

1-1-1988

AN INTRODUCTION TO CONVENTIONALISM

Dennis M. Patterson

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Dennis M. Patterson, *AN INTRODUCTION TO CONVENTIONALISM*, 10 W. New Eng. L. Rev. 43 (1988),
<http://digitalcommons.law.wne.edu/lawreview/vol10/iss1/4>

This Review Essay is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

REVIEW ESSAY

An Introduction to Conventionalism

An Introduction to Law and Legal Reasoning. By Steven J. Burton.*
Boston, Little, Brown, and Company, 1985. Pp. xviii, 241. \$9.95.

DENNIS M. PATTERSON**

If for no other reason than the demands that the undertaking places on one's powers of clarity, brevity, and succinct statement, the writing of an introductory textbook on legal reasoning is a project that most would come to with some reservation, if not trepidation. Another, no less formidable problem, is to write a book that will accomplish the tasks just mentioned without compromising broader interest in the text on the part of those using it as a pedagogical tool.

Steven Burton has written a book that succeeds admirably at meeting the difficulties posed by an introductory text.¹ From a pedagogical perspective, the book thoroughly and analytically surveys the principal forms of legal reasoning (analogy and deduction) in the context of what Burton describes as "the problem of importance."² Turning from pedagogy to theory, the unique feature of the book is the presentation of a theory of interpretation in law that Burton identifies as "conventionalist."³ It is Burton's advancement of a theory of inter-

* Professor of Law, University of Iowa, College of Law.

** Assistant Professor of Law, Western New England College, School of Law. B.A., 1976; M.A., 1978; J.D., 1980; Ph.D., 1980, State University of New York at Buffalo.

1. These difficulties can, indeed, be burdensome. See Morawetz, *Addressing Sacred Texts: On Jurisprudence by Soper and Lyons* (Book Review), 80 NW. U.L. REV. 489, 499 (1985) (reviewing D. LYONS, *ETHICS AND THE RULE OF LAW* (1984) ("Lyons' abbreviated accounts of the ideas of others are often more misleading than the demands of compression would require.")).

2. See *infra* note 24 and accompanying text.

3. Burton refers to his theory in several places as "conventionalist." A representative example is as follows: "The approach in this book emphasizes the judge's responsibility to the legal community's conventions of language, argument, and judgment, which seek to work out the implications of order and justice in cases." S. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 142 n.20 (1985). For an extended discussion of the philosophical sources for Burton's view of conventionalism, see *infra* note 36.

pretation, coupled with an exegesis of the basics of legal method, that mark this book as a unique contribution to jurisprudential literature.

This review essay concentrates on two of the book's key, interrelated themes: methods of legal reasoning and legal interpretation. The former topic is a necessary prelude to the latter, because while Burton sees the traditional forms of legal reasoning as important, in his view a full account of reason in law must contain a theory of how judges decide novel issues against the background of conventional legal practices. This is the theory of interpretation. The book is divided into three sections, with the latter two containing the theory of interpretation that builds upon the description of traditional forms of legal reasoning found in the first part of the book. Taken together, they constitute a vigorous introduction to some of the most pressing issues in contemporary jurisprudence.

I. THE ELEMENTS OF LAW AND LEGAL ARGUMENT

In Part I of *An Introduction to Law and Legal Reasoning*, Burton describes legal reasoning as "an intellectual process"⁴ in which legal problems are addressed and solved, principally by the use of two forms of reasoning: analogy and deduction. As he emphasizes, before the forms of legal argument can be considered, more basic considerations need to be addressed. That is, before one can focus on the forms of legal reasoning, one must first identify the material that is constitutive of legal reasoning itself.

It is to state a truism to say that cases are the "stuff" of legal argument. But what is a case? How does one identify it, and what is its relation to legal argument? Burton suggests that a case is best regarded as a short story, having as it does a beginning, a middle, and an end.⁵ The first phase of the story usually begins in the form of a dispute between two or more persons or as a dispute between a citizen and an authority. The move to the middle phase occurs when one of the parties files a lawsuit against the other, and ends when the case is decided by a trial court in favor of one of the parties. As it happens, the story may not end there, for one of the parties, dissatisfied with the trial court's decision, may appeal the case to a higher court. When the case is finally decided, it is usually said that it establishes a rule or is an instance or application of a rule.

A rule, which is "an abstract or general statement of what the law

4. S. BURTON, *supra* note 3, at 9.

5. *Id.* at 11.

permits or requires of classes of persons in classes of circumstances,"⁶ is by its nature quite general in scope.⁷ In other words, a rule ranges across a variety of circumstances and may encompass a wide range of cases. Each judicial decision presents an occasion for deciding whether the case before the court falls within the purview of a legal rule articulated in a previous decision. It is in answering this central question,⁸ that the forms of legal reasoning are employed.

