract. Under that view, ‘it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.’ 395 U.S. at 390. After *Turner*, however, that view can no longer be given any credence in the cable context. It is the operator’s right that is preeminent.

518 U.S., at 816 (Thomas, J., concurring in the judgment).
Like a free-lance writer seeking a paper in which to publish newspaper editorials, a programmer is protected in searching for an outlet for cable programming, but has no free-standing First Amendment right to have that programming transmitted.\textsuperscript{222}

Justice Thomas observed that the First Amendment rights of the bookstore owner, editor, and newspaper publisher all predominate over the rights of authors and the rights of the reading public. To compel a publisher, editor, or bookstore owner to publish or sell unsolicited works would be “forced speech,” and a serious infringement of First Amendment freedoms.\textsuperscript{223} Justice Thomas concluded that to compel a cable operator to carry indecent programming against its will is likewise forced speech and a violation of First Amendment rights.\textsuperscript{224}

Extending the analogy comparing cable television to the print media, Justice Thomas expressly found the court’s decision in \textit{Miami Herald Publishing Co. v. Tornillo}\textsuperscript{225} to be controlling. In that case the court invalidated a state law that required newspapers to give persons a “right of reply” to editorial attacks. Justice Thomas reasoned that in light of \textit{Tornillo} the only rights of any constitutional significance in this case were the rights of the cable operators, stating: “If \textit{Tornillo} ... [is] applicable, and I think [it is], ... then, when there is a conflict, a programmer’s asserted right to transmit over an operator’s cable system must give way to the operator’s editorial discretion.”\textsuperscript{226} In the context of this case, he concluded that the interests of programmers and viewers

\begin{itemize}
\item \textsuperscript{221} \textit{Id.} at 816.
\item \textsuperscript{222} \textit{Id.} at 817.
\item \textsuperscript{223} Justice Thomas stated: “In no other public forum that we have recognized does a private entity, owner or not, have the obligation not only to permit another to speak, but to actually help produce and then transmit the message on that person’s behalf.” \textit{Id.} at 829.
\item \textsuperscript{224} “There is no getting around the fact that leased and public access are a type of forced speech.” \textit{Id.} at 820. Anticipating the issue that was later decided in \textit{Turner II}, Justice Thomas took the position that “the proper question is whether the leased and public access requirements ... are improper restrictions on the operators’ free speech rights.” \textit{Id.} at 822. In \textit{Turner Broadcasting System v. F.C.C.}, 520 U.S. 180 (1997) (\textit{Turner II}), the court rejected Justice Thomas’ position, and upheld the constitutionality of the “must carry” provisions of federal law.
\item \textsuperscript{225} 418 U.S. 241 (1974).
\item \textsuperscript{226} 518 U.S. at 816.
\end{itemize}
may not even qualify for First Amendment consideration:

None of the petitioners in these cases are cable operators; they are all cable viewers or access programmers or their representative organizations. It is not intuitively obvious that the First Amendment protects the interests petitioners assert, and neither petitioners nor the plurality have adequately explained the source or justification of those asserted rights.\(^{227}\)

Like Justice Thomas, Justice Kennedy reasoned by analogy to existing First Amendment law. In contrast to Justice Thomas, however, who had found that cable operators were analogous to bookstore owners, editors, or newspaper publishers, Justice Kennedy found that cable television operators are analogous to telephone companies: “Laws requiring cable operators to provide leased access are the practical equivalent of making them common carriers, analogous in this respect to telephone companies: They are obliged to provide a conduit for the speech of others.”\(^{228}\) Accordingly, the correct analogy was to the Court’s decision in *Sable Communications v. F.C.C.*\(^{229}\) where the Court struck down a federal law prohibiting “indecent” commercial telephone messages, because such a law “has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear.”\(^{230}\) Next, Justice Kennedy analogized common carriers to public forums. “A common carriage mandate, nonetheless, serves the same function as a public forum. It ensures open, nondiscriminatory access to the means of communication.”\(^{231}\) Justice Kennedy accordingly concluded that strict scrutiny should apply: “The functional equivalence of designating a public forum and mandating common carriage suggests the same scrutiny should be applied to attempts in either setting to impose content discrimination by law. Under our precedents, the scrutiny is strict.”\(^{232}\) Applying strict scrutiny, Justice Kennedy found that Section 10(a) of the Act was unconstitutional because it was not “narrowly tailored” to protect children from indecent programming. Justice Kennedy noted that under the law cable operators could choose to transmit indecent programming, in which case children could see it, or cable operators could choose not to transmit it, in which case adults as well as children would be prevented from seeing it.\(^{233}\)

\(^{227}\) *Id.* at 817 (citations to the record omitted).

\(^{228}\) *Id.* at 796. For an extended analysis arguing that cable television should be treated as a public forum, see generally Beemer, note 175 supra.


\(^{230}\) *Id.* at 131.

\(^{231}\) 518 U.S. at 797-798.

\(^{232}\) *Id.* at 798.

\(^{233}\) *Id.* at 806-807.
Like Justice Thomas, Justice Kennedy decided that under relevant case law only some of the parties had First Amendment rights that were at stake. Unlike Justice Thomas, however, Justice Kennedy found that the rights of the cable operators had been “extinguished.”

For purposes of these cases, we should treat the cable operator’s rights in these channels as extinguished, and address the issue these petitioners present: namely, whether the Government can discriminate on the basis of content in affording protection to certain programmers. I cannot agree with Justice Thomas that the cable operator’s rights inform this analysis.\(^\text{234}\)

According to Justice Kennedy, the relevant interests for constitutional purposes were the rights of the programmers and the viewing public, and government is not free to “exclude speech it dislikes by delimiting public fora.”\(^\text{235}\) Justice Kennedy noted, “Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media.”\(^\text{236}\)

4. The Realist Approach of Justice Breyer

Arguing by analogy, Justice Thomas treated cable operators as speakers, and Justice Kennedy treated them as conduits for other speakers. In contrast, by refusing to adopt any specific analogy, Justice Breyer was able to treat cable operators both as speakers and as conduits.

Instead of identifying a single analogous case and applying the rule of that case to the case at hand, Justice Breyer sought to identify all of the relevant values and interests that were at stake. Justice Thomas had found that the Denver Area case was controlled by Miami Herald v. Tornillo in which the editorial discretion of the newspaper publisher predominated. Justice Kennedy had found common carrier cases such as Sable Communications to be controlling, and that, like telephone companies, the rights of cable operators were not at stake; the only rights of any significance were the rights of persons utilizing and viewing the cable platform.

Justice Breyer, in his plurality opinion, declined to follow the example of Justice Thomas and Justice Kennedy in attempting to unravel the knotty doctrinal questions raised by this case. A series of related public forum questions that Justice Thomas or

\(^\text{234}\) Id. at 796.

\(^\text{235}\) Id. at 802.

