

Quot iudices tot sententiae: A study of the English reaction to continental interpretive techniques

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When the United Kingdom joined the European Economic Community in 1973, the English bench and bar must have perceived only dimly the challenges before them. Like contemporary descendants of Noah, they dropped into a Babel of languages and legal terms indispensable to the operation of the European Commission and the Court of Justice. Membership in the European Economic Community entailed the substantive harmonisation of English laws with those of other member states, and England's common law tradition could not have made the process easy. But the scope of the harmonisation task reached beyond substantive law to deeply rooted judicial attitudes toward the role of legislation and techniques of interpretation. In a recent editorial, Dr C. D. Ehlermann, Director of Legal Services for the European Commission, offered reasons for the English judiciary's potential resistance towards harmonisation of interpretative techniques.

'The United Kingdom has in relation to community legislation a special psychological problem. To "civil lawyers" law enacted by the State is something wholly familiar; membership of the community merely means that the originator of the enacted law changes. The United Kingdom, on the other hand, is proud of its historically developed common law. If even the statute law enacted at Westminster is regarded with scepticism, the institutions of Brussels are all the more certain to face mistrust, even aversion¹.'

In a sense, this paper concerns the English judiciary's mistrust of legislation and their nearly unanimous aversion to purposive legislative interpretation. Inevitably, Lord Denning, the chief proponent of purposive or liberal interpretation, figures prominently in the discussion along with his decision in *James Buchanan & Co Ltd v Babco*

1. C. D. Ehlermann, (1978) 15 Common Market Law Review 7. Interesting speculations on England's adjustment to membership in the European Economic Community appear in Chloros, 'English Law and European Law: The Problem of harmonisation' (1972) 36 *Rechts Zeitschrift für ausländisches und internationales Privatrecht* 603. On legislative interpretation see N. S. Marsh, 'Interpretation in a National and International Context' (1974); C. D. Ehlermann and I. Sinclair, 'The Interpretation of Community Law' (1976) and Bredimas, 'Methods of Interpretation and Community Law' (1978). On the special question of English treaty construction, see Lipstein, 'Some Practical Comparative Law: The Interpretation of Multi-Lingual Treaties with Special Regard to EEC Treaties, (1974) 48 *Tul L Rev* 907. For an excellent treatment of the United Kingdom in the European Community, see Lord MacKenzie Stuart, (1977). *The European Communities and the Rule of Law*.

*Forwarding & Shipping (UK) Ltd*². In clinical terms *Buchanan* is an ideal specimen, for it frankly displays a variety of consciously employed interpretive techniques and a remarkable judicial willingness to discuss these techniques. The case is also ideal for analysis because it concerns an unemotional, even mundane question of commercial liability, not an explosive issue that might cloud judicial perceptions.

Using the *Buchanan* decision as a springboard, this paper attempts to demonstrate two points; first, conceptual reasoning teleological reasoning are inevitable antagonists; and, second, conceptual analysis will remain a valid interpretive technique despite constant challenges by utilitarians and proponents of teleological techniques. As the paper later elaborates on these terms, a brief definition of them should suffice here. When we analyse a rule conceptually, we try to derive a concept from its words to discover what it commands. Then over the course of our experience with the rule, we apply our view of the command concept, usually quite literally. Teleological reasoning, etymologically from *telos*, the Greek word for 'end' or 'goal', seems antithetical to conceptual reasoning. It directs us to interpret a rule by focusing on its social purpose, even if we end up ignoring what it seems to command.

The first part of the paper analyses Lord Denning's judgment in *Buchanan* because it is so clearly committed to teleological techniques. Then, for contrast, it examines the opinions of Lord Wilberforce and Lord Edmund Davies because they typify the strict, conceptual analysis of the other judges. The second part of the paper traces the historical roots of conceptual and purposive techniques; the third speculates on reasons for distinctive interpretive techniques of English judges and the fourth and fifth parts examine in turn the application of conceptual and teleological techniques in selected continental decisions, and their political and philosophical implications.

I

The facts of *Buchanan*³ were not contested. Buchanan had hired Babco to transport a shipment of whisky. En route, Babco's driver left his vehicle unattended over a weekend. When he returned on Tuesday of the following week, the whole shipment had apparently been stolen. The shipment was to have been trans-shipped to Europe and thence to Iran. Outside England its sale price was about £7,000. But the driver's fault, which was conceded by Babco, brought section 85 of the Customs and Excise Act 1952, into operation, requiring Buchanan to pay an excise duty of £30,000. Though Babco admitted liability, there was sharp disagreement on the amount of damages; Buchanan claimed the total £37,000 while Babco contended that it

2. Opinion in Court of Appeal, [1977] 1 All ER 518. Opinion in House of Lords, [1977]

3 All ER 1048.

3. Ibid.

owed only £7,000. The amount of damages, as everyone agreed, had to be fixed according to a carriage contract subject to CMR conditions. In other words, the contract incorporated the terms of an international convention enacted into English law by the Carriage of Goods by Road Act 1965.

The critical question in *Buchanan* was whether, in the language of section 23(4) of the Carriage of Goods by Road Act 1965, a substantial excise duty was 'a charge incurred in respect of the carriage of the goods'⁴ and therefore refundable to Buchanan. According to Lord Denning, the quoted phrase, strictly interpreted, covered packing, insurance and certificates of quality, but it excluded the excise duty⁵. In his view, Buchanan had paid the £30,000 in respect of the non-carriage of the goods, not their carriage. But, asked Lord Denning, should the court be speaking strictly when the text at issue appears in an international convention, not in a traditional English statute? No. '... It should be given the same interpretation in all the countries who were parties to the convention. It would be absurd that the courts of England should interpret it differently from the courts of France, or Holland or Germany. Compensation for loss should be assessed on the same basis, no matter in which country the claim is brought. We have for years tended to stick too closely to the letter – to the literal interpretation of the words. We ought, in interpreting this convention, to adopt the European method'⁶.

Against resistance, Lord Denning advocated English adoption of a European method of interpretation as early as 1949. He described it more recently in an important decision, *H. P. Bulmer Ltd v J. Bollinger SA*⁷. There he pointed out that English statute drafters tried to legislate so as to foresee all possible circumstances that might arise; and English judges, following suit, interpreted the statutes literally as though they applied only to the circumstances covered by the very words of the statute. By contrast, the drafters of the Treaty of Rome had laid down general principles, aims, and purposes and European judges divined the spirit of the treaty and themselves filled the gaps. Finding a gap in section 23(4), Lord Denning emulated his European colleagues, filled it and elaborated on European interpretive method:

'They adopt a method which they call in English by strange words – at any rate they were strange to me – the "schematic and teleological" method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose . . . behind it. When they come upon a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and

4. [1977] 1 All ER 521-522.

5. [1977] 1 All ER 522.

6. *Ibid.*

7. [1974] 2 All ER 1226 at 1236-37.

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purpose of the legislature – at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly'⁸.

