INFORMATION TO USERS

This was produced from a copy of a document sent to us for microfilming. While the most advanced technological means to photograph and reproduce this document have been used, the quality is heavily dependent upon the quality of the material submitted.

The following explanation of techniques is provided to help you understand markings or notations which may appear on this reproduction.

1. The sign or "target" for pages apparently lacking from the document photographed is "Missing Page(s)". If it was possible to obtain the missing page(s) or section, they are spliced into the film along with adjacent pages. This may have necessitated cutting through an image and duplicating adjacent pages to assure you of complete continuity.

2. When an image on the film is obliterated with a round black mark it is an indication that the film inspector noticed either blurred copy because of movement during exposure, or duplicate copy. Unless we meant to delete copyrighted materials that should not have been filmed, you will find a good image of the page in the adjacent frame.

3. When a map, drawing or chart, etc., is part of the material being photographed the photographer has followed a definite method in "sectioning" the material. It is customary to begin filming at the upper left hand corner of a large sheet and to continue from left to right in equal sections with small overlaps. If necessary, sectioning is continued again–beginning below the first row and continuing on until complete.

4. For any illustrations that cannot be reproduced satisfactorily by xerography, photographic prints can be purchased at additional cost and tipped into your xerographic copy. Requests can be made to our Dissertations Customer Services Department.

5. Some pages in any document may have indistinct print. In all cases we have filmed the best available copy.

University Microfilms International

300 N. ZEEB ROAD, ANN ARBOR, MI 48106
18 BEDFORD ROW, LONDON WC1R 4EJ, ENGLAND

Downloaded from SHAREOK. Persistent Handle URL: https://hdl.handle.net/11244/4687

8012292

RODGERS, RAYMOND SINCLAIR

JUSTICE WILLIAM O. DOUGLAS ON THE FIRST AMENDMENT: RHETORICAL GENRES IN JUDICIAL OPINIONS

The University of Oklahoma PH.D. 1979

University Microfilms International 300 N. Zeeb Road, Ann Arbor, MI 48106 18 Bedford Row, London WC1R 4EJ, England

THE UNIVERSITY OF OKLAHOMA

GRADUATE COLLEGE

JUSTICE WILLIAM O. DOUGLAS ON THE FIRST AMENDMENT: RHETORICAL GENRES IN JUDICIAL OPINIONS

A DISSERTATION

SUBMITTED TO THE GRADUATE FACULTY

in partial fulfillment of the requirements for the

degree of

DOCTOR OF PHILOSOPHY

BY

RAYMOND SINCLAIR RODGERS

1979

Norman, Oklahoma

JUSTICE WILLIAM O. DOUGLAS ON THE FIRST AMENDMENT:

RHETORICAL GENRES IN JUDICIAL OPINIONS

APPROVED BY:

Paul A. Bauerfeld

L. Brooks Hill

Roger M. Bohrer

William Carmack

David W. Levy

DISSERTATION COMMITTEE

ACKNOWLEDGMENTS

No individual ever produced a dissertation. Individuals only oversee their production and receive credit or blame for the final product. The several people who truly produce it should be credited for any value the product may have; its overseer is the sole heir to blame. The people who have added their intellect, energy, talent, and love to this dissertation are most gratefully acknowledged. Dr. Paul A. Barefield, as director of the study provided continuing insight and encouragement as the project evolved. The committee members, Dr. L. Brooks Hill, Dr. Roger Babich, Dr. Bill Carmack, and Dr. David Levy each provided invaluable criticism, direction, and encouragement as those qualities were needed. Dr. Lauren Wispe, though not a committee member, provided additional moral support, in addition to serving as an influential role model of academic discipline. Dr. Jimmie Neal Rogers of the University of Arkansas provided valuable advice toward the end of the project, as well as timely reminders that the thing was not finished. Special

thanks go to Dr. Bill Franklin, my Department Head at North Carolina State University, for his boundless patience. Mrs. Charlotte Swart typed the manuscript with surpassing skill and genuine personal concern. Finally, my wife, Peggy Beasley-Rodgers, was always there, her career waiting in the wings, never being a "dissertation mother." Gonzo was there when I needed him. All of these people receive my deep and sincere gratitude. I could not have done it without each of them.

TABLE OF CONTENTS

Page

LIST OF TABLES viii

Chapter

I. INTRODUCTION TO THE STUDY. 1

Purpose of the Study 4
Overview of the Study. 7
Review of Literature 10
Overview. 10
Douglas' Works 11
Limitations. 12
The Legal Perspective. 13
The Academic Perspective. 29
Major Works 34
The Communication Perspective 36
The Jurisprudential Perspective 47

II. THE NATURE OF JUDICIAL COMMUNICATION: SEEKING THE INTERNAL DYNAMIC 49

Introduction 49
Jurisprudence and Rhetoric: The Generic Potential 51
Argument from Ideal: The Natural Law Warrant. 51
Argument from Rule: The Positive Law Warrant. 56
Argument from Context: The Legal Realist Warrant. 61
The Living Hand of Tradition: Institutional Rhetoric in the Supreme Court. 68
Precedent, Dicta, and Style: Functional Constraints on Supreme Court Rhetoric. 77
Douglas Opinions: Style and Philosophy . 96

Table of Contents Continued

Chapter		Page
III.	METHODS AND PROCEDURES	104
	Introduction	104
	Assumptions of Critical Method: The Role of Content Analysis in Genre Criticism	105
	Analytic Procedures	127
IV.	RESULTS AND CONCLUSIONS	134
	Introduction	134
	The Internal Dynamic of Natural Law: The Argument from Ideal	135
	Argument from Ideal: The Thomist Sub-Species	138
	Argument from Ideal: The Natural Rights Sub-Species	144
	The Internal Dynamic of Legal Positivism: The Argument from Rule	155
	Argument from Rule: The Deductive Sub-Species	156
	Argument from Rule: The Analogic Sub-Species	166
	The Internal Dynamic of Legal Realism: The Argument from Context	171
	Argument from Context: The Sociocentric Sub-Species	172
	Argument from Context: The Relativistic Sub-Species	181
	Argument from Context: The Exigential Sub-Species	184
	The Case for Rhetorical Genres in Judicial Opinion	190
	Rule-Based Rhetoric and the First Amendment: The Douglas Dynamic	193
	The Rhetoric of Majority and Dissent: Measuring the Received Wisdom	196
	Summary	202

Table of Contents Continued

Chapter		Page
V.	IN RETROSPECT	
	Introduction	213
	Rhetorical Genres in Judicial Opinion	213
	Qualifying the Douglas Dynamic	219
	The Rhetoric of Majority and Dissent: Qualifications, Implications, and Further Research	223
	Epilogue	227
APPENDIX		229
BIBLIOGRAPHY		246

LIST OF TABLES

		Page
1.	Frequency of All Opinions by Genre	204
2.	Yearly Distribution of Genres	205
3.	Frequency of Majority Opinions by Genre.	207
4.	Frequency of Non-Majority Opinions by Genre. . .	208
5.	Distribution of Genres by Opinion Type	209
6.	Distribution of Genres by Opinion Sub-Type . . .	210
7.	Distribution of Majority Opinion Sub-Type by Genre.	211
8.	Distribution of Non-Majority Opinion Sub-Type by Genre.	212

JUSTICE WILLIAM O. DOUGLAS ON THE FIRST AMENDMENT: RHETORICAL GENRES IN JUDICIAL OPINIONS

CHAPTER I

INTRODUCTION TO THE STUDY

On the morning of November 12, 1975, Associate United States Supreme Court Justice William Orville Douglas handed an envelope containing his letter of resignation to Chief Justice Warren Burger, asked him to deliver it to President Gerald Ford, and "stepped into history."[1] His tenure, the longest in the history of the Court, spanned almost thirty-seven years and was served under five Chief Justices and seven Presidents. His opinions, found in Volumes 306 through 423 of United States Reports, number almost twelve hundred and occupy more than a fourth of the bound records of the Supreme Court. On the occasion of Justice Douglas' thirty-fifth anniversary on the Court, his close friend

---

[1] Newsweek, November 24, 1975, p. 45.

and former Chief Justice Earl Warren wrote that,

> If it is true, as said by de Tocqueville almost a century and a half ago, that in a period of time every public problem in American life eventually reaches the Supreme Court, certainly Justice Douglas has served through such a period, and he has written on every one of those problems without reservation or equivocation.[2]

When Douglas took his place on the Court on April 17, 1939, filling the seat vacated by the resignation of Justice Louis D. Brandeis, he came there as one of the country's most widely recognized experts in finance law and business regulation. When the University of Chicago's new president Robert M. Hutchins tried unsuccessfully to recruit Douglas away from the Yale law faculty he called him "the most outstanding law professor"[3] in the United States. In addition to expertise in corporate finance, and his brilliant service on the Securities and Exchange Commission during the Roosevelt administration, and in addition to his association with a noted Wall Street law firm and his appointments to the law faculties of Columbia and Yale, William O. Douglas was about to enter upon a new and distinguished career in

---

[2]Earl Warren, "Mr. Justice Douglas," Columbia Law Review 74 (April 1974), p. 342.

[3]Quoted in William O. Douglas, Go East Young Man, (New York: Random House, 1974), p. 164.

American jurisprudence. Between 1942 and 1975 he authored two hundred and seven opinions touching upon first amendment freedoms, opinions which would cause him to be regarded as the foremost advocate of individual liberty in the history of the United States Supreme Court. Professor Thomas I. Emerson of Yale wrote in 1974 that Douglas:

> . . . sees the first amendment as much more than a weapon to prevent the government from interfering with freedom of speech, press, assembly and petition in narrow terms. He views it not only in Mill's sense as performing a social function in maintaining a marketplace of ideas, or in Meiklejohn's sense as essential to the working of the democratic process, but also as supplying the constitutional grounds for protecting each person in seeking to realize his or her potential as a man or woman. . . . He is utilizing the first amendment as a counter to all the pressures of modern life toward conformity, bureaucracy and purely plastic existence. In this respect, Justice Douglas has given a totally new dimension to the first amendment.[4]

If only for existential reasons then, a figure of Douglas' historical significance, personal flamboyance, literary productivity and penchant for political controversy deserves scholarly attention. But William O. Douglas' path in American history has been marked most significantly not

---

[4]Thomas I. Emerson, "Justice Douglas' Contribution to the Law: The First Amendment," Columbia Law Review 74 (April 1974), p. 356.

by his early and unceasing involvement in the ecology and conservation movements, nor even by his contributions to the Roosevelt administration and his subsequent flirtations with Vice Presidential nominations, but by his candid and forceful arguments defending freedom of expression. Thus, this study focuses upon those arguments in order to better understand the philosophical and rhetorical supports for Douglas' beliefs.

Purpose of the Study

Although William O. Douglas' liberal interpretation of the first amendment is well-documented, the rhetorical bases of his position are not. Further, although the intrinsic rhetorical nature of judicial opinions is often asserted, their generic constituents remain undemonstrated. Therefore, the first question posited in this study asks: Can judicial opinions be generically classified according to the jurisprudential bases of their argument? This study hypothesizes that they can be so classified because of a characteristic nexus between argumentative substance and jurisprudential warrant; i.e., substantive rhetorical content depends for warrants on legal philosophy. The broad

theoretical categories of natural law, legal positivism, and legal realism thus can serve as the categories of an analytic system for classifying substantive arguments within particular opinions.

The second question of this study is: Presuming the general categories of natural law, legal positivism, and legal realism, are there generic clusters in Douglas' first amendment opinions, and if so, what are they and how can they be characterized? To answer that question, operational definitions of three potential rhetorical genres corresponding to the general judicial orientations are adopted as content analytic categories. Each first amendment opinion of Douglas is then examined to determine which hypothetical genre best characterizes it. This analysis results in a grouping of his opinions into the three categories of natural law, legal positivism, and legal realism. If actual rhetorical practice flows from these jurisprudential orientations, we may argue that legal philosophy and institutional constraints inherent in the United States Supreme Court merge to form rhetorical genres in judicial opinions.

The final question raised in this study asks: Does William O. Douglas argue from different jurisprudential/

rhetorical bases in majority and non-majority opinions? Legal scholarship claims that substantial differences characterize these two opinion types. To determine whether Douglas' opinions typify this pattern, his majority and non-majority opinions are compared to determine whether he adopts divergent rhetorical strategies when writing with the majority than he does when entering a dissent. For analytic purposes, the two classes are each sub-divided. Majority opinions Douglas authored are grouped as (1) Douglas for the majority (those cases in which he wrote the Court's ruling), and (2) Douglas concurring with the majority (those cases in which he voted with the majority but authored a separate opinion). Non-majority opinions are classified as either (1) Douglas dissenting from a substantive ruling of the Court (cases which the Court heard and issued decisions for from which he dissented), and (2) Douglas dissenting from procedural rulings (those cases in which he published an opinion dissenting from the Court's decision to deny certiorari, remands from re-trial at a lower court level, stays or denials of stays, and various other jural proceedings). These groups are then compared to determine whether significant differences in the form or argument exist between them.

Such an inquiry into the rhetorical and jurisprudential bases of judicial opinions is justified for the communication scholar, the legal philosopher, and the legal practitioner alike. The communication scholar gains insight into the uses of rhetoric in one of its more crucial forums--the United States Supreme Court. The legal philosopher gains insight into the implementation of abstract philosophical principles in the day-to-day exigencies of legal reasoning. And the legal practitioner, representing either the bench or bar, gains insight into the argumentative bases of Supreme Court opinions.

Overview of the Study

This study is divided into five chapters. Chapter I provides an introduction to the study, states the purpose of the study in terms of three research questions to be pursued, presents an overview of the project, and reviews three areas of relevant literature.

Chapter II explores the nature of judicial writing with special emphasis upon rhetorical differences between majority and non-majority opinions. This chapter draws upon the work of legal philosophers, jurists, and communication scholars to determine whether a constellation of

constraints operates upon the rhetorical options of the judge-rhetor that produces a characteristic nexus between philosophic warrant and rhetorical strategy. Three hypothetical argument forms drawn from natural law philosophy, legal positivism, and legal realism are operationalized respectively as Argument from Ideal, Argument from Rule and Argument from Context and subsequently serve as content analytic categories by which to examine Douglas' first amendment opinions. The constraints created by systemic and substantive limitations inhering in the Supreme Court as an institution are next examined to estimate their impact upon the rhetorical options of the judge. The chapter concludes by examining critical comment on Douglas' opinions so that the present analysis may be placed in proper scholarly context regarding his judicial philosophy and rhetorical behavior.

Chapter III elaborates the assumptions underlying the research methods employed in this study and explains the LEXIS system of computerized legal data retrieval used to determine which of Douglas' career opinions touched upon the first amendment. The chapter concludes by detailing the practical procedures employed in coding each of the

opinions according to the categories established in Chapter II.

Chapter IV presents the results of the study. The chapter's organization is derived from the order of questions pursued in the study: Section one discusses critical observations regarding the existence of rhetorical genres in judicial opinion. The second section offers both critical and quantitative data pertaining to the generic clusters which characterize Douglas' first amendment opinions. The final section presents data regarding differences between the rhetoric of majority and dissent.

Chapter V offers the conclusions drawn by this study regarding the existence of rhetorical genres in judicial writing and the generic variations found between majority and non-majority opinions. Finally, suggestions for further research into judicial rhetoric in general and William O. Douglas in particular are offered in the fifth chapter.

Five appendices follow the study. Appendices A, B, and C respectively present Tables of Cases providing citations for cases coded as Natural Law (The Argument from Ideal), Legal Positivism (The Argument from Rule), and Legal Realism (The Argument from Context). Appendix D lists those

cases retrieved by LEXIS, but judged not relevant to the present study. Appendix E provides an example of the coding form used to analyze the opinions. A bibliography of sources consulted completes the study.

Review of Literature

Overview

Three general areas of scholarship impact upon the present study. The first is that literature pertaining to William O. Douglas' judicial career. These sources are reviewed to determine how previous analysts have evaluated Douglas and to establish his place and significance in American jurisprudence. Douglas' own non-judicial literary and scholarly works are introduced but not reviewed. The second body of literature surveyed is that produced by communication scholars working in the area of freedom of expression. This review functions to provide the disciplinary backdrop into which the present study fits. A third area, philosophy of law and legal communication, is briefly surveyed here and then probed in depth in Chapter II.

Douglas' Works. Even in retirement William O. Douglas continues to be one of the more prolific writers of all United States Supreme Court justices and his output during his career both on and off the bench was mammoth. He personally authored over twelve hundred opinions during his service on the Court, a tenure which on October 29, 1973, surpassed that of Justice Stephen J. Field, thus making Douglas' career the longest in the Court's history. In addition to this vast body of legal opinion, Douglas' extra-judicial writings are as numerous as they are varied. On topics ranging from casebooks on the law of business finance and corporate reorganization, to his well-known works on conservation and ecology (written long before such issues were fashionable), from his polemic and controversial tract, Points of Rebellion, to his autobiography, Douglas has authored thirty-five book-length works.[5] In addition to these, he has produced scores of both scholarly and popular articles appearing in periodicals as diverse as the Harvard Law Review, Playboy, and the American Library Association's Intellectual Freedom Newsletter. Indeed, the complete extent of Douglas' literary output is not known. In an interview

---

[5]See Bibliography for these titles.

with this researcher, Mr. Monty Podva, Douglas' present law clerk, reported that an entire year was allotted for the compilation of an accurate bibliography of the Justice's works. Obviously some restriction of this body of literature is necessary for present purposes. Since Douglas is best-known for his first amendment position, and since history must ultimately evaluate a Supreme Court justice principally on the basis of his judicial record, only those opinions dealing with the broad concept of freedom of expression will be analyzed in this study. Of the more than twelve hundred opinions Douglas authored, three hundred and one contain references to the first amendment, either substantial or tangential, and two hundred and seven of those were deemed relevant to this study.[6]

Limitations. Even though a Supreme Court justice has channels of communication open to him other than the opinion itself (an assertion clearly borne out in the case of Douglas himself), this study views the legal opinion as the channel which is likely to reveal recurrent patterns of relevant communication behavior. This study, therefore, for

---

[6]See Chapter III for the criteria adopted to determine relevance or irrelevance of opinions.

practical as well as theoretical reasons, will neither review now nor analyze later the extra-judicial writings of Justice Douglas.

During his long career William O. Douglas has continually attracted the attention of scholars and popular writers alike, and commentary on him has been characterized by glowing encomia as well as vitriolic invective. Within this body of literature, a considerable portion has focused upon his position regarding first amendment freedoms. Because of the focus of the present inquiry, only those studies dealing with this aspect of Douglas' career will be examined. Commentary on Douglas in popular periodicals is far too profuse to review here, nor does the purpose of this study require it.

The Legal Perspective. Since Douglas came to the Supreme Court in April of 1939, his judicial behavior has received extensive comment, but it was 1951 before such comment focused upon his first amendment opinions. This delay of over a decade was, no doubt, caused by the scarcity of opinions in the area of free speech produced by Douglas during the period. Two scholars have suggested explanations for why Douglas produced relatively few opinions on freedom

of expression during his first ten years on the bench. Gerhard Casper argued that it was only after World War II that Douglas underwent "a shift of interest from concern with the problems of economic equality to those of political freedom."[7] A more insightful explanation than merely "a shift of interest" was offered by Sidney Davis who wrote that although many students believe that the Justice's early tastes ran toward cases involving business regulation and finance law, a better explanation is "that Chief Justice Stone, his former dean at Columbia, tended to assign to him--more than to any other justice--the writing of cases that generally fell within that area."[8]

Despite Douglas' being something of a captive of his own expertise in the area of finance law, in 1951, Leo Epstein examined the Justice's record in the field of civil liberties generally, noting that "the first ten years of his judicial tenure . . . coincided with an unprecedented volume of cases revolving about the application of

---

[7] Gerhard Casper, "The Liberal Faith: Some Observations on the Legal Philosophy of Mr. Justice William O. Douglas," Federal Bar Journal 22 (1962), p. 189.

[8] Sidney Davis, "Mr. Justice Douglas," Columbia Law Review 74 (April 1974), p. 350.

safeguards to personal liberties."[9] Epstein investigated the Justice's record in such areas of civil liberties as free speech, procedural due process, involuntary confessions, right to counsel, trial by jury, and search and seizure. Although Justice Jackson had termed Douglas' position regarding the citing of reporters for contempt of court "a dogma of absolute freedom,"[10] Epstein disagreed, pointing out that even though "his opinions may seem, on occasion, to be dogmatic, they are not the approach of an absolutist."[11] Epstein supported this conclusion by citing Douglas' opinion in United Public Workers v. Mitchell[12] in which he argued "that Congress had the power to prohibit some employees from engaging in political activity. Specifically Douglas distinguished between administrative employees and industrial employees."[13]

Epstein next turned to the civil liberties cases arising specifically out of World War II, most notably

---

[9]Leon Epstein, "Justice Douglas and Civil Liberties," Wisconsin Law Review 125 (1951), p. 125.

[10]Criag v. Harney, 331 U.S. 367 (1947), at 384.

[11]Epstein, p. 133.

[12]330 U.S. 75 (1947).

[13]Epstein, p. 133.

those dealing with the military relocations imposed upon Japanese-Americans.[14] In each of these cases Douglas voted to sanction the activities of the military, agreeing with Black in Hirabayshi v. United States, for example, that "where the peril is great and the time is short, temporary treatment on a group basis may be the only practical expedient."[15] Epstein seemed most interested in refuting Justice Jackson's charge of absolutism on the part of Douglas and, accordingly, offered these wartime cases as evidence to the contrary. He seemed to rule out the possibility of philosophical consistency on Douglas' part and concluded that although a charge of "war hysteria" against Douglas would be inaccurate, the exigencies of 1941 and 1942 were such that the Justice "deviated from his usual position."[16]

Epstein had noted that Douglas largely adherred to a clear and present danger test in opinions such as the several cases involving the Jehovah's Witnesses, but he failed to

---

[14]Hirabayshi v. U.S., 320 U.S. 81 (1943); Korematsu v. U.S. 323 U.S. 214 (1944); and Ex parte Endo, 323 U.S. (1944).

[15]320 U.S. 81 at 107, [Opinion by Black, Douglas concurring.]

[16]Epstein, p. 156.

see Douglas' behavior in the wartime cases as the philosophical inverse of such a position. Although Vern Countryman called the curfew cases "a grave error of constitutional interpretation,"[17] it seems clear that Douglas was being consistent with a rigorous clear and present danger test: he argued that the exigencies raised by the Japanese attack on Pearl Harbor and throughout the Pacific had created conditions sufficient to tip the scales in the government's favor. The fact that in virtually simultaneous cases involving the Jehovah's Witnesses he routinely voted to protect their activities as posing no potential harms which government might curtail supports this assertion.

Scholarly attention to Douglas' legal philosophy arose ten years following Epstein's article when Gerhard Casper examined "a rather arbitrary sample of [Justice Douglas'] utterances chosen in order to make a point which is received by general and broad reading."[18] Despite this cavalier sampling procedure, Casper's essay provided valuable insights

---

[17]Vern Countryman, The Douglas Opinions (New York: Random House, 1977), p. 37.

[18]Casper, p. 180.

into the judicial philosophy upon which Douglas seemed to be operating up to that time. Casper found elements of both legal realism and natural law at work in Douglas' opinions and concluded that "the most characteristic trait of Justice Douglas and his judicial philosophy [is] the persistent and consistent pursuance of the liberal faith."[19] Casper turned to John Dewey to define what he meant by "the liberal faith:"

> . . . belief in the conclusions of intelligence as the finally directive force in life; in freedom of thought and expression as a condition in order to realize this power of direction by thought, and in the experimental character of life and thought.[20]

In 1964 the Yale Law Journal published a series of essays celebrating Mr. Justice Douglas' twenty-fifth anniversary on the bench. Hugo Black suggested in one of them that Bill Douglas "must have come into the world with a rush and that his first cry must have been a protest against something he saw at a glance was wrong or unjust."[21]

---

[19]Ibid,, p. 194.

[20]John Dewey, "Justice Holmes and the Liberal Mind," in Felix Frankfurter, ed., Mr. Justice Holmes (New York: 1931), p. 3.

[21]Hugo Black, "William Orville Douglas," Yale Law Journal 73 (1964), p. 915.