\(^\text{236}\) Id. at 802-803.
Justice Kennedy addressed, but that Justice Breyer did not, include: (1) whether cable operators are “common carriers;” (2) whether public access and leased access channels on cable are a “public forum;” (3) whether private property may ever be considered a public forum; and (4) whether content discrimination in a public forum should be treated as a limitation on the forum. 237

Justice Breyer not only declined to address the public forum issues in this case, he did not answer basic threshold issues such as whether Section 10(a) of the Act is a content based or a content neutral law, and whether indecent speech is fully protected or only marginally protected under the First Amendment. 238

Justice Breyer bypassed the threshold issues and proceeded directly to a realist analysis. His explanation for this mode of review was that the threshold issues have nothing to do with the ultimate constitutionality of the law. He characterized the threshold categories (content based or content neutral law, high value or low value speech, public forum or nonpublic forum) as mere “labels,” that do not change the underlying realities of the law or the speech being suppressed. 239

By leapfrogging the threshold issues, Justice Breyer also avoided using established standards of review such as strict scrutiny, intermediate scrutiny, and rational basis. 240 Justice Breyer’s reasoning is a nearly pure example of “legal realism,”

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237 Justice Breyer expressly acknowledged his decision not to resolve these public forum issues. He explained:
Rather than decide these issues, we can decide this case more narrowly, by closely scrutinizing Section 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech. 
_Id._ at 743.

238 Breyer observed: “Nor need we here determine whether, or the extent to which, _Pacifica_ does, or does not, impose some lesser standard of review where indecent speech is at issue.” _Id._ at 755. In _Pacifica_ Justice Stevens, writing for the plurality, found that indecent speech received lesser First Amendment protection, 438 U.S. at 745-748, while Justice Powell, concurring in part and concurring in the judgment, thought that indecent speech was fully protected speech. _Id._ at 761-762.

239 Breyer noted:
But unless a label alone were to make a critical First Amendment difference (and we think here it does not), the features of this case that we have already discussed -- the government’s interest in protecting children, the “permissive” aspect of the statute, and the nature of the medium -- sufficiently justify the “limitation” on the availability of this forum. 
_Id._ at 750.

240 “In adjudicating Sec. 10(a) …, the plurality elected not to use traditional First
characterized by the balancing of interests and the absence of doctrine. Justice Breyer did not apologize for this absence of doctrine; instead, he maintained that the interests of the parties and the reasonableness of the law were unaffected by the legal category that might apply.\footnote{241}

Justice Breyer’s realist approach enabled him to consider the interests of all of the interested parties, making his analysis more comprehensive than the analogistic approaches of Justice Thomas and Justice Kennedy. Unlike Justice Thomas, who considered only the rights of the cable operators, and unlike Justice Kennedy, who gave weight only to the rights of programmers and the viewing public, Justice Breyer considered and balanced the rights of all of the parties.\footnote{242}

5. The Difference Between Formalist and Realist Analogies: Justice Breyer’s Realist Analogy to the Pacifica Case

Justice Breyer rejected the traditional categorical analysis of First Amendment jurisprudence, but he did not altogether abandon reasoning by analogy. He identified and

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\footnote{241}{Elizabeth Nau Smith, 47 DePaul L. Rev. 1041, 1078 (1998). Strict scrutiny requires proof that the law is “necessary” to accomplish a “compelling governmental interest.” Intermediate scrutiny requires proof that the law is “substantially related” to achieving an “important governmental purpose.” The standard employed by Justice Breyer in Denver Area studiously avoids adopting either formula:

\[ W \text{e can decide this case ... by closely scrutinizing Section 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech.}\]

518 U.S. at 743.}

\footnote{242}{Justice Breyer stated:

Finally, and most important, the effects of Congress’ decision on the interests of programmers, viewers, cable operators, and children are the same, whether we characterize Congress’s decision as one that limits access to a public forum, discriminates in common carriage, or constrains speech because of its content.

\textit{Id.} at 750.}

\footnote{242}{Justice Breyer wrote:

While we cannot agree with Justice Thomas that everything turns on the rights of the cable owner, we also cannot agree with Justice Kennedy that we must ignore the expressive interests of cable operators altogether.

followed a case he thought analogous,243 *FCC v. Pacifica Foundation.*244 In *Pacifica*, the court considered the constitutionality of a federal law prohibiting the broadcasting of “obscene, indecent, or profane language,” as applied to a daytime radio broadcast of George Carlin’s “Filthy Words” monologue.245 The *Pacifica* court held that, considering the nature of the speech,246 the time of day,247 the intrusiveness of the medium of radio248 and its accessibility to children,249 that the law was constitutional as applied.250 Justice Breyer noted that the nature of the speech that was banned by Section 10(a) of the Cable Act, as well as the pervasiveness of cable television and its accessibility to children, was the same as in *Pacifica*, and that the cases were therefore analogous.251

Despite finding the facts in *Pacifica* to be analogous to the facts in the *Denver Area* case, and despite his decision to come to the same result, Justice Breyer did not apply the reasoning of the *Pacifica* decision. He did not find Section 10(a) to be content based as the plurality did in *Pacifica*.252 He did not ascribe a lower value to offensive speech, as the plurality did in *Pacifica*.253 In short, Justice Breyer did not mechanistically

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243 Justice Breyer stated: Rather than seeking an analogy to a category of cases, however, we have looked to the cases themselves. And, as we have said, we found that *Pacifica* provides the closest analogy and lends considerable support to our conclusion. 518 U.S. at 747-748.


245 438 U.S. at 742.

246 *Id.* at 744-748.

247 *Id.* at 750.

248 *Id.* at 748-749.

249 *Id.* at 749-750.

250 *Id.* at 750-751.

251 518 U.S. at 744.

252 438 U.S. at 744.

253 *Id.* at 746.
apply the reasoning of Pacifica to the facts. Instead, he drew the analogy in order to identify the interests and values that would have to be taken into account in weighing the validity of the law in question. In so doing, Justice Breyer made a realist analogy, not a formalist analogy.

As noted above, reasoning by analogy may be either formalist or realist. A formalistic analogy compares the factual elements of an existing case to the facts of a new case, and if the facts are sufficiently similar then the rule of the first case is applied to the new case. But practically all cases can be distinguished in some respect from a case already decided. For example, Denver Area involved the regulation of indecent speech on cable television, while Pacifica concerned the regulation of indecent speech on radio. Is this difference important? A natural response to that question is, “Important compared to what?” When drawing an analogy, how do we measure the importance of a factual similarity or distinction?

Steven Burton refers to this as “the problem of importance,” and it cannot be resolved simply by comparing the facts of one case to the facts of another case. Without knowing the values or interests that are served by a rule of law, there is no basis for deciding whether or not an existing rule of law rule ought to be extended to a new case.

A critical step in the reasoning process is to determine what values and interests are at stake. How is this accomplished? One could attempt to simply imagine what the various values and interests are, and arbitrarily assign them weight, but this effort is likely to fail. Richard Warner has described the difficulty of using a mere “thought experiment” to identify all of the relevant interests and values at stake, and instead recommends: “Looking retrospectively over a long series of cases reveals differences and distinctions that mere imagination is likely to miss.”

