The role of rationality in the legal process, as described in the sociological jurisprudence of Max Weber, is examined and analyzed in this Article. Professor Morris, an established authority in the fields of tort and insurance, here offers a comparison of Weber’s system with divergent contemporary legal thought on the nature of the judicial process, and calls for an articulate basis for discriminating between instances in which legislatures should act to correct unjust rules, and those in which it is appropriate for courts to act.

Socially-oriented political philosophers of the eighteenth and nineteenth century knew little behavioral science.¹ Their acquaintance with differing cultures came from their own informal observations and from a “cosmography” of travel books and gossip. Modern anthropology and sociology furnish a richer factual grounding for Twentieth Century Sociological Jurisprudence. Max Weber, a sociologist with legal training, took advantage of this modern opportunity. He is a scientific describer of the patterns that law takes in societies. His science combines both learned appreciation of many cultures and skilled understanding of legal processes.²

¹ Professor of Law, University of Pennsylvania. LL.B., 1925, University of Colorado; LL.M., 1926, Columbia University.

² When Weber is referred to in this Article citation will be made to WEBER, LAW IN ECONOMY AND SOCIETY (1954) which will hereinafter be called LAW IN SOCIETY. The work is a translation from WIRTSCHAFT UND GESELLSCHAFT (2d ed. 1925). The translated volume was edited and annotated by Max Rheinstein, who, with Edward Shils, did the translating.
This Article tries to do three things. (1) State the outlines of Weber's theories on the logic and illogicalities of law in action. (2) Compare Weber's views with those of some important jurists at odds with him. (3) Develop answers for some questions that are raised by the comparisons.

WEBER'S THEORIES ON THE LAW'S RATIONALITY

Throughout the ages most legal philosophers have characterized law as applications of formulated rules to established facts yielding decisions (or logical steps towards them). Of course, no one says that legal systems furnish wise rules, clearly applicable to any and all legal problems. But most jurists have assumed: (1) that rules of law ascribe a class of legal consequents to a kind of cases, and that (2) a magistrate deciding a case attaches to facts legal consequents appropriate (in the magistrate's eyes) to that kind of case. When, if ever, this stereotype is what goes on, law is rational at least in the sense that it is a process in which a resolution is kept. This kind of rationality of the judicial process is assumed in most jurists' definitions of the law.

Weber, however, says law's actual beginnings were irrational. He rejects the Nineteenth Century "Historical" School's thesis that early societies developed legal principles by verbalizing their customs and enacting them into law. Only in advanced societies, says Weber, do legislators turn usage into statute; in primitive society new law changes usage. The view, then, that early law emerged from folk spirit is unscientific; primitive usages were rigid and tended to check, rather than inspire, promulgations of law that nevertheless were uttered.

In all societies suspicions of impropriety, frictions, disputes arise; so when men live in groups legalistic problems are inevitable. Weber defines a law as a rule of conduct backed by a "coercive apparatus" (persons holding themselves ready to enforce it by legal coercion). Such an apparatus, even in primitive societies, at times considers whether it should go into action. Primitives, according to Weber, resolve such doubts by magic. Occult rites reveal that a tribesman has acted either legally or illegally; no one, however, purports either to apply a formulated legal rule to the case or to identify the salient aspects of its facts.

3. LAW IN SOCIETY 34.
4. Id. at 67-68.
5. Id. at 13. Weber goes on to say that the apparatus' power must be such that rules will probably be respected because of its availability. Id. at 14. Nevertheless, most law abiders are more likely to conform either (1) because of their unreflecting habituation to law (which is therefore also "usage") or (2) for fear of evoking adverse public opinion, which is the force behind "conventions." Id. at 12.
Magical procedures can go forward without clearly formulated rules of conduct—new or old.6

When, says Weber, aboriginal law does congeal into rules, primitives cannot conceive that they invented or can amend these rules; they believe that law is god-given and immutable.7 Only wizards and priests (who commune with spirits) can interpret these supernatural edicts.8 Therefore when law is to be applied to a case, reason cannot plumb either the meaning of the applicable rules or the significance of operative facts.

Whenever magic is used in a legal process, its irrationality is of the clearest sort. Weber classifies oracular law as "formally irrational."9 The historical line of change from (a) legal judgments revealed by magic to (b) secular enactment of rules of law, says Weber, usually happened in some such way as this: An alliance brought heads of kinship groups or local chieftains into council. Their accredited magician reported a divine principle newly revealed to him. The gathered elders disseminated the new doctrine to their local groups and ordered them to respect it.