A. *Analogical Reasoning*

Reasoning by analogy is a form of reasoning that is not peculiar to legal argument.⁹ When, in everyday life, any two circumstances are compared with one another, the motivation for the comparison is to demonstrate that some material element¹⁰ in the one is or is not present in the other: there is a difference between the two that *makes* a difference, and it is that difference that is articulated as a reason for disparity in treatment. The same is true in legal argument. When a new case is similar factually to one or more decided cases, that similarity in fact figures as a reason in an argument for similarity in legal disposition.¹¹

Burton demonstrates the analogical development of common law rules by employing an example taken from Lon Fuller.¹² In Case 1, Abbott steals a horse from Costello and sells it to Holliday, who buys it without notice of the theft. When Costello sues Holliday for its re-

6. S. BURTON, *supra* note 3, at 13. See H. HART, *THE CONCEPT OF LAW* 121-50 (1961); see also W. TWINING AND D. MIERS, *HOW TO DO THINGS WITH RULES* 48-72 (1976).

7. This generality, however, is no guarantee of equality, nor is equality necessarily associated with generality. See Raz, *The Rule of Law and Its Virtue*, in *LIBERTY AND THE RULE OF LAW* 9 (R. Cunningham ed. 1979).

8. Even sophisticated critics of liberal legalism see this as a central concern of any legalist jurisprudence. See R. UNGER, *KNOWLEDGE AND POLITICS* 89 (1975) ("The main task of the theory of adjudication is to say when a decision can truly be said to stand 'under a rule,' if the rule we have in mind is the law of the state, applied by a judge. Only decisions 'under a rule' are consistent with freedom; others constitute arbitrary exercises of judicial power.").

9. See, e.g., J. LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 666-67 (P. Nidditch ed. 1975) ("Reasoning from Analogy leads us often into the discovery of Truths, and useful Productions, which would otherwise lie concealed."); N. WOLTERSTORFF, *WORKS AND WORLDS OF ART* 58-105 (1980) (analyzing the role of predicates in identifying works of art). See generally J.F. ROSS, *PORTRAYING ANALOGY* (1981).

10. Burton does not endorse a philosophical realist's ontology. On the matter of ontology, he is strictly anti-realist. For a recent attempt to develop an anti-realist semantics, see C. WRIGHT, *REALISM, MEANING & TRUTH* 241-363 (1987).

11. See J. RAZ, *THE AUTHORITY OF LAW* 203 (1979).

12. S. BURTON, *supra* note 3, at 32-35 (citing Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353, 375-76 (1978)).

turn, the court grants relief to Costello, citing the rule that a thief cannot create an ownership interest in his transferee where the thief did not have title to the transferred property. A variation on these facts is presented in Case 2, where Abbott "purchases" the horse from Costello with a forged check drawn on another's account. When Costello discovers the fraud, he sues for return of the horse and is awarded a judgment. Here, the applicable rule is different: one who acquires property by fraud cannot acquire an ownership interest in it.

What happens when, in Case 3, Abbott obtains the horse with a forged check, but sells it to Holliday before Costello can replevy it from Abbott? May Costello get the horse back from Holliday, the innocent purchaser? If the court applies the rules from Cases 1 and 2, it seems that judgment must be entered for Costello. Because Costello's ownership interest never has been extinguished, the thief has no legal interest and, thus, cannot pass legal title to the property. But the court may, and perhaps should, take notice of the important fact that Holliday took no part in the fraud perpetrated upon Costello. The court could fashion a new rule such that an owner of property who loses possession of the property by another's wrongful act may recover possession only from the perpetrator or from a subsequent purchaser if the wrongful act was theft. As Burton argues, this new rule remains faithful to the holdings in Cases 1 and 2 and, in addition, takes account of the material difference in Case 3 that Holliday's possession of the horse was acquired rightfully.¹³

B. *Deductive Reasoning*

As with analogical reasoning, deductive (syllogistic) reasoning has its roots in everyday contexts. For example, in the board game *Monopoly*, there is a rule that a player passing "Go" receives \$200.00 unless that player is going to "Jail," in which case the player gets nothing.¹⁴ Likewise, if a teacher has a rule that students achieving a score of 90 or above on an exam will receive a grade of "A," then Susan must be given an "A" when she scores 92 on the exam.¹⁵

The syllogistic form of reasoning is such that if the premises of the syllogism are true, it is logically necessary that the conclusion be true. Despite its apparent simplicity, the syllogism is subject to abuse. Consider the following:

MAJOR PREMISE: A foot has 39 inches.

13. S. BURTON, *supra* note 3, at 38.

14. *Id.* at 42.

15. *Id.*

MINOR PREMISE: Susan has a foot.

CONCLUSION: Susan has 39 inches.¹⁶

Although the form of the argument mimics perfectly the form of the syllogism, the conclusion is nonsensical. The conclusion is unsound because the meaning of foot is not consistent between the argument's major and minor premises.¹⁷ A syllogism "is only as good as its premises and the relationship between them."¹⁸ Thus, in the deductive form of argument, "[t]he key problems are (1) adopting a correct major premise; (2) formulating a correct minor premise in the language of the major premise; and (3) using the relationship of the premises to yield a sound conclusion."¹⁹

As several recent authors on the subject of deductive reasoning in law have shown, it is the language of the minor premise that poses the most significant problems for the deductive form of argument.²⁰ Burton addresses this problem in the context of the "merchant's exception" to the Statute of Frauds in Article Two of the Uniform Commercial Code.²¹ When Franny Farmer, a seller of peaches, decided that the time for marketing her crop was drawing near, she contacted a distributor, Morris Auster. After inspecting the crop, Auster agreed to buy Farmer's peaches for the price of \$40.25 per box. They shook hands but did not reduce their agreement to writing.²²

Shortly after arriving at their agreement, a severe rain storm struck the jurisdiction and much of the area's peach crop was destroyed. Auster, concerned about his contract with Farmer, sent her a letter confirming their agreement. Farmer did not reply to the letter and a month later sold her crop to another vendor for \$60.75 per box.²³

Burton devotes a fair amount of space to the analysis of this hypothetical, considering carefully the many arguments that each of the parties could bring to bear in support of his or her contention that

16. *Id.* at 43.