Eventually the House of Lords rejected Lord Denning's use of teleological reasoning, though Buchanan prevailed on the ground that 'other charges' was conceptually wide enough to include the excise duty. According to Lord Wilberforce (and his view was typical) there was no gap in section 23(4). The question was whether the loss should fall on the owner or the carrier. Somehow the words had to cover the case. Lord Wilberforce also took issue with Lord Denning's denigration of English methods and praise of continental ones. 'The assumed and often repeated generalisation that English methods are narrow, technical, and literal whereas continental methods are broad, generous, sensible seems to me insecure at least as regards interpretation of international convention'⁹. If the goal of the teleological approach was uniformity, it certainly had not been reached by the twenty-odd states that signed the Convention. One English decision showed that courts in six member countries had produced twelve different interpretations of particular provisions and Lord Wilberforce, to underscore the international disunity, examined two specific recent decisions interpreting section 23(4), one from Paris¹⁰ the other from Amsterdam¹¹. These cases, though factually similar to *Buchanan*, went for the carriers. They showed 'that there is no universal wisdom available across the channel upon which our insular minds can draw'¹². And in Lord Wilberforce's view, it was pointless to characterise an interpretive style as liberal or strict as Lord Denning had done. One might as easily ask whose ox was being gored. According to Lord Edmund Davies, Lord Denning instead of reading the legislation, had legislated the result *on his own* and then justified the decision by reference to the intent of the drafter. Excise duty did not fit the category of charges in section 23(4) and 'liability to pay duty was not incurred in respect of the carriage of goods'. He conceded that a true gap might justify a continental approach, but in this case there was no gap. 'The literal approach [was] preferable to the schematic and teleological approach'¹³. And he drew attention to the misgivings about the teleological approach expressed in another decision. 'a possible danger of that approach . . . is not, indeed, that the judges

8. [1977] 1 All ER 522-523.

9. [1977] 3 All ER 1053.

10. *Cie L'Helvetia v Cie. Seine et Rhone* [1973] Bulletin des Transports 195.

11. *British American Tobacco Co (Nederland) BV v Van Swieten BV* (unreported) (30 March 1977).

12. [1977] 3 All ER 1054.

13. [1977] 3 All ER 1060.

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become legislators, but that they may become legislators with widely differing, and perhaps unduly legalistic, views of the policy which is, or ought to be, behind the legislation. Hence the law, whatever it may gain in other respects, may in some cases suffer a loss in what has always been regarded as one of the essential features of law—uniformity; or, at least predictability. Sometimes, in relation to the judicial view of “the presumed purpose of the legislation”, it may be a case of *quot judices, tot sententiae*; whereas in relation to what the legislation has actually said, it is unlikely that judicial opinion would vary so widely¹⁴.

It is hard to argue with Lord Edmund Davies’s observations. A teleological interpretation might easily require the sacrifice of predictability to a deity of uniformity. Judging from varied treatments of section 23(4) by continental tribunals in France, the Netherlands and elsewhere, the god itself remains unappeased and unpredictable. And this unpredictability is expressed in the Latin maxim, *Quot judices tot sententiae*.

II

Laws, unlike many other forms of verbal expression, are dominantly instrumental in the sense that they incite us to action. They order, permit, and forbid; they announce rewards and punishments. In a positivist legal tradition, rules appear as statements, and they become commands when judges apply them to facts. The legal significance of a legislative text is the command the judge discovers in it, and discovery depends upon interpretation.

The debate in *Buchanan* about proper statutory interpretation was not isolated or accidental. On the contrary, the judges’ literalism – sometimes called a search for plain meaning – is a hallmark of English statutory interpretation; it practically pre-ordained the shape of the decision in the House of Lords. For thirty years, Lord Denning himself unsuccessfully urged purposive techniques on his colleagues. In *Seaford Court Estates Ltd v Asher*¹⁵, then a Lord Justice of only six months standing, he had to interpret the thoroughly ambiguous term ‘burden’ in a rent act. His fundamental insight in that case, one that often eludes both jurists and historians, was that history will always outstrip the imagination:

‘Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity . . . It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the

14. *Ibid.*

15. [1949] 2 KB 481.

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competed unsuccessfully with strict, literal interpretation, and the facts of *Buchanan* provided a contemporary arena for the contest. As Professor Thorne has shown, English judges traditionally refused to extend the words of a statute even when refusal might lead to injustice. Their attachment to literalism was a by-product of their commitment to the gradual case-by-case evolution expressed by a judge as early as 1342: 'We will not and cannot change ancient usages'²³. In a system where decisions were the source of predictability and stability, statutes were understandably aberrational; they were 'in derogation of common law'.

Professor Thorne's description of an ancient cast of mind, characterised by literalism, has a distinctly modern ring:

'Statutes are to be taken as they stand; though they may be restricted in scope without comment, any extension, however slight, must be justified by reference to a definite doctrine of interpretation . . . The general attitude during the later Year Book period is one of jealousy for the common law which was not to be modified by statute more than could be avoided. Statutes will be held to do no more than they literally say in changing or adding common law rules . . . common law policy can be read into statutes to restrict general words that change common law principles too violently'²⁴.

Long before *Buchanan*, English judges had displayed an affection for strict interpretation. Predictably, teleological reasoning – call it equity of a statute, reason for the remedy – would run against the grain of most of Denning's colleagues. One could not expect them to abandon an 'ancient usage' because the legislation at hand was organic, not incidental or occasional. As two commentators said of *Buchanan* even before the decision in the House of Lords, a grammatical approach was 'inevitable. Teleology was clearly the last resort'²⁵.

This section explores the historical background of conceptualism and teleological reasoning, two interpretive techniques that figure prominently in the *Buchanan* case. Both techniques rest on the assumption that the legislation at issue is the primary source of law. This view contrasts sharply with the traditional Anglo-American notion that statutes derogate from common law. In a system dependent on the gradual evolution of rules in cases, full-blown interpretive theories would be unlikely. As long as the judge was his own interpreter, such theories, if they existed at all, were submerged in the judge's psyche; their emergence is due to the expanding reach of legislation. On the continent, however, such theories blossomed because of the separation of powers: judges had to explain how they applied legislation they had not authored. According to Professor Arthur Lenhoff, modern theories of legislative interpretation arose

23. YB 16 Edw. III, 1, 90, YB 19 Edw. III, 12. Quoted in Thorne, 'The Equity of a Statute and Heydon's Case', (1936) 31 Ill L Rev 202 at 214 n.44 (cited as *Thorne*).

24. *Thorne*, supra, pp. 208-209, 36.

25. Sacks & Harlow, (1977) 40 MLR 581.

draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which was passed to remedy . . .'¹⁶.

Although the House of Lords eventually upheld the decision in *Seaford Court Estates*, the majority, as Lord Denning later recounted, rested their decision on traditional grounds¹⁷. And only a year later Denning's approach came in for heavy criticism. In *St. Mellons Rural District Council v Newport*¹⁸, Lord Simonds 'poured scorn'¹⁹ on the teleological approach, and accused Lord Denning of attempting a naked usurpation of the legislative function under the thin disguise of interpretation. Then in a succession of cases, teleological techniques arose only to be shot down. In 1974, Lord Denning, fortified with arguments based upon England's membership in the European Community, tried once again to introduce teleological interpretation. In *Bulmer Ltd v Bollinger SA* he characterised the Treaty of Rome as an incoming tide that 'flowed into the estuaries and up the rivers'²⁰. To promote international uniformity, he argued, English judges had to construe the treaty purposively. His technique did not take hold in 1974, and it was rejected in *Buchanan*. His fellow judges' insistence leads us to ask several questions. First, was Lord Denning proposing anything new or revolutionary? Second, assuming he was correct about the English tendency to literalism, why was this so? Third, why did continental judges not share such literalism towards statutory interpretation?