"However the boundaries between technical decree, interpretation of tradition by individual decision, and revelation of new rules were vague and the magicians' prestige was unstable. Hence the creation of law could be . . . increasingly secularized and revelation could be either completely excluded or applied as an ex post facto legalization of the compacts. As a result, wide areas in which law making was once possible only through revelation became subject to regulation by the simple consensus of the assembled authorities."10

In two other ways magic fell into disuse: (1) Successful military leaders allotted prisoners, booty and conquered territory. "They thus created new individual rights and, under certain circumstances, new law." Preparation for and prosecution of war were furthered by promulgation of practical legal rules.11 (2) "In early medieval Europe . . . the Christian Church, by its example of episcopal power, everywhere

6. Id. at 73.
8. LAW IN SOCIETY 86.
9. Id. at 63.
10. Id. at 83-84.
11. Id. at 91-92.
strongly encouraged the interference of the princes in the administration and enactment of the law. Indeed the Church often instigated this intervention for its own interests as well as the interests of the ethics it taught.”

Purging law of magic eliminates only one variety of irrationality. In several other ways legal processes can include unreasoned steps. Weber points out that law is forever changing without judges or legislatures noticing the shift. The meaning of a legal term grows, shrinks or slips imperceptively; a court decides a novel case thinking it an example of an old well-understood type; a judge applies new law assuming it has always obtained. But law does not have a rational beginning when it emerges with no legislator or judge adverting to its merits.

Many legal philosophers have said that judges’ bias against and sympathy for disputants tend to warp their reason. Aquinas, for example (comparing legislative with judicial lawmaking), said that a general rule enacted before occasion for its application arises is more likely to be rational than a rule invented by a judge to dispose of a case before him. One of three reasons he gave for his belief was that law decided before the event is not skewed by the emotional appeal of irrelevant aspects of concrete cases. Rousseau was of the same mind on the ground that only by consulting their “general will” on abstract problems of policy can men design true justice; concrete cases inevitably activate the perverse “particular will” except when they are decided by applying principles previously formulated by exercise of the general will. Weber also believes that prior rule formulation is crucial for rationality. He observes that jural thought of the western world tends to favor separation of governmental powers by allocating the “law-maker” role to one branch of the government and the “law finder and applier” role to another. He classifies legal systems in which these functions are not separated as “irrational.” He says the separation is not made when there is “free” adjudication from case to case, and therefore irrational law (in a pure or modified form) has been man’s

12. Id. at 92. Not only was adjudicative law magical in primitive times; the ways of entering into some binding legal relations were also magical. Weber says the invention of money tended to eliminate magic and sacramental elements from legal transactions. Id. at 109.

13. Id. at 67.

14. AQUINAS, SUMMA THEOLOGICA, 1st pt. of 2d pt., QQ.95, art. 1, reply objection 2. The other two reasons are: (1) It is easier to find a few wise legislators than many wise judges; and (2) Legislators have more time to study the whole nature of a problem than judges who must act promptly on a single set of facts.

15. See THE SOCIAL CONTRACT, especially Book II, chs. III, IV, at 26-32 (Cole transl. 1950). Rousseau, by the way, probably never read Thomas; the Summa was not translated into French until after Rousseau’s death and Rousseau was poor at Latin.
fate through world history except in Rome and in countries that adopted the Roman system.  

Remember Weber has used the term "formal irrationality" to denote oracular systems of law. Magical methods are not inconsistent with separation of powers; a taboo can be revealed in advance to one wizard and magically applied to a concrete case by another wizard. When Weber classifies non-Roman law as "irrational" he is not concerned with the "formal" irrationality of magic; he is concerned with what he calls "substantive" irrationality. He says, "law making and law finding are substantively irrational . . . to the extent that decision is influenced by concrete factors of the particular case as evaluated upon an ethical, emotional or political basis rather than by general norms." In other words a judicial decision is "substantively" irrational unless (1) it is, in fact, the result of disposing of the case by applying a rule of law, rather than some other kind of guide to conduct (such as a principle of morality, an intuited ethical truth, or a political maxim), and unless (2) that rule of law actually has, in advance, solved the kind of problem raised by the case at bar. Weber's definition of "substantive rationality" requires further that the legal rule applied have a special characteristic: the rule itself must be "rational"—that is, it must be more than a mere legalistic, abstract rule; it must be based on "ethical imperatives, expediential rules, and political maxims." His system also includes a junior grade of legal rationality, which he calls "formal rationality." It is like "substantive rationality" except that the rules themselves need not be rational; they are what the layman calls "technicalities" when he wants to infer that law has retreated to a professional realm beyond ordinary men's understanding. Weber says that a formally rational system is at least "relatively rational." He divides formal rationality into two classes: (1) Rules of law requiring a set form of words or acts to accomplish a certain kind of legal result (some examples: words of negotiability in a promissory note, seals at common law, delivery of a twig or clod to convey land by livery of seisin). (2) "The other type of formalistic law is found where the legally relevant characteristics of the facts are disclosed through the logical analysis of meaning and where, accordingly, definite fixed legal concepts in the form of highly abstract rules are formulated and applied."  