17. The fallacy is that of equivocation. See A. ARNAULD, *THE ART OF THINKING* 51 (J. Dickoff & P. James trans. 1964) (1st ed. 1662) ("A word is equivocal when men have linked the same sound to different ideas.").

18. S. BURTON, *supra* note 3, at 43.

19. *Id.* at 43-44. For a recent argument for the centrality of deductive reasoning in law, see N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 19-72 (1978).

20. See Wellman, *Practical Reasoning and Judicial Justification: Toward An Adequate Theory*, 57 U. COLO. L. REV. 45 (1985); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981).

21. U.C.C. § 2-201(2) (1978).

22. S. BURTON, *supra* note 3, at 45.

23. *Id.*

there was or was not an enforceable contract between them. The focus of the analysis is on the question of whether Farmer can be considered a merchant within the meaning of Section 2-104(3) of the U.C.C. Although deductive reasoning will not answer this question, an answer to it is of paramount importance to any syllogism in which the meaning of the term "merchant" is to play a role. The judgment of a court as to the meaning of "merchant," in this context, is what Burton refers to as an instance of the "the problem of importance."²⁴ In short, the decision whether or not to denominate Farmer as a "merchant," is one that is required "in order to decide which facts [about Farmer's activities vis-a-vis Section 2-104(3)] are reasons that justify placing a problem case in a class of cases designated by a legal rule."²⁵

The merchant's exception to Article Two's Statute of Frauds is particularly helpful in making the point that the most powerful theories of legal interpretation are purposive;²⁶ that is, they place at the

24. Burton defines the problem of importance generally as "the problem of deciding which of the many facts in a case will or should lead a court to decide the case one way or the other because they count as reasons." *Id.* at 83.

25. *Id.* at 53.

26. Professor Tony Honoré has recently put the matter this way:

If the legal system is to be a continuing, problem-solving system, historical criteria are not sufficient. For the rules to be interpreted have in that case to apply to situations not contemplated by their author or authors. But it is central to the process of legal interpretation that, though an inquiry into the author's meaning is often not sufficient, interpretation takes as its starting-point the words of non-verbal practices to be interpreted. Its paradigm is the interpretation of a form of words or text: for example, the text of a statute, code, treaty, contract, will, regulation, or some other document. This has two implications: first, that *prima facie* a legal text should be given the meaning, if any, intended by its author or the official body which adopted it; secondly, that nothing which the words could not mean counts as an interpretation of the text. Similarly, nothing inconsistent with a customary practice can count as an interpretation of that practice.

These semantic constraints ensure that within certain limits officials and ordinary people can discover what laws prescribe, though sometimes only with difficulty. In this way the semantic constraints further the ideology of law. But they leave a large area of choice. When norms set by society or individuals are incorporated in texts they become to some extent independent of the intentions of those who originally drafted or adopted them. To formulate a text is inescapably to run a risk about what it will be taken to mean; though lawyers try hard to reduce the extent of that risk. This fact leaves room, in the process of interpretation, for arguments which are not concerned with any possible meaning of the words used, let alone the one intended by its original author. For the choice between different meanings of, say, the term 'money' (cash, deposits, assets) cannot be settled by recourse to any one of those meanings.

T. HONORÉ, MAKING LAW BIND 25-26 (1987) (footnote omitted).

In the realm of literary theory, E.D. Hirsch remains the strongest voice for the supremacy of authorial intent in the interpretation of literary works. His thesis is set forth in E.D. HIRSCH, THE AIMS OF INTERPRETATION (1976) and E.D. HIRSCH, VALIDITY IN

center of any interpretive methodology the intended role or function of legal standards.²⁷ History is a necessary element in any purposive theory simply because it is in history that the purposes and aspirations for law are expressed.²⁸ Resort must be made to those purposes and aspirations before the meaning of a legal norm can, in any particular context, be discerned.²⁹

INTERPRETATION (1967). Recent developments of the theory by Hirsch include Hirsch, *Meaning and Significance Reinterpreted*, 11 *CRITICAL INQUIRY* 202 (1984); and Hirsch, *Past Intentions and Present Meanings*, 23 *ESSAYS IN CRITICISM* 79 (1983).

For an impressive Wittgensteinian development of Hirsch's views, see C. ALTIERI, *ACT & QUALITY* 148-59 (1981) ("Meaning is determined as a set of words which make a semantically coherent statement which one can see in context as embodying or expressing a purpose.").

The role of intent in the interpretation of law is not an "all-or-nothing" affair. One sees this as soon as one recognizes that intention is not coextensive with meaning. See J.B. WHITE, *HERACLES' BOW* 101 (1985) ("The proper question is . . . not 'what the writer intended,' as this question is usually meant—as if its answer were something other than an interpretation—but 'what this language by this speaker in this context means.' This is to some degree an objective and determinable question, for what the language means is the way it modifies our cultural situation."). See also J. HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* 196 (F. Lawrence trans. 1987) ("It is one of the peculiarities of our language that we can separate utterances from their original contexts and transplant them into different ones . . .").