Douglas' former student, Abe Fortas, observed in another essay in the Yale tributes that "to himself, to friend and foe alike, Mr. Justice Douglas is a harsh critic who lies in wait for the slothful, the untidy, the drooling, the soft and sappy. The unerring leap to the jugular, the fantastic speed and cleanliness of the kill--these are the marks of Douglas' mind."[22]

Five years later, to mark Douglas' thirtieth year on the bench, the U.C.L.A. Law Review published a similar series of essays in which Douglas' long-time friend and companion, Fred Rodell of the Yale law faculty, made a like comment when he suggested that while on the bench Douglas "fidgets and doodles as brethren and lawyers alike wend their wordy way toward the point that his precise and tight-wound watch of a mind has ticked off long since."[23] Rodell went on to supply an example of such behavior on Douglas' part drawn from an occasion when Mr. Justice Frankfurter, a frequent Douglas antagonist, had been continually interrupting

---

[22]Abe Fortas, "Mr. Justice Douglas," Yale Law Journal 73 (1964), p. 718.

[23]Fred Rodell, "As Justice Bill Douglas Completes His First Thirty Years on the Court: Herewith a Random Anniversary Sample, Complete with Casual Commentary, of Divers Scraps, Shreds, and Shards Gleaned from a Forty-Year Friendship," U.C.L.A. Law Review 16 (1969), p. 705.

counsel with questions while hearing argument before the Court. His patience and judicial decorum having worn thin, Douglas turned to Justice Reed and muttered, "Why can't the little bastard keep his big mouth shut and let us get on with it?"[24]

In the same series of essays, Professor Kenneth L. Karst of the U.C.L.A. law school compared the thirty year career philosophies of Douglas and Black regarding the application of the due process mandates of the Constitution. His conclusion was that Black's philosophy was "to resist doctrines that permit judges to impose their own values on a reluctant society," while "Douglas has consistently adopted the position of an egalitarian activist, willing to use whatever judicial tools may be at hand--or may be created--to promote the ends of equality of opportunity."[25] Karst's essay traced Black's critique of the modern formulation of the due process doctrine, a critique which leveled the charge of a return to natural law on the part of Douglas and others. However, Karst closed his essay with a passage

---

[24]Ibid., p. 706.

[25]Kenneth L. Karst, "Invidious Discrimination: Justice Douglas and the Return of the 'Natural-Law-Due-Process Formula," U.C.L.A. Law Review 16 (1969), p. 717.

which underscored the problem with such accusations. Quoting Paul Freund's 1949 lectures, On Understanding the Supreme Court, Karst reminded us that "one man's natural law may turn out to be simply another's fighting verities."[26]

Though not breaking any particularly new ground, John P. Frank's essay on Douglas in The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions, made several important points concisely. Of great importance in understanding Douglas is an idea mentioned frequently regarding the jurisprudential heritage to which he was heir. Frank wrote that,

> Douglas did more than take the Brandeis seat. He continued, so nearly as it was relevant in changing times, the Brandeis point of view. As he developed his own legal doctrine, he drew first and most often on Brandeis, particularly in rate-making, antitrust, and freedom of speech cases.[27]

By following and then extending the Brandeis tradition, Douglas was, Frank suggested, "a bridge from an old

---

[26]Quoted in Karst, p. 750.

[27]John P. Frank, "William O. Douglas," in Leon Friedman and Fred L. Israel, eds., The Justices of the United States Supreme Court 1780-1969: Their Lives and Major Opinions, with an Introduction by Louis H. Pollak, (New York and London: Chelsea House Publishers in Association with R. R. Bowker Company, 1969), p. 2455.

liberalism to a new, spanning almost a third of a century with a consistent freshness of outlook."[28]

Although Gerhard Casper's observation that Douglas did not author many free speech opinions during his first decade is correct, the next ten years were a marked contrast. In 1971, Professor H. Frank Way examined Douglas' opinions during the period from 1953-1962, noting the Justice's consistent voting record in the fields of taxation, civil rights, personal injury, criminal cases, subversion, and a number of others and described the "overarching quality" of Douglas' opinions to be "fear of alienation." Professor Way explained this quality in Douglas' jurisprudential orientation by pointing out that "through a number of connecting attitudes, Justice Douglas expressed a fear of the loneliness of the individual as he confronts the state." According to Way's interpretation, various components of a citizen's relationship to government combined to form in Douglas' judicial philosophy "an almost classical 19th Century liberal view of the state and power."[29]

---

[28]Ibid., p. 2460.

[29]H. Frank Way, Jr., "The Study of Judicial Attitudes: The Case of Mr. Justice Douglas," Western Political Quarterly 24 (March 1971), pp. 19-20.

In 1974 William O. Douglas celebrated his thirty-fifth anniversary on the Court, the only such anniversary in the history of that institution. To mark the occasion, the Columbia Law Review published not only a number of tributes, including two by Chief Justices with whom Douglas had served,[30] but also several important studies of his long career. Michael I. Sovern, Dean of the Columbia Law School described both Douglas' philosophy and his impact upon American constitutional law, calling him "the supreme expositor from the bench of the philosophy of legal realism."[31] Sidney Davis found legal realism to be the central influence on Douglas' jurisprudence, but also found elements of positivism and natural law, but concluded that "if he can be said to represent a legal tradition, it is the functionalism and realism that flowered at Yale in the late 1920's."[32] Although Davis pointed to strong influences

---

[30]Warren E. Burger, "Mr. Justice Douglas," Columbia Law Review 74 (April 1974), p. 344.

[31]Michael I. Sovern, "Mr. Justice Douglas," Columbia Law Review 74 (April 1974), p. 345.

[32]Sidney Davis, "Mr. Justice Douglas," Columbia Law Review 74 (April 1974), pp. 350-352. See also Jerome Frank, Law and the Modern Mind (New York: Bretano's, 1930), pp. 74-80 for a discussion of fact-skepticism.

of rule and fact skepticism in Douglas' opinions, he also noted exceptions to the Justice's antipathy to absolute truths, and those exceptions were in the area of freedom of expression.

The work of Yale's Thomas I. Emerson in the field of first amendment law is well known.[33] It was thus appropriate for Columbia to call upon him to comment upon Douglas' contribution to American jurisprudence in that area. Emerson pointed to two aspects of Justice Douglas' position on the first amendment which have received less attention than his liberalism or alleged absolutism. The first of these, in Emerson's view, was Douglas' "remarkable ability to grasp the realities of the system of freedom of expression and to formulate legal doctrine which takes those realities into account."[34] He wrote that,

> . . . the great capacity of the Warren Court to function on this level was one of its principal glories. These efforts have been frequently

---

[33]Thomas I. Emerson's works include: Toward a General Theory of the First Amendment (New York: Random House, 1966); with David Haber and Norman Dorsen, Political and Civil Rights in the United States (Boston: Little, Brown and Co., 3rd ed., 1967); The System of Freedom of Expression (NY: Vintage Books, 1970).

[34]Emerson, "Justice Douglas' Contribution to the Law: The First Amendment," p. 354.

> denounced as 'activism' but, in fact, they are essential to transform constitutional principles into effective working rules for everyday life.[35]

Among Emerson's chief concerns in his own writing is that a legal system must not only evolve general theoretic principles of law, but that it must construct a body of positive law and governmental machinery to insure that a system of freedom of expression works. Not surprising, then, is Emerson's reference to Douglas' teleological bent in first amendment law, a trait typical of legal realism. Emerson pointed out that "Justice Douglas has not only grasped the theory of the first amendment; he has also understood the apparatus of repression and sought to attack it at every point."[36]

But beyond the influence of sociological jurisprudence, Emerson saw in Douglas a second characteristic which has not received extensive comment; that characteristic being "his emphasis upon the amendment's personal fulfillment aspect."[37] Professor Emerson wrote that Douglas,

---

[35] Ibid.

[36] Ibid., pp. 354-355.

[37] Ibid., pp. 355-356.

> . . . has understood the deeper significance of the civil rights movement, the black revolution, the organizers for peace, and above all, the youth culture. He sees these social phenomena as legitimate strivings toward a more open, more fraternal, more rational, and more self-fulfilled society. And he has sought to transform the basic principles of constitutional law in order to protect and foster these new values against society's effort to suppress them.[38]

The social engineering of Douglas thus appears to have been motivated by a belief that the fundamental law of a system must ultimately connect with a system of morality; a fundamental tenet of natural law theory was thus welded to legal realism.

The most valuable essay to appear in the 35th anniversary series published in the Columbia Law Review was that by L. A. Powe, Jr., Assistant Professor of law at the University of Texas and former law clerk to Mr. Justice Douglas. To date, it is the most definitive statement of Douglas' first amendment philosophy. Powe began by examining the period of 1939-1945, and noted that Douglas "displayed a cautious liberalism in extending the amendment's protections," and summarized the period by suggesting that Douglas "engaged in a balancing process to determine

---

[38]Ibid., p. 356.

whether federal government interests should prevail over individuals' assertions of first amendment rights."[39]

The intermediate decade of 1946-1956, in Powe's view, saw Douglas' position on the first amendment undergo significant changes. He noted that during this period "Douglas began to make the first amendment the cornerstone of his judicial philosophy."[40] The justice engaged in less balancing than in previous years and began to demonstrate an "increasing reliance on [Holmes' and Brandeis'] understanding of the first amendment."[41] But by the end of this period, Douglas had abandoned even the clear and present danger test and was "no longer willing to balance competing interests; instead his reading of the unequivocal language of the first amendment compels him to give unqualified protection to expression."[42] The only exception to this shift noted by Powe was Douglas' position regarding the exercise of religion clause of the first amendment. In Cleveland v.

---

[39]L. A. Powe, Jr., "Evolution to Absolutism: Justice Douglas and the First Amendment," Columbia Law Review 74 (April 1974), p. 380.

[40]Ibid., p. 384.

[41]Ibid., p. 384.

[42]Ibid., pp. 390-391.

United States[43] Douglas wrote an opinion for the Court sustaining the convictions under the Mann Act of several Mormons who practiced polygamy. This case, along with several others,[44] led Powe to conclude that during this period, "Douglas' approach to the religion clauses . . . was one of cautious balancing."[45]

In the period from 1957 to the date of Powe's essay in 1974 Douglas arrived at his "absolutist" stance in both expression and religion cases. Powe wrote that "under the new standard, whenever pure expression is at issue, anything less than absolute protection is automatically inadequate."[46] His inclination toward balancing in the area of religious freedoms was now gone, and Powe suggested that it "was replaced by an analysis demanding as complete a separation of church and state as possible."[47]

---

[43]329 U.S. 14 (1947).

[44]e.g., Everson v. Board of Education, 330 U.S. 1 (1947) which held that the separation of church and state did not prevent reimbursement of parents' expenses for their children's transportation to religious schools.

[45]Powe, p. 393.

[46]Ibid., p. 396.

[47]Ibid., p. 398.

Professor Powe offered as his explanation of Douglas' "Evolution to Absolutism" an argument implying the influence upon him of legal realism. Powe suggested that Douglas had "one eye on the world around him and the other on the law,"[48] and that the "key to understanding Douglas' treatment of the free exercise clause lies in a full appreciation of his global outlook."[49] He concluded that,

> Douglas' changes in the expression, free exercise, and establishment areas can be laid in large part to an increasing maturity and understanding of societies at home and abroad. . . . as his own thinking on these issues progressed, the evolution of his ideas became intertwined with two other significant developments: his exceptionally strong sense of globalism and his growing skepticism about government's ability to solve problems without creating new ones. . . . Douglas' views evolved towards absolutism by demanding that the tainting hands of government stay away from the precious liberties protected by the first amendment.[50]

The Academic Perspective

Several doctoral dissertations have dealt wholly or in part with William O. Douglas, although none have focused specifically upon the rhetorical/jurisprudential bases of his first amendment opinions. John W. Hopkirk's study, "William O. Douglas--Individualist; A Study in the

---

[48]Ibid., p. 398. [49]Ibid., p. 409. [50]Ibid., p. 410.

Development and Application of a Judge's Attitudes," (Ph.D. dissertation, Princeton University, 1958), inquired into the ways in which Douglas' "opinions have been shaped by the Justice's background, both during his youth and in the course of his professional training and apprenticeship for the position of Associate Justice of the United States."[51] This early work concluded that Douglas' boyhood poverty, physical handicaps, and environment contributed to a "spirit of Western Populism," and that,

> A definite shift is noticeable since he joined the Court. While he still employs the techniques of 'functional' analysis of legal problems, his concern seems to be less focused on methods of efficient law enforcement, more on the need to protect the individual from abuse of organized power, either public or private.[52]

A third study, R. L. Meek's "Justices Douglas and Black: Political Liberalism and Judicial Activism," (Ph.D. dissertation, University of Oregon, 1964), compared the value systems (defined as "the hierarchical ordering of values representing patterns of choice followed in concrete cases") of Justices Douglas and Black for the period of 1939-1961. As is widely agreed, the study concluded that "the

---

[51] Dissertation Abstracts 20 (1960), p. 4428.

[52] Ibid., p. 4429.

two Justices share a basically similar orientation," but noted that "Justice Douglas more consistently supports the claims of individual freedom and political rights--a liberal response--than does Justice Black." Meek also concluded that while Justice Black opted for the "'paternalistic' liberalism of the twentieth century . . . the pattern of choice of Justice Douglas is somewhat closer to the more pluralistic and individualistic liberalism of the nineteenth century."[53]

Dorothy Bructon James' study, "Judicial Philosophy and Accession to the Court: The Cases of Justices Jackson and Douglas," (Ph.D. dissertation, Columbia University, 1966), employed the paradigm of role theory to analyze all of the two justices' "published and unpublished speeches prior to and following accession to the Court, their books, and their published opinions during the period they served together on the bench (1941-1954)." James found that while Jackson and Douglas both accepted the "pivotal attribute" of the role of the Court in the American political system, they demonstrated differences which "stemmed from Douglas'

---

[53]Dissertation Abstracts 25 (1964), p. 3086.

devotion to 'libertarian activism' and Jackson's devotion to 'libertarian restraint.'"[54]

A study critical of Justice Douglas was that done by Paul King Pollock, "Judicial Libertarianism and Judicial Responsibilities: The Case of Justice William O. Douglas," (Ph.D. dissertation, Cornell University, 1968). Pollock ambitiously set out not only to discover "the judicial philosophy of Justice William O. Douglas," but also "to explore the very nature of constitutional adjudication itself and to draw some . . . conclusions as to the pre-conditions for responsible adjudication." Although Douglas had been on the bench for twenty-five years at the time of Pollock's study, only one hundred opinions were examined, along with Douglas' extra-judicial writings. Pollock concluded that Douglas' brand of liberalism was, in fact, a return to "mechanical jurisprudence," that it failed "to meet the requisites of responsible adjudication," and that his "basic approach to adjudication was neither viable or persuasive because it did not represent a true understanding

---

[54]Dissertation Abstracts 27 (1966), p. 1878-A.

of what a judge was actually faced with when called upon to decide a constitutional law case."[55]

The study with greatest implications for the present inquiry was that of Solomon Resnik, "Black and Douglas: Variations in Dissent," (Ph.D. Dissertation, New School for Social Research, 1970). Resnik examined the free speech opinions of both justices for the period of 1937-1964 with particular attention paid to the differences between majority and non-majority opinions. He found that both justices frequently resorted to "absolute philosophies and immutable canons"[56] in dissents, but not in majority opinions. Resnik, a political scientist, did not address the communication implications of such a finding. In addition to a communication focus, the present study differs from Resnik's in three ways: first, it covers the full span of Douglas' career; second, it focuses exclusively on Douglas; and third, it attempts to relate rhetorical behavior in majority and non-majority opinions to traditional categories of legal philosophy.

---

[55] Dissertation Abstracts 29 (1969), p. 4073-A.

[56] Dissertation Abstracts 31 (1971), p. 6130-A.

Major Works

A number of book-length works on Douglas have been published over the years, several of which were edited by Professor Vern Countryman of the Harvard Law School.[57] Countryman, one of Douglas' early law clerks, has compiled three volumes of representative excerpts from the Justice's opinions, and in some instances reproduced them in full, thus making them available to wide audiences. Unfortunately, Countryman's works make no attempt to analyze, interpret, or critique the opinions, only to anthologize them.

One of the most thorough and valuable works to date on Douglas is a critical analysis of his opinions in the field of tax law. In 1973, Wolfman, Silver, and Silver published Dissent Without Opinion: The Behavior of Justice William O. Douglas in Federal Tax Cases.[58] The authors traced a substantial shift in Douglas' attitudes reflected

---

[57]Countryman's works are: Douglas of the Supreme Court: A Selection of His Opinions (New York: Doubleday, 1959); The Judicial Record of Justice William O. Douglas (Cambridge: Harvard University Press, 1947); and The Douglas Opinions (New York: Random House, 1977).

[58]Bernard Wolfman, Jonathan L. F. Silver, and Marjorie A. Silver, Dissent Without Opinion (Philadelphia: University of Pennsylvania Press, 1975).

in two hundred seventy-eight federal tax cases between 1939 and 1973. At the beginning he authored the Court's opinion in Helvering v. Clifford,[59] "one of the strongest pro-government tax cases in the books."[60] But by 1973, as Wolfman pointed out, Douglas had shifted to a "pattern of solitary pro-taxpayer stances."[61] The bibliography provided by the authors is the most complete in print and was most valuable to the present study.

One final work should be mentioned. In 1971, H. E. McBride published a disjointed harangue entitled Impeach Justice Douglas. Mr. McBride offered several innuendos regarding Douglas' travels to the Soviet Union, railed at his liberalism, and accused him of being "almost totally committed to support . . . pornographers and other immoral elements."[62] Despite the fact that McBride's book was published as "Volume I," no companion volume evidently went to the presses.

---

[59]309 U.S. 331 (1940).

[60]Erwin N. Griswold, "Foreword," in Wolfman, Silver, and Silver, p. x.

[61]Bernard Wolfman, "Preface," in Wolfman, Silver, and Silver, p. xv.

[62]H. E. McBride, Impeach Justice Douglas (New York: Exposition Press, 1971), p. 110.

Clearly the commentary Douglas has inspired since coming to the Court has not always been favorable, but it has typically been intense. Henry Steele Commager observed that because "the Supreme Court is the greatest and most effective of our educational institutions, the judge should be a great teacher."[63] If that is correct, perhaps the most insightful comment about Mr. Justice Douglas was that made by Sidney Davis that "he has, in a sense, been the great teacher of our times, and the lessons he teaches will stay with us far longer than the false bromides of those who flaunt their patriotism in their lapels and temper their beliefs to fit the season."[64]

The Communication Perspective

The second general area of scholarship relevant to this study is that dealing with the study of freedom of expression by communication scholars. Since 1970 researchers in communication have produced a considerable body of literature in freedom of speech, much of which was published in the Free Speech Yearbook. Two topical subdivisions of this

---

[63]Henry Steele Commager. "Choosing Supreme Court Judges," The New Republic, May 2, 1970, p. 16.

[64]Davis, p. 352.

scholarship impact upon the present study. The first deals with the justification for freedom of speech inquiry and teaching by communication specialists, a body of literature which forms the disciplinary context into which this study fits. Second, a representative sampling of substantive research is reviewed in order to note the kinds of questions typical of the research produced in freedom of speech by communication scholars.

Notwithstanding Earnest Wrage's assertion that scholarship should be judged on "its merits, not by the writer's union card,"[65] academic territoriality is a fact of life and the arguments offered in support of free speech studies by communication scholars deserve attention.

Professor Donald C. Bryant, then president of the Speech Communication Association, wrote to Professor Thomas L. Tedford, editor of the association's new publication, Free Speech Yearbook in September of 1970, saying that the work presented in the debut of that journal was,

> . . . appropriate to the profession of Speech Communication, whose particular province includes research into the problems and history of free

---

[65]Earnest Wrage, "Public Address: A Study of Social and Intellectual History," Quarterly Journal of Speech 33 (1947), p. 454.

> speech, education of youth in school and college in those problems and that history, and active, vigilant investigation and exposure of hazards to freedom of speech and its correlatives in the context of the times.[66]

Since that first issue in 1970, the Free Speech Yearbook has come to be recognized as the primary outlet for communication scholars interested in problems of freedom of expression. Franklyn S. Haiman, one of the chief instigators of the study of free speech in departments of communication, offered three reasons justifying such research as is reported in the present study. He argued that,

> The first and most basic point is that the viability of our very profession rests on the assumption that freedom of speech, as a political principle, is sufficiently understood and accepted in the society in which we work so that what we do has substance and meaning. . . . The vitality of the teaching of speech, from classical to modern times, has ebbed and flowed with the relative absence or presence of freedom of speech in the surrounding society.[67]

Haiman suggested next that, just as students of journalism must be well grounded in the law of their discipline,

---

[66]Donald C. Bryant, letter to Thomas L. Tedford, Free Speech Yearbook (1970), p. v.

[67]Franklyn S. Haiman, "Why Teach Freedom of Speech," Free Speech Yearbook (1970), p. 2.

> . . . the oral communicator, whether his medium be the public speech or rally, radio or television, stage or screen, needs equally to know his rights and responsibilities--especially in an era when so much controversy surrounds the exercise of those rights and the relevant laws and court decisions are as complex as they are.[68]

Perhaps of greatest impact for the present study, Haiman argued third that,

> . . . there is a unique research and writing contribution that scholars in speech communication can make to the development of the law of freedom of speech which lawyers, or political scientists, because of the particular perspectives from which they view the world, are not likely to offer. [Haiman's argument on this point had already been twice demonstrated by the fact that his own essay, "The Rhetoric of the Streets: Some Legal and Ethical Considerations," Quarterly Journal of Speech 53 (April 1967), pp. 99-114, was cited in litigants' briefs before the United States Supreme Court in Gregory v. City of Chicago, 394 U.S. 111, (1969), a case involving the picketing of Mayor Richard Daley's home, and in Street v. New York, 394 U.S. 576 (1969), the highly significant flag-burning case. Additionally, his article, "Speech v. Privacy: Is There a Right Not to be Spoken to?" appeared in the Northwestern University Law Review (May-June, 1972), pp. 153-199.] It is the semanticist who can most effectively analyze the weaknesses of the Supreme Court's 'fighting words' doctrine . . . or its obscenity test . . . . It is the communications experimentalist who is most likely to produce evidence which casts doubt on the law's unquestioned assumption that a speaker can justifiably be held to account for 'inciting' illegal conduct in his listeners. It is the historical critic of free speech controversies who may sharpen

---

[68]Ibid.

> our perceptions regarding the political and social causes of repression, and the empirical field researcher who may help us better understand the fears and anxieties which make the public's acceptance of the First Amendment's mandates so difficult.[69]

Due largely to the impetus given by Haiman, Tedford, and others, the Speech Communication Association authorized the formation of the association-wide Committee on Freedom of Speech and subsequently the first Free Speech Yearbook in 1970 carried syllabi for free speech courses being taught by professors of communication at Northwestern University,[70] Indiana University,[71] Simmons College,[72] and Bradley University.[73]

In 1976, the Southern Speech Communication Association became the first regional professional association of

---

[69]Ibid., pp. 2-3. [Haiman's N.U.L.R. article was cited in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).]

[70]Franklyn S. Haiman, "Outline for Contemporary Problems in Freedom of Speech," Free Speech Yearbook (1970), pp. 5-6.

[71]Richard L. Johannesen, "Syllabus for the Social Influences of Speech," Free Speech Yearbook (1970), pp. 7-10.

[72]Kenneth F. Kister, "Syllabus for Intellectual Freedom and Censorship," Free Speech Yearbook (1970), pp. 11-27.

[73]David M. Hunsaker, "Syllabus for Freedom and Responsibilities of Speech, Free Speech Yearbook (1970), pp. 28-43.

communication scholars to grant full division status to free speech studies. It was appropriate that Franklyn Haiman was chosen to keynote that occasion. In San Antonio, on April 9, 1976, he no longer dwelt upon justification for teaching and research in freedom of speech by communication scholars, but instead forthrightly suggested that the agenda for such studies should take the form of historical-critical research, case or field studies, empirical and experimental studies on communication effects, attitude research, and critical analyses and theory development. Haiman explained that within the last area was the important task of testing "the evidence and reasoning upon which the conventional wisdom of pubic and courts is based, using whatever skills we may possess because of our presumed expertise in understanding the communication process."[74]

In addition to the numerous essays published in the Free Speech Yearbook, several excellent book-length works and anthologies have been produced by communication researchers writing in freedom of speech. Once again, Franklyn Haiman emerges as one of the leaders in the field. To date

---

[74]Haiman, "Freedom of Speech as an Academic Discipline," Speech Delivered at the Southern Speech Communication Association Convention, San Antonio, Texas, April 9, 1976 and published in the Free Speech Yearbook (1976), pp. 1-6.

he has published three works, the first of which was published under the auspices of the American Civil Liberties Union. It was a summary of key first amendment concepts including such headings as The Public Forum, Schools and Colleges, State Security, and The Mass Media.[75] In 1965 Haiman published Freedom of Speech: Issues and Cases,[76] which anthologized significant court cases as well as relevant extra-judicial works under the headings of provocation to anger and the problem of preserving the peace, political heresy and the problem of national survival, and artistic expression and the problem of public morality. In 1977 Haiman presented his most comprehensive effort, a six volume edition of works covering the entire spectrum of civil liberties. He served as general editor for the series and authored the volume on freedom of speech.[77]

Other well known works by professors of communication include Robert M. O'Neil's Free Speech: Responsible

---

[75]Franklyn S. Haiman, The First Freedoms: Speech, Press, and Assembly (New York: The American Civil Liberties Union).