This section attempts brief answers to the first two questions. The third must be postponed until we have first described and contrasted the roles of legislation in both civilian and common law contexts. If anything is clear from the literature on English statutory interpretation, it is the unrevolutionary nature of Lord Denning's proposed interpretive techniques. In *Seaford Court Estates* he acknowledged that the proposed purposive technique went back at least four centuries to *Heydon's case*²¹ celebrated today for its articulation of the rule that correct interpretation requires a search for the equity of the statute. As the Barons of the Exchequer said, 'The sure and true interpretation of all statutes' required consideration of the 'true reason of the remedy'²². Though interpretation according to the equity of a statute was not novel, it was not the pre-eminent interpretive technique during four centuries either; it seems always to have

16. *Ibid.*

17 Denning, *The Discipline of Law* (1979) p. 13 (hereinafter cited as *Discipline*).

18. [1951] 2 All ER 839.

19. *Discipline*, supra, p. 14, n. 31.

20. [1974] 2 All ER 1226 at 1236-37.

21. [1949] 2 KB 481.

22. (1584) 3 Co Rep 7a. Quoted in Thorne, 'The Equity of a Statute and Heydon's Case,' (1936). 31 Ill L Rev 202 at 214, n.44 (hereinafter cited as *Thorne*).

with the bureaucratic state intent on providing judges with a codified standard²⁶. Eighteenth century jurists portrayed monarchs and enlightened despots as absolute law-givers, and judges as their personal spokesmen. There is also a connection between the assumption of the supremacy of codified legislation and the rise of a natural law school established during the Enlightenment. According to an enlightenment dogma, sometimes attributed to Grotius and Pufendorf, a law drafter was to codify a few definite and immutable principles of human interaction buried among thousands of disparate rules in much the same way as natural scientists, by means of reason and detailed inspection, could discover the natural laws inherent in the universe²⁷. Assuming the role of legal scientists, drafters and lawyers looked askance at sources of law other than legislation. They shared a general commitment to a strict separation of powers in which the judge was to decide cases by logical and scientific application of legislation to facts.

On the continent, a historical school led by the German scholar Savigny arose to legitimate civil codes as the source of law. The Civil Codes of both France and Germany were supposedly logical gapless systems, internally consistent documents whose logic appeared in the interaction of their provisions and the results derived from them. 'Every decision seemed to be a logical conclusion in a syllogism whose major premise was a rule and whose minor premise was the factual situation of the particular case'²⁸. Since the keystone of the purely deductive theory of interpretation lay in the assumption that the Code was final and complete, the prevalent school of thought was satisfied by linking the decision to the code. This link was important whether the decision was based upon literal interpretation of a command in the code or logical deduction of its consequences. As Professor Lenhoff tells us,

'A legal technique was developed which often reminded the reader of the medieval scholastic disputes concerning the existence of God. For the case at issue, the decision is deduced from certain conceptions by way of subsumption . . . Notions are worked out from certain legal propositions and moulded into abstract conceptions from which, in turn, new concepts will be deduced through a similar logical-mechanistic process, and so on, *cum gloria in infinitum* . . . Thoël explained these methods as follows: "One has to find those rules which are not expressly defined in the statute by deducing them from general principles which, in turn, are to be discovered either by . . . abstraction, or by drawing consequences from those governing principles'²⁹.

26. Lenhoff, 'On Interpretative Theories: A Comparative Study in Legislation', (1949) 27 Texas L Rev 312 (cited hereafter as *Lenhoff*).

27. The relationship between techniques of natural science and legal science during the enlightenment is elaborated in Herman, 'Legislative Management of History: Notes on the Philosophical Foundation of the Civil Code', [1979] 53 Tul L Rev 380.

28. *Lenhoff*, supra, p. 313, 29.

29. *Ibid.*, at 313-314.

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In Germany, the scholastic conceptual approach described by Lenhoff came to be called *Begriffsjurisprudenz* while in France it was associated with the exegetical school. The chief virtues of conceptual jurisprudence were said to be predictability and certainty. Its chief drawback was that it eliminated the human element needed for the resolution of new social and economic problems. A German writer, Rudolph von Jhering, satirised the *Begriffsjurist* as a scholar who constructed a legal decision purely from texts and abstract concepts without taking into account its political impact³⁰. By over-emphasising conceptualism and literalism, *Begriffsjurisprudenz* had a petrifying effect. While the civilian scholar gained skill in detecting the faintest shades of meaning in statutory language, courts, challenged by changing social conditions, had to use verbal gymnastics and legal technicalities to adapt the codes to new circumstances. Inevitably, the judge's image as tender of a legal machine was destined to be transformed into that of law creator. Interpretive techniques supplied a basis for the transformation.

In retrospect the change seems natural because the scholarship harped on a variety of inter-related themes. To encourage the break from hairsplitting literalism, writers stressed important general terms in the codes, the purposive character of law, and the inevitable incompleteness of any legislation. The civil codes of Germany and France contained a number of sweeping general clauses. For example, German Civil Code, Article 242 provided that 'obligations of any kind are to be performed in such manner as good faith (*guter Glaube*) requires with due regard to the custom of the trade (*Verkehrssitte*)'. A German writer, Oscar von Bülow, argued that the use of these clauses gave judicial decisions a uniquely creative character, and he invoked Platonic metaphors to support the point. A judge, proceeding upon general clauses such as 'good faith', was said to be filling an abstract vessel with particular content; he was thus writing a particular rule for a particular case³¹. As we shall see shortly, the general clauses of Article 242 became the basis for a revolutionary turn in German private law. On the western bank of the Rhine, meanwhile, the French Cour de Cassation generated a theory of strict liability and tomes of decisions from flexible terms like 'fault' in a handful of tort articles. The following is a celebrated text of the French Civil Code:

'Art. 1382. Any act of a person which causes damage to another makes him by whose fault the damage occurred liable to make reparation for the damage.'

Once the scholarship had rationalised the leap from literal interpretation to the general clauses, the incompleteness of civil codes arose as a corollary. Paradoxically some codes codified the

30. *Ibid.*, at 315-316. Translations of lengthy passages by Jhering, Heck and other continental scholars appear in *Jurisprudence of Interests* (M. Schoch ed. & trans. 1948).

31. *Ibid.*, at 317.

corollary, offering convenient hooks to a judge who sought to decide a case outside the code's literal framework. For example, Article 7 of the Austrian Civil Code (1811) provided:

'Where a case cannot be decided either according to the literal text or the plain meaning of a statute, regard shall be had to the statutory provisions concerning similar cases and to the principles underlying other laws or similar matters. If the case is still doubtful, it shall be decided according to the principles of *natural justice* after careful research and consideration of all the individual circumstances'³².

'And the first article of the Swiss Civil Code, enacted a century later, provided:

'The Civil Code applies to all cases as to which it contains provisions either according to its letter or its spirit. In default of an applicable provision, the judge shall decide according to customary law, and in default of a custom, according to such rules as he would enact if he were the legislator. He may inspire his decision by solutions sanctioned by doctrine and by the course of judicial decision'.

One can imagine Lord Denning's delight if such provisions appeared at the beginning of the Carriage of Goods by Road Act 1965. To Lord Edmund Davies's charge that he was legislating in *Buchanan*, he would respond that he did it because the pertinent legislation authorised it. Even when broad directives were unstated, they constituted an integral part of a continental judge's interpretive baggage. As scholars quickly noted, Austrian Civil Code Article 7 furnished a road map of techniques for the resolution of cases otherwise unprovided for within the confines of the code itself. It distinguished judicial recourse to rules expressly provided for similar cases (*Gesetzesanalogie*) from a method that seeks a solution implicit in the spirit of the law, that is, the general principles on which the entire legislation is based (*Rechtsanalogie*). A judge, armed with such an arsenal of analogical techniques, was well equipped to settle many ambiguities. If he still could not solve a particular problem, he might then refer to the 'natural justice' clause, presumably a reference to the natural law school that viewed certain principles as innate in human nature and superior to any municipal law. In constitutional law such principles might include the right of privacy and the right against self-incrimination. In the *Buchanan* decision, several judges almost fastened on a maxim of natural justice that is a commonplace in tort law: If one of two parties must suffer, let it be the one whose negligence contributed to the damages.