16. Law in Society 59. Compare "Written law is the law for civilized nations: traditional law, for barbarians: customary law, for brutes." Bentham, The Limits of Jurisprudence Defined 244 (Everett ed. 1945).  
17. Law in Society 63. (Emphasis added.)  
18. Ibid.  
19. Id. at 63-64.  
20. Id. at 63.
The first type of formalism can, of course, become archaic, over-technical, and annoying. The common law seal's rigidity and livery of seisin's naive drama fortunately are history and not practice. But the formal words of negotiability, the arbitrary octagonal shape of highway stop signs, and the fixed requirements of statutes of frauds and statutes of limitation have not become quaint nuisances; they are still very useful.

Problems raised by Weber's second type of formality are much more difficult and have been of central interest to twentieth century legal philosophers—nearly all of whom deal with law's tendency to retreat into technical manipulation of words and away from concern with policy.

**THE PLACE OF WEBER'S THEORIES IN MODERN JURISTIC THOUGHT**

Cardozo's *The Nature of the Judicial Process* (1921) is contemporary with Weber's work. Cardozo pictured judges using a blend of methods. The method he dealt with first—the "rule of analogy or method of philosophy"—is virtually Weber's "formal rationality." Cardozo describes this method as logical and abstract legal reasoning; he gives it an important place in the judicial process.\(^2\)

Like Weber, Cardozo says that other forces affect judges' decisions and that they use other methods. He recognizes history's and tradition's part in the judicial process but his most stressed supplement to abstract reasoning is "the method of sociology"—which focuses the judicial process on society's welfare as the key to interpretation of existing rules. Social welfare, says Cardozo, is a broad term; it may mean expediency or prudence for the good of the collective body; or it may mean social gain wrought by adherence to the community's mores—the demands of religion, ethics, or the social sense of justice.\(^2\)

Cardozo says judges do and should use both methods—that of "philosophy" and that of "sociology."

Weber, as a "scientist," makes no judgment on what law's method should be. He says, however, that the professional, legalistic and abstract approach to law cannot exist and continue without some acceptance of formally rational law.

"Only that abstract method which employs the logical interpretation of meaning allows the execution of the specifically systematic task, i.e., the collection and rationalization by logical means of all the several rules recognized as legally valid into an internally consistent complex of abstract legal principles."\(^2\)

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22. Id. at 66-72.
23. Law in Society 64.
Cardozo makes a value judgment. He gives his method of philosophy an important permanent place in the judicial process, but he approves it because of its secondary value in promoting orderliness and impartiality. He says, "I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history, or custom, or policy, or justice." Even though Cardozo is a professional lawyer he publicly devalues "formal rationality" whenever its abstractions hide and thwart society’s needs. Nevertheless he does agree with Weber that this in fact happens.

Cardozo is one of those legal philosophers who characterize modern law (including non-statutory law) as an application of principles to facts—all of his "methods" of common-law decision are different ways of understanding and developing existing common-law rules and then applying them to cases. Weber, looking at a wider strip of the legal fabric, sees courts sometimes deciding cases inconsistently on fluid and shifting grounds. He says, for example, that English trial by jury replaced oracular ordeals but still resembled them in one way—neither stated rational grounds for their holdings. Weber continues,

"The popular view which assumes that questions of fact are decided by the jury and questions of law by the judge is clearly wrong. Lawyers esteem the jury system, and particularly the civil jury, precisely because it decides certain concrete issues of 'law' without creating 'precedents' which might be binding in the future, in other words because of the very 'irrationality' in which a jury decides questions of law."  

Remember that since Weber’s "science" is "value free" he does not condemn irrationality; he is describing and not deprecating practices he calls irrational. Flexibility resulting from submitting to juries a certain range of questions anew every time they occur is thought by some (less value free) writers more desirable than formal fixed stand-

24. Weber, in passing, notes that one of judges' motives for respecting rules of law used in the past is escape from charges of bias. Id. at 74.
25. CARDozo, op. cit. supra note 21, at 33. (Emphasis added.)
26. But see id. at 19-20. "Some judges . . . notion of their duty is to match the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule."
27. LAW n Socnrv 79.
28. Especially is this so when Weber makes such statements as, for example, "Because of the jury, some primitive irrationality . . . has thus continued to survive in English procedure even up to present time." Id. at 80.
ards (which can become outmoded and unjust and yet stay frozen into law). 29

Weber characterizes common-law growth resulting from alternating interaction between private business practices and judicial decisions as lacking in "the rational character of legal propositions as evolved by modern legal science." He says that in this process cases are "distinguished from each other in a thoroughly empirical way in accordance with their objective characteristics rather than in accordance with their meanings as disclosed by formal legal logic." 30 He is talking about judicial rule development aimed at substantive justice—the very process that Cardozo calls "the method of sociology."

Americans have looked on Cardozo as a significant and enlightened legal philosopher largely because his "method of sociology" legitimates the adaptive justice of the common law. Though we can say that Weber has not (even by implication) criticized either Cardozo's theories or our liking for them, a reading of Weber does, nonetheless, raise the question, are Cardozo's prized views an apology for less rationality than we deserve? Before we deal directly with the question, a more detailed look at what Weber has to say about social forces that work for and against rationality in law is in order.