Although purely formalist analogies that compare the facts of one case to the facts of another case are of limited utility, reasoning by analogy is a critical step in constructing a realist argument, because by examining cases with similar facts, we may identify the relevant values and interests that are implicated in the case under consideration.

In the Denver Area case, for example, all of the analogies contribute to the eventual realist analysis of the case. Justice Thomas’ analogy to the law of print media

See supra notes 51-52 and accompanying text. See also HUHN, supra note __, at 120-125.


STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 83-84 (19__).

Warner, supra note 13, at 1560.
highlights the First Amendment value of protecting the editorial discretion of the owners of media. Justice Kennedy’s analogy to the public forum cases identifies the value of maximizing public access to the means of communication, in view of the fact that the principal means of public communication no longer takes place in the streets and parks, but through telecommunications and mass media. Justice Breyer’s analogy to Pacifica implicates the value of shielding children from a pervasive and intrusive source of offensive speech. Realistic reasoning, therefore, uses analogies to identify all of the values and interests implicated by a case, so that a court may weigh them and make an informed choice. Justice Breyer used all of the competing analogies for this purpose, and in balancing the interests of cable operators, programmers, and viewers, Justice Breyer concluded that giving cable operators editorial control over indecent speech on leased channels was constitutional.

6. The Justices’ Dispute Over Realism and Reasoning by Analogy

Justice Kennedy opened his dissenting opinion with the words, “The plurality opinion, insofar as it upholds Section 10(a) of the 1992 Cable Act, is adrift.” He deplored the indeterminacy of Justice Breyer’s reasoning, decrying its lack of predictability, particularly in light of the fact that the result was nonprotective of speech. He believed “the most disturbing aspect of the plurality opinion” to be “its

258 518 U.S. at 780.

259 Id. at 787. One pair of authors have suggested that even Justice Cardozo would not have approved of Justice Breyer’s “pure” realistic approach:

Justice Kennedy is correct. The approach followed by the plurality would have been shocking to Justice Cardozo because the plurality is saying that history is unclear, the method of analogy is too confusing, we are uncertain about applicable customs, and social values give uncertain guidance. Therefore, rather than pursuing these analyses, we’ll just balance the interests and hope we did the right thing.


evasion of any clear legal standard in deciding this case."\textsuperscript{260} He characterized the reasoning as “a legalistic cover for an ad hoc balancing of interests”\textsuperscript{261} that would “sow confusion in the courts.”\textsuperscript{262} While admitting that the advance of technology creates difficult cases, he argued that this does not justify ignoring established precedent and well-settled doctrine: “The novelty and complexity of the case is a reason to look for help from other areas of our First Amendment jurisprudence, not a license to wander into uncharted areas of the law with no compass other than our own opinions about good policy.”\textsuperscript{263} Finally, Justice Kennedy asserted a vigorous defense of reasoning by analogy, noting that “This newfound aversion to analogical reasoning strikes at a process basic to legal analysis.”\textsuperscript{264}

Justice Breyer countered by noting the inapplicability of the analogies cited by Justices Kennedy and Thomas: “Both categorical approaches suffer from the same flaws: they import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious political problems without sacrificing the free exchange of ideas the First Amendment is designed to protect.”\textsuperscript{265}

Justice Breyer traced his rejection of established standards and analogies to the fast pace of technological change:

But no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. That is not to say that we reject all the more specific formulations of the standard – they

\begin{itemize}
  \item 518 U.S. at 784.
  \item Id. at 786.
  \item Id.
  \item Id. at 787.
  \item Id. at 799-800, citing LEVI, quoted in the text accompanying note 38, supra.
  \item 518 U.S. at 740. Justice Thomas, who concurred in the judgment with Justice Breyer, nevertheless joined Justice Kennedy’s criticism of Breyer’s analysis: “It is true that the standard I endorse lacks the ‘flexibility’ inherent in the plurality’s balancing approach, but that relative rigidity is required by our precedents and is not of my own making.” Id. at 818.
\end{itemize}
appropriately cover the vast majority of cases involving government regulation of speech. Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now.266

Justice Breyer’s balancing approach received explicit support from the concurring justices. Justice Stevens said, “Like Justice Souter, I am convinced that it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this.”267 Justice O’Connor added, “I agree with Justice Breyer that we should not yet undertake fully to adapt our First Amendment doctrine to the new context we confront here.”268 Justice Souter echoed this theme, noting: “All of the relevant characteristics of cable are presently in a state of technological and regulatory flux.”269 Furthermore, he observed that “as broadcast, cable and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.”270 Justice Souter was, in effect, unwilling to cast First Amendment doctrine in stone at a time when society is beginning to communicate in cyberspace.271 Justice Souter’s closing remark contained this caution: “Maybe the judicial obligation to shoulder these responsibilities can itself be captured by a much older rule, familiar to every doctor of medicine: ‘First, do no harm.’”272

266 Id. at 741-742.

267 Id. at 768.

268 Id. at 779-780.

269 Id. at 776.


271 Justice Souter quoted and agreed with Professor Lessig that “if we had to decide today ... just what the First Amendment should mean in cyberspace, ... we would get it fundamentally wrong.” Lawrence Lessig, The Path of Cyberlaw, 104 YALE L. J. 1743, 1745 (1995), quoted at 518 U.S. at 777.

272 Id. at 778. Professor Sunstein agrees with this careful approach in Constitutional Caution, 1996 U. CHI. LEGAL F. 361, 362-363 (1996), but Israelashvili, supra note 174,
The Denver Area case is instructive not only because the justices of the United States Supreme Court utilize both analogy and realism in reaching their decisions, but because they debate the relative merits of each mode of reasoning. The justices implicitly agree that the case could not be resolved with the certainty of formalism. Justice Kennedy and Justice Thomas argue that the court ought to embrace the consistency and predictability of reasoning by analogy, while Justice Breyer and the concurring justices employ a realistic approach in order to avoid the straightjacket of analogy in this rapidly changing technological setting.

In the following section of this paper I discuss a series of cases in which the courts moved from formalism to analogy in determining a legal question that some legal scholars have urged is now ripe for realistic analysis.

B. Family Law and The New Reproductive Technology

Biomedical advances have made possible new ways of procreating a child, and have led to the creation of a new being -- human embryos outside the womb. These technological advances have, in turn, given rise to new legal questions regarding the determination of parentage and the nature of parental or ownership rights over potential human life.

1. Parentage in Gestational Surrogacy Cases

Technological breakthroughs in biology and medicine have made gestational surrogacy possible, and have also created a novel question of law: Who is the legal mother of the child?

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273 In vitro technology has not only made possible a new way to procreate, it has also opened the window to human genetic engineering and stem cell research, raising a host of bioethical and legal questions. See generally Lori B. Andrews, Maxwell J. Mehlman, & Mark A. Rothstein, Genetics: Ethics, Law and Policy (2002).