The step from analogical reasoning to purposive reasoning is illuminated by reference to Article 1 of the Swiss Civil Code, for this article literally provided a basis for the judicial filling of a legislative gap. Of course it did not authorise a judge to fill a gap with his own privately held social ideals. Instead, according to Swiss legal doctrine, it called upon the judge to seek a fuller articulation of principles

32. Ibid.

embodied in the code itself. Lenhoff traced Article 1 of the Swiss Civil Code to a passage in Aristotle's *Nichomachean Ethics*: 'Where a law is not specific enough and therefore lacks a rule applicable to the case, one should fill the gap as the lawgiver if present and faced with the case would have formulated the rule'³³. Equally convincing is Professor Jaro Mayda's claim that Article 1 of the Swiss Civil Code was inspired by a modern French writer, Francois GénY, whose *Méthode d'interprétation et sources en droit privé positif* was a devastating assault on the formalistic code exegesis prevalent in France well into the twentieth century³⁴. GénY was the foremost exponent of '*libre recherche scientifique*', the view that the judge, having found neither an appropriate formal norm nor guidance in doctrine and decisions, must freely and objectively search for a rule in social realities and values. GénY sought to demolish the positivist myth that legislated law was exclusive and self-sufficient. He attacked the methods of *Begriffsjurisprudenz* that 'erected on a legislative text a system of concepts handled in closed circuit by means of formal logic, independently of the changing world of facts'³⁵. Inspired by Von Jhering, a prime mover in the teleological school of *Interessenjurisprudenz*, GénY envisioned a civil code as a structural frame that did not *a priori* establish the limits of judicial interpretation. Recognising that history would always outrun the imagination, he elaborated the concept of the insufficiency of written law that Portalis, chief architect of the Code Napoleon, had expressed a century before him: 'It is for experience gradually to fill up the gaps we leave. The codes of nations are the fruit of the passage of time: properly speaking we do not make them'³⁶.

For GénY, the judge's first task was interpretation of the legislative text pursuant to a subjective theory that aimed at discovering the legislator's actual will. If, by means of this approach, the interpreter discovered that the legislator had expressed no intention regarding the precise situation at hand, either because the specific problem did not come to his mind or had been overlooked, then he should find the basis for the decision in sources beyond the confines of the legislation. For GénY, a legislative provision was a general rule or norm enacted for a general type of situation, although the provision might be couched in terms of specific facts. If the interpreter could not subsume a given set of facts within a general conceptual category, then he could project the norm beyond its original scope. In the context of *Buchanan*, Lord Denning accomplished this projection by reference to the overall scheme and purpose of the Act as well as the general goal of uniformity among the member states' courts.

33. *Ibid.*, at 318. Aristotle, *Nichomachean Ethics*.

34. Mayda, *Francois GénY and Modern Jurisprudence* (1978) 31-32 (cited hereafter as *Mayda*).

35. *Ibid.*, at 7.

36. Author's translation in Levasseur, 'Code Napoleon or Code Portalis', (1969) 43 *Tul L Rev* 762 at 773.

For analytical purposes, Gény had assumed the command element of a provision could be severed from its purpose; and because command and purpose were often antagonistic, the assumption was convenient. However, other proponents of teleological reasoning argued this division was artificial because the two elements were in reality inseparable. In other words, a command in positive law could be regarded as an objectification of subjective purpose. The German scholar, Philip Heck, founder of the school of *Interessenjurisprudenz*, made this point when he suggested that every legal norm has on one hand its logical place in a conceptualistic framework of legal precepts. On the other hand, it aims at a balancing of conflicting private interests by drawing a line of demarcation between one party's interest and those of others. According to Heck, conceptualism was onesided and mechanical because it missed the connection between a norm and the conflict of human interests for whose settlement it was enacted. Heck attributed the onesidedness of conceptualism to the fallacious idea that a rule for every case ultimately must be derived from a legislative provision. Though legislation might be the primary source of law, it was not the only one. Heck did not argue for the destruction of conceptualism; instead he sought to emphasise the indissoluble links between command and purpose, norm and interest. According to Lenhoff, the fallacy of conceptualism was a logical inversion; it ignored that rules are formulated deductively from concepts that were themselves formed to establish the rules³⁷. Although, to all appearances, a judicial opinion generally omits allusion to a process of valuation of interests in the case, the true reasons for the decision lie in the perception of and the significance given to the manifold interests in the balance³⁸. According to the school of *Interessenjurisprudenz*, the judge was no mere legal automaton operated by logical mechanics. He could not focus strictly on the words of a text and derive concepts logically from it without attending to the provision's purpose. A creative assistant to the lawmaker, he had to lay bare, to articulate and to classify what a statute might express inarticulately. To fashion a rule appropriate for the case he had to evaluate the interests involved in the case, not enshroud the process in mechanical, formalistic deductions.

III

Having explored briefly two interpretive techniques for civil codes, we can return to a question posed earlier: Why do English judges and their continental counterparts not share literalistic attitudes toward statutory interpretation? This is not a new question, but perhaps we can offer some new explanations.

Long before England joined the European community, commentators warned against impatience with the English for their distinc-

37. Lenhoff, *supra*, p. 330.

38. *Ibid.*

tive attitudes toward statutory interpretation³⁹. Dr Ehlermann's explanation, quoted at the beginning of this article, explains these attitudes⁴⁰. For an English lawyer, unlike his continental counterpart, an exploration of the limits of judicial interpretation might seem a vain exercise. Conditioned to attach great weight to judicial decisions, he might wonder why anyone would bother to debate the values of judicial lawmaking. To complicate matters, a continental jurist might wonder why English judges, by their own admission capable of creating law, insist on reading statutes literally (uncreatively?). Answers to these questions will take us some distance toward understanding why Lord Denning's teleological approach fell like a hand grenade among his brothers. As we have seen, the reasons for their rejections are institutional, not personal. The explanation requires a sketch of English and continental assumptions about the separation of powers and the roles of statute and precedent as sources of stability. It will be recalled that modern continental theories of legislative interpretation arose with the bureaucratic state intent on providing judges with the stability of a codified standard. By definition, a codified standard entailed the glorification of the legislator. Equally important, it also required the denigration of the judicial function, a trick that could easily be played because judges in the precodification era had been traditional objects of distrust. Civil law dogma asserted legislative supremacy; and a corollary of the assertion was that judicial decisions were not law. The products of judges in courts had no place in the hierarchy of recognised sources of law.

By contrast, English common law had no significant tradition of distrust of the judiciary, at least since the time of Coke. Thus it placed no particular emphasis on restricting the judicial function. To the contrary, judicial decisions were the principal means of developing the law; unlike continental codes, English statutes played a minor uneven role in legal development. From this basic contrast between continental and English experience with statutes and decisions flowed other differences that influenced their perspectives. As noted previously, the civil law tradition entrusted to the legislature the task of assuring predictability and stability. Thus, a civil code, a visible sign of predictability, was necessarily characterised as a comprehensive scheme, complete in its field and logical in its arrangement. In the common law tradition since the Glorious Revolution, predictability was a responsibility of the judiciary rather than Parliament. While the demand for predictability virtually precluded the development of a doctrine of binding precedent on the continent, the same desideratum of the English common law demanded it. Precedent was the soil from which predictability was mined, and *stare decisis* was its visible sign. Even today, the English lawyer, though

39. Chloros 'English Law and European Law: The Problem of Harmonisation', (1972) 36 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 603.