A significant discussion of the intention-statement-audience approach to interpretation is found in C. CONDREN, *THE STATUS AND APPRAISAL OF CLASSIC TEXTS* 286-93 (1985).

27. An excellent example of such an approach, with specific application to the U.C.C., is McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 *U. PA. L. REV.* 715 (1978). For a powerful presentation of the same approach in the context of moral discourse, see J. KOVESI, *MORAL NOTIONS* (1967) (Moral notions do not evaluate the world of description but describe the world of evaluation.).

28. Ronald Dworkin recognizes this in his analysis of practices, but fails to appreciate fully its significance. See R. DWORKIN, *LAW'S EMPIRE* 46-53 (1986) (rules of courtesy).

29. Hans-Georg Gadamer emphasizes this in his discussion of the importance of history as an element of "understanding" the law. He states:

The jurist understands the meaning of the law from the present case and for the sake of this present case. As against this, the legal historian has no case from which to start, but he seeks to determine the meaning of the law by considering constructively the whole range of its application. It is only in all its applications that the law becomes concrete. Thus the legal historian cannot simply take the original application of the law as determining its original meaning. As an historian he will, rather, have to take account of the historical change that the law has undergone. He will have to understand the development from the original application to the present application of the law.

In my view it would not be enough to say that the task of the historian was simply to 'reconstruct the original meaning of the legal formula' and that of the jurist to 'harmonise that meaning with the present living actuality.' This kind of division would mean that the definition of the jurist is more comprehensive and includes the task of the legal historian. Someone who is seeking to understand the correct meaning of the law must first know the original one. Thus he must him-

The importance of purpose for legal interpretation is well illustrated by Burton in his illumination of the connection between analogy and the deductive form of argument.³⁰ Consider the following statute:

It is unlawful for any person . . . or corporation . . . in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . under contract . . . to perform labor or services of any kind in the United States.³¹

In 1887, the Church of the Holy Trinity, a New York corporation, contracted with an "alien," the English Reverend E. Walpole Warren, to serve as the church's rector and pastor. The church was prosecuted for violating the statute,³² with the lower court offering the following deductive argument in support of its judgment:

This suit is brought to recover the penalty of \$1,000 imposed by the Act of Congress of February 26, 1885, upon every person or corporation offending against its provisions by knowingly encouraging the migration of any alien into the United States "to perform labor or service of any kind under contract" . . . previously made with such alien. The defendant, a religious corporation, engaged one Warren, an alien residing in England, to come here to take charge of its church as pastor.³³

In the course of vacating the lower court's ruling in favor of the government, Justice Brewer, writing for the United States Supreme Court,³⁴ acknowledged the formal correctness of the lower court's logic. However, in reaching the conclusion that the scope of the statute did not include the activity at issue in the lawsuit, he looked to the evil that the statute was designed to prevent: the practice of disreputable capitalists of bringing large numbers of immigrant, uneducated la-

self think in terms of legal history—only that here historical understanding serves merely as a means to an end. On the other hand, it is not the historian's place to be dogmatic about the law. As an historian he moves toward historical objectivity in order to see its historical value, whereas the jurist, in addition, applies what has been learned in this way to the legal present.

H. GADAMER, *TRUTH AND METHOD* 290-91 (G. Barden & J. Cumming eds. 1975). An excellent, short summary of Gadamer's approach to interpretation is A. MEGILL, *PROPHETS OF EXTREMITY: NIETZSCHE, HEIDEGGER, FOUCAULT, DERRIDA* 20-25 (1985) (linking Gadamer's hermeneutics to the German Romantic historicist tradition and Heidegger's aesthetics).

30. S. BURTON, *supra* note 3, at 73-76, 79-80.

31. 3 Stat. 332, ch. 164 (1885).

32. *United States v. Church of the Holy Trinity*, 36 F. 303 (1888).

33. S. BURTON, *supra* note 3, at 73 (quoting *Church of the Holy Trinity*, 36 F. at 303-04).

34. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

borers to the United States to work for very low wages in offensive work environments.³⁵

The case of cheap immigrant labor was, in Brewer's analysis, the "paradigm case" of the type of pernicious practice that Congress intended to halt when it passed the statute. While Pastor Warren was undeniably an alien who had been brought to the United States to perform services for a domestic corporation, to punish that activity would not serve the purpose of the statute. Because the church's conduct was not of the sort that the statute was designed to prevent, the Court deemed it improper for the case to be brought within the statute's purview, notwithstanding the surface applicability of the act.

Burton's purpose in discussing the *Church of the Holy Trinity* case is to demonstrate that deductive and analogical reasoning are each necessary to an adequate account of legal reasoning and, moreover, that neither can be used in any sort of mechanical way to solve legal problems. The case illustrates quite clearly that despite its powerful role in legal method, even deductive reasoning can lead to unjust results, unless it is used in a careful and reflective manner. Having presented the basic elements of law and legal reasoning in Part I of *Introduction*, Burton then integrates those elements into a theory of legal interpretation. It is to that theory that we now turn.