[76]Franklyn S. Haiman, Freedom of Speech: Issues and Cases (New York: Random House, 1965).

[77]Franklyn S. Haiman, ed., To Protect These Rights (Skokie, Ill: National Textbook Co., 1977).

Communication Under Law published in 1972. O'Neil, then the debate coach at Tufts University, covered subjects such as the overall concept of freedom of speech, limits on the right of free speech, the speaker's right to a forum, the state's role in regulating the time, place, and manner of expression, and protection of the speaker's legal liabilities.[78] Haig A. Bosmajian has been active in free speech research among communication scholars for many years and has produced two significant major works in addition to many articles. His first came in 1971 under the title The Principles and Practice of Freedom of Speech.[79] Bosmajian's anthology included selections from major court cases, the Areopagitica of Milton, the works of John Stuart Mill, and the writings of Alexander Meiklejohn, Zechariah Chafee, and Herbert Marcuse. Bosmajian's magnum opus came in 1976 in the form of Obscenity and Freedom of Expression.[80] In a review of the work which also noted the value of Professor

---

[78]Robert M. O'Neil, ed., Free Speech: Responsible Communication Under Law (Indianapolis: Bobbs-Merrill Col, 1972).

[79]Haig A. Bosmajian, The Principles and Practice of Freedom of Speech (Boston: Houghton Mifflin, 1971).

[80]Haig A. Bosmajian, Obscenity and Freedom of Expression (New York: Burt Franklin and Co., 1976).

Bosmajian's career contributions to the field, Franklyn Haiman wrote that,

> If there were any doubt, prior to the publication of this book, that Haig Bosmajian had earned the title of chief encyclopedist for the freedom of speech sub-discipline, he has now established an undisputed claim to that position. Obscenity and Freedom of Expression is the most comprehensive source book of court opinions dealing with the obscenity issue that has ever been published.[81]

Over the years, a number of essays treating freedom of speech have been published in communication journals and anthologies other than the Free Speech Yearbook. In 1975 Gillmor and Dennis urged that legal research offered unique opportunities that "the versatile communication researcher may want to include in his methodological armamentarium."[82] Noting that most communication law researchers had simply adopted traditional methods used in the field, Gillmor and Dennis argued that "if communication law scholarship has one great need, it is probably a greater infusion of creativity

---

[81]Franklyn S. Haiman, review of Obscenity and Freedom of Expression by Haig A. Bosmajian, in Quarterly Journal of Speech 63 (October 1977), p. 332.

[82]Donald M. Gillmor and Everette E. Dennis, "Legal Research and Judicial Communication," in Steven H. Chaffee, ed., Political Communication: Issues and Strategies for Research (Beverly Hills and London: Sage Publications, 1975), p. 284.

into the process of research itself."[83] They argued in conclusion that communication law researchers must be familiar with both the traditional and behavioral approaches to legal data, but if they adhere blindly to "legal research as practiced by jurisprudents and behaviorists [they] will probably always be frustrated. It should be remembered that neither group is particularly interested in communication problems."[84] Gillmor and Dennis suggested that,

> Communication researchers study the law in the context of freedom of expression or for the purpose of identifying communication patterns within judicial structures. And for this they need a new model, one which has a communication research perspective.[85]

As if to answer this challenge, Professor Don R. Le Duc, a communication researcher as well as member of the United States Supreme Court bar, wrote in 1976 in the Quarterly Journal of Speech that the judicial process "would seem most susceptible to an analysis that recognized its intrinsic nature as an extremely specialized and specific form of communication."[86] Le Duc argued in particular

---

[83]Ibid., p. 292. [84]Ibid., p. 299. [85]Ibid., p. 299.

[86]Don R. Le Duc, "'Free Speech' Decisions and the Legal Process: The Judicial Opinion in Context," Quarterly Journal of Speech 62 (October 1976), p. 279.

that the judicial opinion's two major aspects, the ratio decidendi, or rationale for decision, and the obiter dicta, or those "statements in opinions wherein courts indulged in generalities that had no bearing upon the issues involved,"[87] are employed differently by judges "to address arguments to fellow jurists, members of the bar, governmental officials, and even the public at large."[88] Professor Le Duc's essay has singular importance to the present study and it will be discussed at greater length in a subsequent chapter; it is sufficient to note at this point his closing observation that we should study judicial

> . . . material with the skills of a communication scholar. Understanding these basic rules of legal communication should allow the scholar to place judicial opinions in their proper context, and perhaps even more importantly, through this process to gain a better perspective for viewing the overall influence of the legal process upon the communication process.
>
> This type of perspective is crucial if the scholar is to play some role in the development of freedom of expression doctrine in law. . . . [We should] use a synthesis of legal methodology and communication research techniques in perceptive fashion to develop a philosophy for the area of

---

[87] Black's Law Dictionary, 4th rev. ed., (St. Paul: West Publishing Co., 1968), p. 1222.

[88] Le Duc, p. 280.

> greatest concern to communication scholarship, that law defining rights in the vital process of communication.[89]

The Jurisprudential Perspective

The final area of scholarship which impacts upon this study is that work done primarily by jurisprudents investigating the nature of judicial writing, particularly that dealing with the role of precedent in legal reasoning. Ratio decidendi, and its less respectable counterpart, obiter dicta, have received comment by numerous legal philosophers who have examined these parts of the judicial opinion as bases for legal arguments. Chapter Two of the present study examines the nature of judicial writing and draws upon the work of legal philosophers such as A. W. B. Simpson's, "The Ratio Decidendi of a Case and the Doctrine of Binding Precedent," in Oxford Essays in Jurisprudence,[90] the work of jurists such as Justice Benjamin Cardozo's Law and Literature, and the recent work of communication scholars such as Don R. Le Duc, reviewed above. The chapter

---

[89]Ibid., p. 287.

[90]A. W. B. Simpson, "The Ratio Decidendi of a Case and the Doctrine of Binding Precedent," in A. G. Guest, ed., Oxford Essays in Jurisprudence (London: Oxford University Press, 1961), pp. 148-175.

further examines the mechanics of opinion writing through such works as former Justice Tom Clark's essay, "Inside the Court,"[91] and Professor Henry J. Abraham's well known text, The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France.[92] Because of the treatment of these sources and similar others in Chapter Two, a detailed review of them at this point will be omitted.

---

[91]Tom C. Clark, "Inside the Court," in Scott and Earle, eds., Politics, USA: Cases on the American Democratic Process (New York: The Macmillan Company, 1965), pp. 440-444.

[92]Henry J. Abraham, The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France, 3rd ed., (New York: Oxford University Press, 1975).

CHAPTER II

THE NATURE OF JUDICIAL COMMUNICATION: SEEKING THE INTERNAL DYNAMIC

Introduction

Is there a characteristic nexus in judicial communication between philosophic warrant and rhetorical strategy? Are certain situational and functional constraints identifiable in the rhetoric of the Supreme Court opinion? This chapter explores these questions by first noting the philosophic bases of natural law, legal positivism, and legal realism and then by establishing their relationship to rhetorical type. In other words, do the assumptions of each school of thought also assume typical forms of argument?

The influence of institutionally based constraints upon the opinions of United States Supreme Court justices is the first area of concern. These constraints fall into two classes. The first are systemic limitations imposed by

the mechanics of how opinions come to be written, including such factors as the judicial conference, the assignment of opinions by the Chief Justice, and so on. The second are substantive constraints: expectations of the bench, bar, and law school regarding standards for judicial opinion writing, or the limitations imposed upon the judge-rhetor by the doctrine of stare decisis. Here we examine existing scholarship regarding supposed differences between majority and non-majority opinions in order to get a basis for later evaluations of such differences in the Douglas opinions. Third and finally, critical commentary on Douglas' opinions is examined to note where contemporary scholars have placed him philosophically. The present analysis of his opinions can then either confirm or dispute existing evaluations. This chapter thus serves to elaborate the hypotheses posited in Chapter I that a correspondence between jurisprudence and rhetoric typifies judicial opinion and that different opinion types are likely to be marked by divergent rhetorical strategies. Only after fully explicating these hypotheses may we progress to methodological issues such as those treated in Chapter III.

Jurisprudence and Rhetoric: The Generic Potential

This section hypothesizes three potential genres of judicial rhetoric drawn from legal philosophy and taking the form of (1) Argument from Ideal: The Natural Law Warrant; (2) Argument from Rule: The Positive Law Warrant; and (3) Argument from Context: The Legal Realist Warrant. While no attempt is made to fully explicate these three schools of jurisprudential thought,[1] this section outlines the fundamental tenets of each, identifies its significant proponents, synthesizes operational definitions of the arguments based therein, and establishes the relationship of each to rhetorical theory.

Argument from Ideal: The Natural Law Warrant

Martin P. Golding summarized natural law philosophy when he wrote that thinkers in the tradition

> . . . maintain that lawmaking is a purposive activity that must satisfy certain moral requirements in order

---

[1]Legal philosophers generally agree that the three traditions of natural law, legal positivism, and legal realism, while receiving different treatment by different theorists, for practical purposes represent all fundamental approaches to jurisprudence. See, e.g., M. P. Golding, ed., The Nature of Law (New York: Random House, 1966): M. P. Golding, Philosophy of Law (Englewood Cliffs, NJ: Prentice-Hall, 1975); Ronald Dworkin, Taking Rights Seriously (London: Gerald Duckworth & Co., 1977).

> for it to have laws as its outcome. Secondly, they tend to maintain that the question of the existence of laws cannot be completely separated from the question of their moral obligatoriness or moral quality. Thus, natural law theorists adopt, or come close to adopting, a moral-deontic position.[2]

These two basic tenets of natural law thought, despite d'Entreves' warning to the contrary,[3] can be found in its defenders' writings for at least the last seven hundred years. Although roots of the tradition reside in the works of Plato, Aristotle, and Cicero, the first, and still most influential, specific elucidation of the philosophy is the Summa Theologica of St. Thomas Aquinas written in the thirteenth century. The essence of the Thomist position argued, in his words:

> As Augustine says, that which is not just seems to be no law at all. Hence the force of a law depends upon the extent of its justice. . . . Every human law has just so much of the nature of law as it is derived from the law of nature. But if at any point it departs from the law of

---

[2]Golding, Philosophy of Law, p. 25.

[3]A. P. d'Entreves is an Italian subscriber to the natural law tradition who argues that "except for the name, the medieval and the modern notions of natural law have little in common." Natural Law: An Introduction to Legal Philosophy, 2nd ed., (London: Hutchinson & Co., 1970), p. 15.

> nature, it is no longer a law but a perversion of law.[4]

It is important to note how these ideas connect: the validity of a law depends upon its adherence to a moral order, and the obligatoriness of a law depends upon its validity. The Thomist position achieved this nexus by reference to Eternal law, or the "rational guidance of created things on the part of God," and thus reached the postulate that "the Natural law is nothing else than the participation of the Eternal law in rational creatures."[5] Perhaps the most characteristic feature of natural law philosophy was its reliance upon self-evident propositions.

A. P. d'Entreves, Professor of Political Theory in the University of Turin, argued that the intersection of the moral content of laws and the attendant obligatoriness of laws was the thread flowing through the natural law tradition:

> This point where values and norms coincide, which is the ultimate origin of law and at the

---

[4] Summa Theologica, in Anton C. Pegis, ed., Basic Writings of St. Thomas Aquinas (New York: Random House, 1954), p. 784.

[5] St. Thomas Aquinas, Summa Theologica, quoted in d'Entreves, p. 43.

> same time the beginning of moral life proper, is I believe, what men for over two thousand years have indicated by the name of natural law.[6]

How this view of the nature of law might work in a judge's reasoning about cases was indicated by Columbia's Harry W. Jones who wrote that "in Natural Law theory any asserted statutory or case-law rule that fails to conform to the ought to be of the Natural Law is not law at all. Such an enactment, such a case-law principle, is as the Natural Lawyers say, 'law only in appearance.'"[7] Thus, when a judge exercises discretion in hard cases, he may in fact be applying natural law philosophy to fill the so-called "gaps" in the positive law. Discovering whatever personal beliefs are guiding the judge at such times has been the business of the judicial sociologists;[8] the important idea to grasp, though, and one that Jones made clear is that

---

[6]d'Entreves, p. 116.

[7]Harry W. Jones, "Legal Realism and Natural Law," in Golding, The Nature of Law, p. 265.

[8]Notable among these efforts is the work of such scholars as: Herman C. Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values, 1948: Theodore L. Becker, Political Behavioralism and Modern Jurisprudence: A Working Theory and Study in Judicial Decision-Making, 1964; and the several works of Glendon Schubert, most notably, The Judicial Mind, 1965.

"far closer affinities [exist] between the approach of legal realism and that of Natural Law than exist between conventional analytical jurisprudence [i.e., legal positivism] and the Natural Law tradition."[9]

From these Thomist and modern statements can now be synthesized an operational definition of a potential rhetorical genre bound together by the fundamental tenets of natural law: Arguments drawing warrants from natural law philosophy rely predominantely or exclusively upon such self-evident moral-deontic principles as justice, unalienable rights, fairness, and the dictates of reason. Such arguments do not rely ultimately upon statute, precedent, or extra-judicial evidentiary materials.

In addition to having origins in the literature of jurisprudence, the Argument from Ideal has a corresponding analog in rhetorical theory which Richard Weaver termed the Argument from Genus:

> What the argument from genus then says is that 'generic' classes have a nature which can be predicated of their species. Thus man has a nature including mortality, which quality can therefore be predicated of the man Socrates and the man John Smith. The underlying postualte here, that things have a nature,

---

[9]Jones, p. 263.

> is of course a disputable view of the world, for it involves the acceptance of a realm of essence. Yet anyone who uses such a source of argument is committed to this wider assumption. Now it follows that those who habitually argue from genus are in their personal philosophy idealists.[10]

Argument from Ideal thus involves certain epistemological and juriprudential presuppositions. By holding these presuppositions central, an analysis of actual opinions may reveal a rhetorical genre whose "internal dynamic" is predicated upon them.

Argument from Rule: The Positive Law Warrant

Among our more influential contemporary legal philosophers is Oxford's H. L. A. Hart. His simple definition of the tradition to which he subscribes provides a clear starting point for understanding the Argument from Rule: "Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."[11] Although a positivist himself, Hart does not entirely reject the

---

[10]Richard Weaver, The Ethics of Rhetoric (Chicago: Henry Regenery Company, 1970), p. 56.

[11]H. L. A. Hart, "Positivism and the Separation of Law and Morals," Harvard Law Review 71 (February 1958), p. 181.

viability of natural law theory, but his definition underscores where the two philosophies diverge: the proponents of legal positivism refuse to require an inherent link between man-made laws and morality, a law's existence establishes its obligatoriness--the law is the law.

A fragment from Justinian's Digest provided an early intimation of the essential feature of legal positivism: "What pleases the Prince has the force of law."[12] This cynical conception of positivism faces upon examining the version of it that emerged in nineteenth-century British Utilitarianism. The central jurisprudential work in that tradition was John Austin's The Province of Jurisprudence Determined, first published in 1832. Flatly repudiating the core of natural law doctrine,[13] Austin articulated the so-called "command" theory of law which expanded the Justinian notion of sovereign to mean "a determinate human superior not in a habit of obedience to a like superior, [and receiving] habitual obedience from the bulk of a given

---

[12]Quoted in Golding, Philosophy of Law, p. 25.

[13]E.g., Austin wrote: "Now, to say that human laws which conflict with the Divine law are not binding . . . is to talk stark nonsense."

society."[14] This definition allowed for "sovereign" to take shape as a sovereign monarch, a sovereign legislature (in Austin's term, a "determinate body"), or a court of last resort. Golding put the Austinian view in modern terms, saying that "whatever is enacted by the lawmaking agency is the law in the society."[15]

The contribution to modern positivist thought of Hans Kelsen, "probably the most influential legal philosopher in the twentieth century"[16] was expressed in his "Pure Theory of Law."[17] The theory provides insight into the bases of judges' arguments in opinions. For Kelsen the validity of laws, and hence their obligatoriness, always depends upon the existence of super-ordinate laws. To determine the validity of a legal rule (statutory or case-law), one need only determine its "pedigree." Kelsen thus stipulated:

> The validity of a legal norm [i.e., rule] cannot be questioned on the ground that its contents are

---

[14]Quoted in Golding, ed., The Nature of Law, p. 94.

[15]Golding, Philosophy of Law, p. 25.

[16]Golding, ed., The Nature of Law, p. 108.

[17]Kelsen holds his theory to be "pure" for two reasons: (1) it is free from deontic or ideological content, and (2) it is free from the study of political, historical, economic, or sociological influences upon the development of law.

> incompatible with some moral or political value. A norm is a valid legal norm by viture of the fact that it has been created according to a definite rule and by virtue thereof only.[18]

This passage could serve as the first precept of the doctrine of stare decisis and its corollary, judicial restraint. A judge basing an opinion in this philosophy needs only to "find" the appropriate statutory or case-law rule and he can, ipso jure, determine what is valid for the case before him.[19]

A conception of positive law evolved from Justinian, Austin, Hart, and Kelsen, can now be synthesized in a second operational definition of a potential rhetorical genre referred to as Argument from Rule: Arguments drawing

---

[18]Hans Kensen, General Theory of Law and State, trans. A. Wedberg, (New York: Russell and Russell, 1961), quoted in Golding, The Nature of Law, pp. 125-126.

[19]Although the present study eschews detailed explication of the critiques of these various legal philosophies, it should be noted that strict adherence to either an Austinian or a Kelsonian version of legal positivism results in what has been criticized as "mechanical jurisprudence," or "the slot-machine theory of judicial decision." (Jones, p. 264) The legal realists in particular refused to accept a syllogistic model of judicial decision-making in which statutes and common-law rules serve as major premises, the fact pattern or the instant case as minor premises, and the judges decision as the forced conclusion. In Courts On Trial: Myth and Reality in American Justice (Princeton, NJ: Princeton University Press, 1949), Judge Jerome Frank criticized this view of judicial process, representing it as reducible to the formula: R(rules) X F(facts) = D(decision).

warrants from legal positivism rely predominantly or exclusively upon statutory or case-law rules. Such arguments tend to be deductive and/or analogical--the legal rule providing either the major premise for a deduction or the model for an analogy, the facts of the instant case the minor premise or analog, and the decision the necessary conclusion.

As with the Argument from Ideal, the Argument from Rule has a corresponding rhetorical analog. Weaver explained the Argument from Similitude as the process of invoking,

> . . . essential (though not exhaustive) correspondences . . . . Thinkers of the analogical sort use this argument chiefly. If required to characterize the outlook it implies, we would say that it expresses belief in a oneness of the world, which causes all correspondence to have a probative value.[20]

The inherent reference to antecedent statutes and/or analagous controlling cases typical of the positive law warrant rests upon such a belief in the probative force of correspondence. An analysis of opinions focusing upon this aspect of positive law philosophy may reveal a second rhetorical genre bound together by an internal dynamic predicated upon such essential correspondences.

---

[20]Weaver, pp. 56-57.

Argument from Context: The Legal Realist Warrant

Addressing the New York State Bar Association in 1932, Justice Benjamin N. Cardozo claimed that "the most distinctive product of the last decade in the field of jurisprudence is the rise of a group of scholars styling themselves realists."[21] The realists to whom Cardozo referred were in fact both scholars and jurists.[22] The scholars providing seminal philosophical impetus for the movement were William James and John Dewey, the fathers of pragmatism; the central jurist was Oliver Wendell Holmes, Jr., whose chief interpreter, Dean Roscoe Pound of the Harvard Law School, was primarily

---

[21] "Jurisprudence," in Margaret E. Hall, ed., Selected Writings of Benjamin Nathan Cardozo (New York: Falon Publications, 1947), p. 10.

[22] The term draws in a variety of writers. Harry Jones explains that he "shall be using the tent term 'legal realist' in a sense broad enough to accomodate the behavioral focus of Karl Llewellyn, the fact-skepticism of Jerome Frank, the institutional empiricism of Underhill Moore and the logical pragmatism of Edwin Patterson." (Jones, p. 263) Ronald Dworkin refers to "the powerful intellectual movement called 'legal realism,'" and associates with it the names of John Chipman Gray, Oliver Wendell Holmes, Jr., Jerome Frank, Karl Llewellyn, Roscoe Pound, and Morris and Felix Cohen (Taking Rights Seriously, pp. 3-4). Neither writer would claim comprehensiveness for his list; perhaps the work of Wilfried E. Rumble, Jr., American Legal Realism: Skepticism, Reform, and the Judicial Process (Ithaca, NY: Cornell University Press, 1969) does the best job of identifying both the representative contributors and significant ideas of the realist tradition.

responsible for initiating the corollary to legal realism, "sociological jurisprudence." Wilfred E. Rumble's valuable book, American Legal Realism thus argued that the realist movement was "best understood as an outgrowth of pragmatism, sociological jurisprudence, and the ideas of Mr. Justice Holmes."[23]

Although the term "sociological jurisprudence" is sometimes subsumed by the term "legal realism" and sometimes used synonomously, a clearer understanding of them reveals that the former refers to the study of legal institutions from a certain perspective, while the latter refers to a certain view of their operation. Ronald Dworkin explained the first:

> The emphasis on facts developed into what Roscoe Pound of Harvard called sociological jurisprudence; he meant the careful study of legal institutions as social processes, which treats a judge, for example, not as an oracle of doctrine, but as a man responding to various sorts of social and personal stimuli.[24]

A radical shift of focus was implied in this view, one which no longer viewed jurisprudence as a closed logical system but rather as functional institutions with social

---

[23]Rumble, p. 46.

[24]Dworkin, Taking Rights Seriously, p. 4.

causes and effects to be reckoned with. Thus in an essay entitled "The Need for a Sociological Jurisprudence," Dean Pound called for "scientific apprehension of the relations of law to society and of the needs and interests and opinions of society today."[25]

The extension of this view made by the realists focused upon the operation of legal institutions and jural agents and was similarly radical in departing from traditional views of the judicial decision-making process. The impact of William James' psychology was most significant here. Harry Jones suggested that the realist concept of legal thinking was best characterized as,

> . . . a shared legacy from Holmes--that judges, prosecutors, and practicing lawyers do not really think in syllogims, that substantive doctrine is not the essence of law, and that one who would know the ways of legal action must dig beneath the doctrines formally announced in judicial opinions down into the substrata of personal preference, empirical fact, and conflicting social interests.[26]

This view of the decision-making process received its most sophisticated development in the work of Jerome Frank, known both as "rule-skepticism" and "fact-skepticism." The

---

[25]Green Bag XIX (1907), pp. 610-600, quoted in Rumble, p. 9.

[26]Jones, p. 263.

arguments judges use in announcing their decisions are better understood when viewed as Judge Frank viewed them:

> Rules, whether stated by judges or others, whether in statutes, opinions, or text-books by learned authors, are not the Law, but are only some among many of the sources to which judges go in making the law of the cases tried before them. . . . The law, therefore, consists of decisions, not of rules. If so, then, whenever a judge decides a case he is making law.[27]

Frank's explanation is clearly the progeny of Holmes' famous definition of law itself: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[28]

The important conclusion to be drawn from this discussion of judges as the centerpiece of legal realism is that their decisions provide the realist with criteria for determining the validity of laws. Whereas the proponents of natural law seek adherence to a moral order as the sine qua non of validity and the positivists insist upon a law's inclusion in a valid legal system, the realists' ultimate criterion is social utility. A legal rule, either in the

---

[27]Jerome Frank, Law and the Modern Mind (New York: Anchor Books, 1963), pp. 137-138.

[28]Holmes, "The Path of the Law," Harvard Law Review 10 (1897), pp. 457-468, quoted in Golding, The Nature of Law, p. 179.

form of a judge's decision or a statute, would be required to meet two standards: (1) Does the rule aspire to desirable social goals? and, (2) Does the rule provide a rational basis for achieving those goals through the argument it presents or implies? Of course no realist would argue that pedigree is unnecessary for a law, but such legitimation by virtue of harmony with the rules for rule-making would be seen as ancillary to its capacity for social engineering.