Three gestational surrogacy cases posing this issue have reached the courts: Johnson v. Calvert,\(^{275}\) decided by the California Supreme Court, Belsito v. Clark,\(^{276}\) decided by an Ohio Probate Court, and Buzzanca v. Buzzanca,\(^{277}\) decided by the California Court of Appeal for the Fourth Circuit. The cases arose amid different facts but presented the same legal question of maternity.

In Johnson v. Calvert, Mark and Crispina Calvert desired to have a child, but Crispina, though fertile, was unable to carry a pregnancy. The Calverts entered into a surrogacy agreement with Anna Johnson, pursuant to which an embryo created from the Calvert’s gametes would be implanted into Anna’s womb; Anna agreed to bear their child and relinquish the child to the Calverts at birth. When the child was born, however, Anna changed her mind and sought to retain custody of him.\(^{278}\)

In Belsito v. Clark, the procreative facts were identical to those of the Johnson case. Shelly Belsito could produce viable ova but was unable to gestate a child. Her sister, Carol Clark, agreed to bear the pregnancy on behalf of Shelly and her husband Anthony. Unlike Anna Johnson, Carol was at all times faithful to the surrogacy arrangement. In Belsito the parties were suing for a declaration that upon the birth of the child Shelly and Anthony would be considered the lawful parents, making an adoption procedure unnecessary.\(^{279}\)

The Buzzanca case presented an even more baffling question of parentage. Luanne and John Buzzanca had agreed to create their child by having a donated embryo,


\(^{277}\) 72 Cal. Rptr.2d 280 (1998).

\(^{278}\) 5 Cal. 4th at 87-88.

\(^{279}\) 67 Ohio Misc. 2d at 58, 644 N.E.2d at 762, and Pierce-Gealy, supra note 242, at 551-552.
genetically unrelated to either of them, implanted into a gestational surrogate. John filed for divorce one month before the child (Jaycee) was born. In the divorce case he claimed that he and Luanne were not Jaycee’s legal parents, while Luanne contended that they were the legal parents. The surrogate who bore Jaycee delivered her to Luanne and made no claim of parentage. In Buzzanca, unlike Johnson and Belsito, neither of the intended parents were genetically related to the child. Also unlike Johnson and Belsito, neither the birthmother nor the genetic mother made any claim to the child. In determining maternity, the practical choice before the court in Buzzanca was between the intended mother and no mother.

**The Formalist Argument**

Only one of the courts in the gestational surrogacy cases embraced a purely formalist approach to resolving the question of parentage, and that court handed down a remarkable decision. The trial court in Buzzanca found this to be a clear case under existing law; it reached the unprecedented conclusion that Jaycee was born without legal parents. Ruling on Luanne’s claim to be the lawful mother, the court said:

> One, there’s no genetic tie between Luanne and the child. Two, she is not the gestational mother. Three, she has not adopted the child. That, folks, to me, respectfully, is clear and convincing evidence that she’s not the legal mother.

The trial court formalistically applied the rules of law setting forth the legal criteria for motherhood (genetics, gestation, or adoption), and found that Luanne failed to qualify as the legal mother under any of those rules. The court determined that the child had no mother or father in the eyes of the law. Despite the fact that all of the people who created the child were alive, in the opinion of the trial court the child was born an orphan.

The appellate court in Buzzanca overruled the trial court’s decision. The California Court of Appeal rejected the formalist approach of the trial court, choosing instead to reason from analogy and by reference to public policy. Analogical reasoning and policy analysis also dominated the opinions of the courts in Johnson and Belsito.

**Analogical Reasoning**

Prior to the gestational surrogacy cases of Johnson, Belsito, and Buzzanca, the

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280 72 Cal. Rptr.2d at 282.

281 *Id.*

282 *Id.*

283 *Id.* at 283.
leading surrogacy case was In the Matter of Baby M. As in Johnson, the surrogate in Baby M. changed her mind upon giving birth of the child and sought to retain custody. A key difference between the gestational surrogacy cases and Baby M., however, was that the birthmother of Baby M., Mary Beth Whitehead, was also the genetic mother, the child having been conceived in her through artificial insemination. The New Jersey Supreme Court considered Mary Beth Whitehead to be the child’s legal mother. The Johnson and Belsito courts declined to apply the rule of Baby M. on the ground that the traditional rule conferring maternity on the birthmother had never been intended to apply to cases of gestational surrogacy.

Having distinguished Baby M., the courts were without a clearly applicable rule to guide them, and they proceeded to reason from analogy. The courts were faced with no shortage of analogies from which to draw a rule of decision. The problem was that for each analogy drawn in favor of finding parentage in a particular party, a contradictory analogy could be found. The parties argued and the courts discussed a welter of analogies thought to govern the question of parentage in cases of gestational surrogacy. Competing analogies were drawn from the fields of contract law, family law, and the law of gender equality. In addition, the Buzzanca court relied upon a fourth analogy, comparing gestational surrogacy to the practice of artificial insemination.


In Johnson v. Calvert, both sides argued that the gestational surrogacy agreement between Anna Johnson and the Calverts was a contract, but they disagreed about whether it was more like a contract for the sale of goods or more like a contract for services. Counsel for Anna Johnson contended that the agreement was a contract for the sale of goods – Anna’s baby – and therefore that the contract amounted to “babyselling,” which is prohibited by statute. The California Supreme Court in Johnson rejected the “babyselling” analogy, finding that a surrogacy contract is more like a lawful agreement for the rendering of gestation services, and awarded the child to the Calverts on the ground that this was the result consistent with the intent of the parties to the contract.

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285 Id. at 450.
286 5 Cal. 4th at 92-93; 67 Ohio Misc. 2d at 60.
287 5 Cal. 4th at 95; see Cal. Penal Code Sec. 273.
288 5 Cal. 4th at 97.
289 5 Cal. 4th at 96, 100.
290 Id. at 93.
2. Family Law: Adoption or Foster Parenthood

The Ohio Probate Court in Belsito rejected both of the foregoing analogies to the law of contract, and it rejected the “intent of the parties” test employed by the California Supreme Court in Johnson. Instead, the Ohio court noted that there existed abundant precedent for a traditional standard for determining parentage: namely, genetic relationship. The court held that maternity is to be determined by genetic relationship, unless the genetic parent waives parental rights (as in the case of a sperm or egg donor), and the court entered judgment for the genetic mother. In support of this conclusion the Belsito court initially noted that a gestational surrogacy arrangement bears resemblance to a private adoption agreement that would normally require a postpartum waiver of maternal rights by the mother. Accordingly, because the genetic mother had not waived her maternal rights, the Ohio court ruled that she was the legal mother of the child at birth.

The Johnson court had rejected the adoption analogy, reasoning that gestational surrogacy is comparable to adoption only if one assumes the very point in controversy, viz. that either the genetic mother or the gestational mother is the lawful mother whose parental rights predominate unless waived. The California trial court offered a competing analogy. Instead of finding gestational surrogacy comparable to a private adoption, it likened gestational surrogacy to foster parenthood. The court reasoned that the surrogate merely has custody of another person’s child for a time that the true parents are unable to care for it.