**SOCIAL FORCES SUPPORTING OR ATTACKING LEGAL FORMALISM**

The politically powerful of ancient times, says Weber, did not outmode magic to serve only their own interests. They were pushed in that direction "by powerful interest groups with whom they were allied and to whom rationality in substantive law and procedure constituted an advantage, as, for instance, to the bourgeois classes of Rome, of the late Middle Ages, or of modern times." Weber continues, saying that juridical thought was retarded when those in power were not allied with commercial interests, because priests and monarchs are not impelled to stabilize legal systems; their own temperaments and aims are usually better served by non-formal law. 31 Non-formal law also suits the politically powerful in democracies; they seldom are willing to tie themselves down by rules 32—even those they enact. Democrats inevitably are put to the choice between: (a) formalism's certainty

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31. *Id.* at 225.

32. Weber probably does not include constitutions; he excepts "those norms which they regard as religiously sacred and hence absolutely binding." *Id.* at 226.
and impartiality, and (b) their prized substantive goals. When economic power is spread unequally formal systems of justice tend to stabilize a system in conflict with religious ethics or with political expediency.

"Formal justice is . . . repugnant to all authoritarian powers . . . because it diminishes the dependence of the individual upon the grace and power of the authorities. To democracy, however, it has been repugnant because it decreases the dependency of the . . . individuals upon the decisions of their fellow citizens." 34

Authoritarians and democrats are likely to prefer what Weber calls "Khadi justice"—"decisions reached on the basis of concrete, ethical, or political considerations or of feelings oriented toward social justice" 35—decisions made not on the basis of legal rules inspired by these materials, but on the materials themselves.

Laymen (who read into formal rules economic and utilitarian meanings), says Weber, are doomed to legal disappointment; formal legal thought is bound to diverge from private economic expectations. "Lawyers' law" will protect laymen's expectations only when lawyers renounce the formalism embedded in their law—an unlikely event. Lawyers' formalism, says Weber, will persist in England as doggedly as on the continent. 36

Lawyers' mechanically simple roles in formal systems, however, irk some of them. Weber says that these lawyers try to up-grade their work by demanding a creative judicial process—at least when statutory law is "silent." The "free law" school holds this view in an extreme form: statutes inevitably, they say, are silent because life's facts are legally unorderly; judicial decisions, therefore, should be made as "concrete evaluations" rather than in accord with formal legal rules. 37 Jurists who believe that gaps are bound to occur in all systems of legal rules say that the judicial process

"never consisted, or at any rate never should consist, in the 'application' of general norms to a concrete case . . . . In this view, the 'legal propositions' are regarded as secondary. 38 [T]he preference for a case law which remains in contact with legal reality—which means with the reality of the lawyers—to statute

33. Id. at 226-27.
34. Id. at 228.
35. Id. at 228-29.
36. Id. at 307-08.
37. Id. at 307-09.
38. Id. at 311.
law is in turn subverted by the argument that no precedent should be regarded as binding beyond its concrete facts. The way is thus left open to the free balancing of values in each individual case."  

However most lawyers, says Weber, recoil from creative roles that leave their law so unchanneled, and try "to re-establish an objective standard of values."  

Judges, presently and in the past, tend to think of themselves as "the mouthpieces of norms already existing, though perhaps only latently, and to be their interpreters or appliers rather than their creators."  

Weber prophesies that growth of legislation's scope will change the English judge's role profoundly, and he says that laying a "creator's crown" on the brow of the continental judge would not much dispose him to strike out on his own. "In any case the juristic precision of judicial opinions will be seriously impaired if sociological, economic, or ethical argument were to take the place of legal concepts."  

In spite of various economic and political forces disfavoring formalism, laymen's ignorance of the law will increase; legal specialization will keep pace with inexorable technological and economic growth; the specialists are sure to develop more complicated legal rationality. Weber does not insist that this more specialized law will be inflexible. "Inevitably," he says, "the notion must expand that the law is a rational technical apparatus, which is continually transformable in the light of expediential considerations and devoid of all sacredness of content."  

Weber is not, however, here prophesying extended use of Cardozo's method of sociology, since Weber is foreseeing a system that is rational and yet socially adaptable, and since his "rationality" implies separation of law making and adjudication, Weber must mean that enlightened and mobile legislation (or administrative rule making) will advance law's ability to serve society's needs.