40. See text accompanying note 1.

he is aware of the growing role of statute, is bound by a traditional view that legislation is abnormal and occasional. It is law made outside the usual and traditional developmental machinery of the legal system. It arose in derogation of the process whereby predictability was achieved, and therefore was not fully assimilated into the legal system until the judiciary legitimated it. English statutes, from a practical standpoint, must also have been outside the traditional machinery. Until the nineteenth century, English enactments, some dating back to the 1200s, 'were disorderly to an almost incredible degree'⁴¹. If the importance of statutes to a legal system can be gauged by their disarray and incompleteness, English enactments must have rated pretty low.

English and continental perspectives on the role of statute and precedent entailed differences in judicial and legislative methods. Lord Cooper summed up these differences well:

'A civilian system differs from a common law system much as rationalism differs from empiricism or deduction from induction. The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, "What did we do last time?" . . . The instinct of the civilian is to systematise. The working rule of the common lawyer is *solvitur ambulando*'⁴².

Differences between continental and English interpretation suggest a fundamental difference between continental and English legislation *per se*.

As Portalis, the chief drafter of the French Civil Code noted, the fundamental task of civilian legislation is to establish general principles of law 'fertile in their effects' from which particular applications might be deduced. Thus, the civilian separation of powers model presents a distinctive division of labour between judge and legislator: 'There is a legislative skill as well as a judicial skill and the two are quite distinct. The skill of the legislator is to discover the principles in each area which most conduce to the common weal; the skill of the judge is to put these principles into action'⁴³.

41. C. K. Allen. *Law in the Making* (7th edn, 1964).

42. Cooper, 'The Common Law and the Civil Law - A Scot's View', (1950) 63 Harv L Rev 468 at 470. See also, R. Pound, What Is the Common Law? in the Future of the Common Law (1937) 3: 'Behind the characteristic doctrines and ideas and technique of the common law lawyer there is a significant frame of mind. It is a frame of mind which habitually looks at things in the concrete, not in the abstract . . . It is a frame of mind which is not ambitious to deduce the decision for the case in hand from a proposition formulated universally . . . It is the frame of mind behind the sure-footed Anglo-Saxon habit of dealing with things as they arise instead of anticipating them by abstract universal formulas'.

43. Portalis, 'Discours préliminaire prononcé lors de la présentation du projet de la commission du gouvernement', in 1 P. Fenet, *Recueil complet de travaux préparatoires du code civil* (Paris 1827) 470, translated by S. Herman in Levasseur, *Code Portalis*, supra, p. 769, n. 50. See the translation by T. Weir in 1 Zweigert & Kötz, *An Introduction to Comparative Law* at 82.

The common law tradition presents a strikingly different division of labour. During the formative periods of English law, general principles of law were drawn inductively from existing decisional law, not deductively from legislation. Thus the division of labour between common law judge and legislator is almost the converse of that embodied in the civil law tradition. Not surprisingly, the judicial approach to statutory construction in the two traditions differs significantly. For English lawyers, legislation has traditionally consisted of ad hoc enactments to alleviate particular social or economic mischief. English empiricism, in combination with a conception of decisional common law as a seamless web, reacts with suspicion to such enactments: the common law judge senses that legislation is itself a kind of mischief, a nagging disturbance of the 'lovely harmony of the common law'⁴⁴. English statutory interpretation, even when applied to a modern convention like the Carriage of Goods by Road Act, reflects a conviction that the mischief of legislative interference should be confined within a narrow compass⁴⁵. Statutes in derogation of the common law are to be strictly construed and limited to the particular situations they address unquestionably. This assumption of strict construction would exist even in the face of the most comprehensive legislative scheme, and as Lord Denning learned, even if the scheme is a multilateral commercial treaty. If the particular facts do not fit into the unquestionable coverage of the legislation, the judge turns away from it, confident that he will somehow turn up a solution from common law. Even when he denies the application of common law, he does not seem concerned over the potential chaos that might result from a defect in legislation. Unlike his civilian counterpart, he does not exhibit a strong commitment to maintaining the myth that legislation is logically complete and perfect. This absence of commitment is predictable because the English judge, even when he says otherwise, believes he works with a safety net. If he falls through the superstructure of a legislative scheme, he believes he will land safely in the seamless, stable web of the common law⁴⁶. Even Lord Denning, the most 'liberal' of statute readers, justified his reading of section 23(4) of the Carriage of Goods by Road Act on the ground that it coincided with the common law rules that would have applied without the legislation.

44. 1 Zweigert and Kötz at 269: 'The judges saw statutes as being an evil, a necessary evil, no doubt, which disturbed the lovely harmony of the common law . . .' The restrictive attitude towards statute is well documented in Plucknett, *Statutes & Their Interpretation in the First half of the Fourteenth Century* (1922), Thorne, 'A Discourse upon the exposition and Understanding of Statutes' (1942).

45. F. Pollock, 'Essay upon Jurisprudence and Ethics' 85 (1882).

46. The English judge 'has no feeling that, if he fails to provide a remedy through the statute for the particular set of fact with which he is presented, he is failing in his duty, that he is leaving a gap in the law. There is always, apart from the statute, the common law, the law developed by the judges themselves, which will govern the legal relations of the parties'. N. S. Marsh, 'Interpretation in a National and International Context' (1974) 67.

Civil law tradition presents a model of the judge at work diametrically opposed to the description above. For a continental judge, a body of law is by definition legislative in character; he is in partnership with the legislator and the guardian of the integrity of the legislation. Hence their functions are complementary, not antagonistic. Unlike his English counterpart, he instinctively tries to avoid the legislative gap or explain it away. His use of analogy and teleological method reflects a desire always to save the legislation, for tradition requires the assumption that it is the fountainhead of predictability in law. No matter how much he engages in judicial lawmaking he will not easily admit he is doing so. For him, unlike his English counterpart, there is no safety net, no extra-legislative stability. His interpretive techniques tend to expand rather than restrict the reach of legislation. For him, expanded structure is safer than a void.

IV

Conceptualism and literal interpretation have been fashionable targets of scholarly criticism at least since the inception of legal realism. The criticism probably had its seed in the United States in Holmes's statement that the life of the law was experience, not logic⁴⁷. But judicial method is more than a matter for scholarly discourse. Both conceptualism and teleological interpretation have political implications evident in microcosm in the *Buchanan* decision. I argue here that conceptualism is inevitable and desirable in legislative interpretation if there is to be legitimacy to the rule of law. As Montesquieu taught us, certainty can positively affect the citizenry: if private actors know in advance the incidence of state intervention, they can adjust their activities to account for it, thereby avoiding the effect of sporadic legal catastrophes⁴⁸. Thus, in criminal statutory interpretation we have not subscribed to purposive interpretation. Even in interpreting organic civil statutes like the Uniform Commercial Code, we normally try to subsume cases within categories established by the various sections⁴⁹.

I do not argue that there is a cause-effect relationship between conceptualism and liberal democracy on one hand or between teleology and totalitarianism on the other, but judicial preference for one of

47. Holmes dictum was probably borrowed from Jhering who said in *Der Geist des Römischen Rechts*, 'Life is not here to be a servant of concepts, concepts are here to serve life . . . What will come to pass is not postulated by logic but by life'. Zweigert & Kötz, 'Jhering's influence on the Development of the Comparative Method', (1971) 19 *AJCL* 215, 225-226. I am indebted to Professor Mary Ann Glendon for the connection between Holmes' dictum and Jhering's statement.