3. Gender Equality: Paternalism or Involuntary Servitude

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292 67 Ohio Misc. 2d at 65-66, 644 N.E.2d at 766-767.

293 Id. at 62-63, 644 N.E.2d at 765-766.

294 5 Cal. 4th at 95-96. One scholar has proposed that a gestational surrogate, like a mother who has promised to give up her child for adoption, should have the power to keep the child if this right is exercised within five days after the birth of the child. Amy Garrity, *A Comparative Analysis of Surrogacy Law in the United States and Great Britain*, 60 LA. L. REV. 809, 830 (2000).

Anna Johnson’s attorneys drew a third analogy on behalf of their client. It was argued that gestational surrogacy is a form of slavery or involuntary servitude, exploitative of women, and therefore against public policy. The California Supreme Court responded to the surrogate’s argument by adopting a competing analogy. The court found Johnson’s proposed restrictions on gestational surrogacy analogous to paternalistic laws that prohibited women from entering professions or earning a livelihood.

4. The Analogy Between Gestational Surrogacy and Artificial Insemination

In Buzzanca, the Court of Appeal reversed the trial court’s decision of Jaycee’s “legal orphanage,” and found Luanne and John to be Jaycee’s legal mother and father. In crafting its opinion the court reasoned principally from analogy, and like the Ohio Probate Court in Belsito, the California Court of Appeal in Buzzanca drew an analogy to an existing rule of family law to reach a decision. In assessing John Buzzanca’s claim that neither he nor Luanne were Jaycee’s lawful parents, the court analogized gestational surrogacy to the practice of artificial insemination. The court noted that a husband who consents to his wife’s artificial insemination is the legal father of the resulting child under the case law and statutory law of the State of California, even though he is not the genetic father. In drawing the analogy between artificial insemination and the facts of Buzzanca, the Court of Appeal noted specifically the husband’s consent to the procedure and his role in causing the creation of the child militated in favor of finding him to be the

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298  The court also cited precedent, noting that in Johnson the California Supreme Court had anticipated the fact situation in Buzzanca and proposed a solution by way of obiter dictum:

In what we must hope will be the extremely rare situation in which neither the gestator nor the woman who provided the ovum for fertilization is willing to assume custody of the child after birth, a rule recognizing the intending parents as the child’s legal, natural parents should best promote certainty and stability.

5 Cal. 4th at 94-95, quoted at 72 Cal.Rptr2d, at ___.

299  72 Cal. Rptr.2d at 284-288.


301  California Family Code Sec. 7613.
legal father of the child.\textsuperscript{302}

In a traditional surrogacy case, the Supreme Judicial Court of Massachusetts declined to apply the artificial insemination statute in a traditional surrogacy case because the result would have been to make the husband of the surrogate, who had consented to the procedure, the legal father of the child, a result that was not intended by the legislature.\textsuperscript{303}

\textit{The Realist Argument}

Ultimately, the analogies that were drawn in the gestational surrogacy cases seem strained at best. The decision in \textit{Johnson} applying the law of contract to surrogacy agreements suffers from the flaw that many aspects of surrogacy contracts are unenforceable. For example, several jurisdictions have limited payment to surrogates.\textsuperscript{304} In addition, the surrogate’s constitutional right to bodily integrity would trump the contractual rights of the intended parents. Prior to viability, the surrogate probably has an absolute right to choose an abortion rather than fulfill the agreement.\textsuperscript{305} It is even doubtful that the intended parents could specifically enforce provisions of the surrogacy agreement imposing restrictions on the surrogate’s behavior, such as forbidding the use of tobacco or alcohol.\textsuperscript{306} Accordingly, it is anomalous to apply the law of contract to determine

\textsuperscript{302} The court stated:
John argues that the artificial insemination statute should not be applied because, after all, his wife did not give birth. But for purposes of the statute with its core idea of estoppel, the fact that Luanne did not give birth is irrelevant. The statute contemplates the establishment of lawful fatherhood in a situation where an intended father has no biological relationship to a child who is procreated as a result of the father’s (as well as the mother’s) consent to a medical procedure. 72 Cal. Rptr. 2d at 288.


\textsuperscript{305} Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992). But see Kevin Yamamoto & Shelby A.D. Moore, \textit{A Trust Analysis of a Gestational Carrier’s Right to an Abortion}, 70 Fordham L. Rev. 93 (2001) (arguing that the gestational surrogate could be forced to carry the child to term unless her life or health is in danger).

parentage.

The analogical reasoning of the Belsito court, resulting in the application of the genetic relationship test to cases of gestational surrogacy, while adequate to decide the case before the court, would not have sufficed to decide Buzzanca, where neither the birthmother nor the genetic mother sought legal parentage. Similarly, the analogy drawn in Buzzanca between gestational surrogacy and artificial insemination also seems inapposite. A sperm donor is a close equivalent to an egg donor, but is not similarly situated to a gestational surrogate who carries and gives birth to a child.

The analogical reasoning in Johnson, Belsito, and Buzzanca has the same strengths and weaknesses as the analogical opinions of Justice Kennedy and Justice Thomas in the Denver Area case. Kennedy and Thomas each invoked existing rules of law by analogy to govern a new case, the regulation of indecency on cable television. Their approaches had the advantages of familiarity and predictability, but suffered from the inability to take into account the relevant interests of all of the affected parties. Similarly, although the Johnson, Belsito, and Buzzanca courts identified a number of relevant analogies from contract law, family law, and the law of women’s rights, ultimately no single analogy offers a persuasive rationale.

In Johnson and Belsito, the courts expressly noted that they had resolved a novel question of maternity by invoking an existing rule of law by analogy. In the opinion of Professor Malina Coleman, both the rationale in Johnson (contract law) and the rationale in Belsito (genetic relationship) undervalue the contribution of the gestational mother, and are inadequate to protect her legitimate interests. The Johnson and Belsito courts,

The similarity of a sperm donor and an egg donor was the decisive factor in the case of McDonald v. McDonald, 608 N.Y.S.2d 477 (App. Div. 1994), where the court held that a child that was conceived with a donated egg and implanted into a woman with her husband’s consent was a lawful child of the marriage.

Both courts disclaimed that they were developing new law, and instead indicated that it was the province of the legislature to make such changes. The California court stated, “It is not the rule of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so ... .” 5 Cal. 4th at 101. The Ohio Probate Court echoed this sentiment:

If a break with traditional law and public policy, as represented by the Johnson test, is to be made part of the law of this state, it must be argued that the legislature, through the scrutiny of public hearings and debate, is better situated than a judicial proceeding to test the effectiveness and appropriateness of such a change.

67 O. Misc. 2d at 64, 644 N.E.2d at 766.

See Coleman, supra note 274, at 510-514 and 517-518. See also John A. Robertson, Assisted Reproductive Technology and the Family, 47 HASTINGS L. J. 911
although acknowledging the novelty of the issues presented, attempted to resolve these cases by resort to familiar rules of law. Professor Coleman argues for a more nuanced balancing of the public policies and private interests than was adopted by either court.  