II. LEGAL METHOD AND THE INTERPRETIVE COMMUNITY

The second and third parts of *Introduction* are the most ambitious portions of Burton's book, and the ones that most directly will engage those with an interest in the role of interpretation in legal theory. Here, Burton presents a theory of legal interpretation that is at the heart of his solution to the problem of importance.³⁶ The theory

35. S. BURTON, *supra* note 3, at 74 (citing *Church of the Holy Trinity*, 143 U.S. at 463 (quoting *United States v. Craig*, 28 F. 795, 798 (1886))).

36. As noted above, Burton describes his theory of interpretation as "conventionalist." See *supra* note 3. Conventionalism has been the object of philosophical discussion since antiquity. Aristotle, for example, had this to say:

Of political justice part is natural, part legal—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent Now some think that all justice is of this sort, because that which is by nature is unchangeable and has everywhere the same force (as fire burns both here and in Persia), while they see change in the things recognized as just. This, however, is not true in this unqualified way, but is true in a sense; or rather, with the gods it is perhaps not true at all, while with us there is something that is just even by nature, yet all of it is changeable; but still some is by nature, some not by nature. It is evident which sort of thing, among things capable of being otherwise, is by nature; and which is not but is legal and conventional, assuming that

both are equally changeable. And in all other things the same distinction will apply; by nature the right hand is stronger, yet it is possible that all men should come to be ambidextrous. The things which are just by virtue of convention and expediency are like the measures; for wine and corn measures are not everywhere equal, but larger in wholesale and smaller in retail markets. Similarly, the things which are not just by nature but by human enactment are not everywhere the same, since constitutions also are not the same, though there is but one which is everywhere by nature the best.

Of things just and lawful each is related as the universal to its particulars; for the things that are done are many, but of *them* each is one, since it is universal.

ARISTOTLE, NICOMACHEAN ETHICS, *Book V, Ch. VII.

In modern philosophy of science, conventionalism originates with the French mathematician Henri Poincaré. See H. POINCAIRÉ, *SCIENCE AND HYPOTHESIS* (W. Greenstreet trans. 1905); Poincaré, *On the Nature of Mathematical Reasoning*, in P. BENACERRAF AND H. PUTNAM, *PHILOSOPHY OF MATHEMATICS: SELECTED READINGS* (1964). The most complete recent study of conventionalism in the philosophical literature is D. LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* (1969) (Regularity in behavior becomes a convention when it benefits the members of a group.). For an analysis of the historical role of convention in literary theory, see L. MANLEY, *CONVENTION: 1500-1750* (1980).

The linguistic conventionalism of the later Wittgenstein is a likely source of philosophical inspiration for Burton's position; however, intuition is of central importance in Burton's development of conventionalism. See, e.g., S. BURTON, *supra* note 3, at 132. Intuition is wholly inconsistent with Wittgenstein's approach to philosophical issues, particularly those in the philosophy of mathematics. See P. HACKER, *INSIGHT AND ILLUSION: THEMES IN THE PHILOSOPHY OF WITTGENSTEIN* 121 (rev. ed. 1986) ("[Wittgenstein] viewed intuitionism as an aberration, a perversion in mathematics that stands in need of philosophical therapy, not as a source of inspiration in philosophy of mathematics, let alone as involving an insight that can be generalized to the whole domain of philosophical logic and philosophy of language."). See also G. HALLETT, *A COMPANION TO WITTGENSTEIN'S "PHILOSOPHICAL INVESTIGATIONS"* §§ 213-14, at 291-93 (1977); S. SHANKER, *WITTGENSTEIN AND THE TURNING POINT IN THE PHILOSOPHY OF MATHEMATICS* (1987).

A strong philosophical source of inspiration for Burton is the work of the logician and linguistic philosopher, W.V.O. Quine. See W.V.O. QUINE & J. ULLIAN, *THE WEB OF BELIEF* (1970). See also W.V.O. QUINE, *WORD & OBJECT* (1960); Quine, *Two Dogmas of Empiricism*, in W.V.O. QUINE, *FROM A LOGICAL POINT OF VIEW* 20-46 (2d ed. 1961). Clearly, the metaphor of "web of beliefs" is crucial to Burton's development of the notion of an "interpretive community." S. BURTON, *supra* note 3, at 132-36. However, there are at least two reasons why Quine is not a good source for philosophical conventionalism.

First, the metaphor of "web of beliefs" is a *psychological* description of how we think. It says nothing about the *epistemology* of justification. See L. BONJOUR, *THE STRUCTURE OF EMPIRICAL KNOWLEDGE* 195 (1985) ("Quine's main view seems to be that the web picture simply describes our psychology, how we behave and think."). See also R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 221-43 (1979). "[Quine's] genial 'Don't let's throw out epistemology—let's let it be psychology' line is entirely reasonable if our aim is to show what in empiricism can be saved once we throw out the dogmas. But if we want to know why anybody thought it worthwhile, much less exciting or morally obligatory, to be an empiricist, we have to step back from the whole subject and press questions which Quine can safely neglect." *Id.* at 223.