From these perspectives on legal realism can now be extracted the operational definition of a third potential rhetorical genre of judicial opinion herein called Argument from Context: Arguments drawing warrants from legal realism, while possibly referring to statutory or case-law rules, in fact rely upon reference to social goals for support and typically stress the exigencies of the instant case or extra-judicial evidentiary materials.[29]

---

[29]In an important article in The Journal of Philosophy Ronald Dworkin detailed exactly what forces are at work when a judge bases his decision upon factors other than statute or precedent. Pointing out that the belief that judges always "find law" is a tenet of the outmoded school of thought called "formalism" or "mechanical jurusprudence," Dworkin explained that "the position presently in vogue insists rather that there are two sources of judicial decision: rule and discretion." Dworkin, who insisted that the exercise of discretion is not "an occasional misfiring but a characteristic feature of the legal process," suggested that there are

The analog to Argument from Context found in rhetorical theory was explained by Richard Weaver as "Argument

---

basically three types of standards available to the judge as legitimate inventional options when arguing from sources other than statute or precedent:

> First, there are standards, like 'No man shall profit by his own wrong' and 'Infants are the wards of the law,' which are like textbook rules in that they have already been used in a variety of cases as good reasons for decision, and a judge will determine the weight and scope of such standards by awareness of these cases.
>
> Second, certain institutions of any community are competent to declare standards on its behalf. For us, today, such institutions include legislatures, executive officers, and administrative agencies, and the judiciary itself, in the sense that a 'new' standard may be shown to represent a proper summary of the resolution of other standards achieved in other cases.
>
> [Third], judgments of the community at large or some identifiable segment thereof. The court refers to such judgments when it rejects a particular result or rule as unjust, as well as when it more explicitly invokes the ideals of the society. . . . This discussion treads on the famous controversy. . . about the relation of law and morals. On some occasions, in some kinds of cases, moral principles accepted as standards within the community will figure as good reasons for a legal decision, just as, on other occasions, in other kinds of cases, will standards otherwise established.

(Ronald Dworkin, "Judicial Discretion," The Journal of Philosophy 60 (1963), pp. 624-638.

In Dworkin's argument lies the key to understanding Jones' suggestion quoted on p. 4 above that close affinities exist between natural law and legal realism. The point at which they intersect is the point at which they depart from the Argument from Rule in order to make discretionary decisions and thereby fill the so-called "gaps" in the positive law. The realist adopts a more empirical orientation, the

from Circumstance," which he characterized as "the nearest of all arguments to purest expediency. This argument merely reads the circumstances. . .and accepts them as coercive, or allows them to dictate the decision." Weaver went on to suggest that such "argument savors of urgency rather than of perspicacity; and it seems to be preferred by those who are easily impressed by existing tangibles."[30]

---

natural lawyer tends to the idealistic. Arthur Goodhart explained the empirical basis of such a realist orientation:

> It is by his choice of material facts that the judge creates law. A congeries of facts is presented to him; he chooses those which he considers material ones. . . . His conclusion is based on the material facts as he sees them, and we cannot add or subtract from them by proving that other facts existed in the case.

(Arthur Goodhart, "Determining the Ratio Decidendi of a Case," Yale Law Journal XL (December 1930), p. 169.)

Abraham L. Davis provided numerous examples of such fact selection in his important work, The United States Supreme Court and the Uses of Social Science Data (New York: MSS Information Corporation, 1973). A notable case was the apparent influence upon Chief Justice Earl Warren's Brown opinion of extensive social psychological evidence relating the harms of racial segregation.

[30]Some legal theorists of a positivistic bent would agree with Weaver's suggestion that those adopting this form of argument are less than perspicacious, particularly as regards analysis of statutory and/or case-law constraints. However, that misses the point of American legal realism; it was astute social perspicacity that sired the urgency of their arguments in favor of making precedents rather than following them.

The underlying teleological nature of legal realism (which it inherited from sociological jurisprudence), when viewed in tandem with Weaver's explanation of Argument from Circumstance, may provide clues with which to seek an internal dynamic in judicial opinions in order to determine whether such elements form a rhetorical genre. But philosophy alone is insufficient to explain a particular rhetorical transaction, for there are other constraints as well. We now turn to an accounting of institutionally based influences upon the rhetorical choices of United States Supreme Court justices.

The Living Hand of Tradition: Institutional Rhetoric in the Supreme Court

Rhetors speaking for institutions, Kathleen Jamieson argued in 1973 in Philosophy and Rhetoric,

> . . .are more constrained by genre than others because of their sense of the presentness of the past. An institutional spokesman who draws his perceptions of his role from the traditions of the institution itself tends, for example, to feel generic constraints more acutely than does the rhetor not tied to a tradition-bound institution.[31]

---

[31]Kathleen Jamieson, "Generic Constraints and the Rhetorical Situation." Philosophy and Rhetoric 6 (Summer 1973), p. 165.

But the rhetors thus constrained, Jamieson further suggested, contribute to a reciprocal relationship between themselves and the institution they represent, for "establishment and maintenance of definable forms of rhetoric serve to define the institution itself." Thus a rhetorical tradition begins to form, "creating expectations which any future institutional spokesman feel obliged to fulfill rather than frustrate. A long-lived institution tends to calcify its genres."[32] Perhaps no American institution better fits this description than the Supreme Court. Steeped in almost two centuries of tradition, the Supreme Court opinion must answer to the expectations of history, the bench, the bar, the law school critics, other branches of government, and the public at large. But this highly specialized form of communication is first the product of more or less rigid mechanical constraints as well. We turn first to those, then to the more substantive influences upon the content of opinions.

Before an opinion can be written, it must be assigned. If the Chief Justice has voted with the majority, he assigns the opinion writer, if not, the senior Associate Justice

---

[32]Ibid.

voting with the majority has the task of assigning an author.[33] But the bases upon which such a decision are made are also constrained by the institution. Professor Henry Abraham suggested one consideration guiding the assignment of opinions to particular justices. Using Brown v. Board of Education of Topeka[34] as his example, Abraham claimed that frequently the "so-called 'great,' or 'big,' or 'important constitutional' cases--although these are somewhat subjective concepts--should be authored by the 'Chief' himself."[35]

A second consideration influencing choice of opinion writer, and one dictated largely by the need of the legal community for precision and accuracy, may at times supersede the first. Abraham noted in this light that "no matter what the importance of a case, the selection of a Justice to write the opinion must take into account the possible

---

[33]Tom C. Clark, "Inside the Court," in Andrew M. Scott and Earle Wallace, eds., Politics U.S.A.: Cases on the American Democratic Process, 2nd ed., (New York: The Macmillan Company), p. 443.

[34]347 U.S. 483 (1954).

[35]Henry J. Abraham, The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France, 3rd ed., (New York: Oxford University Press, 1975), pp. 205-206.

importance of the decision as a precedent."[36] Consequently, the Justice with greatest expertise in the relevant field of law will likely get the assignment. An example was pointed out in Chapter I in Sidney Davis' suggestion that Chief Justice Stone tended to assign to the young Douglas most cases involving issues of business reorganization and finance in order to take advantage of his expertise gained as Chairman of the Securities and Exchange Commission.[37]

Still another audience of Supreme Court opinions provides a third consideration affecting choice of who shall be author. Although all these considerations are intrinsically rhetorical, this one is particularly so, for Professor Abraham argued that,

> . . . there is considerable evidence that the 'Chief' is conscious of an element of 'public relations' in designating his opinion writer. This is particularly true in cases that are undoubtedly going to be

---

[36]Ibid., p. 206.

[37]See, e.g., Sidney Davis, "Mr. Justice Douglas," Columbia Law Review 74 (April 1974), p. 350, and see also, John R. Frank, "William O. Douglas," in Leon Friedman and Fred L. Israel, eds., The Justices of the United States Supreme Court 1780-1969: Their Lives and Major Opinions, with an Introduction by Louis H. Pollak, (New York and London: Chelsea House Publishers in Association with R. R. Bowker Company, 1969), p. 2486.

> unpopular to a sizeable segment of the population. In other words, he is not unmindful of the importance of making a decision acceptable to the public, or, when possible, of coating the bitter pill that must be swallowed.[38]

David M. Hunsaker, a communication scholar and communications lawyer, cited an example of such rhetorical considerations influencing both choice of author and the opinion itself. Hunsaker reported that Chief Justice Earl Warren, discussing his recently published majority opinion in Brown v. Board of Education with law students at the University of Virginia, said that he "wanted an opinion short enough and simple enough to appear on the front page of every major newspaper in the country the day after it was handed down."[39] Thus, if the theorists are correct, Warren's decision to author the opinion himself was influenced both by the signal importance of Brown and by its supposed unpopularity with some elements of the population.

The Brown example notwithstanding, Abraham suggested another aspect of this public relations phenomenon in

---

[38]Abraham, p. 207.

[39]David M. Hunsaker, "The Rhetoric of Brown v. Board of Education: Paradigm for Contemporary Social Protest," Southern Speech Communication Journal 43 (Winter 1978), pp. 91-109.

claiming that to facilitate such bitter pills going down, it is not unusual for the Chief Justice to "assign so-called 'liberal' opinions of the Court to 'conservative' Justices and so-called 'conservative' opinions to 'liberal' Justices--again in the hope of making them more palatable."[40] Obviously the Brown opinion illustrated that this practice is not always followed, but other cases suggest that it sometimes apparently is. Justice Black with Justice Douglas concurring, for example, authored the surprisingly harsh and singularly unpalatable Korematsu[41] opinion sustaining the military relocation of thousands of Japanese American citizens during World War II. Another example of this tactic possibly affecting choice of opinion writer is the case of "conservative" Texas Democrat Justice Tom Clark getting the assignment to author the widely unpopular condemnation of required Bible-reading in public schools handed down in School District of Abington Township v. Schempp.[42]

Both before assignment of writer, and sometimes for months after, the rhetorical direction of a single opinion

---

[40]Abraham, p. 208. [41]323 U.S. 214, (1944).

[42]374 U.S. 203, (1963).

is shaped and reshaped in one of the most confidential rituals in American society, the judicial conference of the Supreme Court. Not until 1979 when A.B.C. News obtained advance information on the Harris v. Lando case had significant material leaked from this inner sanctum. But descriptions of its operation and anecdotes of its struggles have been recorded by those who were there. Justice Tom Clark, in a short and valuable essay called "Inside the Court," provided one such insight. He told of one judicial conference when Justice Harlan was presenting his view of a case and Justice Holmes, breaking the usual protocols of the occasion, blurted out, "That won't wash! That won't wash!" But, as Justice Clark continued,

> Fortunately, the Chief Justice at the time was Melville Fuller. He had already discussed the case and his position was similar to that of Harlan. When the diminutive but courageous, silver-haired, handlebar-mustached Chief Justice realized that all was not well between his brothers he quickly answered Holmes' 'That won't wash,' with a cheery 'Well, I'm scrubbing away, anyhow.' A tense situation passed over during the ensuing laughter.[43]

An idea of the importance and value of such interaction was expressed in a letter to William O. Douglas signed by

---

[43]Clark, p. 442.

all his brethren on the Court on the occasion of his retirement. The letter, dated December 19, 1975, appeared in Volume 423 of United States Reports. They said,

> . . . as colleagues we valued highly your unparalled knowledge of the multitude of decisions of the Court covering more than one-third of this century. It was a unique resource for the Court and one that may never again be present at our Conference table. We shall always remember your occasional verbal 'footnotes' telling us intimate details as to how some opinion evolved.[44]

In all liklihood the Justices were being diplomatic in that account of the conferences. As Justice Clark pointed out, once the opinion is assigned and an original draft composed, the author's arguments are printed in the print shop in the basement of the building and circulated to the other Justices and

> . . .then the fur begins to fly. Returns come in, some favorable and many otherwise. . . . The cases are often discussed by the majority both before and after circulation. The final form of the opinion is agreed upon at the Friday conferences. Of course, any Justice may dissent or write his own views on a case. These are likewise circulated long before the opinion of the majority is announced.[45]

The Supreme Court opinion, then, though one man receives credit, blame, and historical judgment for it, is truly the product of nine men, as well as all their institutional

---

[44]423 U.S. VIII. [45]Clark, pp. 443-444.

predecessors. Nevertheless, we may be confident that the opinion contains nothing the authoring Justice cannot live with, despite Abrahams' comment that "studies based on the Justices' [unpublished] papers make abundantly clear that Justices of all ideological persuasions ponder, bargain, and argue in the course of reaching their decisions--even at the risk of compromising their ideologies."[46] But despite this process, the option of the seriatim opinion, either concurring or dissenting, makes the published opus of his decisions a valid index of the Supreme Court Justice's judicial philosophy, and certainly a valid record of the rhetorical bases for that philosophy. But constraints enter in that are perhaps much more influential than those imposed by the mechanical operation of the Court itself. These constraints are imbedded in the system of Anglo-American jurisprudence, and particularly in the doctrine of stare decisis. They comprise an important star in the constellation of constraints shaping American judicial rhetoric, and must also be considered.

---

[46]Abraham, p. 215.

Precedent, Dicta, and Style: Functional Constraints on Supreme Court Rhetoric

Cicero noted the communicative nature of law, and particularly the interplay between laws and judges, observing that "it can be truly said the magistrate is a speaking law, and the law is a silent magistrate."[47] Our reverence for precedent, institutionalized as the doctrine of stare decisis, binds us inherently, though not inescapably, to the words of generations of such "silent magistrates" known still as the common law. This doctrine produces perhaps the single most powerful constraint operating upon the rhetorical options of the judge. His opinion must function as a central element in the total legal system of which it is a part. Awareness of the functional importance of his words, coupled with traditional stylistic expectations for opinions, form a paradigm case of what Jamieson described as "doctrine and form becom[ing] fused as style and content are ultimately fused."[48] But the United States Supreme Court justice retains substantial options by virtue of the

---

[47]Cicero, De Republica, De Legibus, trans. Clinton Walker (Cambridge: Harvard University Press, 1928), p. 461.

[48]Jamieson, p. 165.

availability of the seriatim, or separate, opinion. He may write the majority opinion itself, write a concurring opinion, or post a dissent.[49] Much legal scholarship holds that the rhetoric of Supreme Court opinions differs widely depending upon whether it represents a majority or non-majority position. Because of the diverse functions served by majority and non-majority opinions, and because they are often aimed at different audiences, students of the Court have held that the judge's rhetorical responses are governed by the diverse sets of constraints at work in these two situations. One of the primary questions of the present study asks whether William O. Douglas typifies this claim, and further, whether legal philosophy as manifested in argument also correlates with majority/non-majority status of the opinion? So that this question can be answered, we must first examine the alleged differences.

Three basic opinion types are present in Supreme Court rhetoric: the majority opinion, the concurring opinion, and

---

[49] Justices may dissent in several ways. They may dissent from an actual substantive decision of the court, they may dissent from the denial of a writ of certiorari, from an order to remand, from a stay or the removal of a stay of some kind, etc. For purposes of analysis, dissents of a substantive type and a procedural type are treated separately in this study. See Ch. IV.

the dissenting opinion. Each has certain functions, certain audiences, and certain relationships to legal philosophy. In the Anglo-American system of common law the majority opinion has one overriding function: to state legal rules which support the present decision and which should guide lawyers, litigants, and judges in future similar cases. For this reason we may expect, hypothetically at least, that the rules orientation of legal positivism would most frequently typify majority opinion writing, and that hypothesis has been implied by legal philosophers from John Austin to the present. The early thinkers in that tradition in fact insisted that the decision acieved its authority by the statement of a legal rule. Austin wrote that "the general reasons or principles of a judicial decision. . .are commonly styled, by writers on jurisprudence, the ratio decidendi."[50] This rationale for decision becomes the precedent of the case and thus the desire to achieve the rule of law in fact results in the law of rules. Accordingly, Professor Carleton Allen indicated the close nexus between ratio decidendi and the concept of stare decisis

---

[50]John Austin, Jurisprudence, 5th ed., (1885), p. 627, quoted in Goodhart, p. 161.

when he pointed out that "any judgment of any Court is authoritative only as to that part of it, called the ratio decidendi, which is considered to have been necessary to the decision of the actual issue between the litigants."[51] Writing in Oxford Essays in Jurisprudence, A. W. B. Simpson admitted that "there may indeed be as many ways of finding the ratio of a case as there are ways of finding a lost cat," but went on to offer a contemporary affirmation of the Austinian view of the concept:

> For purely legal purposes we may take it for granted that we should look in cases for a rule or rules of some kind or other. Furthermore, the term ratio decidendi is normally used to refer to some kind of binding rule . . . which is to be found in decided cases--some rule which a later court . . . cannot generally question.[52]

An important, but implicit, aspect of Simpson's argument, is that, at least as far as the American Supreme Court is concerned, one must look for ratio decidendi only in majority opinions. Neither concurring nor dissenting opinions

---

[51]Sir Carleton Allen, Law in the Making, 2nd ed., (1930), p. 155, quoted in Goodhart, p. 162.

[52]A. W. B. Simpson, "The Ratio Decidendi of a Case and the Doctrine of Binding Precedent," in A. G. Guest, ed., Oxford Essays in Jurisprudence (London: Oxford University Press, 1961), pp. 155, 160.

may serve as sources of law for the instant case, though either may eventually attain that status.

A rhetorical practice often necessary in any common law system is that of "distinguishing" cases. Simpson pointed out that this strategy was often taken to be "some sort of intellectual sharp practice," or as "a suspicious or spurious 'way round' the doctrine of precedent." That charge, however, misunderstands both "distinguishing" and the doctrine of precedent itself, for:

> Distinguishing cases, which consists in giving reasons why a rule in a case ought not to be followed or applied in a later case, is often conceived to be an indication that courts are not 'really' bound; in truth, earlier cases are distinguished, and have to be distinguished, just because they are binding, so that they ought to be followed unless a reason can be given for not following them; in much the same way courts have to interpret statutes just because statutes are binding.[53]

The conclusion relevant to the present study is that the practice of distinguishing cases, despite its apparent departure from the Argument from Rule, is very much a characteristic of Legal Positivism--the binding rule is not being denied its importance, only its present relevance.[54]

---

[53]Ibid., pp. 174, 158-159.

[54]Lawyers, legal scholars, and rhetoricians alike agree that the process of applying precedent is fundamentally that

Thus properly understood, "following and distinguishing cases [may] turn out to be the very ways in which the

---

of analogical reasoning. Lawrence C. Becker wrote that "standard accounts of analogy in legal reasoning focus on the question of the similarities and dissimilarities to be found between the things (people, events, acts, circumstances, verbal expressions) said to be analogous." But noting that if one adopts a quantitative standard for validity in analogical reasoning, the result is complete identity and thus no analog at all, Becker pointed out that "the Morning Star and the Evening Star are not analogs, but the same thing." Thus he suggested that, "a purely quantitative approach to the question of validity will not do: it is not just the sheer number of similarities between analogs which counts, but somehow the significance of their similarities. . . . It is relevant similarities which are at stake." Becker concluded that a good analogy is judicial matters is no different from one in other social sciences and suggested that "what one looks for in a good dynamic analogy. . . is simply an object which has a property which can be 'yoked' to a property in its analog for the purposes at hand. Relevance, or validity (i.e., whether A and B are appropriately thought of as analogs for a given purpose) is decided here in just the same way one decides the worth of a theoretical model: in terms of its consequences for predictive, explanatory, heuristic, or other tasks." (Lawrence C. Becker, "Analogy in Legal Reasoning," Ethics 83 (April 1973), pp. 248-249, 252.) In other words, does the controlling case (the precedent) help to explain or predict the correct results in the instant case in terms of relevant similarities? If so, a fundamental threshold of fairness is presumed to have been met, and the parties to the litigation should achieve a sense of aesthetic closure as a result. The Belgian rhetorician and jurisprudent Chaim Perelman called such a result the "Rule of Justice," and he defined it as "a principle of action in accordance with which beings of one and the same essential category must be treated in the same way." (Chaim Perelman, The Idea of Justice and the Problem of Argument, trans. John Petrie, (New York: The Free Press, 1963), p. 16.) Thus, the concept of relevant similarity intersects with the concept of ratio decidendi

creation of law by judges usually takes place in the common law system."[55]

Because the majority opinion must function well in future courtrooms, a judge's stylistic options are understandably constrained when composing one. Most theorists have agreed with Justice Cardozo in this light that "there can be little doubt that in matters of literary style the soveriegn virture for the judge is clearness."[56] Making

---

in a crucial way: to decide what is a relevant similarity and what is not is also to decide what is ratio decidendi and what is obiter dicta. Sir Carleton Allen illustrated the significance of this point in terms of the individual judge's reasoning in cases when he argued that the judge "places the fetters on his own hands. He has to declare whether the case cited to him is truly apposite to the circumstances in question and whether it accurately embodies the principle which he is seeking. The humblest judicial officer has to decide for himself whether he is or is not bound." (Quoted in Simpson, p. 149.)

Edward H. Levi, who was to become President of the University of Chicago and subsequently Attorney General of the United States, made the same point in his classic work, An Introduction to Legal Reasoning (Chicago: University of Chicago Press, 1949) when he wrote that "the determination of similarity or difference is the function of each judge." (p. 2) With characteristic directness, Justice Douglas also confirmed that the "re-examination of precedent in constitutional law is a personal matter for each judge who comes along." (We The Judges, p. 429)

[55]Simpson, p. 155.

[56]Benjamin N. Cardozo, "Law and Literature," in Law and Literature and Other Essays and Addresses (New York: Harcourt, Brace and Company, 1931), p. 7.

more explicit the notion of how audiences use the opinion, Percival Jackson elaborated upon the rhetorical necessity for clarity in majority opinions:

> The judge who writes for the Court must not roam the fields; on the contrary, he must weigh his words within an ambit of discretion so that he may secure agreement from his fellows. He must avoid confusion and uncertainty not only to obtain unanimity but also to command respect from the bar and the public for the decision of the Court.[57]

Indeed, the functional significance of clarity in majority opinions exists at all levels, for as Don R. Le Duc pointed out,

> lack of clarity will invite an appeal at the trial court level and with it the potential embarrassment of a reversal. Lack of clarity at the appellate level will stimulate litigation throughout the court's jurisdiction to resolve all questions left unsettled by the opinion.[58]

At least in terms of the ideal then, theorists agree that the rhetoric of majority opinions (when they announce the judgment of the court) is constrained by the doctrine of stare decisis, by the functional applications of the

---

[57]Percival E. Jackson, Dissent in the Supreme Court: A Chronology (Norman: University of Oklahoma Press, 1969), p. 15.

[58]Don R. Le Duc, "'Free Speech' Decisions and the Legal Process: The Judicial Opinion in Context," Quarterly Journal of Speech 62 (October 1976), p. 283.

opinion, and by the expectations of various critical audiences. There is, however, another species of majority opinion which may be less constrained, the concurrance.

A judge may feel any of several motivations for issuing a concurring opinion. He may only wish to add a rhetorical, "Me, too!" to the Court's judgment; he may wish to say that he concurs only with the result and that he disagrees with the route by which it was achieved; he may wish to argue that the Court's decision has not gone far enough. Douglas, for example, often used concurring opinions in the First Amendment area for this reason, agreeing with the judgment when the Court upheld some aspect of free speech, but insisting that any law restrictive of such liberties should be invalidated. It was to these and other purposes that Abraham had reference when he wrote that

> there are many legal scholars who are convinced that, whereas dissenting opinions are both eminently justifiable and necessary, concurring opinions are neither--that they are frequently nothing more than ego-manifestations and/or 'quibbling,' which would more profitably be confined to footnotes in the body of the majority opinion. Yet there is no doubt that the concurring opinion is a significant tool in the judicial process.[59]

---

[59]Abraham, p. 205.

Because the concurring opinion is less constrained by the systemic needs of the legal community, two generalizations may be made about it. First, it is not the place to look for ratio decidendi. By definition, a case may set only one precedent at a time, not several. Although the judge may issue "rule-like" statements in concurrances, they possess no legal force for the instant case. Second, and following from the first, concurring opinions are less likely to be predictive of judicial philosophy. A judge may urge upon his brethren the relevance of alternative rules to guide the present decision, thus suggesting a positivistic bent; he may stress the exigencies of the case itself as persuasive, thus tending toward legal realism; or he may argue that the outcome should be dictated by transcendent values existing independent of the positive law, thus invoking natural law. But if the concurring opinion is of less value or interest to the legal community, it still retains importance for the academic. Although concurring opinions may not predict judicial behavior as well as majority opinions, they certainly reflect it as well. Douglas' First Amendment opinions, for example, were almost thirty percent concurrances, and in terms of legal

philosophy as manifested in argument, turned out to be quite similar to both his majority and dissenting opinions.[60]

In terms of uses by the legal community and as the object of study for scholars, a third opinion type, the dissent, may surpass both the majority and the concurring opinions for its rhetorical ramifications. If the primary function of the majority opinion is to announce legal doctrine, then, as Chief Justice Harlan Fiske Stone pointed out, the function of "a considered and well-stated dissent [is to sound] a warning note that legal doctrine must not be pressed too far."[61] Stone saw the public pronouncements of the Court as vital to the healthy functioning of the democracy and stressed the role of dissent, saying that such decisions must "be supported by written opinions, freely criticized by the members of the Court who do not agree with them."[62] Since unanimity in the Supreme Court's deliberations has become more and more rare, the functional importance of the critiques couched in dissents has become more important.