In the course of their opinions the gestational surrogacy courts identified a number of interests and policies that influenced their determinations of parentage, including the procreative rights of an infertile married couple, the interest of the state in assigning parentage to all children, the likelihood that the intended parents are more likely to protect the child’s interests than persons connected merely through genetics or gestation, the policy of discouraging private agreements to give up parental rights, the right of a person to be given an unpressured opportunity before a neutral magistrate to surrender parental rights, the responsibility of the state to supervise the placement of a child, the promotion of stability and finality in placement decisions, and the right of a genetic provider to consent to the use of his or her unique genes.

The analogies drawn by the parties and the courts were the vehicle by which these

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(1996) (proposing a number of protections for gestational surrogates); and Lori B. Andrews & Nanette Elster, Regulating Reproductive Technologies, 21 J. LEG. MED. 35 (2000). One scholar has argued that the gestational surrogate “cannot be fully marginalized as a womb for rent and must be afforded some rights as a woman with ‘motherly’ claims.” Laufer-Ukeles, supra note __, at 445. Amy Garrity’s proposed surrogacy statute contains a number of protections for gestational surrogates, including the right to custody of the child. See Garrity, supra note __, at 822-832.

Coleman “recommends that intent should be the determinative factor, but only if a system of rules is in place to protect against overreaching in surrogacy agreements. Otherwise, motherhood should be based on gestation alone.” Coleman, supra note 274, at 499.

5 Cal.4th at 100-101.

72 Cal. Rptr. 2d, at 289.

Id. at 290.

Id. at 290.

67 Ohio Misc.2d, at 62, 644 N.E.2d at 765.

Id.

Id. at 63, 644 N.E.2d at 765.

Id.

Id. at 63-64, 644 N.E.2d at 766.
interests and values were brought to the fore. As in the Denver Area case, the analogical arguments served to identify the policies that inform a realist analysis. The task that still awaits the courts is to balance all of these interests and policies in formulating a new and comprehensive law of parentage in cases of gestational surrogacy.

In the following section of this article I discuss a case where the court, like the plurality in Denver Area, rejected reasoning by analogy for a realistic approach.

2. The Legal Status of the Human Embryo

In vitro fertilization, the same medical technology that makes gestational surrogacy possible, has also brought into existence a new form of being: a human embryo which can, in frozen state, survive outside the womb. The novel legal question created by this technology is, in the event of a dispute, what are the rights of various parties with respect to this form of life?319

In Davis v. Davis,320 the Tennessee Supreme Court confronted the question of defining the legal status of human embryos. Junior and Mary Sue Davis had begun treatment at a Knoxville fertility clinic. At the time of their divorce, seven preembryos created from their gametes were in frozen storage at the clinic. Each spouse sought possession of the embryos; Mary Sue wanted to donate the embryos to an infertile couple for implantation, and Junior wished to have them destroyed.321

Two analogies from the law of domestic relations potentially applied to this case. If the embryos are considered children, then the court should award custody to the parent best able to care for them. If the embryos are property, then the court ought to divide the embryos among the parties along with the other marital property.

The trial court followed the first analogy, and awarded the “children” to their “mother” in accordance with the rule that custody is to be determined by reference to “the best interests of the child.”322

319 Among the first scholars to address this question were Lori B. Andrews, The Legal Status of the Embryo, 32 LOY. L. REV. 357 (1986), and John H. Robertson, In the Beginning: The Legal Status of Early Embryos, 76 VA. L. REV. 437 (1990).


321 842 S.W.2d at 589-590.

322 Id. at 595.
The intermediate appellate court did not expressly identify the nature of the parties’ legal interest in the embryos, but, in the opinion of the Tennessee Supreme Court, the lower appellate court had “left the implication that it is in the nature of a property interest.”

The Tennessee Supreme Court rejected both analogies, finding that human embryos are neither “persons” nor “property.” The court expressly adopted a realist approach to resolve this case: “[W]e must weigh the interests of each party to the dispute, in terms of the facts and analysis set out below, in order to resolve that dispute in a fair and responsible manner.” In balancing the interests of the parties, the court decided in favor of the husband, concluding that “Mary Sue Davis’ interest in donation is not as significant as the interest Junior Davis has in avoiding parenthood.”

In summary, in hard cases the reasoning of the courts progresses from formalism, to analogy, to realism. Realist analogies serve as the bridge between formalism and realism by identifying all of the underlying values and interests that must be taken into account.

In the following portion of this article I argue that the evolution of rules and standards also reveals the stage structure of legal reasoning.

III – THE STAGES OF LEGAL REASONING IN THE EVOLUTION OF RULES AND STANDARDS

Law may take the form of rules or of standards. A law requiring drivers to stop at a red light is a rule. A law requiring drivers to proceed cautiously through a blinking yellow light is a standard. To determine guilt or innocence, the application of a rule

323 *Id.* at 596.

324 “We conclude that preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.” *Id.* at 597.

325 *Id.* at 591.

326 *Id.* at 604. The court noted:

Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered.

*Id.* at 604.
depends solely on the existence of specific facts (Did the car stop?). The application of a standard involves the consideration of one or more facts in light of one or more underlying values (How fast was the car going, what were the weather, road, and traffic conditions, and how much danger will the law tolerate?) Larry Alexander offers the following distinctions between rules and standards:

Rules are often described as “bright-line” (clear and easy to follow), “formal” (to be applied without regard to substance of the results but only with regard to the rule’s terms) and “opaque” (to the rule’s background justifications).

Standards are norms that have the opposite characteristics. A standard can be applied only by engaging in evaluation. Therefore, to the extent that evaluation is contentious and uncertain, standards will be as well. Standards are thus vague, substantive (as opposed to formal), and transparent (to background values).

One of the most significant choices between rules and standards in American law occurred in the drafting of the exceptions to the hearsay rules under the Federal Rules of Evidence. In 1969, the Advisory Committee on the Rules of Evidence proposed the following standard for determining admissibility as an exception to the rule against hearsay: “A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy.” Ultimately, this


328 “A legal directive is a ‘standard’-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.” Sullivan, supra note 292, at 58.

329 Alexander, Incomplete Theorizing, supra note 48, at 541.

330 Proposed Rule 8-03(a) (1969 Preliminary Draft). See David E. Soneshein, The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule, 57 N.Y.U. L. REV. 867, 871 (1982). “In short, the 1969 draft contained no specific exceptions to the hearsay rule; any hearsay that met the relatively unguided standard of Rules 8-03(a) and 8-04(a) could be admissible.” Id. at 872.
basic approach to the law of hearsay was rejected, and the Federal Rules incorporated a lengthy list of specific exceptions to the rule against hearsay. The only remnant of the Advisory Committee’s original standard is the “residual exception” to the rule against hearsay, now codified in Rule 807, which provides that a hearsay statement is admissible if it has equivalent circumstantial guarantees of trustworthiness and is more probative of a material fact than other available evidence. Legislative history indicated that the Congress intended for this exception to be applied only in exceptional circumstances. Legal scholars have disagreed on the question of whether or not courts have abused their discretion in their interpretation of the residual exceptions.