48. About the plight of peasants in the Ottoman Empire in the eighteenth century, Montesquieu wrote: 'Ownership of land is uncertain and thus the incentive for agricultural development is weakened: Neither title nor possession is good against the rulers' caprice'. *Lettres Persanes* (1721) 65 (author's translation).

49. See, e.g., Hawkland, 'Uniform Commercial Code Methodology', 1962 *U Ill L Forum* 291.

these techniques at a given period is a remarkably sensitive weather vane of political currents. Once political forces establish a dictator or tyrant, he can feed on an anti-conceptual judicial method with an entrenched tradition of gap filling by teleological reasoning. In this section, it will be helpful to liken reading a text to sticking to a footbridge over a chasm. Security and predictability are possible if one looks straight ahead. As we shall see in a brief contrast of Swiss and German judicial experiences in the twentieth century, peering down into the chasm may induce vertigo.

Professor Mayda, after meticulous analysis of a number of Swiss decisions, concluded that Swiss Courts, in the first thirty to forty years after the enactment of the Swiss Civil Code, 'exuded confidence in the judge's suppletory mission'⁵⁰. This confidence appeared in a variety of cases reflecting 'substantial broadening of the scope of the gap in a teleological direction'⁵¹. In 1925, for example, a Swiss court declared that 'where the text is insufficient to resolve a question, the judge should complement it according to his judgment'⁵². And the court went on to declare itself guardian of both the word and spirit of a text.

'The existence of a gap to be filled judicially must be admitted not only when a given fact situation is not covered by any statutory provision. It must be admitted also when there is such a provision, but its application to the specific case obviously does not correspond to the true ratio of the statute according to its meaning, its text and content. In such a case one cannot speak of simple equity lying outside the positive legal system, which could be considered only in the presence of a clearly and categorically expressed legislative will. On the contrary, the true content of the law, which the judge must find and apply, is at issue'⁵³.

About ten years later a Swiss court further elaborated the judge's role as gap filler in *Haus v Graber*. This case involved a creditor's right to sue an original debtor and a surety for the unpaid remainder of a debt, a situation not expressly regulated in Swiss civil law. Eugen Huber, the principal draftsman of the Swiss Civil Code, had written that a solution to the case could be derived from the Swiss Code of Obligations. Huber's opinion and a consistent ninety year line of decisions from the canton of Zurich (where *Haus v Graber* originated) were both unfavourable to Haus' appeal. But the Swiss Bundesgericht reversed, on the ground that the lower courts had ignored the spirit of the legislation. Inspired by this spirit, the judge was bound to 'supplement the law'⁵⁴.

Haus was a landmark. For a decade after it, Swiss courts showed a willingness to invoke the judge's creative power authorised in Article 1.

50. Mayda, *supra*, p. 42, n. 37.

51. *Ibid.*

52. *Ibid.*

53. *Ibid.*

54. *Ibid.*, at 43-44.

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According to Mayda's careful analysis of more recent Swiss rationes and dicta, however, Swiss judges, relying on a strict separation-of-powers doctrine, have hesitated to exercise their pretorian lawmaking powers. The judicial retreat from pretorian use of Article 1 was already clear in the *Suisa* case decided in 1948. In *Suisa*, plaintiffs argued that the Swiss copyright law of 1922 had a gap because it could not have been intended to cover talking films. The plaintiffs argued that this gap should be filled by reference to custom and technological progress. In the course of the opinion, the court elaborated on gap filling techniques:

'The existence of a gap must not be assumed lightly. The judicial exercise of the lawmaking power, . . . provided for in cases of extreme need (Art. 1, ZGB), represents a violation of the principle of separation of powers, a fundamental principle of modern democracy. The judge must therefore proceed with the making of new rules only where there is no doubt that a norm cannot be derived from the statute. If it is possible to solve a new fact situation through analogous use of existing legal prescriptions, the claim of a gap in the statute must be normally denied even if the resulting order is not the most expedient one. For expedience alone is not the factor that determines the existence of a gap'⁵⁵.

Mayda attributed the 'atrophy' of teleological method partly to Swiss psychology and technique. On a political plane, however, such atrophy seems to have been associated with the rise of authoritarian regimes after 1933 and the 'vertigo caused by the recognition of where a deviation from respectful deference from the texts might lead'⁵⁶. Mayda expressed disappointment that the Swiss Bundesgericht slipped backward from the technique of teleological gap filling, generally associated with the purposive interpretation of *Interessenjurisprudenz*, and fell into mechanical conceptual jurisprudence. The 'slip backward', if that is what it was, is understandable: Exaggerated judicial deference to the texts was a predictable response for a nation that witnessed judicial tyranny beyond its borders. The judges of the Nazi regime, in response to demands of the new social order, ran roughshod over teleological gap filling techniques. A brief look at German judicial behaviour from 1920 to 1945 reveals reasons for the Swiss judiciary's retreat.

Lenhoff reports that in the early 1900s techniques of *Interessenjurisprudenz* had gained ground in Germany, and German courts between the World Wars showed a tendency to escape from a technical scholastic approach. Many cases arose out of one of the greatest currency devaluations of modern times, proportionally like the plunge of confederate money. One celebrated piece of litigation concerned a pre-war lease with a clause permitting the landlord, at the end of the lease, to recover livestock for an amount fixed in Reichsmark. When the case reached the highest court, the German

55. *Ibid.*, at 47.

56. *Ibid.*, at 51.

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Reichsmark had lost 90% of its foreign market value. Because the lease ended at a time when the Reichsmark's value was skidding, the tenant naturally objected to the enormous loss threatening him if his compensation were computed by face value of the mark. On the other hand, the prices of livestock had skyrocketed, so that the tenant, if he were compensated on the basis of then current prices, would reap enormous profit from the changed circumstances. The German Reichsgericht declined to follow the conceptualists' tenet that a proper result could be derived from the legislative text alone. 'Viewed in the light of reality, all legislation, not excepting the [German] Civil Code, is only patch-work . . .'⁵⁷. Neither jurisprudence nor the parties' intentions supplied a basis for the decision, as the case was a matter of first impression and the disputed clause did not provide for the situation. Thus, the court, legitimately seeking to do equity, sought a middle course:

'A middle course [between the two diametrically opposed interpretations offered by the parties] must be charted to strike a balance between the two conflicting interests . . . Where the statute fails to offer a solution, the judge replaces the law-maker for the particular situation. One often speaks in such a case of a gap; but the expression is inappropriate because it conveys the idea that it would be possible to restrict the multifariousness of life within the confines of a code. Such a thing is impossible. Every day produces new aspects of legal significance, the creative power of life is infinite and the judge has to find the law in all such cases'⁵⁸.

This judicial revaluation case prefigured dramatic interpretive developments. According to Professor John Dawson, the disruption of private transactions, occurring on a vast scale, was traceable to one primary cause: the capricious fluctuations of the currency as a helpless government financed itself through the printing press. 'Disparities of value became so enormous as in themselves to stamp the results as unjust, by any measure of injustice'⁵⁹. Only in the case of debts arising from original money loans did judicial relief seem precluded. This was so because pre-war legislation, admittedly valid, had made the paper mark legal tender at its normal par – 'one mark equalled one mark' – for the purpose of discharging a money debt. As the inflation progressed, this legislation enabled a debtor to pay in money whose purchasing power was a thousandth or a millionth of the purchasing power he had acquired through the original loan. In a case involving a mortgage debt contracted before World War I, the court concluded that payment tendered in 1920, under appropriate circumstances, would not be 'performance in good faith'. This conclusion was supported by two arguments, by then predictable tools in the teleologists' toolchest: First, the framers of the legal tender

57. *Lenhoff*, supra. p. 331, n. 29, citing Reichsgericht 26 May, 1922; [1922] *Juristische Wochenschrift* 1910.