A second, and more compelling reason for avoiding Quinean notions is Quine's extreme skepticism concerning translation. In Quine's view, no interpretation—even of the simplest of activities—can ever be preferred demonstrably over another. See R. TRIGG, *UNDERSTANDING SOCIAL SCIENCE* 10 (1985) ("Quine insists that there will always be a

relies heavily on the notion of an "interpretive community"³⁷ which, as is well known, is an idea that figures mightily in Owen Fiss' recent arguments against the rising tide of nihilism from within the legal

certain indeterminacy of translation, even given the same sensory input. Interpretations of the most basic experience may differ, and indeed the very notion of a basic experience is exposed to an empiricist prejudice." See generally G. ROMANOS, *QUINE AND ANALYTIC PHILOSOPHY* (1983).

This leaves as Burton's last philosophical source for his view of conventionalism, the pragmatism of William James. See W. JAMES, *PRAGMATISM* (Perry ed. 1955). But James' empiricist conception of truth is incompatible with Burton's claim for the role of intuition in adjudication. See J. SMITH, *PURPOSE AND THOUGHT: THE MEANING OF PRAGMATISM* 62 (1978) ("It has frequently been pointed out that James was unique among the pragmatists in assigning to the sensible element in knowledge a cognitive force of its own. This is true and it constitutes his point of closest contact with classical empiricism and its reliance on sense as an ultimate criterion."). See also C. MORRIS, *THE PRAGMATIC MOVEMENT IN AMERICAN PHILOSOPHY* (1970). An interesting comparison of the pragmatic perspectives of James and Quine is found in R. NEWELL, *OBJECTIVITY, EMPIRICISM, AND TRUTH* 39-61 (1986).

As he unpacks it, Burton's theory is closest philosophically to the "later" writings of Wittgenstein, for the conventionalism of which Burton speaks are the "activities" of lawyers (e.g., disputation, dialogue, justification, etc.). These activities comprise the "practice" of law. Claims of justification are advanced within a framework of pre-existing forms of rationality (this is where Burton sees intuition at work).

As stated above, this perspective (absent the claims for intuition) is completely consistent with Wittgenstein's general approach to language. See generally L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (E. Anscombe trans. 3d ed. 1953); L. WITTGENSTEIN, *PHILOSOPHICAL GRAMMAR* ¶ 55, at 97 (A. Kenny trans., R. Rhees ed. 1974) ("A reason can only be given *within* a game."); L. WITTGENSTEIN, *ON CERTAINTY* ¶ 82, at 12e (D. Paul & E. Anscombe trans., E. Anscombe & G. von Wright eds. 1969) ("What counts as an adequate test of a statement belongs to logic. It belongs to the description of the language-game."). For an excellent assessment of Wittgenstein's views on the relationship between grammar, necessity, and justification, see J. RICHARDSON, *THE GRAMMAR OF JUSTIFICATION: AN INTERPRETATION OF WITTGENSTEIN'S PHILOSOPHY OF LANGUAGE* (1976).

For a more recent discussion of conventionalism by Burton, see Burton, *Reaffirming Legal Reasoning: The Challenge from the Left*, 36 J. LEGAL EDUC. 358, 363-69 (1986). See also Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985). Dworkin takes up the topic of conventionalism in R. DWORKIN, *supra* note 28. His analysis of the shortcomings of the theory is wide-ranging, but his characterization of the theory does not accord closely with any of the descriptions of it given here. Of particular interest in the present context is his discussion of a conventionalist approach to *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889). I discuss Burton's analysis of *Riggs* from Burton's conventionalist perspective *infra* at notes 51-53 and accompanying text.

37. The notion of an "interpretive community" was first introduced by David Bleich. See D. BLEICH, *SUBJECTIVE CRITICISM* (1978). See also S. FISH, *IS THERE A TEXT IN THIS CLASS?* 355 (1980) ("[I]nterpretation is the only game in town."). See generally E. SCHAUER & E. SPOLSKY, *THE BOUNDS OF INTERPRETATION: LINGUISTIC THEORY AND LITERARY TEXT* 145 (1986). For a recent effort to enhance the notion of interpretive community with an "institutional" approach to legal discourse, see Joseph & Walker, *A Theory of Constitutional Change*, 7 OXFORD J. LEGAL STUD. 155, 172-81 (1987) ("[T]he hermeneutics of constitutional change must comprehend a notion of 'institution;' lacking in legal positivism This institutional framework is integral to our notion of interpretive community.").

academy.³⁸ Other concepts that figure prominently in Burton's theory are W.V.O. Quine's metaphor of "web of beliefs,"³⁹ intuition,⁴⁰ and convention.

Any theory of interpretation must, Burton argues, begin with some notion of how it is that two or more cases can be said to be "alike," and therefore, "members of the same legal class."⁴¹ Borrowing from Wittgenstein, Burton urges his reader to think of similarities among cases as akin to the likenesses between members of a family.⁴² As with family members, no two cases will share all features in common, and yet, each is said to be "alike" in some important way. How is it that this "likeness" is perceived and articulated?

The ability of lawyers to recognize the importance of empirical similarities among cases is largely a matter of "intuition," which Burton explains thus:

[T]he fact of widespread agreement among members of the legal community on what the law permits or requires in a wide range of cases . . . reflects professional intuitions that are developed by legal training and experience and influenced in each case by the conventions of the profession. . . . Conventional practices and dispositions characterize the legal community adequately to treat it as an interpretive community, which in significant respects is different from the people at large or other professional communities. The legal community in relation to a legal system is an interpretive community whose job is to interpret the law, in addition to other functions.⁴³

38. See Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). A representative example of the nihilism described by Fiss is Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982). For criticism of the philosophical assumptions inherent in Levinson's position, see Patterson, *Interpretation in Law—Toward a Reconstruction of the Current Debate*, 29 VILL. L. REV. 671 (1984).