---

[60]See Chapter IV.

[61]Quoted in Alpheus T. Mason, Harlan Fiske Stone (New York: The Viking Press, 1956), p. 591.

[62]Ibid., p. 575.

That dissents frequently find their way into majority opinions is a commonplace stated with uncommon incisiveness in a frequently quoted passage by Chief Justice Charles Evans Hughes:

> A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.[63]

But does the non-majority opinion represent a different rhetorical type? Commentary from both the bench and the academic community seems to so indicate, and the explanation, as with concurring opinions, is the relative absence of constraints. Authors of non-majority opinions are not articulating case law, at least for the instant case. In this regard Justice Cardozo, one of our more rhetorically gifted judges, asserted that "comparatively speaking at least, the dissenter is irresponsible," and that therefore,

> we need not be surprised . . . to find in dissent a certain looseness of texture and depth of color rarely found in the per curiam. Sometimes, as I have said, there is just a suspicion of acerbity, but this after all, is rare. More truly characteristic of dissent is a dignity, an elevation of mood and thought and phrase. Deep conviction and warm

---

[63]Charles Evan Hughes, The Supreme Court of the United States (Garden City, NY: Garden City Publishing Co., Inc., 1928), p. 68.

> feeling are saying their last say with knowledge that the cause is lost.
> . . . The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years.[64]

Contemporary social scientists affirm the rhetorical divergence of dissents. Le Duc noted recently that "the dissenting judge is free to range beyond generalizations to abstract philosophical arguments," and that "thus as a general rule it might be said that the more vigorous or eloquent the judicial passage being quoted, the less likely it is to be an expression of existing law."[65] Solomon Resnik went even further in his analysis of the stylistic variables in judicial communication, suggesting that the literary excesses so often attributed to dissents are "really a function of the non-majority opinion and are thus stated in exaggerated form in order to present ideals to be emulated rather than specific precedents for the here and now," and therefore such "statements have a strategic rather than a literal purpose."[66]

---

[64]Cardozo, pp. 33-37. [65]Le Duc, p. 284.

[66]Solomon Resnik, "Black and Douglas: Variations in Dissent," Unpublished Ph.D. Dissertation, New School for Social Research, 1970, quoted in Dissertation Abstracts 31 (1971), p. 6130-A.

The relative absence of functional constraints operating upon the non-majority opinion gives rise to two generalizations. First, dissents are not likely to be the home of obiter dicta, defined by Abraham as "more or less extraneous point[s], presumably unnecessary to the decision, made by the author of an opinion,"[67] and more colorfully described by Justice William Brennan as "the gas on the stomach of the Justice at the time he was writing the decision."[68] And second, as with concurring opinions, dissents are less likely to predict legal philosophy as manifested in argument. This is not to dispute Le Duc's argument above that non-majority opinions are less likely to express existing law, for by definition they do not. But Le Duc's argument should not be extended to suggest that a dissent is unlikely to adopt Argument from Rule. Douglas, for example, adopted this argument type more frequently in dissents than Argument from Ideal and Argument from Context combined.[69] An example of why such a rhetorical strategy makes sense is found in Douglas' DeFunis[70] dissent.

---

[67]Abraham, pp. 221-222. [68]Quoted in Abraham, p. 222.

[69]See Chapter IV.

[70]DeFunis v. Odegaard, 416 U.S. 312 (1974).

The Court, per curiam, remanded for mootness a case alleging reverse discrimination in the University of Washington law school minority admissions program. Justice Douglas filed a lengthy and highly technical dissent from this remand which ultimately had significant impact upon Thurgood Marshall's majority opinion in the Bakke case.[71] Such a possibility of future implementation of arguments by the Court makes desirable, from time to time, a highly positivistic dissenting opinion. Also instructive to recall in this light is that the "clear and present danger" test, one of the most widely invoked common law rules in American jurisprudence, was born in Oliver Wendell Holmes, Jr.'s dissent in Schenck v. United States.[72] Again as with concurrances, dissents serve well as repositories of and indexes to a justice's judicial philosophy and rhetorical behavior; they simply are not as likely to predict them as well as the more constrained majority opinion.

Several conclusions emerge from this examination of supposed differences between majority and non-majority

---

[71]Regents of University of Calif. v. Bakke, 438 U.S. 912 (1978).

[72]249 U.S. 47 (1919).

opinions. First, majority status for an opinion is more likely to predict a dependence upon positivistic jurisprudence, the Argument from Rule. Both mechanical and substantive institutional constraints combine to support this generalization. Rules often form the basis of a universal vocabulary for judges, a way of justifying a decision that is least likely to give rise to dispute. Although on some occasions a judge may decide that reliance upon precedent is insufficient justification, he would never regard its use as inappropriate, nor would any critic of judicial decision-making. Furthermore, although we may expect the majority opinion to be characteristically precedent-laden, even dissents often rely predominantly or exclusively upon rule-based arguements. Thus, despite a judge's personal philosophical orientation, we may expect his rhetorical indulgence of that orientation to be significantly constrained by the doctrine of stare decisis. Second, concurring opinions, although a type of majority opinion, are less likely to predict jurisprudential/rhetorical substance because of their comparatively less constrained nature. And third, the non-majority opinion is also a less reliable predictor of rhetorical genre for it, too, feels fewer constraints than the majority opinion. What must be remembered,

though, is that both the concurring and dissenting opinion may very well adopt the Argument from Rule as frequently as the majority opinion, but not as a functional necessity. If rule-like arguments are present in non-majority opinions they are not there to function as the imprimatur of case law, they serve rather the function of critiquing the majority opinion and recording for future parties the bases of potential evolution in the law.

The most important conclusion flowing from these explanations of judicial rhetoric, though, is that to suggest that a jurist is exclusively a "positivist," or a "realist," or a "natural lawyer" is to misunderstand the nature of legal reasoning, the operation of the American Supreme Court, and the nature of rhetoric itself. A proper understanding of legal philosophy sees it not as a denominational choice made by the judge for life, but as a rhetorical choice made in any given case as the "available means of persuasion" appropriate to that situration. Natural Law, therefore, is neither the vestigial remains of a medieval tradition nor the exclusive province of Catholic jurisprudents;[73] it is simply a source of argument and a

---

[73]Natural Law Forum, a leading jurisprudential publication, for example, is published by the Notre Dame Law School.

type of reasoning which relies ultimately upon values presumed to transcend the positive laws of the society governed by them. Likewise, Legal Realism is not best understood as a rationale for implementing the social policy prerogatives of activist judges; it is rather an approach to legal argument which recognizes that law is meaningful only if viewed in a social context, and which believes that sometimes societies outrun their rules and when they do, judges can help the rules catch up. And finally, the judge practicing Legal Postivism should not, ipso facto, be accused of "mechanical jurisprudence" or "slot machine"[74] decision-making;

---

[74] Jones, p. 264. Others have likewise disparaged such knee-jerk jurisprudence. Oliver Wendell Holmes, Jr. wrote that judges often seem "to fortify principle with precedent," (The Common Law, p. 209) and Cardozo suggested that "the power of precedent . . . is the power of the beaten track." (The Growth of the Law, p. 62). Justice Jackson elaborated the point by revealing the often present judicial timidity at work: "The judge who can take refuge in a precedent does not need to justify his decision to the reason. He may 'reluctantly feel himself bound' by a doctrine, supported by a respected historical name, that he would not be able to justify to contemporary opinion or under modern conditions." (Robert H. Jackson, The Struggle for Judicial Supremacy (New York: Vintage Books, 1941), p. 295). Cardozo suggested that lawyers as well as judges sometimes abused the doctrine of stare decisis observing that in some of their arguments "anything bound might be cited, though wrought through no process more intellectual than paste pot and scissors." (The Growth of the Law, pp. 13-14). The abusive or unthinking deference to precedent by his fellows on the bench was described by Cardozo as "march[ing] at times to pitiless

rather a decision of relevant similarity is allowed to govern the instant case and such a decision is, in Chaim Perelman's view, essentially rhetorical.[75] To these inventional choices, Cardozo admonished, we should turn if we wish to study judicial rhetoric, for they are,

> . . . more important than the mere felicities of turn or phrase. [They] are what we may term the architectonics of opinions. The groupings of fact and argument and illustration so as to produce a cumulative and mass effect; these, after all, are the things that count above all others.[76]

Oxford's Ronald Dworkin suggested the payoff for such inquiry when he argued that "attention to the explanations judges give may reveal patterns of judicial behavior, self-adopted

---

conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity." (Ibid., p. 66). Harold Ickes, Secretary of the Interior under Franklin Roosevelt, suggested what may actually be at work when judges behave in such a way. William O. Douglas quoted him as characterizing Justice Felix Frankfurter as "a real conservative who embraced old precedents under the guise of bowing to 'the law' but who actually chose the old precedents because he liked them better." (Go East Young Man, p. 327.)

[75]His notion of the Rule of Justice (see note 54 above) is fundamentally an epistemological process of assigning individual cases to appropriate categories and supporting such decisions by argument.

[76]Cardozo, "Law and Literature," pp. 32-33.

guides which will aid a careful observer in predicting decision, in making them more 'reckonable' or perhaps less 'unreckonable."[77] The patterns may turn out to be genres.

But before turning to the issue of genre theory, one final task remains for the present chapter, and that is to examine the critical commentary upon William O. Douglas' judicial rhetoric. Only by so doing can the forthcoming analysis of his opinions be placed in meaningful context.

The Douglas Opinions: Style and Philosophy

Any Justice of the United States Supreme who composes the line that the purpose of the Bill of Rights is "to keep government off the backs of the people,"[78] may expect a considerable body of criticism to accumulate around his decisions, and such a literature has grown up around Douglas'. Professor Vern Countryman of the Harvard Law School was one of Douglas' first law clerks and between 1959 and 1977 edited three collections of Douglas' opinions. Countryman observed that such comments drew the ire of "some of the more fastidious students of the Court who do not like Douglas' judicial

---

[77]Dworkin, "Judicial Discretion," p. 628.

[78]Laird, Secretary of Defense v. Tatum, 408 U.S. at 28 (1972), Justice Douglas, dissenting.

style." Over the long run, though, Countryman suggested that such criticism mellowed. He wrote that,

> At an earlier time, some of these critics were inclined to the view that Justice Douglas' approach led him frequently into error. Today, many of them would complain only that he has reached the right conclusion by the wrong route.[79]

So that the forthcoming analysis of Douglas' opinions may be placed in scholarly context, we must examine both the stylistic route he took and the philosophical conclusions his critics have drawn therefrom. What will become apparent is that there exists a strong connection between judicial style and philosophical inferences based on it. It is those inferences we mean to test.

A recurrent criticism levelled at Douglas' opinions was that they were "unjudicial." H. Frank Way made this charge, adding that, on occasion, "Justice Douglas' rhetoric [stood] outside the mainstream of legal prose, a prose which may out of some inner necessity be colorless and lifeless."[80]

---

[79]Vern Countryman, The Judicial Record of Justice William O. Douglas (Cambridge: Harvard University Press, 1974), pp. 380-381.

[80]H. Frank Way, Jr., "The Study of Judicial Attitudes: The Case of Mr. Justice Douglas," Western Political Quarterly 24 (March 1971), p. 22.

The law professors have been among Douglas' most severe critics. William Cohen of the U.C.L.A. Law School, and one of the Justice's former clerks, wrote that Douglas was,

> . . . not a law professor's judge. His opinions draw more professional ire than praise because they are terse--even brusque--marching to their conclusions without the elegantia juris which marks the academic ideal.[81]

Professor Kenneth L. Karst, also of the U.C.L.A. law faculty, indicated the profession's technical tendencies when he wrote that Douglas' opinions were "long on conclusory statements and short on the kind of painstaking analysis that one might expect from a lawyer of Justice Douglas' intellectural attainments. . . . I still yearn for a little more explanation."[82]

Percival Jackson saw Douglas and Black as two of a type and described their opinions as "monuments of disregard for precedent," and bemoaned "their disrespect for past wisdom."[83] Jackson disapproved particularly of Douglas'

---

[81]William Cohen, Introduction to "Mr. Justice Douglas: Three Decades of Service," U.C.L.A. Law Review 16 (1969), p. 701.

[82]Kenneth L. Karst, "Invidious Discrimination: Justice Douglas and the Return of the 'Natural-Law-Due-Process Formula," U.C.L.A. Law Review 16 (1969), p. 749 (final ellipsis in original).

[83]Percival Jackson, p. 13.

dissents, calling them examples of "intransigency." The charge of being unjudicial became more specific in Jackson's critique when he noted with dismay that "Justice Douglas quotes liberally from extrajudicial sources, even in one case, a recent antitrust suit, he reproduced a column written by Art Buchwalk."[84] But Gerhard Casper represented another typical response to the same practice by Douglas of turning to widely diverse extra-judicial sources for his arguments. In Times Film Corporation v. City of Chicago[85] Casper noted that Douglas' seven page dissent,

> . . . quoted (aside from court opinions and legal treatises): Plato, Republic; Hobbes, Leviathian; Milton, Areopagitica; John Galsworthy and George Bernard Shaw in addition to two sociological works, Pfeffer's Creeds in Competition, Father Murray's recent book about Thomism and the Founding Fathers (We Hold These Truths) and the New York Times.[86]

But if opinions are consistently "unjudicial," are certain jurisprudential inferences more likely to follow than others? In Douglas' case the answer is yes, and the inferences have uniformly pegged him as a legal realist.

---

[84]Ibid., pp. 14, 9. [85]365 U.S. 43 (1961).

[86]Gerhard Casper, "The Liberal Faith: Some Observations on the Legal Philosophy of Mr. Justice William O. Douglas," Federal Bar Journal 22 (1962), p. 193.

Two factors in addition to the manifest content of his opinions, however, may have exaggerated the accuracy of this classification. The first is that Douglas was trained by legal realists during the inception of the movement at Columbia and Yale. Second, cirtics may have taken Douglas himself too literally when he claimed in his extra-judicial writings to be a legal realist. His autobiography recalled his early years on the Columbia faculty:

> At Columbia, revolt against the traditional approach to law was now under way. Underhill Moore, Herman Oliphant, Hellel Yntema, Karl Llewellyn, and Walter Wheeler Cook were the renegades. I joined their ranks. . . . We wanted to discover whether the law in books served a desirable social end or should be changed. We were dubbed the leaders of 'sociological jurisprudence.'[87]

This orientation followed him to the Yale faculty where he came to know Robert Hutchins. There, he said, "some of us . . . were trying to do what we had been unable to do at Columbia--make the law more relevant to life."[88] Douglas' high regard for Hutchins was lifelong,[89] and the nexus

---

[87] Go East Young Man, pp. 159-160. [88] Ibid., p. 166.

[89] Douglas listed "six seminal forces in the law who shaped my life." He wrote that "they were followed by many others; but the first six were Robert M. Hutchins, FDR, Ben Cohen, Jerome Frank, Louis Brandeis, and Hugo L. Black." Go East Young Man, p. 182.

between law and society central to legal realism was an article of faith they shared. Douglas quoted Hutchins' explanation of the doctrine in his autobiography: "The law is the application of thought to what is perhaps the most important of all matters, the regulation and direction of the common life. . . . Since law is architechtonic, which means that it shapes the conduct of society, everything in the society is relevant to it."[90]

Gerhard Casper's study of Douglas' opinions led him to conclude that "the legal philosophy and method applied in the decision-making of these years was basically that of legal realism. That is: an attempt was made to ascertain the social and economic facts of the day before passing judgment on what was considered to be in the public interest."[91] Pointing to United States v. Columbia Steel Company,[92] Casper asserted that the opinion was "an excellent example of how a 'legal realist' can write a court opinion which at the same time is an essay on economics, an essay of rare clarity relating economic and political facts to community policies."[93] Casper was perceptive to note the

---

[90]Ibid., p. 170. [91]Casper, p. 189.

[92]334 U.S. 495 (1948). [93]Casper, p. 186.

epistemological nearness of legal realism to natural law, citing Douglas' statement that "we believe with Jefferson that all men are created equal and endowed by their Creator with unalienable rights."[94]

Sidney Davis' philosophical classification of Douglas mentioned in Chapter I[95] is consistent with the argument above that legal philosophies are best understood as the basis of judicial rhetoric rather than as lifelong predispositions tending to color all of a judge's opinions. However, the verdict seems nearly unanimous, the academics, the jurists, and Douglas himself all put him in the camp of legal realism. The evidence for this classification is persuasive: his mentors and colleagues founded the movement, he admits to being one of the "renegades," and his opinions are "flayed in law school classrooms and in the law reviews,"[96] because he associates rhetorically with the likes of Art Buchwald and John Milton. No scholar or jurist has ever accused Douglas of being a staunch positivist, but some have perceived traces of natural law at work. Nevertheless, if the assumptions from which the present study proceeds--that

---

[94]Ibid., p. 180. [95]See Ch. I, p. 16.

[96]Cohen, p. 701.

philosophy of law is best apprehended as argument in actual decisions--the received wisdom of these classifications may be questionable. But before turning to the results of the present analysis of his career first amendment opinions, we must first examine the presumptions underlying the methods by which those results were reached, and we must elaborate the procedures employed to reach them.

CHAPTER III

METHODS AND PROCEDURES

Introduction

The generation of knowledge is governed both by certain epistemological assumptions and by systematic practical procedures. This chapter's first task is to explain the assumptions underlying qualitative content analysis, a broad class of methods including such techniques as genre criticism. The second function of this chapter is to detail the use of the LEXIS program for computerized legal data retrieval in the present study. The final section of this chapter details the procedures and criteria governing the coding of content units into the hypothesized categories of Argument from Ideal, Argument from Rule, and Argument from Context.

Assumptions of Critical Method: The Role of Content Analysis in Genre Criticism

Despite the opinion of Lasswell, Lerner, and Pool that there "is clearly no reason for content analysis unless the question one wants answered is quantitative,"[1] a broader understanding of content analysis allows for message-centered studies of an essentially qualitative nature as well. Indeed A. L. George argued that for certain kinds of questions "qualitative analysis of a limited number of crucial communications may often yield better clues to the particular intentions of a particular speaker at one moment in time than more standardized techniques."[2] When the researcher is interested in making inferences about the intentions of the source, the effects of messages, or other

---

[1]Harold D. Lasswell, D. Lerner, and Ithiel de Sola Pool, The Comparative Study of Symbols (Stanford, CA: Stanford University Press), 1952, p. 45.

[2]A. L. George, "Quantitative and Qualitative Approaches to Content Analysis," in Ithiel de Sola Pool, ed., Trends in Content Analysis (Urbana: University of Illinois Press, 1959), p. 7.

message-based conclusions,[3] the qualitative approach often surpasses a simple frequency-counting routine. Of course qualitative and quantitative research techniques are not mutally exclusive, nor is one necessarily superior to the other. Holsti, in fact, offered a binary definition of qualitative content analysis itself when he suggested that the approach is best understood as "the drawing of inferences on the basis of appearance or nonappearance of attributes in messages."[4] The important point to understand in analyzing qualitative content is that while one may count things, the counting itself is neither sufficient nor meaningful. At the same time, critical judgments alone are neither final nor infallible. Pool stressed the reciprocal relationship between methods when he wrote that "it should not be assumed that qualitative methods are insightful and quantitative ones merely mechanical methods for checking

---

[3]For a discussion of various inferential motives, see Ole R. Holsti, Content Analysis for the Social Sciences and Humanities (Reading, Mass.: Addison-Wesley Publishing Company, 1969), especially Chapter 2, "Content Analysis Research Designs."

[4]Holsti, p. 10.

hypotheses. The relationship is a circular one; each provides new insights on which the other can feed."[5]

Message-centered research assumes that the content of messages indexes something else. Such inferences may be to sources, receivers, or other messages, but they all rest upon the same assumption. If the researcher infers from content data to the attitudes, values, beliefs, or motives of the source, the research relies upon the psycholinguistic theory known as the representational model. The essence of the theory as well as its relevance to content analysis was explained by its primary author, Charles Osgood:

> The 'representational model' in content analysis assumes (1) that in semantic encoding by the source the occurrence of specific lexical items in his messages is indicative of the immediate prior occurrence in his nervous system of the corresponding representational mediation processes; and (2) that in semantic decoding by the receiver the occurrence of specific lexical items in messages are predictive of the occurrence in his nervous system of those representational mediation processes which he has developed in association with these signs. This, of course, is merely a more formal way of saying that words 'express' the ideas of the speaker and 'signify' ideas for the hearer.[6]

---

[5]Pool, ed., Trends in Content Analysis, p. 192.

[6]Charles Osgood, "The Representational Model and Relevant Research Methods," in Pool, ed., p. 39.

Thus, when the researcher infers from message events to the source of the message, he is relying upon psycholinguistic theory which postulates a relationship between those events and certain states or events in the source.

Although the message makes up only one part of a rhetorical event, the traditional rhetorical critic also engages in qualitative content analysis when inferring message effects as a function of message content. When a rhetorical critic relies predominantly upon the message over other aspects of a rhetorical transaction, the assumption that the message indexes something else (usually effects) underlies the research. A review of meta-criticism over the last fifty years is not necessary to support the observation that conclusions about the effects of messages predominate the Neo-Aristotelian perspective in rhetorical scholarship. Edwin Black, after reviewing most of the significant traditional rhetorical criticism of this century, argued in 1965 that the only formalistic or judicial conclusions Neo-Aristotelian criticism reveals are inextricably tied to discovering "the historically factural effects of

the discourse on its relatively immediate audience."[7] The point here is that such scholarship properly belongs in the context of qualitative content analysis and to illustrate that it proceeds from an assumption that message content indexes one or more other aspects of the rhetorical event.

A third kind of inference made by communication researchers based upon message content aims at drawing conclusions about other messages. Here the qualitative content analyst finds theoretical underpinning in genre theory. With the elaboration of the assumptions underlying genre theory, it surfaces as a fruitful type of qualitative content analysis.

A key insight regarding the assumptions of a generic approach to message-centered scholarship was offered in Frye's influential work, The Anatomy of Criticism, when he insisted that the "purpose of criticism by genres is not so much to classify as to clarify."[8] Frye's concern with clarifying relationships among literary works rather than

---

[7]Edwin Black, Rhetorical Criticism: A Study in Method (New York: The Macmillan Company, 1965), p. 48.

[8]Northrop Frye, The Anatomy of Criticism: Four Essays (Princeton, NJ: Princeton University Press, 1957), pp. 247-248.

merely assigning them to categories is analagous to A. L. George's concern noted earlier regarding the frequent superiority of qualitative judgments over the counting of lexical, stylistic, or other message events. The assumption which underlies the generic approach is basically essentialistic: by focusing upon the commonalities of discourse instead of the pecularities, we move closer to grasping its essential nature. This essentialistic conception of discourse provided the assumptive base of Black's important work, Rhetorical Criticism: A Study in Method. He summarized the position by suggesting that,

> if one of the major objectives of rhetorical criticism is to enrich our understanding of the rhetorical uses of language critics can probably do their work better by seeing and disclosing the elements common to many discourses rather than the singularities of a few.[9]

Black's genre approach to rhetorical scholarship is superior to the Neo-Aristotelian perspective precisely because its epistemological aim is essentialism rather than the more narrow, existentialist aims of the latter. While the sensitive and thorough explication of a single rhetorical events, such as Nichols' well-known essay on Lincoln's first

---

[9]Black, pp. 176-177.

inaugural,[10] certainly claims value in and of itself (an existentialist view), it makes no claims to illuminate the nature of presidential inaugurals as a genre.[11]

The essentialistic assumptions of generic criticism received their most elegant statement to date in the recent collection of essays edited by Campbell and Jamieson entitled Form and Genre: Shaping Rhetorical Action.[12] Clearly consistent with the goals of A. L. George, Frye, and Black, the editors insisted initially that "the justification for a generic claim is the understanding it produces rather than the ordered universe it creates."[13] The first criterion Campbell and Jamieson then set for generic criticism was that "classification is justified only by the critical illumination

---

[10]Maire Hochmuth Nichols, "Lincoln's First Inaugural," in Robert L. Scott and Bernard L. Brock, eds., Methods of Rhetorical Criticism, A Twentieth Century Perspective, (New York: Harper and Row, Publishers, 1972), pp. 60-100.