In his last paragraphs Weber says that all democratic movements are ambivalent toward legal rationality. Demands for "legal equality"

39. Id. at 313.
40. Ibid.
41. Id. at 320. Remember Cardozo looks on the judge as a molder of existing rules.
42. Id. at 320.
43. Id. at 321. Weber also considers the rationality of the executive branch of government. Technical superiority, he says, accounts for the success of bureaucracy. Id. at 349. Bureaucracy allocates administration to appropriate specialists, and their professional performance results in execution of their work without regard for persons and in accordance with calculable rules. Ibid. "In the place of the old type ruler who is moved by sympathy, favor, grace, and gratitude, modern culture requires . . . the emotionally detached, and hence rigorously 'professional' expert." Id. at 351. But, says Weber, objectivity and professionalism need not be identical with supremacy of general abstract rules. The bureaucrat is sometimes instructed by statute to individualize. Executives who claim freedom within their jurisdiction can act without being personally motivated. In principle, says Weber, behind every act of administration there can be a system of rationally discussable grounds. Id. at 354-55.
and guarantees against official caprice call for formal rationality. Demands for justice to individuals in concrete cases embarrass formalism and the rule-bound objectivity of bureaucracy.

WE WHEN LEGAL FORMALISM WILL OR SHOULD TRIUMPH

Weber's classification of law as rational only when made by one arm of the government and applied by another and as irrational when judges deciding concrete cases are also lawmakers can be defended as a scholar's "value free" analysis that he finds useful. But I propose to show in the following paragraphs that his system of definitions may, in one respect, under-stress important facts.

Perhaps Immanuel Kant was the most uncompromising exponent of man's capacity to lead a rational life. Kant said man can exert free will only if he is rational; by cold abstract reason man can escape from both enslavement to his emotions and involvement in unimportant passing circumstances; by conforming to the universally right, man can both avoid logical contradiction and harmonize his own free will with free wills of others.

Kant's arid and psychologically impossible prescriptions have little appeal in our time. But he left us some valuable ethical legacies—one of which is his Categorical Imperative: Act according to a maxim that can be adopted as a universal law. The Categorical Imperative calls not only for the substance of unselfishness urged by the Golden Rule; it also insists on a procedure of rationality. One who stops for a minute before acting (to imagine how he would like to be done by) may not stop long enough to formulate a maxim for his conduct worthy of being a universal rule. The Categorical Imperative, then, prescribes not warm considerateness but profound consideration.

Kant allies himself with Thomas and Rousseau in recognizing the rationalizing force resulting from dispassionate formulation of general rules of law. But unlike them Kant does not insist that a judge must apply only rules formulated prospectively. On the contrary the Categorical Imperative demands wide ranging thoughtfulness on fields of action as well as in dens of reflection.

44. He has said earlier that formal rationality is preferred by three kinds of people: (1) Those in economic power who want to guard the status quo and promote stability. (2) Those who want to curb authoritarians. (3) Those who want to check irrational emotions of the masses. Id. at 228-29.

45. Id. at 355-56.

46. This seems to me to be most available in the first forty-nine pages of THE SCIENCE OF RIGHT (1791) translated by Hastie and published under the title of Kant's PHILOSOPHY OF LAW.

47. Id. at 34.
Perhaps, then, we can say that Cardozo's "method of sociology" calls for rationality in a Kantian sense; it is reasoned, objective, and principled, even though the judge using it may creatively make (or, more properly, remake) law for the type of case before him. This does not mean, of course, that a judicial lawmaker spontaneously emits newly formed rules molded without reference to the concrete case he is hearing. All rule making is a process (moving from an inchoate start to an organized product) whether the job is done by a legislator or a judge.

Weber believes that any judge who adapts old law to new needs acts like a Khadi. He takes his cues from hunches, predilections, ideals and community values—instead of from rules of law. He does not rationalize his holdings by subsuming cases under established rules. This picture is a good likeness of some common law judges some of the time.

A judge settling a substantive law issue can write an opinion bare of rules and relying only on precedents. Says Cardozo, "Some judges' . . . notion of their duty is to match the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule." Cardozo, like Weber, sees the irrationality in such a cramped technique. Cardozo continues, "But, of course, no system of living law can be evolved by such a process, and no judge of a high court worthy of his office, views the function of his place so narrowly." A wider technique moves out from cases to principles, from the Khadi justice of informed intuition to more articulate reasoning in which rules of law (perhaps newly reshaped) are applicable and applied to the facts of the case. Such a process can be usefully thought of as rational—as importantly different from intuited Khadi decisions and importantly like reasoned decisions reached by applying rules laid down in advance of litigation. Thoughtful and objective judicial lawmaking can be as thoughtful and objective as judicial application of statutes.

The point of Cardozo's theory of multiple methods is that frozen law will not stay reasoned and reasonable; therefore unless courts re-adapt the law from time to time it becomes irrational—legalistic application of abstract doctrine, in the long run, becomes blind technique.

Aristotle saw the clumsiness inevitable in pre-stated legal rules. "[T]he material of conduct", he says, "is essentially irregular. When therefore the law lays down a general rule, and thereafter a case arises which [should be] an exception to the rule, it is then right . . . to rectify the defect by deciding as the law giver would himself decide if

48. CARDOZO, OP. CIT. SUPRA NOTE 21, AT 19-20.
he were present on the occasion, and would have enacted if he had been cognizant of the case in question." 49 A judge who can reduce the ambit of his thinking to Weber's formal rationality will thereafter never see any reason to except a case from a rule abstractly covering that case.