39. W.V.O. QUINE & J. ULLIAN, *supra* note 36.

40. It is indeed quite possible that there is much less to be made of intuition in Burton's theory than I suggest (see the discussion of Burton's conception of conventionalism, *supra* note 36). Perhaps Burton means nothing more by intuition than what, in a different way, used to be referred to as "judicial hunch." An approach to intuition along this line is articulated in Bell, *The Acceptability of Legal Arguments*, in THE LEGAL MIND: ESSAYS FOR TONY HONORÉ 45 (N. MacCormick & P. Birks eds. 1986) (legal reasoning takes place within a framework of accepted canons of legal argument). See also G. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 79 (1986) ("Argument from analogy to familiar past cases or incidents or general features of shared social life is more likely to succeed . . . than creating a new rule which itself needs interpretation, before it can efficiently guide action.").

41. S. BURTON, *supra* note 3, at 85.

42. L. WITTEGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (E. Anscombe trans. 3d ed. 1953) (the notion of "family resemblance").

43. S. BURTON, *supra* note 3, at 95-96 (footnotes omitted). The appeal of the argu-

The skeptical reader will no doubt question the empirical accuracy of Burton's claim that there exists widespread agreement among the legal community about what the law does and does not require. In fact, it is the very fact of widespread *disagreement* that fuels the fires of relativist rhetoric.⁴⁴ While Burton acknowledges this group of detractors, his argument, which is more sophisticated than this brief review can convey, will no doubt fall short of the demands of those who reject any theory of interpretation that fails to generate a completely determinate account of legal reasoning. Joseph Singer has recently put the challenge thus:

A legal theory or a legal rule is determinate if it tells us what to do.
A completely determinate theory or rule will leave us no choice; a relatively determinate theory or rule will constrain our choices,

ment is, at bottom, to tradition and practice as normative constituents of the practice of interpretation. As one critic of the post-modernist movement in art has remarked in a similar vein:

For a tradition to be in place, there have to be some shared standards of excellence, some rules that are already established. These standards and rules cannot be determined by the individual—their authority derives from the fact of being socially determined by the practice. Only then can we criticize and try to change them. The central attitude of pluralism—that art is various, that whatever artists define as art is acceptable as an 'end' to be pursued—breaks down the unity of a narrative history that until now has made art intelligible and sustained its practice. Once there is no longer any ultimate agreement as to the rules which constitute and sustain a practice—once there is no longer anything to impose constraints—all that pluralism can do is obscure the depths of our conflicts.

S. GABLIK, *HAS MODERNISM FAILED?* 76 (1984).

44. The usual reference is, of course, to *Critical Legal Studies*. But no *general* reference is appropriate, for there are certainly divisions of opinion within the Conference on the degree to which law can truly be said to be "indeterminate" and legal reasoning nonautonomous. Representative examples of each can be found in *Critical Legal Studies Symposium*, 36 *STAN. L. REV.* 1 (1984) and in the essays collected in *THE POLITICS OF LAW* (D. Kairys ed. 1982).

Roberto Unger, the Doyen of CLS, is himself not above criticizing the more extreme elements in "radical" legal thought. He writes:

[T]he history of modern legal thought can be written in large part as the history of the discovery of the legal indeterminacy of such vague institutional projects as a market order or a representative democracy. The result is to leave rationalizing legal analysis without a ready-made foundation. Confronted with the ideas of the rationalizing legal analyst, the radical critic says once again: It's all politics . . .

. . . The claim of those who say that it's all politics is easy to misunderstand. It can be heard as merely the expression of a skepticism that has gone beyond modest eclectic response, evincing a more radical disbelief in the prospects for any style of social and historical explanation . . .

Those who take the all-is-politics side in this dispute have often given cause for this reading of their words. They have almost always failed to grasp the consequences of their own position or to identify with clarity different ways to develop and support it.

R. UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* 148-49 (1987).

more or less narrowly, within boundaries. The claim that a legal doctrine is indeterminate means that the doctrine allows choice rather than constraining or compelling it.⁴⁵

In presenting his theory of interpretation, Burton plays down the idea of constraint, and thus defers addressing directly those who reject as incomplete or inadequate any theory of legal interpretation that does not end with claims of absolute completeness and logical inexorability.⁴⁶ As he sees it, legal argumentation is not a matter of construction of impeccable deductive syllogisms, but is more in the nature of an ongoing "conversation"⁴⁷ about order and justice in light of "the conventions of the legal community, as indicated by the legal experience and the totality of our theories about law."⁴⁸

But what is the "cash value" of these metaphors and generalities? We can see this most directly in the situation where a decision in a case can come out either way, depending upon the construction of an appropriate legal standard. In short, where two interpretive approaches are each embedded in existing legal conventions and are, seemingly, equally applicable to a set of facts, how is it that the choice of one over the other can be defended solely by reference to internal, legalistic criteria?