[11]For contrast, see Donald Wolfarth, "John F. Kennedy in the Tradition of Inaugural Speeches," Quarterly Journal of Speech 47 (April 1961), pp. 124-143.

[12]Karlyn Kohrs Campbell and Kathleen Hall Jamieson, Form and Genre: Shaping Rhetorical Action (Falls Church, VA: The Speech Communication Association, 1978).

[13]Campbell and Jamieson, "Form and Genre in Rhetorical Criticism: An Introduction," in Campbell and Jamieson, p. 18.

it produces not by the neatness of a classificatory schema."[14] Northrop Frye's insistence upon clarifying over classifying is obviously hospitable to this criterion.

Campbell and Jamieson explained just what the critic seeks when pursuing clarification as a goal. The aim is to find the "internal dynamic" which binds together constellations of substantive and stylistic forms. Thus, when the critic purports to have found a rhetorical genre, the claim is being made "that a group of discourses has a synthetic core in which certain significant rhetorical elements, e.g., a system of belief, lines of argument, stylistic choices, and the perception of the situation, are fused into an indivisible whole."[15]

After noting that genres may be derived either deductively, as from a model or touchstone, or inductively by surveying vast numbers of situationally similar discourses, Campbell and Jamieson identified the pitfalls of both approaches. More directly relevant to the present study, though, is the warning they provided regarding both:

---

[14]Ibid., p. 18.

[15]Ibid, p. 21.

> The confusion of deductive and inductive approaches to genres can also create difficulties. In a number of cases, critics have assumed, a priori, that a genre already exists and is known and defined--e.g., the sermon, the presidential inaugural, the apology, among others--and an inductive procedure, content analysis in some cases, is applied to parse its elements. Such studies are suspect because the a priori definition of a genre and identification of its members generates a circular argument: an essential and preliminary procedure defining the generic characteristics has been omitted. Generic critics need to recognize explicitly the assumptions they are making and the procedures required to establish their claims.[16]

The present study avoids such difficulties by making no assumptions that rhetorical genres exist, a priori, in the form of natural law arguments, legal positivist arguments, and legal realist arguments. The assumption is made that (a) those philosophies exist, and (b) that philosophy is argument.[17] Thus, the operational definitions of such

---

[16]Ibid., p. 23.

[17]Cf., Chaim Perelman, An Historical Introduction to Philosophical Thinking (New York: Random House, 1969), p. 201, when he wrote that "the goal of philosophy is to influence the mind and win its agreement." Numerous writers have highlighted Perelman's insistence upon the rhetorical nature of philosophy; among them are: Max Loreau, trans. Lloyd I. Watkins and Paul D. Brandes, "Rhetoric as the Logic of the Behavioral Sciences," Quarterly Jouranl of Speech 51 (December 1965), pp. 455-463; Ray D. Dearin, "The Philosophical Basis of Chaim Perelman's Theory of Rhetoric," Quarterly Journal of Speech 55 (October 1969), pp. 213-224; Douglas H. Parker, "Rhetoric, Ethics, and Manipulation," Philosophy and Rhetoric 5 (Spring 1972), pp. 69-82; John R. Anderson, "The Audience as a Concept in the Philosophic Rhetoric of

argument posited in the previous chapter serve as hypotheses to be tested, not as assumptions from which to proceed. By surveying jurisprudential literature we have synthesized hypothetically argumentative forms by identifying fundamental tenets from each school of thought. Then by examining a large sample of opinions we can determine whether such characteristics are fused together by an "internal dynamic." Only upon the basis of such a theoretically guided analysis of documents can a rhetorical genre be claimed to inhere in legal philosophy.

Attempts to define "genre" have typically followed the ad hoc route taken by Potter Stewart in defining obscenity when he said, "I know it when I see it."[18] Critics have gathered together samples of poems or novels or speeches with certain similarities and have based a generic claim thereon without first offering any definition, either operational or conceptual.[19] A second problem often overlooked

---

Perelman, Johnstone, and Natanson," Southern Speech Communication Journal 38 (Fall 1972), pp. 39-50; and Nathan Rotenstreich, "Argumentation and Philosophical Clarification," Philosophy and Rhetoric 5 (Winter 1972), pp. 13-23.

[18]Jacobellis v. Ohio 378 U.S. at 197 (1964).

[19]A survey of the first several years of the journal Genre, for example, revealed numerous essays describing and/or analyzing specific literary types asserted to be genres, but none devoted exclusively to meta-critical questions like definition of the concept itself.

is that literary genres and rhetorical genres differ from one another in a most basic way. The poet or novelist quite consciously sets out to write a work which, if well-executed, will be called a good poem or a good novel--that is, a good example of what the genre poetry or the genre novel is supposed to be. In this sense, the literary author is an actor--he or she acts upon the reader by manipulating words and themes and moods constrained only by the historical evolution of the genre itself and his or her own capabilities. There are usually no exigencies involved in writing a novel. The rhetorical author, on the other hand, is a reactor, and the audience forms only one from a number of influences to which he or she must react. If the rhetor speaks for and through an institution, its constraints may merge with others to form an institutional rhetoric, perhaps even a genre in time.

Herbert Simons' definition of rhetorical genre came close to this notion of rhetor as reactor when he suggested that it is "a recurring pattern of rhetorical practice which includes, among others, the repeated use of images, metaphors, arguments, structural arrangements, configurations of language,

or a combination of such elements."[20] But Simons' definition failed to distinguish rhetorical genre from literary genre and it is the reactive nature of rhetorical discourse which separates it from literary discourse. Previous definitions of rhetorical genre have either failed to make clear this distinction or have seemed to suggest that a genre was simply the sum of constraints at work in a given situation. In this study rhetorical genre is defined as a predictable cluster of recurrent patterns of responses (arguments, types of support, philosphic orientations) by various rhetors in various times and places to recurrent patterns of external or institutional influences (exigencies, constraints, audiences). The genre is to be sought in the responses, not the influences. The existence of a conflux of externally recurring influences is our clue that a genre may be nearby, but does not, in and of itself, prove it. The pattern of responses will vary from pope to pope and president to president and Supreme Court justice to Supreme Court justice only to the extent allowed by the influences, whether exigential, situational, or institutional. The rhetor who goes

---

[20]Herbert Simons, "'Genre-alizing' About Rhetoric: A Scientific Approach," in Campbell and Jamieson, eds., pp. 33-50.

beyond the constraints (or who ignores them, or is unaware of them) is obviously not constrained and thus cannot be said to be writing in the genre for his rhetoric is not reactive to the constraints.

The methodological literature in content analysis stresses two points that Simons urged also upon genre critics. One speaks to the issue of theoretic parameters being established and the other to the need for specification of analytic procedures. He insisted that "the task of generic identification should take place within theoretical frameworks, should be guided by theoretically devised hypotheses, and should be focused upon theoretically significant similarities."[21] While he may be correct that categories drawn from aesthetics or literature might not prove helpful to the rhetorical critic, it is more difficult to accept his exclusion of philosophy as a source of hypotheses for generic criticism.[22] The historic proximity

---

[21]Simons, p. 41.

[22]Cf., Recommendation #31 of the New Orleans Conference on Research and Development in Speech Communication, which stated in part: "Opportunities exist to advance speech communication theory and research through amplification and refinement of formulations originating in other branches of the behavioral sciences and humanities." (Robert J. Kibler and Larry L. Barker, eds., Conceptual Frontiers in Speech Communication (New York: Speech Association of America, 1969), p. 36.

of rhetoric, law, and philosophy, along with the compelling arguments of Perelman, led this researcher to the position that a theoretic framework drawn from jurisprudence for the purpose of attempting to discover rhetorical genres in judicial opinions is admissible, appropriate, and valuable. The well-established theoretic framework of jurisprudence makes it admissible; the inherent intersection of rhetoric, law, and philosophy makes it appropriate; and because such a study promises theoretic contributions to both rhetorical scholarship and jurisprudential scholarship, its value is evident. In this vein, Simons argued:

> The great promise of generic study lies not simply in classification but in the identification of common purposive and situational constraints that lead to generic similarities. While other students of persuasion are busy determining the differential effects of varied rhetorical choices, [genre] critics can be breaking new ground by developing theory and conducting research about the factors influencing those choices.[23]

LEXIS: The Use of Computerized Legal Data Retrieval in the Social Sciences and Humanities

Characteristic of existing scholarship on William O. Douglas are statements describing the sampling procedures

---

[23]Simons, p. 44.

such as "a rather arbitrary sample of utterances was chosen,"[24] or "a sampling of opinions will provide the main outlines of the Justice's position while the nuances must necessarily be neglected."[25] One explanation for the qualifiers is that the studies done prior to Mr. Douglas' retirement in 1975 were necessarily restricted to certain periods or aspects of his judicial career, and thus none were comprehensive in scope. A second explanation, though, has to do with the nature of traditional legal data retrieval systems. Law finding aids are designed to facilitate the work of the legal community and to that end they do an admirable job. But frequently the social scientist or humanist approaches legal archives with non-legal questions of foremost importance and his or her research may not be served as efficiently as that of a colleague from the bench or bar.[26] Legal indices and finding aids are organized

---

[24]Gerhard Casper, "The Liberal Faith: Some Observations on the Legal Philosophy of Mr. Justice William O. Douglas," Federal Bar Journal 22 (1962), p. 180.

[25]Leon D. Epstein, "Justice Douglas and Civil Liberties," Wisconsin Law Review 125 (1951), p. 125.

[26]See Morris Cohen, Legal Research in a Nutshell (St. Paul, MN: West Publishing Company, 1971) for a summary of the strengths and weaknesses of conventional legal research aids. See also, Michael G. Parkinson, "Language Variation and Success in the System of Criminal Justice," Ph.D. dissertation, University of Oklahoma, Norman, OK, 1978.

around topic headings which direct the researcher to points of law, and if the question was only tangentially legal, the work, until recently, was difficult.

Other than the limitation of the topical system in legal archives, the researcher approaching the law library faces a profusion of documents virtually unparalleled in other areas of inquiry. Morris Cohen, Professor of law and law librarian at Harvard, reported that there are currently about three million cases on record in Anglo-American jurisprudence and the number grows at the rate of around thirty-thousand a year.[27] Thousands of these cases emanated from the United States Supreme Court and William O. Douglas personally produced over 1200 of them. Describing this situation, Cohen pointed out that "traditional legal research techniques are rapidly proving inadequate to permit accesses to [such] vast, continually expanding reservoirs of information."[28] One response to this large and rapidly growing expanse of cases has been computerized legal data

---

[27]Ibid., p. 40.

[28]Ibid.

retrieval technology[29] and one such system was used to determine the universe of documents examined in the present study.

The system, developed by the Mead Corporation of Dayton, Ohio, is called LEXIS and it improves upon traditional legal research tools in two basic ways. The first is the speed with which a researcher may discover the range of relevant documents. Where traditional law finders would require a seasoned researcher to spend days in the law library, the LEXIS system searches a body of data and prints out citations to the relevant materials in minutes. The second advantage of LEXIS over traditional law finders accrues particularly to the social scientist or humanist who has legal inquiries in mind that are likely not of interest to the juristic researcher pursuing strictly legal questions. This advantage is explained in the LEXIS desk book as it discusses the central principle of the system, which is "the determination by the researcher of words, phrases, and numbers, and combinations of these, which are likely to occur in cases or

---

[29]For a discussion of various computerized legal data retrieval systems, see Francis H. Musselman, "Computers: A Boon to Legal Research," Legal Economics (Winter 1976), pp. 7-8, 11-12, 33.

statutory material which may be useful to the researcher."[30] This Key Word in Context (KWIC) principle frees the researcher from pre-established legal index headings and enables him or her to formulate search requests limited only by imagination and resources. The KWIC approach is advantageous to traditional research methods, particularly for its suitability to the prose style of Supreme Court justices. As was illustrated in Chapter II, justices frequently play the role of social or moral philosopher as much as that of jurist and their rhetoric thus ranges over a broad array to topics, many of which may not directly pertain to the issue at hand. Traditional citators and indices cannot be relied upon for accurate or complete retrieval of such obscure or tangential remarks, even though they may be of primary interest to the non-lawyer researcher. But with the assistance of the KWIC feature of LEXIS, a researcher can specify any word or phrase of interest and the computer will retrieve all documents in which it appears, regardless of whether it holds central importance to the case.

---

[30] LEXIS: A Primer (Dayton, Ohio: Mead Data Central, 1975), p. 1.

The KWIC ability of LEXIS rests on its "full-text" approach to data storage in which "the full, natural text of an appropriate set of documents . . . is stored character by character, precisely as published, in a computer's memory bank."[31] As of May, 1979, the LEXIS system consisted of several "libraries"[32] including all United States Supreme Court cases dating back to January 1, 1938. This made the system particularly suitable for researching Douglas because his tenure on the Court began a year and a half after that date and thus all of his opinions are stored.

As with traditional research methods, intuitional, basic skills, and practice are necessary for successful

---

[31] Legal Research and the Computer (Dayton: Mead Data Central, Inc.), p. 4.

[32] The libraries consist of two broad categories: Federal Materials and State Materials. The Federal libraries consist of (1) General Federal which includes Supreme Court, Courts of Appeals, and District Court materials loaded to various dates; (2) Securities Law including materials from U.S.C. Title 15, S.E.C. Rules and Regulations, Federal Reserve Board Regulations, and Legislative Histories; (3) Tax Law, including the I.R.S. Code, Tax Court Decisions, and other materials; and (4) Trade Regulation Law, including Federal Court Decisions and F.T.C. Decisions. The State Libraries (as of May, 1979) included thirty-three states and the District of Columbia with plans to include all fifty states by July 1, 1979. Typically a state library includes the state's statutes, constitution, and supreme court reports, with many including other materials as well.

computer-assisted legal date retrieval. With LEXIS, this means carefully phrased search requests. Complete instructions and options for phrasing search requests are quite lengthy and can be found in the LEXIS desk book,[33] so the present study explains only the request formulated by this researcher for the present study of William O. Douglas.

Like other computerized data retrieval systems (such as ERIC), LEXIS functions on a combination of features such as various connectors, KWIC, and several search limitors. The KWIC feature allows the computer to retrieve any case in which the specified words or phrases appear; the connectors, such as OR, AND, W/N, (Within N words of the specified word), AND NOT, and BUT NOT, serve to broaden a search request according to the needs of the researcher. The limitors, such as DATE and SEG (a specified segment of the opinion such as OPINION, DISSENT, HEADNOTES, CITATION, etc.) serve to restrict the request to conform to the researcher's needs.

---

[33] LEXIS: A Primer, pp. 3-14. The actual desk book is available only to subscribers to the system (fees can run as high as $40,000 a year and more), but this shorthand version adequately explains the procedures for formulating search requests.

The DATE limitor restricts the request to a period before a given date, after a given date, or between two dates. The W/SEG limitor restricts the search to NAME (the popular name of the case, e.g., Miller v. California), CITE (the official citation of the case, e.g., 413 U.S. 15), DISSENT (only the dissenting opinions), OPINION (only the majority opinions), OPINIONBY (only the opinion of a specified member of the majority), DISSENTBY (only the opinion of a specified member of the dissent), and so forth.

One goal of the present study was to improve upon existing evaluations of Douglas' first amendment opinions by examining all of them as opposed to samples selected on the basis of sub-classification systems such as time periods within his career. The LEXIS search request formulated to achieve this goal was thus broadly phrased and included no date or segment limitors. The computer was instructed to retrieve and print the names and citations for all cases conforming to: "OPINIONBY (Douglas or DISSENTBY (Douglas) or CONCURBY (Douglas) and 1st AMENDMENT or FREEDOM W/4 SPEECH or PRESS or EXPRESSION." This request produced a yield of three-hundred and one cases and somewhat surprisingly, a substantial number of them proved irrelevant to the

present research interests. If an opinion was of insufficient length or development to allow classification by its jurisprudential-rhetorical bases, even though the specified terms appeared in manifest content, the opinion was not used in this analysis.[34]

In summary, LEXIS is a highly sensitive research tool available to the social scientist or humanist interested in legal questions. Although it may suffer from oversensitivity to manifest content, to expect computers to make decisions of relevance or irrelevance of data when critical decisions are to be made misunderstands their place in research. On the whole, computer-assisted legal data retrieval is a valuable and economically defensible addition to the scholar's armamentarium.

---

[34]See Appendix D for the table of cases retrieved by LEXIS but judged irrelevant to the present study.

Analytic Procedures

Three hundred and one opinions were retrieved by LEXIS under the search request noted above. They were analyzed according to the following procedures:

(1) Exclusion of Irrelevant Cases

Ninety-four cases retrieved by LEXIS were judged to be irrelevant to the present study. Four criteria guided that judgment. First, the case had to conform to the search request in terms of the specified Key Words in Context (KWIC). Three cases, for example, were discarded because they dealt with the twenty-first amendment rather than the first amendment.[35] In each case the hyphenated words were separated from one another from one line of text to the next (i.e., "twenty" on one line, and "first" on another) and this apparently caused the case to be read by LEXIS as conforming to the search request. Second, a number of cases were discarded for lack of clear authorship. Frequently the sub-headings in U.S. Reports would indicate what appeared

---

[35]These cases are: Wisconsin v. Constantineau, 401 U.S. 433 (1971), Lenhausen v. Lakeshore Auto Parts, 410 U.S. 354 (1973), and United States v. State Tax Commission of Mississippi, 412 U.S. 363 (1973).

to be joint authorship of a concurring or dissenting opinion. Since this study focused exclusively on Douglas, such cases were not used. Third, as was mentioned earlier in this chapter, cases often came to the Court on procedural rather than substantive grounds. Although a case may have come to a court of original jurisdiction on first amendment issues, it could terminate in the Supreme Court on fourteenth amendment questions or on claims that a defendant's fourth or fifth amendment privileges were denied. In this study, only those cases in which the first amendment held central focus were retained. Finally, Douglas posted numerous opinions of surprising brevity. Most often they were dissents and typically they were procedural dissents. Many were one terse paragraph. Such cases simply did not provide sufficient data for determining the rhetorical bases of Douglas' reasoning. Freeman v. Flake, for example, conforming to all other criteria for inclusion in the study, brought to the Court the question of whether hair codes in public schools violated students' first amendment rights, but the Court denied certiorari. Douglas posted a very short dissent[36] stating simply that he wanted to hear this issued argued.

---

[36]405 U.S. 1032 (1972).

To attempt to divine the rhetorical bases of such a request would be guesswork and consequently all similarly underdeveloped opinions were discarded.

(2) Coding of Relevant Cases

Two issues predominate coding procedures in content analysis: category construction and coding instructions. The central methodological tenet in category construction is the requirement of mutual exclusivity. As Holsti warns, the criterion "stipulates that no content datum can be placed in more than a single cell."[37] The review of jurisprudential literature and the operational definitions of rhetorical/jurisprudential categories offered in Chapter II of this study satisfy this researcher that the standard of mutual exclusivity has been met. At each point in the evolution of legal philosophy, when legal positivism asserted its uniqueness from natural law and, in this century, when American legal realists made the same assertion of their independent status vis a vis both previous philosophies, the critiques of the various schools of thought have stressed

---

[37]Ole R. Holsti, Content Analysis for the Social Sciences and Humanities. (Reading: Mass.: Addison-Wesley Publishing Company, 1969), p. 99.

the fundamental paradigmatic differences which marked off one territory from the others. This historically consistent demarcation, coupled with the clearly operationalized definitions of each philosophy, provide sufficient basis for a claim of unique and independent categories.

Once clear categories have been devised, criteria must be established according to which coding units will be assigned to them. This, of course, hinges upon the designation of the coding unit itself. The nature of the questions posed in this study required that the entire opinion be adopted as the coding unit. Choice of the complete opinion as the unit of analysis was endorsed by Holsti, who advised that the individual document of interest may be assigned a "single score which most closely characterizes its major theme. In this case we make a single qualitative judgment about the entire document without tabulating the frequency with which any content attribute appears [whichin it]."[38] Having thus designated what the coding unit shall be, the content analyst must proceed next to elucidating the content attributes which must be present in (or absent from) the content unit in order to justify assigning it to one category

---

[38]Ibid., pp. 7-8.

instead of another. Typically this takes the form of instructions to coders who will perform the task of reading the material and making a coding decision. Frequently, the primary researcher performs considerable preliminary analysis, leaving the coders with little more than clerical duty. Their decisions are then statistically compared and the researcher points with some pride to high reliability coefficients. However, some research problems are such that the use of multiple coders is impossible, and even if their work is genuinely judgmental rather than clerical, statistical reliability tests are ruled out. The present study is such a case.

Osgood Saporta, and Nunnally suggested that in some cases (although usually multiple coders are preferable) the primary researcher is justified in doing all coding individually.[39] Two aspects of the present study were felt to be sufficient to preclude the use of multiple coders. First, the sophistication in jurisprudential literacy was felt to be such that it could not be meaningfully reduced to coding instructions. Second, the actual coding of the three

---

[39]Charles Osgood, Sol Saporta, Jum C. Nunnally, "Evaluative Assertion Analysis," Litera III (1956), pp. 47-102.

hundred and one opinions into Not Relevant, Argument from Ideal, Argument from Rule, and Argument from Context required vast amounts of time. This aspect of the study consumed several months of work. The liklihood of obtaining even remotely reliable data from hired coders for such a long-term task eliminated their use as a consideration.

That, however, does not relieve the researcher from attempting to insure the reliability of his own coding decisions. The present study attempted to achieve such reliability by dividing coding decisions into two stages. In the first stage, relevant decisions were read and tagged according to rhetorical/jurisprudential category on the basis of the operational definitions offered in Chapter II. This resulted in an initial grouping of the two hundred and seven relevant opinions into three lists according to the researcher's first impression of the orientation of their warrant. In the second stage, each opinion in each group was re-read in an attempt to ascertain a recurrent pattern of rhetorical practice evident in the category. Once again, the hypothetical definition of the three rhetorical genres was the researcher's guide in this analysis. Notes were taken on a standard form (see Appendix E) recording both the

rhetorical/jurisprudential bases of the opinion and the type of majority or non-majority opinion it represented. The sources which appeared to predominately provide the basis of the opinion (ideals, rules, or contextual factors) made up the content attributed of the document which dictated the coding decision. The results of these procedures comprise the following cahpter.

CHAPTER IV

RESULTS AND CONCLUSIONS

Introduction

This chapter reports the results of analyzing two hundred and seven first amendment opinions by William O. Douglas and offers conclusions about his judicial rhetoric in particular and that of the Supreme Court in general. The organization of the chapter follows the order of research questions posed in Chapter I. This study asked first whether judicial opinion could be generically classified according to the jurisprudential basis of its arguments. The first section of this chapter, therefore, discusses the data gathered in pursuit of that question and offers conclusions regarding rhetorical genres in judicial opinion.

The second question pursued here asked whether generic clusters characterized the judicial rhetoric of William O. Douglas, and if so, what they were and how they may be

classified. The second section of this chapter offers quantitative and critical observations addressing that question.

Finally, this study asked whether such generic clusters in Douglas' judicial rhetoric differed between majority and non-majority opinions. The final section of this chapter offers findings yielded by determining whether Douglas produced significantly more opinions of some types than of others.

The Internal Dynamic of Natural Law: The Argument from Ideal

Chapter II hypothesized that if natural law philosophy provided the warrant for recurrent rhetorical behavior, such arguments would "rely predominantly or exclusively upon such self-evident moral-deontic principles as justice, unalienable rights, fairness, and the dictates of reason. Such arguements," so the hypothesis went, "do not rely ultimately upon statute, precedent, or extra-judicial evidentiary materials."[1] One task of this study was to search Justice William O. Douglas' rhetorical defense of the first

---

[1] Supra, Chapter II, p. 4.

amendment for opinions based predominantly upon this "Argument from Ideal." The purpose of such a definition, drawn from legal philosophy and rhetorical theory, was to help avoid, in Holsti's term, a "fishing expedition," or "research unguided by broader theoretical considerations and undisciplined by a research design."[2] Such a theoretically based classification system, though, is only a beginning, for as Frye, Campbell, Jamieson, and others admonished in Chapter III,[3] the genre critic properly seeks clarification of the relationships among literary or rhetorical forms rather than remaining satisfied with the symmetry of an analytic framework. This section begins the goal of clarification by reporting first the results of classification.

Two hundred and seven of the three hundred and one cases retrieved by LEXIS were judged relevant to the present study under the criteria outlined in Chapter III. Table 1 (p. 204) depicts the percentages of opinions categorized by argument type.

---

[2]Ole R. Holsti, Content Analysis for the Social Sciences and Humanities, (Reading, Mass.: Addison-Wesley Publishing Company, 1969), p. 41. Also see generally, Chapter II, pp. 24-41.