Writing a quarter century earlier than Cardozo and Weber, Holmes (after depreciating "the black letter" man who unknowingly uses rules laid down on grounds long outmoded) said, "A body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." 50 Only the judge who knows the purpose to be advanced by a rule can know the kinds of cases to which it applies. Holmes gives several illustrations of bungling resulting from formal legal reasoning.

We have learned to suspect that judges sometimes defend their decisions with technical rationalizations having nothing to do with the policy grounds which really motivated them. Policy then operates behind a façade of formal reasoning—a façade complying with the decorative decencies and avoiding embarrassing exposure of social preferences. 51 So the pattern of formal rationality can be followed by judges actuated by considerations of Khadi justice or inarticulately using "the method of sociology." Unfortunately, then, either Khadi justice may go unnoticed and unevaluated or errors and ten-strikes of the "method of sociology" may lie buried.

We must not overbelieve that systematized social wisdom lies behind all judicial formalism. Judges are often preoccupied with legal doctrine as the result of: (a) their training and habits, (b) force of legal conceptions, (c) the clarity of some legislation, (d) lack of competent advocacy on policy issues, (e) the feeling that policy considerations are irrelevant, and so on. Trial judges with crowded dockets can be sometimes harried into legalistic thought at the expense of substantive justice. Many trial judges over-dread appellate court reversals; some of them, rightly or wrongly, think that their appellate courts hold to formal considerations—especially when that court has clearly enunciated an applicable doctrine. This attitude of trial judges is partly an attitude on separation of functions—an allocation of roles;

51. Some of these embarrassments would, of course, grow out of disagreement on proper policy. Thurman Arnold, in his SYMBOLS OF GOVERNMENT (1935) and his FOLKLORE OF CAPITALISM (1937), has taught us that legal formalities serve a psychological need in bolstering public faith in the stability, certainty, and rightness of government and law.
trial judges are likely to think that correction or qualification of supreme court pronouncements is properly done only by supreme court judges and that their own role requires them to apply the law laid down by the supreme court.\(^5\) Weber, you will remember, says that certain classes of people are naturally partisans of legal formalism: the economically favored believe formalism preserves the status quo. Patriots believe that formalism curbs both authoritarians and mass hysteria,\(^5\) that formalism defines freedom and checks official caprice.\(^5\) These views are not so convincing after fascist and communist governments have downed both the economically favored and the democratically dedicated while making few changes in existing legal systems, and, perhaps, increasing the formalism of some branches of law.\(^5\)

Legal abstraction usually is a preferred method of courts and often promotes stability, but it enthralls beyond escape only pedants, routineers, and admirers of *elegantia juris*; it does not stop (though it may impede) economic and political change—just or unjust.

The common-law system cannot be described properly without recognizing that it furnishes judges (as guides to decision) a preformulated, authoritative body of doctrine (rules, principles, maxims—more or less integrated and consistent). Though judges purport to have high respect for this doctrine as a body, stability of the common law nevertheless varies. The occasions for variance can be classified. The four following factors should be distinguished:

(1) Sometimes, as we remarked earlier, formality has special merit and legal inventions may advance justice by insisting on technicalities. For example, courts have stood by rules of law (variously stated) effectuating attempts to change life insurance beneficiaries only when policy owners do all within their power to comply with the formalities required by policy stipulations.\(^6\) This formalism tends to discourage litigation that might otherwise dissipate the competence of the widows and children who are the bulk of life insurance beneficiaries. The special social value of such formalism tends to keep it intact. Note, however, that the formal rule will also be applied to cases in

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52. A corollary to this guess is that trial judges are more likely to be swayed by considerations of policy in cases that probably will not be appealed.


54. *Id.* at 355-56.

55. See Lon Fuller's essay in *My Philosophy of Law* 111 (1941), in which he portrays formalism as the tool of excess and praises the ability of more intuitive, less overly rational systems to produce moderate, temperate government and law. Compare his more recent *Positivism and Fidelity to Law*, 71 *Harv. L. Rev.* 630 (1958).

which it has no such value: a change of insurance beneficiary dispute between a millionaire's third mistress and his fourth cousin is decided by the same formal rules that determine a dispute between a workman's widow and his mother. So once formality has substantive value it tends to spread to cases in which that value is not realized; this spread is checked only when the rule reaches ground where it will produce disquieting results. The reason for accepting the rule in cases in which it is not needed but does no harm is clear enough; judges will not break the shell of formality for fear that the whole egg may spill out.