The nineteenth century New York case of *Riggs v. Palmer*,⁴⁹ first used by Ronald Dworkin⁵⁰ to demonstrate the importance of principles in legal reasoning, is pressed into service by Burton to illustrate the explanatory power of the metaphor of law as a "web of beliefs."⁵¹ In *Riggs*, the defendant Elmer Palmer killed his grandfather to accelerate his inheritance under the grandfather's will, and the question posed by the case was whether the murderer should take under the will or be denied his inheritance. Unreflective application of the New York wills statute mandated judgment in favor of Elmer. Thus, the issue considered by the New York Court of Appeals was whether to apply the statute "strictly" or, on some other basis, to deny Elmer his inheritance.

45. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 11 (1984).

46. Burton does, however, consider several forms of legal skepticism, including Legal Realism and Critical Legal Studies, in the course of a general discussion of formal legitimacy. S. BURTON, *supra* note 3, at 187-215.

47. *Id.* at 204-05 (citing R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 377-78, 389-94 (1980)).

48. S. BURTON, *supra* note 3, at 204.

49. 115 N.Y. 506, 22 N.E. 188 (1889).

50. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 23-45 (1977).

51. S. BURTON, *supra* note 3, at 138-43.

Burton points out that the majority opinion written by Judge Earl acknowledged the principle of legislative supremacy, but at the same time argued persuasively for the denial of Elmer's claim to his inheritance. What was at stake in *Riggs* was the proper construction of the principle of legislative supremacy. To take a "strict constructionist" view of legislative authority would, Judge Earl reasoned, exact too high a cost to existing legal conventions. By drawing upon a multitude of instances where strict application of statutes had been disfavored, Judge Earl was able to convince his colleagues, and the legal community generally, that a judgment for Elmer would have been inconsistent with "the collective experience of the legal community."⁵² It was against this collective experience, or "web of beliefs," that an approach to statutory interpretation had to be developed. The only acceptable decision that could have been rendered was one that sought to "maintain as well as possible the coherence and pragmatic value of the law in its entirety, given the centrality of order and justice."⁵³

III. CONCLUSION

The merit of Burton's description of a judge's work in terms of legal conventions forming a "web of beliefs" is in his demonstration of the inner rationality of the legal process.⁵⁴ The analysis is sophisticated in that it employs provocative and perspicuous metaphors that effectively demonstrate the reflective character of legal judgment. What Burton appreciates and articulates so well is that judgment in law is not a determinate (in Kant's sense)⁵⁵ faculty. Rather, judgment in law "is . . . irreducible to algorithm, in the sense of formulation of fully explicit criteria of judgment. What is required is not a 'decision procedure,' but an education in . . . insight, taste, and understanding."⁵⁶

Beyond the contribution that this book makes to the literature of jurisprudence, is its value as a statement of what legal theory in American law schools can become. At the present moment, three "move-

52. *Id.* at 141.

53. *Id.* at 142.

54. For an "insider's" account of appellate judging, see F. COFFIN, *THE WAYS OF A JUDGE* (1980).

55. I. KANT, *CRITIQUE OF JUDGMENT* 18 (W. Pluhar trans. 1987). Compare P. GUYER, *KANT AND THE CLAIMS OF TASTE* 39-40 (1979) (assessing Kant's analysis of the role of judgment in aesthetics) with S. WEBER, *INSTITUTION AND INTERPRETATION* 138-44 (1987) (applying Kant's analysis of the role of judgment in aesthetics to literature).

56. R. BEINER, *POLITICAL JUDGMENT* 163 (1983). See also M. NUSSBAUM, *THE FRAGILITY OF GOODNESS* 301 (1986) (For Aristotle, "[g]ood judgment, once again, supplies both a superior concreteness and a superior responsiveness or flexibility.").

ments" dominate the jurisprudential landscape in American law schools. Two of these, Law and Economics, and Critical Legal Studies, represent attempts to politicize the legal process through the presentation of arguments for the primacy of political vision over doctrine. The third "movement" is not really a movement at all, benefitting as it does from the fact that the orientation of those within it is descriptive rather than prescriptive. As Burton describes it, it is centrist, with the crucial claim being "that a conception of legal reasoning remains intelligible and defensible."⁵⁷

This brings us to the principal merit of Burton's book. In clear prose, Burton offers to the uninitiated reader a sophisticated presentation of the essential claims of traditional legalism.⁵⁸ This is no easy task, and Burton has carried it off in exemplary fashion. It is clear that this book is but the first installment in what will become a sustained and ever-enlarged development of an alternative vision of the legal process. Whatever the results of those efforts might be, Burton has demonstrated that philosophical appraisals of traditional elements of law and legal reasoning can indeed be viable, if not compelling.

57. Burton, *Reaffirming Legal Reasoning: The Challenge from the Left*, 36 J. LEGAL EDUC. 358, 358 (1986). One important group of legal theoreticians working in the natural law tradition are the Kantians. An impressive collection of essays reflecting their approaches is found in *Symposium on Kantian Legal Theory*, 87 COLUM. L. REV. 421 (1987).

58. See J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 271 (1980) (A legal system exemplifies the rule of law to the extent, among other things, that the making of judicial decisions is guided by rules that are promulgated, clear, stable, and relatively general.). See also J. LUCAS, THE PRINCIPLES OF POLITICS 116-17 (1985) (describing the virtues of the rule of law).