[3]Supra, Chapter III, pp. 4-5.

Analysis of the eighteen (8.7%) opinions coded as Argument from Ideal produced two overall observations: first, William O. Douglas did indeed occasionally base an opinion upon tenets of natural law philosophy. While 8.7% of his career total for first amendment opinions is a small percentage, the fact that they are there at all deserves careful scrutiny. Natural law has been most typically conceived as the rationale for revolutionaries and religionists, not justices of the United States Supreme Court. But before concluding that Douglas occasionally indulged in jurisprudential excesses, we must note the second overall observation made about Douglas' use of the Argument from Ideal: all natural law arguments are not alike. Two sub-species of the genre were, in fact, evident. The first is what might be called the Thomist version of the argument,[4] while the second will be referred to as a "Natural Rights" version of natural law.

---

[4]This term by no means intends to suggest that Thomism can be reduced to a shorthand phrase. On the contrary, it is a complex and subtle web spun from such diverse strands as Stoicism, Aristotelian political theory, Augustinian Christian doctrine, and early medieval rationalism. For an excellent account of the philosophical influences upon Thomas Aquinas' Suma Theologica, see A. P. d'Entreves, Natural Law, 2nd ed., (London: Hutchinson University Library, 1970).

Argument from Ideal: The Thomist Sub-Species

The term "Thomist" is adopted because it best denotes an unadorned natural law ontology as its warrant. As Oxford's H. L. A. Hart, an eloquent spokesman for legal positivism observed, St. Thomas' proposition, "lex iniusta non est lex" ("an unjust law is not law"), remains the clearest and most coherent statement of the core of natural law philosophy, d'Entreves agreed that St. Thomas' system of natural law remained unsurpassed in perspicacity and eloquence and added an explanation of what is meant by "the doctrine of natural law as an 'ontology. . . . The ontological approach maintains that the very notion of natural law stands or falls on [an] identification [between] is and ought, between 'fact and values,'"[5] Aquinas himself articulated the political implication of this proposition when he asserted that if secular rulers (or, by implication, the laws enacted by them) "command things to be done which

---

[5]d'Entreves, "Three Conceptions of Natural Law," in M. P. Golding, The Nature of Law, (New York: Random House, 1966) p. 42. The reference to Hume is to his argument that the logical relationships between ought and ought not "are entirely different from" those between is and is not. Treatise of Human Nature, Book III, "Of Morals," quoted in Golding, p. 37.

are unjust, their subjects are not obliged to obey them."[6]

The "natural" lawyers were not indulging in abstractions in advocating the notion that unjust law could claim no binding obligation upon the people under their regime, and this insistence gave rise to their control clash with legal positivism. With an understated touch of satire, John Austin, the Englishman who fathered modern positivism, met the claim head-on:

> Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not law, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.[7]

---

[6]Aquinas, Summa Theologica, 2a-2ae, 104, 6. Quoted in d'Entreves, Natural Law, p. 46.

[7]John Austin, The Province of Jurisprudence Determined, Lecture VI (1832), reprinted in Golding, pp. 96-97.

It may be stark nonsense in John Austin's view, but William O. Douglas, on more than one occasion, based United States Supreme Court opinions on just such claims--that the citizen possessed the right, even the duty, to disobey unjust laws. This is the natural law ontology--the Thomist version of Argument from Ideal--the merging of being with value. But how does it look when published in United States Reports?

Two examples of the ontological, Thomist version of the Argument from Ideal should suffice.[8] The first came in the case of Poulos v. New Hampshire in 1953, in which the Supreme Court upheld the conviction of a Jehovah's Witness for conducting a religious service without first obtaining a permit. The specific issue was whether the citizen could disobey a law he believed to be unconstitutional. The Court said no, and Douglas in a dissent joined by Hugo Black, raised the notion of popular sovereignty to the level of natural law:

> . . . when a legislature undertakes to proscribe the exercise of a citizen's constitutional right to free

---

[8]It is most important to understand that these statements are not asides or afterthoughts, they are the basis of the entire opinion--the warrant which, to this researcher, appeared to undergird the total argument.

> speech, it acts lawlessly; and the citizen can take matters in his own hands and proceed on the basis that such a law is no law at all.[9]

When Douglas said that, he echoed verbatim St. Thomas' edict that "lex iniusta non est lex." The citizen's right to ignore positive laws stood out even more clearly in his next paragraph:

> No matter what the legislature may say, a man has the right to make his speech, print his handbill, compose his newspaper, and deliver his sermon without asking anyone's permission. The contrary suggestion is abhorrent to our traditions.[10]

The underlying epistemological inference Douglas implied in such arguments is also pure Thomism: In Aquinas' scheme, the "law of man . . . is that he should act in accordance with reason," and that "law is nothing else than an ordinance of reason," and that "the natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally."[11] So whence cometh the citizen's right to ignore or disobey duly enacted positive laws? From his reason--his innate ability to know good from evil, even though it may take the arcane form of constitutional from unconstitutional. Possessing this ability

---

[9]345 U.S. 395 (1953) at 423.

[10]Ibid. [11]Quoted in Golding, p. 15, 12.

to know, he is thus mandated to follow St. Thomas' "first precept of law, that good is to be done and promoted, and evil is to be avoided."[12] The civil rights struggle of the 1960's provided the backdrop for Douglas' most explicit statement of this warrant.

Prior to Easter weekend, 1963, a group of black ministers applied to Birmingham's Public Safety Commissioner, Eugene "Bull" Connor, for permits to parade on Friday and Sunday. They were denied the permits and issued an ex parte injunction prohibiting them from any sort of demonstrations or marches. They marched in defiance of the injunction, were arrested, convicted of contempt, and a 5-4 Supreme Court upheld the conviction. Justice William O. Douglas' dissent again conjoined the epistemological and political implications of Thomism by insisting that:

> The right to defy an unconstitutional statute is basic in our scheme. Even when an ordinance requires a permit to make a speech, to deliver a sermon, to picket, to parade, or to assemble, it need not be honored when it is invalid on its face.[13]

The full import of such a statement must take into account that the case in point involved defendants who were not

---

[12]Ibid, p. 18.

[13]Walker v. Birmingham, 388 U.S. 307 (1967) at 336.

trained jurists confronting not only laws, but court injunctions issued in their absence. Still, Douglas argued that they could defy the secular power: "An ordinance--unconstitutional on its face or patently unconstitutional as applied--is not made sacred by an unconstitutional injunction that enforces it. It can and should be flouted in the manner of the ordinance itself."[14] Douglas' use of the term "invalid on its face" twice seems to clearly mean that it is the citizen who makes that decision. If we equate the twentieth-century American manifestation of natural law as argued by William O. Douglas with the thirteenth-century version as argued by Thomas Aquinas, we see "constitutional and unconstitutional," "valid on its face--invalid on its face," as the rhetorical equivalent of "good and evil--just and unjust" with the corollary in both centuries being that "evil is to be avoided." Indeed, Father John C. Murray, S. J., a contemporary American natural law proponent, uses the term "justice is to be done and injustice avoided," and asserts it to be one of only two self-evident principles in natural law, the other being the maxim,

---

[14]Ibid., at 338.

"suum cuique."[15] The abstract doctrine of Aquinas excused subjects from obligation to obey unjust commands of their rulers; William O. Douglas' rhetorical stance in this dissent excused civil rights leaders from any obligation to obey "Bull" Connor's unconstitutional court orders.

Argument from Ideal: The Natural Rights Sub-Species

A second sub-species of the Argument from Ideal also emerged upon close textual analysis of the eighteen opinions placed in the category. In a number of opinions Douglas seemed to proceed from a "Natural Rights" version of natural law philosophy. This sub-species of the argument is very similar to the "Thomist" version just discussed, but differs in that these arguments identify a specific right as the defense for doing or forbearing from certain actions, and suggest that such rights are inherent in the human condition. They may proceed from man's "divine" qualities or his "rational" qualities, but they are in either case "unalienable" from action from the state. In addition to certain rights inhering in the human condition, Douglas argued that

---

[15]John C. Murray, SJ, We Hold These Truths: Catholic Reflections on the American Proposition, (New York: Sheed and Ward, Inc., 1960), p. 332.

they reside in the American condition. The jurisprudential upshot of this aspect of the argument is of signal importance.

Hans Kelsen, an influential proponent of legal positivism, pointed out the connection between metaphysical precepts like equal justice under law, popular sovereignty, or liberty and positive laws like the first amendment. In Kelsen's scheme, all positive laws derive their validity from super-ordinate laws. This leads to a regress up the "pedigree" until we reach the "basic norm." In the United States, the regress would eventually reach the Constitution, and Kelsen stipulated for any legal order "that the first constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of this legal order."[16] What Kelsen is implying is that once we reach the most basic positive law, we still have one step left in our search for the basic norm, and that step moves us outside the legal system and, ipso facto, into natural law. Kelsen went on to explain how natural law thus gains access to the positive legal order:

---

[16]Quoted in Golding, p. 127. (emphasis added)

> The basic norm is not itself a made, but a hypothetical presupposed norm; it is not positive law, but only its condition. Even this clearly shows the limitation of the idea of legal 'positivity.' The basic norm is not valid because it has been created in a certain way, but its validity is assumed by virtue of its content. It is valid, then, like a norm of natural law, apart from its merely hypothetical validity. The idea of a pure positive law, like that of natural law, has its limitation.[17]

This binding together of natural rights with positive legal rights reached rhetorical fruition in a number of Douglas' first amendment opinions.

The well-known case of Public Utilities Commission v. Pollak provided the first example, and one of the clearest, of how Douglas opened the positive legal order to natural law. In Pollak the Court ruled that city busses in the District of Columbia could retain the use of loudspeakers playing FM music and commercial announcements without violating the first or fifth amendments. Douglas felt otherwise, and dissented. In doing so he illustrated how natural law can provide the warrant for positive law:

> The case comes down to the meaning of 'liberty' as used in the Fifth Amendment. Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository

---

[17]Ibid., pp. 133-134. (emphasis added)

> of freedom. The right to be let alone is indeed the beginning of all freedom. . . . The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone.[18]

Clearly both the first and fifth amendments rest, in Douglas' view, on warrants outside the legal system. If, in the case of the fifth amendment, the right to be let alone is "the beginning of all freedom," and if, in the case of the first amendment, "its respect for the conscience of the individual honors the sanctity of thought and belief," we appear to have a paradigm case of a fundamental tenet of natural law: it is the function of positive law to sanction natural law. d'Entreves argued that "human laws must be established to draw out all the conclusions of natural law," so that ultimately, "all law, eternal and natural, human and divine, is linked together in a complete and coherent system."[19] William Douglas' examples of "Natural Rights" rhetoric compose just

---

[18]343 U.S. 451 (1952) at 467, 368.

[19]d'Entreves, Natural Law, p. 47.

such a coherent system with the Bill of Rights as the bridge between the "human and divine."[20]

Other cases reveal this rhetoric even more explicitly. In McGowan v. Maryland the Court sustained the validity of Maryland's "blue laws," and again, Mr. Justice Douglas dissented. Perhaps no clearer statement of positive laws functioning to sanction natural laws can be found than in this dissent:

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect. . . . The

---

[20]Two points should be kept in mind regarding Douglas' invocation of the Constitution as the probitive base of an argument. First, he used the document differently for different purposes. When supporting a natural law argument, he stressed the ideals upon which the document rests: popular sovereignty, individual dignity, natural rights, etc. When supporting a positive law argument by reference to the Constitution, Douglas stressed the rule manifestly stated in the document (e.g., "Congress shall make no law . . ."). Second, Douglas sometimes evinced a key tenet of natural law philosophy which stipulates that a function of the positive law is to give sanction to the natural law. Thus, when an article or amendment of the Constitution is made to serve as the bridge from what is to what ought to be, we must classify that argument on the basis of how the Constitution is being used rather than on the basis of its manifest content.

> body of the Constitution and the Bill of Rights enshrined these principles.[21]

The two aspects of this argument, that a higher moral law exists, and that its existence negates certain powers of the state are rhetorically (and philosophically) bridged by the Constitution, and especially the Bill of Rights, here metaphorically represented as a "shrine." The metaphor is not without significance--by building a shrine of positive laws rather than theological dogma, we construct the phenomenon of secularized natural law and thereby escape religion's near monopoly on the philosophy.[22]

The secular precept, in Kelsen's term the "basic norm," which provides the warrant for these arguments in numerous Douglas opinions is popular sovereignty. Popular sovereignty (suum cuique?) is asserted to be a higher moral law which by

---

[21] 366 U.S. 420 (1961) at 562.

[22] Father Murray's book, We Hold These Truths: Catholic Reflections on the American Proposition, although a lucid and valuable source on natural law philosophy, also exemplifies what results from the doctrine of separation of church and state taking a mental backseat to sectarian doctrine. For example: ". . . the principles of Catholic faith and morality stand superior to, and in control of, the whole order of civil life. The question is sometimes raised, whether Catholicism is compatible with American democracy. The question is invalid as well as impertinent; for the manner of its position inverts the order of values. It must, of course, be turned round to read, whether American democracy is compatible with Catholicism." (at pp. ix-x.)

its self-evident validity constrains grovernment from proscribing some specific right. His most unambiguous statement of the argument came in United States v. International Union of Automobile, Aircraft, and Agricultural Implement Workers of America in 1957. The second paragraph of his dissent began with the major premise that "Under our Constitution it is We the People who are sovereign. The people have the final say."[23] That statement is then linked to a specific right flowing from it: "First Amendment rights are part of the heritage of all persons and groups in this country." And, therefore, he concludes, government is powerless to alter such rights: "They are not to be dispensed with merely because we [the Court] or the Congress thinks the person or group is worthy or unworthy."[24]

The argument had been made five years earlier, but popular sovereignty as the basic norm was left at the implicit level in Douglas' dissent in Beauharnis v. Illinois, a case which upheld the group libel conviction of the defendant. Then Douglas said that the term, "shall not be abridged,"

> . . . is a negation of power on the part of each and every department of government. Free speech, free

---

[23]352 U.S. 567 (1957) at 593. [24]Ibid., at 597.

> press, free exercise of religion are placed separate and apart; they are above and beyond the police power; they are not subject to regulation in the manner of factories, slums, apartment houses, production of oil, and the like.[25]

Not surprisingly, Douglas' use of this argument form rarely occurred in majority opinions, but it was equally explicit when it did. In Girourard v. United States (1946) the Court ruled that an alien claiming conscientious objector status could not be denied citizenship for that reason alone. With characteristic clarity, Douglas based the Court's opinion on the natural rights version of the Argument from Ideal:

> The struggle for religious liberty has through the centuries been an effort to accomodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than sub-ordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.[26]

Once again, the norm of popular sovereignty is asserted, here more clearly than before in the form of "suum cuique" when Douglas points to "conscience of the individual" and "freedom of thought." That self-evident metaphysical

---

[25]343 U.S. 250 (1952) at 286. [26]328 U.S. 61 (1946) at 69.

postulate is seen ensconced in the positive legal order when he says that "our Bill of Rights recognizes. . . ." and we see that the government is thereby restrained: "Freedom of religion [is] guaranteed by the First Amendment . . . ."

Mr. Douglas' concurring opinion in Joint Anti-Facist Refugee Committee v. McGrath, Attorney General also provided a clear example of the rhetorical bridging of value postulates outside the positive legal order to specific provisions of the legal order itself. In this case, three organizations had sued in federal court for declaratory and injunctive relief, claiming that Attorney General McGrath's order placing their names on lists of subversive organizations had caused them irreparable damage. The District court granted McGrath a motion to dismiss, the Court of Appeals affirmed the motion, and the Supreme Court reversed, with Douglas concurring in that result. Again evident in this opinion is the notion of self-evidently valid postulates, by virtue of their inherent appeal, placing restraints on governmental action. The plaintiffs had objected mainly that the Attorney General's order had given them no opportunity to reply. This, Douglas argued, was forbidden, for "government

in this country cannot by edict condemn or place beyond the pale. The rudiments of justice as we know it, call for notice and hearing--an opportunity to appear and rebut the charge."[27] The rudiments of justice, natural rights possessed by all humans, are sanctioned for Americans, in Douglas' argument, again by the Bill of Rights: "Steadfast adherance to strict procedural safeguards is our main assurance that there will be equal justice under law."[28] In this case, then, the basic norm takes shape as "the rudiments of justice," and as "equal justice under law" rather than popular sovereignty, but still central to the argument is the rhetorically achieved link between moral norms and legal norms, between the "human and the divine."

What has been clarified, in this researcher's view, about William O. Douglas in particular is that he manifests arguments on occasion which rely ultimately upon "such self-evident moral-deontic principles as justice, unalienable rights, fairness, the dictates of reason, and so on." But further, the classification of 8.7% of his career first amendments as Argument from Ideal has yielded the clarification of how such arguments work--it has helped discover

---

[27]341 U.S. 123 (1951) at 178. [28]Ibid., at 179.

their "internal dynamic." In one sub-species of the argument, the Thomist as herein called, an ontological bond between existence and value--an unjust law is not a law--serves as the rhetorical warrant for the political behavior pursuant to it. But the argument must include epistemological elements as well as metaphysical--the citizen must be viewed as capable of knowing just from unjust, even constitutional from unconstitutional before he can, in Douglas' term, "flout" the law. The Thomist version of Argument from Ideal thus assumes a syllogistic form: Major Premise: An unjust law is no law; Minor Premise: Individual citizens possess the ability to know just from unjust; Conclusion: individual citizens are not obliged to obey laws they perceive as unjust.

The natural rights version of the Argument from Ideal proceeds from a similar syllogistic internal dynamic: Major Premise: Individual human beings are sovereign creatures with certain natural rights; Minor Premise: The Bill of Rights sanctions specific natural rights flowing from the doctrine of popular sovereignty; Conclusion: government is powerless to alter the sovereign rights of individuals since the rights of individuals were not granted by government.

All elements of the argument must be present in just this dynamic relationship, and in a number of opinions by William O. Douglas, it was manifestly there. Such a logical foundation is an absolute requirement for an argument destined to become part of the state papers of the country. Without each element present, the inferential leaps fall short and the argument fails. In Douglas' hands, though, it works. But a Supreme Court Justice of even Douglas' philosophical acumen and rhetorical skill is still a lawyer, still the propounder of a written Constitution and a body of common law, still the oracle of rules. Such rule-based arguments dominated Douglas' first amendment opinions on all measures, and it is to their classification and clarification that we now turn.

The Internal Dynamic of Legal Positivism: The Argument from Rule

The particular strain of American legal realism urged in the work of Columbia University's Underhill Moore came to be called "Institutional Behaviorism," a term implying that "a legal institution is the happening over and over

again of the same kind of behavior"[29] of human beings. In the present study, the concept of genre has been similarly defined, looking to recurrent rhetorical behavior for its bases. On such an accounting, the occurring over and over of the same rhetorical behavior, we arrive at the result that William O. Douglas has turned most often for his jurisprudential topoi not to the tenets of legal realism, but to legal positivism. Arguments conforming to the hypothesized Argument from Rule made up 56.6% of Douglas' first amendment opinions and were present to some degree in all but four years of Douglas' career. (see Table 2, p. 205). Having made this classification, we now turn to textual analysis of those one hundred and seventeen opinions and to the task of clarifying the relationships among them.

Argument from Rule: The Deductive Sub-Species

As with the Argument from Ideal, the Argument from Rule divided into two non-discrete sub-species. The first is best characterized as "deductive;" the second is analogic." In the "deductive" the argument proceeds from some explicitly

---

[29]Underhill Moore, "Rational Basis of Legal Institutions." Columbia Law Review 23 (1923), p. 609

stated rule (constitutional, statutory, or case law), to the particulars of the instant case, and hence, to the result. Ronald Dworkin described the process of reasoning underlying the deductive mode:

> 'textbook' rules are often given by courst as reasons for deciding a case or part of a case one way or another. It is possible, in some cases, to cast the entire argument of the court's opinion in the form of one or more syllogisms, in each of which the major premise is such a rule, the minor premise a statement of fact either agreed upon by the parties or determined in the proceedings, and the conclusion a statement of the final or an interim decision in the case.[30]

An early example of such argument from Douglas came in the landmark case of Murdock v. Pennsylvania in 1943. Here the Court, through Douglas' majority opinion, struck down a Pennsylvania statute requiring a license tax on colporteur evangelism, in this case as applied to Jehovah's Witnesses. One covering syllogism characterized the entire opinion: Major Premise: the first amendment prohibits taxes of expression; Minor Premise: the state law is a tax on expression; Conclusion: the state law is invalid. This result, of course, hinged upon the applicability of the first amendment to the states via the fourteenth amendment,

---

[30]Ronald Dworkin, "Judicial Discretion," The Journal of Philosophy 60 (October 10, 1963), pp. 625-626.

a rule established twelve years earlier in Stromberg v. California[31] and which Douglas frequently invoked. Here he simply said that the rights "in question exist apart from state authority. [They are] guaranteed to the people by the Federal Constitution."[32]

Note how this argument differs from the Argument from Ideal: he based this opinion upon explicitly identified human, i.e., positive laws without reference to either natural laws or natural rights. Under the coding procedures adopted herein the absence of reference to transcendent ideals leaves such an opinion resting on a positive law warrant.

This case also illustrated an aspect of legal positivism discussed in Chapter II, the practice of distinguishing or over-ruling cases as actually constituting Argument from Rule. Simpson explained that,

> distinguishing [or overruling] cases, which consists in giving reasons why a rule in a case ought not to be following or applied in a later case, is often conceived to be an indication that courts are not 'really' bound: in truth, earlier cases are distinguished, and have to be distinguished, just because they are binding, so that they ought to be followed unless a reason can be given for not following them; in much

---

[31]283 U.S. 359 (1931). [32]319 U.S. 105 (1943) at 115.

> the same way courts have to interpret statutes just because statutes are binding.[33]

Douglas demonstrated how such rule-based rhetoric works when he announced in Murdock that,

> The judgment in Jones v. Opelika has this day been vacated. Freed from that controlling precedent, we can restore to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tents of their faith through the distribution of literature.[34]

Only after demonstrating that the rules established in Jones v. Opelika[35] were no longer tenable could Douglas assert that the judges were "freed from that controlling precedent." He thus disposed of one rule while laying down the one that replaced it, and by doing so relied ultimately upon a rule-based rhetoric.

In Murdock, Douglas' argument became law by virtue of its being couched in a majority opinion. To the disappointment of most civil libertarians, the bulk of Douglas'

---

[33]A. W. B. Simpson, "The Ratio Decidendi of a Case and the Doctrine of Binding Precedent." in A. G. Guest, ed., Oxford Essays in Jurisprudence. (London: Oxford University Press. 1961), p. 159.

[34]319 U.S. at 117.

[35]The original Jones v. Opelika, 316 U.S. 584 (1942) is the case Douglas had reference to. The re-appeal, Jones v. Opelika, 319 U.S. 103 (1943) was a companion case with Murdock.

rule-based reasoning has yet to find its way into precedent. His dissent in the Roth v. United States obscenity case in 1957 provided an instructive example of how a justice may reject the Court's rules while simultaneously arguing from his own. This case, of course, initiated a series of attempts by the Court to deal with obscenity in a rule-governed way. To that end, they established, through Justice Brennan's majority opinion, the "Roth Test:" "The standard for judging obscenity . . . is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."[36] Justice Douglas rejected this legal rule, arguing that,

> By these standards punishment is inflicted for thoughts provoked, not for overt acts nor anti-social conduct. This test cannot be squared with out decisions under the First Amendment. Even the ill-starred Dennis case conceded that speech to be punishable must have some relation to action which could be penalized by government.[37]

Thus it was not rules per se that Douglas objected to in the Roth argument, for he invoked both the first amendment and precedent cases under it in attacking the rule in point. But he went further, and offered his own rule, one

---

[36]354 U.S. 476 (1957). [37]354 U.S. at 509.

which he would posit in numerous opinions, and one which Yale's Thomas I. Emerson developed in his monograph, Toward a General Theory of the First Amendment:[38] "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with action as to be an inseparable part of it."[39] It is noteworthy that Douglas went far beyond what Simpson asserted was "the minimum required before a judge may be said to act upon a legal rule." Simpson's requirements were that:

> (a) He should have a rule in mind when he decides to act. This does not mean that he should have in mind a precise formulation of a rule; a person may act upon a rule without thinking our a draft of a rule.
> (b) He should decide that the rule is applicable--that is to say he should decide that some fact or set of facts should be subsumed under the rule, and this will involve a task of classification.
> (c) He should deliberately so conduct himself that his conduct conforms to the conduct prescribed by the rule.[40]

---

[38]Thomas I. Emerson, Toward a General Theory of the First Amendment. (New York: Random House, 1966).