(2) Formalism tending to produce substantive injustice sometimes stays fairly steady on the verbal surface of the law but covers in fact a variety of more just results. Another chapter from insurance law will illustrate. Eighteenth century judges held in marine insurance cases that any breach of warranty (no matter how slight and even though it did not contribute to the loss) relieves the underwriter from liability. This rule worked well enough; buyers of marine insurance were familiar with the law; policies were hand written and short; warranties were exacted only after discussion and understanding. When, however, American companies sold fine-print fire, automobile, and life insurance to the untutored public, courts soon adapted Draconian warranty law to the changed facts. Of course, the courts enforced some just warranties in these policies, but they found ways to circumvent clauses that unjustly limited company liability. They held that some clauses designed to restrict protection were "mere description" and not warranties, that some failures to comply with warranties were not breaches, that companies had waived some breaches, and that companies were estopped from asserting some breaches.\(^{57}\) The formal rules of insurance warranties changed a little in the process—but remarkably little. The real changes in holdings were radical. Since the formal law tended to stay intact novices find insurance warranty law confusing; courts have been properly selective in choosing the warranties they disfavor; they uphold just warranties with ancient hard-boiled rules, which they easily push aside when they want soft-boiled results.\(^{58}\) The pressure of substantive justice does not always, however, rectify unjust formal rationality. The courts that readapted insurance warranty law kept intact scandal-


58. Cardozo was a past master at leaving formal rules almost as he found them while making radical changes in the law. His opinion in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 11 N.E. 1050 (1916), broke down barriers that protected nearly all negligent manufacturers from liability to consumers. His decision rested on the simple holding that "inherently dangerous" commodities included, in fact, more products than were theretofore so characterized.
ously unjust industrial accident law. Legislatures in all forty-eight states had to reform the law and provide proper remedies for workmen injured on the job. We do not know whether courts would have eventually readapted this branch of law had the legislatures not stepped in, but we do know that courts showed no disposition to do so for a long time.\(^5\)

(3) We have seen that common-law courts tend to stand by formalism when it is just and sometimes readapt the law when formalism is unjust. But there is an in-between class: formality may be neither just nor unjust. A few examples: (a) The distinction between a contract and a trust is neither just nor unjust. If an owner of a diamond ring wants to bind himself to give it to his nephew on a future date he can do so by declaring a trust. If he tries to accomplish the same result by contracting “without consideration,” his promise to make the future gift—no matter how formal—is, according to common-law rules, not binding. Since there is a legally proper way to do the job, courts presided over by trained judges tend to require that it be done that way. When no special equity dislodges this tendency, the legalistically correct theory determines results. (b) The putative father of an illegitimate child refuses to support it and a bastardy suit is filed against him. He marries the girl, legitimating the child, but still declares he shall never contribute to its maintenance. The bastardy proceeding has become legally inappropriate; his duty to support the child must now be enforced in some other kind of proceeding.\(^6\) (c) In some borderline “proximate cause” cases the courts may have no decisive policy reason for holding that the wrongdoer is or is not responsible for some unusual result—that is, considerations of justice do not dictate exact limits of liability and from the viewpoint of justice the case is unresolvable. Once, however, the case is decided (one way or the other) it becomes a reliable precedent and if virtually the same facts recur the court is likely to follow it.\(^7\)

(4) Jerome Frank wrote tellingly about the need for “fact skepticism.” He pictured our courts as rarely reaching sound conclusions of fact in many kinds of litigation.\(^8\) When courts are likely

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59. See, e.g., the court’s liberal treatment of the claimant in a modern Oregon work injury case that happened to fall outside of the workman’s compensation law. Celorie v. Roberts Bros., 202 Ore. 671, 276 P.2d 416 (1954). How would this case have been decided if the court had not had the example of a quarter century of workman’s compensation? Cf. Mahoney v. Dore, 155 Mass. 513, 30 N.E. 366 (1892).


61. See Morris, Torts 192-94 (1953).

62. See particularly his Courts on Trial (1949).
to reach unpredictable versions of fact, adherence to formal legal principles will not serve those who look to law for stability, regularity and predictability.  

"Formal rationality," then, holds the law-in-action stable when facts are not likely to be misfound, and when formality produces results not inconsistent with substantive justice. Substantively unjust results may become institutionalized and persist, but the courts tend eventually to become uneasy with them and in the long run some use of Cardozo’s "method of sociology" is likely.

The last conclusion suggests a new line of questions. Why do courts in fact react promptly against some miscarriages of substantive justice and yet tolerate others for years? When, if ever, should courts be reluctant to use the method of sociology? How should the responsibility for readaptation of the law be divided between courts and legislatures? Judges readapted the law of insurance warranties, but did nothing to ameliorate unjust industrial accident law. Why?

Perhaps forces that have vitalized and repressed judicial law reform are fortuitous. Early in the twentieth century insurance claimants may have been able to hire better lawyers than injured workmen. Judges as a class may have been well disposed toward insurance claimants. Some judges not only recoiled from reforming industrial accident law themselves, they were also hostile to legislative reform.