58. *Ibid.*, at 332.

59. Dawson, *The Oracles of the Law* (1968) 468-69, (hereinafter *Dawson*).

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legislation could not have foreseen the vast depreciation of the mark that had occurred after the war. Second, a conflict had arisen between Article 242 of the German Civil Code and the legal tender legislation, and in this conflict the latter must give way. Though these arguments sounded reasonable enough, the result was remarkable. The court concluded that a general clause of the Civil Code, effective in 1900, could invalidate a *subsequent* statute⁶⁰.

Within two months after rendition of this decision, German courts, in overturning pre-war transactions, would explicitly say that inflation had destroyed the foundation of a transaction, and had distorted the equivalence in a bilateral contract. Nevertheless, the balance could be restored; and the good faith clause of article 242 demanded a fair sharing of the burden of revalorisation⁶¹. In 1933, the German courts' attraction to the general clauses was publicised by a German jurist, Justus Hedemann, in a well-known tract, *The Flight into the General Clauses, A Danger for Law and State*. Hedemann saw the flight as a magnification of judicial power. In his view, its greatest danger was that it would obliterate legal rules as restraints on power, leaving discretion uncontrolled. For all of its drawbacks, the conceptual framework of a legislative text hemmed a judge in, preventing him from arrogating power from the legislature to himself. Hedemann linked the flight into the general clauses to disintegration of Germany's public order and conflicts between power groups that had nearly paralysed government. Investing 'neutral' judges with discretion through new interpretations of general clauses would accelerate the dilution of governmental restraints. A week before Hedemann's book appeared, Hitler acquired command of the state; and with his rise came a new general clause, the will of the Führer. It rivalled all other clauses and could fill any gap. Hedemann's judgment was accurate: the advent of the Nazi regime further accelerated the flight into the general clauses. 'Judges were to promote the "togetherness" of the Volk, its racial purity, common good above private good, the world view of Nazism'⁶². The general clauses, especially 'good faith' and 'good morals', were to be main ports of entry for these principles of the new order. The inflation and revalorisation cases were the channels to the ports, though by the mid-1930's 'good faith' had been invoked for labour contracts, literary property, corporations, civil procedure, the right of neighbouring landowners, taxation and public administration. In 1936, the Great Senate for Civil Matters declared that a contract could be void as offensive to 'good morals' if the values exchanged were unequal and 'in its content, motive and object it offends the sound sense of the people'⁶³.

60. This paragraph paraphrases Dawson's account in *Dawson*, 469-470.

61. *Dawson*, *supra*, p. 474, note 54.

62. *Dawson*, *supra*, p. 476, note 54.

63. *Dawson*, *supra*, p. 474, note 54. On abuses of judicial interpretation committed by the Nazi court, see Lowenstein, 'Law in the Third Reich', (1936) 45 *Yale LJ* (cited hereafter as *Lowenstein*).

Notably, not one line of the German Civil Code had to be repealed for the Nazis to establish their new order. The Great Senate merely had to fill old bottles with new wine:

'The concept of an "offence against good morals" as contained in articles 138 and 826, Civil Code, includes in essence the content of the National Socialist world outlook, which has become since the revolution the prevailing sense of the people (*Volksempfinden*). Filled with this content, article 138 is to be applied also to transactions of the period preceding that have not yet been performed. When a transaction offends good morals according to the views that now prevail no legal protection can be accorded it by any German court'⁶⁴.

According to Dawson, Nazi ideology may have pervaded the Reichsgericht's tests of good faith and good morals in many transactions, and he illustrates this point by reference to beer franchise cases.

'The official Nazi vocabulary had numerous ways of expressing sympathy for hard-pressed, small-time businessmen. One of the stray currents in that turbulent stream was the impulse to help the little man against the big, especially Big, Inc., this being one of the means for curbing the abuses of "monopoly capitalism". So the Reichsgericht must have counted on some nods of approval by heads in high places when in 1936 it described with indignation the unjust terms imposed by a great brewery, having vast resources and "paramount power," on a struggling retailer who must invest his scanty resources and all his efforts in an enterprise that could be cut off at any time, for a whim. This was condemned, it was said, by the German people's "conscience" and "sound sense of right" which had come to incorporate the whole national socialist world outlook'⁶⁵.

On the whole, however, Dawson reports that the permanent deposit of Nazi ideas on German private law and procedure was remarkably small. 'Even the continuing resort to the general clauses was in large part a working out of ideas that had germinated before 1933'⁶⁶. Judicial departure from the conceptual framework established by the Civil Code was a response to the rampant inflation of the 1920s. Ironically, the Nazi courts did not invent new techniques to achieve their goals; they merely had to twist well entrenched judicial methods, filling gaps with the ideals of the new order. They justified this subversion of the rule of law on the spurious ground that they had

64. *Ibid.*, Lowenstein's observation is noteworthy. 'Legal interpretation may . . . change the application of the old statutes without changing their textual formulation. National Socialist 'equity' seized upon those general clauses of the codes which already provided for equity as an integral part of positive law'. *Lowenstein, supra*, p. 804, note 58.

65. Dawson, 'Unconscionable Coercion: The German Version', (1976) 89 *Harv L Rev* 1041 at 1090.

66. *Dawson, supra*, p. 478, note 54. The damage of Nazism, viewed without benefit of historical perspective, seemed much greater. *Lowenstein, supra*, p. 794, note 59. But Lowenstein himself predicted that the abuses of the Third Reich would not cause permanent damage to German law. *Ibid.*, at 814.

uncovered the 'true' purpose of the law in the ruling spirit of the people.

V

According to Montesquieu, predictability and certainty, the chief virtues of conceptualism had a positive effect on the citizenry: if private actors could know in advance the incidence of state intervention they could adjust their expectations and activities to account for it. These virtues must have been especially appealing to the jurists of post-Revolutionary France. Because judges of the ancien régime tended to ignore express commands of law, the drafters of the Code Napoleon put a premium on clear legislation. Division of legislative and judicial functions was the essence of Montesquieu's doctrine of separation-of-powers. Today Montesquieu's argument is implicit in criminal law: if someone were indicted for a crime not clearly prohibited at the time he was alleged to have acted, he would have legitimate due process objections. Predictability and certainty were high on Karl Llewellyn's list of values when he argued for a commercial code. Llewellyn, as though he were a modern Montesquieu, asked rhetorically:

'What does it cost a polity in delay and uncertainty in legal discomfort or injustice to have the making or review of a rule wait upon the chance raising and appeal of issues one by one by dragging one? Consider, in contrast, what a Uniform Commercial Act or a Uniform Commercial Code does in making available in a jurisdiction where rulings are sparse the experience and wisdom of the whole country – all at a single stroke'⁶⁷.

We cannot know for sure if a strongly entrenched conceptualist tradition would have robbed Nazi officials of the opportunity to base decisions on criteria never articulated by the pertinent legislation. But an anti-conceptual strain committed to gap-filling appears to have made their rise to power easier. By contrast, Italian jurists during the same period resisted the Fascist onslaught by invoking the values of conceptualism and certainty and coupling them with a commitment to rigid separation of powers. Italian jurists saw a rigid separation of powers as a bulwark against executive interference in the judiciary. When Fascists suggested the abolition of legal technicalities and relaxation of insistence on certainty so that judges could 'decide in accordance with the facts of the case and the needs of the corporative order, the traditional legal value of certainty became the symbol for defense of the legal order'.