In their derivation, rules and standards do not correspond with formalism and realism. Both rules and standards can be derived either formalistically or realistically. A court can create a rule of law by balancing competing interests and values, or it can

331  Id. at 872-875; see also Joseph W. Rand, The Residual Exceptions to the Federal Hearsay Rule: The Futile and Misguided Attempt to Restrain Judicial Discretion, 80 GEO. L.J. 873, 879-880 (1992).

332  Rule 807 provides:
A statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

333  Rand, supra note 331, at 880.


consider itself bound to apply a standard because the standard is set forth in definitive text or precedent. It is in the application of law that there is a correspondence between rules and formalism, and a correspondence between standards and realism. Rules are usually applied formalistically (Did the driver stop?), and standards must be applied realistically (Did the driver proceed cautiously?).

The “rules versus standards” debate has engrossed jurisprudential scholars. Many authors have examined the relative merits of rules and standards, particularly from the standpoint of efficiency and fairness. Other scholars have explored whether the

(1964), “was molded out of a close examination of the balance of rights and interests inherent in the First Amendment.” Faigman, supra note 292, at 839.

As Wilson notes, “A pragmatic functionalist can be a doctrinal formalist.” Wilson, supra note 26, at 786.

The connection between rules and formalism, and standards and realism, was mentioned by William Eskridge:

Formalism might be associated with bright-line rules that seek to place determinate, readily enforceable limits on public actors. Functionalism, at least as an antipode, might be associated with standards of balancing tests that seek to provide public actors with greater flexibility.


“[T]he amount of ink spilled over debating the virtues of rules versus standards would lead the reasonable observer to believe that something momentous was at stake.” Faigman, supra note 292, at 830.


Economic efficiency is not, of course, the only value that the law serves. When one author argued that the courts could improve their efficiency by developing “stable, certain, and predictable rules of law,” J. Clark Kelso, A Report on the California Appellate System, 45 HASTINGS L.J. 433, 450 (1994), another responded that “judicial economy seems a questionable basis for formulating common-law legal doctrine.”
choice between rules and standards correlates with ideological perspective. The point that I wish to make in this article is that the stages of legal reasoning play a role in the evolution of rules and standards.

Rules and standards are not the only forms that laws can take. Instead, laws fall along a spectrum of generality. The more specific a law is, the more “rule-like” it is, and the more general it is, the more “standard-like” it is. Over time, rules of law are

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Several scholars have argued that rules, as compared to standards, are over- and under-inclusive. Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Stud. 257, 268-270; Larry Alexander, *Can Law Survive the Asymmetry of Authority*, supra note 7, at 42. Kaplow disputes this view, contending that specific standards may also miss their mark. Kaplow, *supra* note 299, at 589. Another scholar argues that while rules may be under- and over-inclusive, “standards create the possibility that similar people will be treated differently.” Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, The Rules/Standards Dilemma and the Line Item Veto*, 44 Vill. L. Rev. 189, 200-201 (1999).

In the area of constitutional law generally, David Faigman suggests that standards are preferable to rules in defining rights. He contends that in defining rights “the court must weigh the social importance of the government action against the value of individual liberty infringed by that action.” Faigman, *supra* note 292, at 838.

In a landmark article Kathleen Sullivan examined the use of rules and standards by justices of the United States Supreme Court during the 1991-1992 term. Sullivan, *supra* note 292. In that work Sullivan sought to determine whether there was a correlation between political affiliation and the judge’s affinity for rules versus standards. She concluded that liberal and conservative justices used both rules and standards in their reasoning. “[R]ules and standards simply do not map in any strong or necessary way onto competing political ideologies, or, in the setting of constitutional adjudication, on to the side of rightholders or the state.” *Id.* at 96. Sullivan suggests, however, that “[i]deological poles tend to attract rules,” and that “[s]tandards moderate ideological swings between poles.” *Id.* at 122.

“[T]he two types of legal forms are better understood, as a descriptive matter, as endpoints of a spectrum than as dichotomous categories.” Korobkin, *supra* note 292, at 26. Accord, Kaplow, *supra* note 292, at 561; and Faigman, *supra* note 292, at 831. James Wilson describes a variety of forms along this spectrum, including exceptions to rules, multi-factor tests, totality of the circumstances tests, “escape hatches,” and “peepholes.” *See* Wilson, *supra* note 26, at 773.

For example, “[m]ulti-factor balancing tests are less pure and more rule-like than requirements of ‘reasonableness’ because they specify ex ante (to a greater or lesser
often modified to become more standard-like, and standards are frequently modified to become more rule-like.

A number of scholars have traced this evolution of the law from rules to standards, or from standards to rules, in different fields of the law. Authors have detected trends from rules to standards in commercial law and civil procedure, while movement from standards to rules has been observed in attorney ethics, juvenile criminal law, criminal sentencing, federal income tax law, and corporate law. In some areas of the law the pendulum has swung back and forth between rules and standards. For example, on the question of whether a cause of action is barred by the lapse of time, the last century saw specific statutes of limitation replace the general doctrine of laches, but more recently, courts have attempted to mitigate the harshness of degree of specificity) what facts are relevant to the legal determination.” Korobkin, supra note 292, at 28.

At the conclusion of her review of the Supreme Court’s 1991 term, Sullivan observed, “Thus, the cycle of rules and standards will continue; this Term’s divisions were but a chapter.” Sullivan, supra note 292, at 123.


Id. at 360.


Id. at 720-722.
statutes of limitations by formulating tolling doctrines such as the “discovery” and “adverse domination” theories. In a counter-response to the uncertainty created by these equitable doctrines, some legislatures have attempted to enact statutes of repose.

Several scholars have examined how rules become standards, and how standards become rules. Russell B. Korobkin has concisely described this process: “Just as a pure rule can become standard-like through unpredictable exceptions, a pure standard can become rule-like through the judicial reliance on precedent.”