On the other hand judges’ motives for adapting one branch of the law and leaving reform of another branch to the legislature may have been related to the competence and facilities of the two different departments of government. Some judges may have believed that change in industrial accident law could be rational only if enacted by the legislature. Legislative committees can investigate needs and means by making inquiries and holding hearings. The legislature can set up new administrative machinery when needed. The legislature can give advance warning of impending change so that those affected can get ready for it. The case for reform was of a kind legislators are likely to heed. The courts may have, however, despaired of the likelihood that busy legislators would get to the lesser problem of insurance warranties—especially since claimants who need law reform know of their need only after their claims arise and so are too late to appeal to the legislature. Maybe judges believed that the insurance law reform could best be made case-by-case and on the social information already

63. Traynor in his Fact Skepticism and the Judicial Process, 106 U. Pa. L. Rev. 635 (1958), concedes that improvement of fact finding procedures should go hand-in-hand with improvement of legal principles—else courts will be driven more inexorably to unjust results. In Weber’s terms, he prefers Khadi justice to efficient, formal, rationally-arrived-at injustice.
Perhaps they were unworried about the retroactive effect of their reform, believing it would have infinitesimal effect on "the experience" of any one insurance company.

I do not claim accuracy for these guesses about judges' motivations for adapting the law or leaving reform to the legislature. The fact of significance is that judges rarely talk about this problem in their opinions. Of course judges who turn down pleas for law reform often say that law reform is the business of the legislature and not of courts—thus they appear respectful to the constitution rather than deaf to justice. But since common law courts using Cardozo's method of sociology do, in fact, sometimes adapt the law, and since we look on this process as sometimes legitimate, we must note the lack of articulate criteria to tell when this process is proper. Without such criteria decisions are Khadi justice—perhaps sometimes not entirely unchanneled. Thus far, however, neither "formal" nor "substantive" rationality, to use Weber's terms, has been brought to bear on decisions defining the judge's role.

I do not mean that decisions made over the years were unsound. Since we know little about that borderland of lawmaking lying between legislative and judicial functions perhaps we have been wise in granting intuition and experiment maximum range—guided only by a few general statements like Holmes' dictum that molecular change is for courts and molar change for legislatures. Only in our century has the legislative process flowered. Judicial respect for its potentialities and appreciation of its advantages have grown—and prompted the judiciary to be more modest in its estimate of its own worth. Perhaps for the first time jurists are competent to formulate guides for discriminating sharply between areas of law reform appropriate to courts and areas that should be left to the legislature. Such a body of doctrine would be substantively rather than formally rational only if its formulators base it: (1) on knowledge of the kinds of problems legislators and administrators will and should tackle, and (2) on understanding of the advantages and facilities of legislative and administrative lawmaking. The problem may be too complicated and too fast moving for useful rationalization. Perhaps wisdom may call for a continued Khadi judgment that may become increasingly channeled. But most enthusiasts for legal intuition generally limit their enthusiasm to pre-rational problems which, for the time being, do not yet yield to reason. If we develop an articulate rational technique for discriminating between (a) unjust rules and decisions that should be corrected only by legislation,

64. The phrase is quoted and discussed by John Dickinson in his essay in My Philosophy of Law 102-03 (1941).
and (b) unjust rules and decisions that courts can properly ameliorate, we may advance the common good. 65

65. One articulated indication that courts may be moving in this direction is the opinion of Desmond, J. in Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951), a case overruling a precedent holding that a perpetrator of pre-natal injuries cannot be held liable for harm he does. Desmond says, "Of course rules of law on which men rely in their business dealings should not be changed in the middle of the game, but what has that to do with bringing to justice a tort-feasor who surely has no moral right to rely on a decision of the New York Court of Appeals? Negligence law is common law, and common law has been molded and changed and brought up to date in many another case . . . . Justice Sutherland, writing for the Supreme Court in Funk v. United States (290 U.S. 371, 382, 54 S. Ct. 212, 215, 78 L. Ed. 369) said that while legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the court to bring the law into accordance with present day standards of wisdom and justice . . . ."  

"The same answer goes to the argument that the change we here propose should come from the legislature, not the courts. Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly non-statutory, when we refuse to reconsider old and unsatisfactory court made rules. Perhaps some kinds of changes in the common law could not be safely made without the kind of factual investigation which the Legislature and not the courts, is equipped for. Other proposed changes require elaborate research and consideration of a variety of possible remedies—such questions are peculiarly appropriate for Law Revision Commission scrutiny, and, in fact, the Law Revision Commission has made an elaborate examination of this very problem (1935 Report of N.Y. Law Revision Commission, pp. 449-476). That study was made at the instance of the late Chief Judge Pound of this Court and was transmitted to the Legislature by the commission . . . . The report itself contained no recommendations for legislation on the subject but that was apparently because the commission felt it was for the courts to deal with this common law question . . . ."