'The example of Germany, where the abolition of legality had gone forward under the theory of "free decision" or by reference to the *Führerprinzip*, was before the Italian jurists, and its tendency to make the law merely another branch of the administration was evi-

67. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) 518.

dent. Many Italian jurists strongly resisted the tendency in the name of the traditional values of the doctrine, among which certainty tended to dominate'⁶⁸.

Thus far I have argued that conceptualism and teleological reasoning are based upon different political assumptions. They also represent different epistemological assumptions. The conceptualist approach derives its strength from the intuition that the human mind operates according to innate ideas or intelligible essences. For a conceptualist words have fixed definite meanings. To assert the virtues of flexibility and adaptability, proponents of teleological reasoning must view the words of a rule as elastic vessels of variable content to be filled and emptied to achieve a right or good result. In opposition to the teleologists, the conceptualists assert that there is no necessary link between a rule and its purpose. They decry speculation about legislative policy and the arbitrary assignment of values to interests as tricks for destabilising the plain meaning of the rule. As outsiders, we may not feel a strong preference for any particular view in *Buchanan* because a minimal change of terms in a commercial statute like the Carriage of Goods by Road Act seems innocuous enough. Lord Denning's decision had an understandably disquieting effect on his colleagues because a matter of principle, symbolised by a verbal quibble, was at issue. And the reaction of Lord Denning's colleagues was summarised in the motto '*quod judices tot sententiae*'.

The conflict between conceptualism and teleological reasoning symbolises an important aspect of the human condition: a contemporary doubt about the capacity of language to convey meanings precisely. This issue requires the serious attention of the legal community because law is the instrumental language *par excellence*, and past research does not fully address it. Because jurists of the great codification era did not share the doubt, their interpretive techniques did not embody contemporary epistemological assumptions.

Although the period of French codification was characterised by rampant irrationalism at the guillotine, it was also marked by exaggerated rationalism, among lawmakers. The French *philosophes* thought human reason capable of analysing and recomposing the constituent meaning of complex terms of a language; in their view, the human mind could attain precise understandings of nature and experience by moving from simple, narrow notions to broader ones by way of logical operations. The Abbé de Condillac, for instance, devoted extensive efforts to developing *une langue bien faite* in his *Essai sur l'origine des connaissances humaines*⁶⁹. He was con-

68. Merryman, 'The Italian Style I: Doctrine' (1965) 18 Stanford L Rev 39 at 62.

69. A Condillac, *Essai sur l'origine des connaissances humaines* (2nd edn 1771 Paris, (1st edn. 1746, Paris). More background on the rationalism of civil codification appeared in Herman, 'Command Versus Purpose: The Scylla and Charybdis of the Code Drafter', (1977) 52 Tul L Rev 115 and Herman, 'Legislative Management of History: Notes on the philosophical Foundation of the Civil Code', (1979) 53 Tul L Rev 380.

vinced that a lucid, well constructed language, simple in its elements but comprehensive as well, was the fundamental desideratum of human thought. The notion of *une langue bien faite* was transferred to the arena in which the Code was drafted. According to rationalist notions of codification, the complex feudal restraints of the *ancien régime* could be abolished by coherent, organic legislation in which each institution was carefully delineated and each article precisely crafted in a simple, straightforward style. An outgrowth of the commitment to rationalism was the utopian viewpoint that the Code Napoleon was to be a manual of general commands that a French judge could read to determine proper relations among citizens. The French historian Sagnac summarised the rationalist view of codification.

'The Civil Code should be simple and clear, like the laws of nature. It must be reduced to a small number of articles which flow logically from general principles of the new democratic society. The individual will know the laws that govern him; he will be delivered from the subtleties and infinite complications that chicanery invents at his expense'⁷⁰.

If the Civil Codes had fully realised the rationalists' hopes, and laws were objectively knowable, then judges might still be characterised as legal automatons. But our era, in contrast to the codificatory period, seems wedded to the view that there are no objective truths. In an address at Cambridge University in 1944, Friedrich Hayek, the economic theorist, argued that the 'most difficult thing to re-create in Germany (after World War II) will be the belief in the existence of an objective truth, of the possibility of a history . . . not written in the service of a particular interest'⁷¹. He went on to criticise German historians for their 'extreme ethical neutrality which tended to 'explain' – and thereby seemed to justify – everything by the 'circumstances of the time'⁷². In his view these historians were afraid even 'to call black black and white white'⁷³. As much as their political colleagues, they inculcated into their fellow Germans the belief that political acts cannot be measured by moral standards, and that ends justify means. Thus, Hayek argued, future historians needed the courage to say Hitler was a bad man; otherwise the time spent explaining Hitler would only glorify his misdeeds.

Hayek was arguing against extreme ethical relativism, a dangerous doctrine a step removed from nihilism, Nietzsche's description of an attitude that would permit everything. If a historian could not call black black and white white, then perhaps he could not distinguish them either. And if he could not distinguish them, then perhaps he

70. P. Sagnac, *La législation civile de la Révolution Française (1789-1804)* 385 (1898) (author's translation).

71. Hayek, 'Historians and the Future of Europe', *Studies in Philosophy, Politics and Economics* 135 at 140.

72. *Ibid.*, at 141.

73. *Ibid.*

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would not think the distinction mattered. Equally nihilistic was the assertion of the eminent existentialist philosopher, Martin Heidegger, that speech and silence were indistinguishable. From Heidegger, such a statement would be predictable, for he seems to have been infected by a nihilist strain. As rector of Freiburg University in the early 1930s, 'he delivered a number of speeches . . . that may be fairly described as an effort to justify national socialism by assimilating the terms of his own philosophy to those of the popular Nazi vocabulary'⁷⁴.

Ethical relativism, like unfettered teleological reasoning, borders on nihilism. Some legal scholars have suggested as much in their criticism of cases such as *Roe v Wade*⁷⁵. For conceptualists and teleologists alike there would be neither legitimacy nor predictability in law if words had no meanings, or only the meanings that eventually emerged from a conflict of subjective incommensurable interests. And the Nazi experience has shown us the danger of granting judges the discretion to be the arbiters of meaning. Hölderlin once said that 'what has always made the state a hell on earth has been precisely that man has tried to make it his heaven'⁷⁶. Assuming the state, through judges, is a permanent fact of life, we would be well advised to avoid the chaos suggested by the maxim *quot judices tot sententiae*. I do not want to be misunderstood as saying that we should abandon teleological reasoning, conceptualism or any other interpretive technique. We are probably doomed to use all these techniques so long as there are cases to be decided under statutory schemes. But the far reaching political implications of the techniques suggests that we employ them soberly and prudently. Otherwise Hoelderlin's hell might be the consequence. •

74. Rosen, *Nihilism: A Philosophical Essay* (1969) 121: '. . . the ease with which Heidegger succeeded in accommodating the teaching of *Being and Time* to the resolute choice of Hitler and the Nazi party provides us with an essential clue to the political philosophy implicit in this ontological analysis of human existence'. Ibid.

75. According to Laurence Tribe, 'nothing in the Supreme Court's opinion provides a satisfactory explanation of why the fetal interest should not be overriding prior to viability'. Tribe (1928) *American Constitutional Law* 927. The ethical dilemma of balancing incommensurables is well discussed in Ely, 'The Wages of Crying Wolf: A Comment on *Roe v Wade*', (1973 82 *Yale L J* 920.

76. Quoted in Hayek, *The Road to Serfdom*, 24 (2nd edn, 1956).

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