The defining characteristic of a rule is that it can be applied by making a simple factual determination. However, as Korobkin notes, rules become more standard-like through the creation of exceptions. As a rule is interpreted in case after case, the courts often discover that, in light of the underlying purpose of the rule, it ought not be applied strictly according to its terms. Thus exceptions to the rule are created in certain factual situations. The more exceptions that arise, the less determinative the rule is. If an underlying policy is identified that explains the rule and all of its various exceptions, the law may be more simply expressed in light of this underlying policy, and the rule has evolved into a standard. The exceptions have swallowed the rule. The initial draft of

353 Id. at 733-735.
354 Id. at 709-715.
355 For example, the Ohio legislature has repeatedly attempted to enact a statute of repose as part of its efforts at tort reform. See State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 O.S.3d 451, 475-478, 715 N.E.2d 1062, 1085-1087 (1999) (striking down the tort reform act on state constitutional grounds).
356 Korobkin, supra note 292, at 29. James Wilson agrees:
After several cases have been litigated in a related area, litigants, scholars, and judges may be able to infer a more rigid rule where only an impulse initially existed.
Wilson, supra note 26, at 820.
357 Another scholar has also observed that exceptions to rules tend to create standards: “The … suggestion that agencies enforce only the ‘spirit’ of the laws, either by granting informal waivers or by approving compliance plans, amounts to a proposal for a broad shift from rules to standards.” Book Note: The Bureaucrats of Rules and Standards, 106 Harv. L. Rev. 1685, 1687-1688 (1993).
358 I thank Elizabeth Reilly for the suggestion that at some point in the evolution of a rule it becomes more simple to express the law in terms of a standard. This is an application of “Occam’s Razor” to principles of law.
359 Korobkin states:
the Federal Rules of Evidence attempted to achieve this result by creating a single standard that would replace all of the specific exceptions to the rule against hearsay.\textsuperscript{360}

In a similar manner, standards become more rule-like as the courts gain experience with them. The defining characteristic of a standard is that its application requires a weighing of multiple policy considerations. As a standard is construed in case after case, eventually factual similarities are discovered in the cases. If the factual patterns in these cases are consistent, then it may be more simple to express the legal consequences of the standard as contingent upon the presence of those factual patterns rather than upon a weighing of the underlying policies, and the standard has evolved into a rule.\textsuperscript{361} The holdings have swallowed the standard. In this manner the interpretation of the residual exception to the rule against hearsay may eventually result in the recognition of specific additional exceptions to the hearsay rule.\textsuperscript{362}

Therefore, a critical component in the evolution of rules into standards and standards into rules is judicial experience. Both exceptions to rules and specific applications of standards are developed by case law, and as a body of case law accumulates the courts reason from these cases with arguments by analogy. But the analogies that the courts employ in the evolution of rules are different from the analogies

The more qualifications and exceptions a rule has, however, the more likely it will be applied unpredictably. ... At the extreme, when a rule is enforced rarely or randomly, it can be said that the law's form has migrated across the legal form spectrum and become a standard. For example, if courts will enforce a rule that mothers are entitled to custody only after reviewing all the unique circumstances of a divorce and determining that the rule should not be abrogated for some reason, it is more appropriate to classify the law as a standard. Korobkin, supra note 292, at 26-27.

\textsuperscript{360} Similarly, James Beaver warns that because the courts have improperly invoked the residual hearsay exceptions in cases that were not “exceptional,” “[t]he residual hearsay exceptions threaten to swallow the hearsay rule.” Beaver, supra note __, at 790.

\textsuperscript{361} Louis Kaplow observes that a standard may be “transformed into a rule by precedent.” Kaplow, supra note 299, at 621. As Kathleen Sullivan puts it, “A rule is a standard that has reached epistemological maturity.” Sullivan, supra note 292, at 62. The resulting rule is frequently enacted statutorily. A tax scholar describes the process: “As controversies develop, the I.R.S. and the courts interpret the statutory standard in ways that cause Congress to amend the statute by providing more detailed rules.” Colliton, supra note 310, at 266.

\textsuperscript{362} For example, the courts or Congress may develop uniform guidelines for the admission of grand jury testimony. See Lizbeth A. Turner, admission of Grand Jury Testimony Under the Residual Hearsay Exception, 59 Tul. L. Rev. 1033, 1064-1070 (1985).
drawn in the evolution of standards. The order of the progression of the stages of legal reasoning is reversed in the two situations. The evolution of rules is the mirror image of the evolution of standards.

As rules evolve into standards – as the law moves from formalism to realism – a key step in the process occurs when the courts, through the use of *realist* analogies, identify the underlying values that justify exceptions to the rule. In contrast, as standards evolve into rules – as the law moves from realism to formalism – the key step in the process occurs when the courts use *formalist* analogies to identify the factual similarities in the cases that apply the standard. As rules age, courts increasingly question their validity as they are applied to unforeseen facts, and as standards age, the courts incrementally determine their meaning. As noted in the previous portion of this article, reasoning by analogy is the bridge between formalism and realism.

Just as law is an amalgam of logic and morals, legal reasoning comprises both formalism and realism. Rules evolve towards standards to serve justice, while standards evolve towards rules to enhance consistency and predictability. Both justice and consistency are fundamental to a rational system of justice. Each is a necessary counterweight to the other. The evolution from rules to standards, and from standards to rules, represents the complex interplay of these fundamental values of the legal system, as legal reasoners engage in an unending cycle of assimilation and accommodation.

CONCLUSION

Legal reasoning embodies both logic and moral reasoning. As such, legal reasoning exhibits the same stage structure that has been observed by psychologists in the development of cognitive and moral reasoning. This structure becomes evident when changes in society, including changes that result from scientific progress, give rise to novel legal problems. When faced with new fact situations the reasoning of the courts frequently follows a typical sequence. First, courts attempt to formalistically apply existing rules of law according to their terms to new facts. If the courts are unable to define the terms of existing rules so that they apply to the new case, then the courts draw analogies between the new situations and familiar ones, applying existing rules by analogy. If these analogies break down, courts fashion new rules by means of a realistic

Joseph Grodin describes the swing of the pendulum between rules and standards as follows:

[A] tension typically develops between the rules and perceived principles of justice, and courts begin to allow for exceptions. Some bright law student writes a law review note observing that the exceptions are so numerous and so vaguely defined as to “swallow the rule,” and the courts proceed to adopt the multi-factored standards that the bright student has proposed. And so it goes, until someone suggests that the standards provide insufficient predictability, and that a “clear bright line” is needed. Grodin, *supra* note 299, at 572.
balancing of policies and interests. The progression from formalism to realism reflects the process of assimilation and accommodation described by James Mark Baldwin, the cognitive change from concrete operations to formal operations described by Jean Piaget, and the change from conventional to postconventional moral thought described by Laurence Kohlberg.

Reasoning by analogy may be either formalist or realist. Courts may draw analogies by noting the factual similarities between previous cases and new cases, and if these formalist analogies are deemed sufficient then the rule of the previous case will be applied to the case at hand. If the formalist analogy is deemed insufficient, the courts may proceed to identify the values that are served and the interests that are protected by existing rules of law in considering whether those interests and values will be similarly promoted by applying the existing rule to the case at bar. If the realist analogy is also insufficient to persuasively justify a result, the courts may then proceed to the third stage of legal reasoning, and may develop new rules of law by directly balancing the underlying values and interests that were identified through the use of realist analogies. In this way reasoning by analogy serves as a bridge between formalism and realism.

Furthermore, as rules evolve into standards, and as standards evolve into rules, a critical stage in the process is judicial experience applying the law. For standards to become rules, the courts must draw formalist analogies between cases interpreting the standards, and for rules to become standards, the courts must draw realist analogies among the cases interpreting the rules. This pattern in the evolution of rules and standards supports the concept that formalism, analogy, and realism are the stages of legal reasoning, and that analogy serves as the bridge between formalism and realism.