[39]354 U.S. at 514. One should note that Douglas' "speech brigaded with action" test is actually a highly evolved and much more subtle "clear and present danger" test, the standard which Justice Holmes first articulated in his dissent in Schenck v. United States, 249 U.S. 47 (1919).

[40]Simpson, p. 162

In his Roth dissent Douglas had in mind both established and hypothetical rules, he argued the inapplicability of those he rejected and the applicability of those he supported (two sides of the same logical process), and his rhetorical behavior comported with the rule itself.

One rhetorical impact of a rule-based argument coming in a dissent is that it cannot be lightly dismissed as, in Hughes' term, "an appeal to the brooding spirit of the law."[41] It is, rather, an appeal to the past wisdom of the law and in a system based on stare decisis causes something of a taller barrier for the majority to breach. Such was the case with Douglas' twenty-page dissent in Communist Party of the Unites States v. Subversive Activities Control Board in 1961. It took the Court's most adept practitioner of judicial restraint, Felix Frankfurter, one hundred eleven pages of majority opinion to state the other side. One reason may be that Douglas couched his dissent in a staunch Argument from Rule rhetoric and marshalled case after case to his cause. In his summation, Douglas wrote:

---

[41]Charles Evan Hughes, The Supreme Court of the United States, (Garden City, NY: Garden City Publishing Company, Inc., 1928), p. 68.

> From these precedents I would hopefully deduce two principles. First, no individual may be required to register before he makes a speech, for the First Amendment rights are not subject to any prior restraint. Second, a group engaged in lawful conduct may not be required to file with the Government a list of its members, no matter how unpopular it may be.[42]

He concluded by chiding the majority for distinguishing two cases he felt were relevant, NAACP v. Alabama and Joint Anti-Facist Committee v. McGrath, and implied that one of the most basic tenets of jurisprudence underlying legal positivism, that legal rules must be general rules, had thereby been violated: "When we reject those precedents, we create a special rule for this day only."[43] Rules are thus acceptable, indeed necessary and desirable, but not if they apply "for this day only."

One of Douglas' clearest uses of Argument from Rule in its Deductive form came a year later in his concurring opinion in Russell v. United States (there were six separate cases joined under this citation), a case which established the rule that congressional investigations must bear direct relation to some legitimate legislative function. While agreeing with that rule, Douglas went on

---

[42]367 U.S. 1 (1961) at 172. [43]367 U.S. 1 (1961) at 188.

to urge what John Austin called the "command theory" of law:

> When a subjective standard is introduced, the line between constitutional and unconstitutional conduct becomes vague, uncertain and unpredictable. . . . My idea is and has been that those who put the words of the First Amendment in the form of a command knew best. That is the political theory of government we must sustain until a constitutional amendment is adopted that puts the Congress astride the 'press.'[44]

Thus, Douglas based this opinion upon the desirability of deducing legal results and political behavior from superordinate general rules, a process impossible under "subjective standards:" An important insight regarding the epistemological justification for citizens disregarding positive laws discussed in the previous section of this chapter also emerged in this opinion. Given the objective standards Douglas insisted upon, not only jurists, but citizens as well, are better able to know where they stand vis-a-vis the law, are better able to recognize an "unjust" law, and can thus better know whether the particular rule is to be followed or flouted.

---

[44]369 U.S. 749 (1962) at 779. Douglas often suggested such a constitutional amendment as a means of curtailing expression, as if to dare someone to try it.

A final example of this deductive sub-species of Argument from Rule dually illustrated Douglas' proclivity to this sort of reasoning. The Court denied certiorari in President's Council, District 25 v. Community School Board #25 (1972), a case involving the banning of a book entitled Down these Mean Streets from the public schools of Queens, New York. Douglas dissented from the denial of certiorari, arraying an impressive number of similar cases which had been given their day in the Supreme Court, and argued that the case should be heard. From his brief, he deduced four rules for granting the petition: (1) "Actions of school boards are not immune from constitutional scrutiny." (2) "Academic freedom has been upheld against attack on various fronts." (3) "The First Amendment involves not only the right to speak and publish, but also the right to hear, to learn, to know." and (4) "And this Court has recognized that this right to know is 'nowhere more vital than in our schools and universities."[45] On the one hand Douglas cited previously established legal rules so that the Court could, on the other hand, establish another legal rule--he deduced

---

[45]409 U.S. 998 (1972) at 998-999.

from precedent the need for a deductive base from which to settle cases.

Argument from Rule: The Analogic Sub-Species

A second sub-species of the Argument from Rule, the analogic, at times surfaced in Douglas' first amendment opinions. As previously mentioned, a claim of mutual exclusivity between these types could probably not be sustained; they are better differentiated by a criterion of emphasis rather than identity. In this case, the sub-species of analogic Argument from Rule differs from the deductive Argument from Rule in that it proceeds from a less general rule, that is to say, a precedent case, rather than a generalized common law rule or a statute. However, such general rules remain an essential feature of the "internal dynamic" of the argument, but they are not its starting point. In Douglas' first amendment opinions, the analogic Argument from Rule (1) established a correspondence between the instant case and at least one precedent case, and (2) linked them both to a general rule, either statutory, constitutional, or case law. Lawrence Becker stipulated just such a progression as the criterion of validity for analogical reasoning in law:

> Clearly, what one looks for in a good dynamic analogy . . . is simply an object which has a property which can be 'yoked' to a property in its analog for the purposes at hand. Relevance, or validity (i.e., whether A and B are appropriately thought of as analogs for a given purpose) is decided here in just the way one decides the worth of a theoretical model: in terms of its consequences for predictive, explanatory, heuristic, or other tasks. . . . [Such arguments work] by yoking the supposed analogs together at the points at which their properties, given certain circumstances, yield intertranslatable results, useful predictions, or explanations.[46]

In this light, the notion of precedent--stare decisis--suggests that one case controls another not because it preceeds it, but because it predicts it--the two cases are "intertranslatable"--they could serve as precedents for each other. Thus, two cases are determined to possess relevant similarities which cause them both to be governed by a more general rule.

An early example of this argument form arose in Follett v. McCormick in 1944. Douglas based his opinion for the Court almost exclusively upon the Murdock opinion he had written for the Court the year before. In Follett the ruling invalidated a tax on book agents as applied to Jehovah's Witnesses. After noting the similarities with

---

[46]Lawrence C. Becker, "Analogy in Legal Reasoning," Ethics 83 (April 1973), p. 252.

Murdock, Douglas first observed that "freedom of religion is not merely reserved for those with a long purse,"[47] and then that such a tax "as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint."[48] Thus, factual situations characterized by license taxes, previous restraints, censorships, and the like, are (a) relevantly similar, and (b) prohibited by the general rule of the first amendment. Again, this argument emphasizes the rule function of a part of the Constitution rather than the ideals implicit in it.

A paradigm instance of the analogic Argument from Rule came in Douglas' opinion for a unanimous court in Fowler v. Rhode Island in 1953. The fact pattern in Fowler was virtually identical with the previous case of Niemotko v. Maryland[49] two years earlier: groups of Jehovah's Witnesses in both cases applied for permission to hold religious services in city parks, were refused, held their services in defiance of city officials, were arrested, convicted, and finally exonerated by the Supreme Court. Douglas

---

[47] 321 U.S. 573 (1944) at 576.

[48] 321 U.S. 573 (1944) at 577. [49] 340 U.S. 268 (1951).

disposed of Fowler with the pronouncement that "in Niemotko v. Maryland . . . we had a case on all fours with this one."[50] Implied in this shorthand phrase is the notion of translatable results, either case could predict the result of the other, for both come under a more general rule.

Perhaps the clearest statement of such analogic reasoning came in Douglas' dissenting opinion in Uphaus v. Wyman in 1960. The case originally came to the Court the year before,[51] was remanded to the New Hampshire courts, and was back on re-appeal. Dr. Willard Uphaus, Executive Director of World Fellowship, Inc., had been convicted of contempt for refusing to reveal the names of members of his group who had attended summer camps in New Hampshire. The Court ruled that New Hampshire's Attorney General Wyman could constitutionally demand membership lists from Uphaus. He refused and ultimately spent a year in jail. Douglas, whose opinion Black joined, vigorously dissented from the Court's ruling and linked the case to several others he saw as relevantly similar:

---

[50]Fowler v. Rhode Island, 345 U.S. 67 (1953) at 69.

[51]360 U.S. 72 (1959).

> World Fellowship, so far as this record shows, is as law-abiding as N.A.A.C.P. The members of one are entitled to the same freedom of speech, of press, of assembly, and of association as the members of the other. These rights extend even to Communists, as a unanimous Court held in DeJonge v. Oregon, 299 U.S. 353 (1937).
>
> What is an unconstitutional invasion of freedom of association in Alabama or in Arkansas should be unconstitutional in New Hampshire.[52]

Once again, the argument proceeds from the establishment of relevant similarity between two cases (either one of which could serve as precedent for the other), to a general statutory, constitutional, or case law rule which covers both situations.

Argument from Rule, as operationalized in this study, is thus seen to assume two forms, the deductive internal dynamic and the analogic internal dynamic. Both incorporate appeals to rules in their logic, but the former begins with rules and the latter ends there. The rule invoked or induced may be the U.S. Constitution, but it is used only as a source of legal rules, not of moral mandates, nor as a touchstone for transcendent ideals.

---

[52]364 U.S. 388 (1960) at 407-408. The reference to NAACP is to the case of NAACP v. Alabama ex rel, Patterson, Attorney General, 357 U.S. 449 (1958) in which the Court ruled that Alabama's attorney general did not possess the power to compel membership lists from that group in that state.

But what appeals may a judge opt for if not for ideals or rules? The legal realists, who claim Douglas as one of their own and who are embraced by him as colleagues, would answer: social goals, social situations which dictate decisions, or perhaps the inability to state rules or agree upon facts. Such rhetorical bases of judicial opinion are herein called the Argument from Context and it is to the classification and clarification of these arguments that this chapter now proceeds.

The Internal Dynamic of Legal Realism: The Argument from Context

Chapter II of this study hypothesized that if the tenets of legal realism formed the warrant for a recurrent pattern of judicial argument, such a rhetorical genre, "while possibly referring to statutory or case-law rules, [would] in fact rely upon reference to social goals for support and [would] typically stress the exigencies of the instant case or extra-judicial evidentiary materials." To test this hypothesis, as with the two previously hypothesized genres, two hundred and seven of Douglas' first amendment opinions were analyzed, with the result that seventy-two, or 34.8% (see Table 1, p. 204) were judged to rely upon such warrants.

But once again, a potential rhetorical genre will not reveal its internal dynamic on the basis of classification alone, and we therefore turn to the task of clarification.

Argument from Context: The Sociocentric Sub-Species

Three sub-species of the Argument from Context emerged upon textual analysis of the seventy-two opinions classified as flowing from legal realism, each typifying a particular aspect of that legal philosophy, but again, none of which could sustain a claim of mutual exclusivity from the others. The first is what may be called the "sociocentric" Argument from Context, the second is characterized as the "relativistic," and the third will be referred to as the "exigential."

Sociocentric Arguments from Context were decided predominantly by reference to social goals and/or social effects. These arguments case closest to typifying a sociological jurisprudence--the view that legal institutions are best understood as being socially embedded, reacting to and impacting upon the society around them. This court-centered view features judges as its focal point and expects them to argue from a desire to achieve social goals or an intent to produce or prevent social effects. Douglas' first amendment opinions provide a rich inventory of such rhetoric.

The cold war mentality of the 1950's gave rise to a plethora of governmental committees charged with insuring the loyalty of public employees. Tenney v. Bandhove came to the Court in 1951 from California, testing the question of whether the privileges and immunities afforded state legislators extended to the investigative function of committees. The majority held that the first amendment granted immunity for such functions, and Douglas dissented. He did not entirely reject the need for immunity, but was clearly motivated in this argument by concern with the social pressures which spawned such committees and by dismay with the social effects they were capable of producing:

> . . . we are apparently holding today that the action of those committees have no limits in the eyes of the law. May they depart with impunity from their legislative functions, sit as kangaroo courts, and try men for their loyalty and their political beliefs? May they substitute trial before committees for trial before juries? May they sit as a board of censors over industry, prepare their blacklists of citizens and issue pronouncements as devastating as any bill of attainder?[53]

What emerged rather clearly in Douglas' Tenney dissent was the sociological view of legal institutions, in this case both of legislatures and of courts. He recognized the

---

[53]341 U.S. 367 (1951) at 382.

social impact of the investigative arm of the state legislature, and sought to curb its undesirable effects with the judiciary's power of review.

Schools and teachers were a popular target in the 1950's for those wanting to safeguard Americanism. To this end, New York passed the "Feinberg Law," aimed at purging "subversive persons from the public school system." The Supreme Court sustained the law and again, Douglas dissented, this time producing one of the more stirring opinions of his career:

> What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. A 'party line'--as dangerous as the 'party line' of the Communists lays hold. It is the 'party line' of the orthodox view, of the conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer a stimulant to safe and sound information; she becomes instead a pipeline for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become servile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.[54]

---

[54]Adler v. Board of Education of the City of New York, 342 U.S. 485 (1952) at 510.

When deTocqueville suggested in the nineteenth century that virtually every problem in American life eventually found its way to the Supreme Court, even he probably would not have guessed that his observation would hold true for the most intimate problems of the bedroom. Yet that is precisely what Poe v. Ullman brought to the Court in 1961, the right of a husband and wife to receive from their doctor information regarding birth control. In this case, the Court sustained lower court rulings which Douglas' dissent argued would have the effect of "sealing the lips of a doctor because he desires to observe the law, obnoxious as the law may be."[55] Such a result, he argued, culminated in social effects which were unacceptable:

> The regime of a free society needs room for vast experimentation. Crises, emergencies, experience at the individual and community levels produce new insights; problems never imagined, appear. To stop experimentation and the testing of new decrees and controls is to deprive society of a needed versatility.[56]

---

[55]367 U.S. 497 (1961) at 514-515.

[56]367 U.S. 497 (1961) at 518. This case was overruled by Griswold v. Connecticut, 381 U.S. 479 (1965), a case in which Douglas wrote the Court's opinion and cited this dissent for support.

What is evident in these two cases is Douglas' reliance upon the sociocentric Argument from Context in order to alleviate or produce certain social effects; in one case in the area of state government, in the other in the area of medicine. Six years later his own profession was drawn in by this argument.

The emergence of poverty law centers in the 1960's was among the more pragmatic results of the civil rights struggle. But when Hackin v. Arizona came before the Supreme Court in 1967 testing the extent to which the indigent were entitled to counsel, the Court, per curiam, dismissed the appeal for want of a federal question. Douglas dissented. In two ways his opinion in Hackin illustrated how a judicial argument may find its warrant in the philosophy of legal realism. First, he stressed the interplay between the legal profession and the society it serves:

> . . . to millions of Americans who are indigent and ignorant--these rights [that lawsuits are protected speech under the first amendment, see N.A.A.C.P. v. Button, 371 U.S. 415 (1963)] are meaningless. They are helpless to assert their rights under the law without assistance. They suffer discrimination in housing and employment, are victimized by shady consumer sales practices, evicted from their homes at the whim of the landlord, denied welfare payments and endure domestic strife without hope of the legal

> remedies of divorce, maintenance, or child custody decrees.[57]

Second, in the style of the "Brandeis Brief"[58] named for his philosophical and chronological progenitor, Douglas footnoted the above passage with citations, not to legal precedents, but to ten major sociolgoical studies of poverty and the law. Such reliance upon extra-judicial sources is a product of the twentieth century almost exclusively, and of legal realists typically. The sociocentric Argument from Context may have reached its zenith in Chief Justice Earl Warren's majority opinion in Brown v. Board of Education,[59]

---

[57]389 U.S. 143 (1967) at 145.

[58]The "Brandeis Brief" is a term of describing an approach to legal argumentation first introduced by Attorney Louis D. Brandeis when he argued Muller v. Oregon, 208 U.S. 412 (1908) before the Supreme Court. Johnson wrote that the "Brandeis Brief" introduced a "new technique in the weighing of constitutional issues. This occurred when Mr. Louis D. Brandeis handed the Court . . . his famous brief, three pages of which were devoted to a statement of the constitutional principles involved and 113 pages of which were devoted to the presentation of facts and statistics, backed by scientific authorities, to show the evil effects of too long hours on women, 'the mothers of the race.'" Johnson, Social Planning Under the Constitution, 2 Selected Essays (1938) 131, 145. Quoted in Edward L. Barrett, Jr., and Paul W. Bruton, eds., Constitutional Law: Cases and Materials, (Mineola, New York: The Foundation Press, Inc., 1973) p. 700.

[59]347 U.S. 483 (1954).

an opinion which relied heavily upon studies by the prominent b ck social psychologist, Dr. Kenneth Clark.[60] Douglas, however, was never more forceful than when making such arguments, and diverse areas of American society came under his scrutiny as he relied upon them. Two final examples should suffice.

In 1972 Healey v. James brought to the Court the question of whether a state college president could constitutionally deny recognition to a proposed chapter of Students for a Democratic Society (SDS) on his campus. Justice Powell's majority opinion ruled that he could not, and Douglas concurred. But the warrant from which Douglas argued was not ruled-based, but sociocentric, stressing goals to which the good society should aspire:

> The present case is miniscule in the events of the '60's and '70's. But the fact that it has come here for ultimate resolution indicates the sickness of our academic world, measured by First Amendment standards. Students as well as faculty are entitled to credentials in their search for truth. If we are to become an

---

[60] See generally: Archibald Cox, The Warren Court: Constitutional Decisions as an Instrument of Social Reform (Cambridge: Harvard University Press, 1968): Abraham Davis, The United States Supreme Court and the Uses of Social Science Data (New York: MSS Information Service, 1973); and Paul L. Rosen, The Supreme Court and Social Science (Urbana: University of Illinois Press, 1972).

> integrated, adult society, rather than a stubborn status quo opposed to change, students and faculties should have communal interests in which each age learns from the other. Without ferment of one kind or another, a college or university (like a federal agency or other human institution) becomes a useless appendage to a society which traditionally has reflected the spirit of rebellion.[61]

No doubt the single most important Supreme Court case affecting mass media in America was Red Lion Broadcasting Co. v. FCC, 345 U.S. 367 (1969), which gave constitutional sanction to the Fairness Doctrine.[62] Much to the dismay of many students of the Court, Douglas' health prevented him from taking part in the Red Lion dicision. However, four years later he had his opportunity to speak to the wisdom of the Fairness Doctrine and in doing so he authored what was his last great first amendment opinion. The case was Columbia Broadcasting System v. Democratic National Committee, and in it the Court ruled that the Fairness Doctrine did not require individual licensees to sell commercial time for the purpose of editorial announcements. Two groups, the DNC and the Business Executives Move for

---

[61]408 U.S. 169 (1972) at 107.

[62]For copious background information on the Red Lion case and other significant legal developments in broadcast regulation, see Fred W. Friendly's excellent work, The Good Guys, The Bad Guys and the First Amendment (New York: Random House, 1975).

Peace had taken a Washington radio station, WTOP, to court in their attempt to broadcast anti-war editorials. The Court of Appeals ruled in favor of the two groups, invoking the Fairness Doctrine. But the Supreme Court, on a 7-2 vote, reversed, Chief Justice Burger's opinion saying, in part, "editing is what editors are for." Douglas took this opportunity to say what he had been unable to say in Red Lion. Concurring with the majority, he argued from the sociocentric Argument from Context that governmental intrusion into the television industry would provoke undesirable effects:

> Red Lion Broadcasting Co. v. FCC, . . . in a carefully written opinion that was built upon predecessor cases, put TV and radio under a different regime [from newspapers]. I did not participate in that decision, and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV and radio in order to serve its sordid or benevolent ends. In 1973--as in other years--there is clamoring to make TV and radio emit messages that console certain groups.[63]

The prospect of government compelled speech--forcing broadcasters to "emit messages"--was one Douglas feared and one

---

[63]412 U.S. 94 (1973) at 154-155.

which remains at the center of debate on the social utility of the Fairness Doctrine.

Argument from Context: The Relativistic Sub-Species

A second sub-species of the Argument from Context finds its roots in the rule and fact skepticism of Jerome Frank.[64] Recognizing the inescapable variability of human judgment, the skeptics argued that the law "consists of decisions, not of rules,"[65] with the upshot being that there are some areas of conduct in which courts should not be making decisions. Thus, the sub-species of argument based upon this aspect of legal realism may be called the "Relativistic" Argument from Context. Douglas' opinions in the area of obscenity and pornography relied heavily upon this type of argument, one which basically denies the possibility of making aesthetic judgments capable of winning universal support, and therefore concludes that such decisions are no business of courts and judges and juries.

An early statement of this position came in Douglas' opinion for the Court in Hannegan v. Esquire in 1946.

---

[64]See Jerome Frank, Law and the Modern Mind (New York: Anchor Books, 1963), originally published by Bretano's, 1930.

[65]Ibid., p. 138.

Postmaster General Hannegan had revoked the second class mailing privileges of Esquire magazine upon a finding that the periodical failed to meet one condition of Section 14 of the Classification Act of 1879, stipulating that publications entitled to the lower rate must contain "information of a public character" and thus contribute to the public good. The Court vacated Postmaster General Hannegan's order, and Douglas argued from the relativistic Argument from Context that in passing the legislation Congress never intended,

> . . . that each applicant for the second class rate must convince the Postmaster General that his publication positively contributes to the public good or public welfare. Under our system of government there is an accomodation for the widest variety of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There would doubtless be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus and Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic [idea] implicit in the requirements of the fourth condition can be served only by uncensored distribution of literature. From the multitude of competing offerings the public will pick and choose. What seems to me to be trash may have for others fleeting or even enduring values.[66]

---

[66]327 U.S. 146 (1946) at 157-158.

The 1957 term of the Supreme Court saw a number of obscenity cases from various parts of the country. In Kingsley Books v. Brown Douglas posted a dissent which foreshadowed his dissent sixteen years later in Miller v. California. The epistemological and aesthetic relativism characteristic of legal realism was clearly stated here as Douglas observed that,

> Juries or judges may differ in their opinions, community by community, case by case. . . . Free speech is not to be regulated like diseased cattle or impure butter. The audience (in this case the judge or jury that hissed yesterday) may applaud today, even for the same performance.[67]

In Ginzburg v. United States in 1966 the Court continued the process begun nine years earlier in Roth of attempting to formulate objective tests for the judicial determination of obscenity. Here Ralph Ginzburg was charged with obscenity as manifested in three of his publications: Eros and Liason magazines, and a monograph entitled The Housewife's Handbook on Selective Promiscuity. The final aspect of the "Roth Test Revised" was added in this case, the so-called "pandering" element. The Court reached its finding of obscenity, in part at least, because Ginzburg,

---

[67]354 U.S. 436 (1957) at 443.

who had attempted to obtain mailing privileges in the towns of Blue Ball and Intercourse, Pennsylvania and Middlesex, New Jersey, was found guilty of possessing "the leer of the sensualist." As Professor Emerson pointed out, Douglas' dissent "stressed the elusiveness of all the standards which have been proposed."[68] The opinion, perhaps the clearest example of the Relativistic Argument from Context, began with a citation from Jerome Frank's circuit court opinion in the Roth case and then proceeded to posit a number of unanswerable questions typical of rule and fact skepticism:

> How can we know enough to probe the mysteries of the subconscious of our people and say that this is good for them and that is not? Catering to the most eccentric taste may have some 'social importance' in giving that minority an opportunity to express itself rather than to repress its inner desires. . . . How can we know that this expression may not prevent antisocial conduct?[69]

Argument from Context: The Exigential Sub-Species

A third sub-species of the Argument from Context emerged in Douglas' first amendment opinions. This type might be called the "exigential," for it allows the decision to be

---

[68]Thomas I. Emerson, David Haber, and Norman Dorsen, Political and Civil Rights in the United States, Student Edition, Vol. I (Boston: Little, Brown and Company, 1967), p. 656.

[69]383 U.S. 463 (1966) at 491.

dictated primarily by the pecularities of the instant case. Karl Llewellyn's article, "Some Realism About Realism" in the 1922 Harvard Law Review provided insight into this type of argument when he wrote that the realists,

> . . . want law to deal . . . with things, with people, with tangibles, with definite tangibles, and with observable relations between tangibles--not with words alone; when law deals with words, they want words to represent tangibles which can be got at beneath words, and observable relations between those tangibles.[70]

This, of course, was not to suggest that the legal realists wanted law to become a disconnected sequence of ad hoc decisions, with no memory of precedent cases and no reference to generalized legal rules. It simply meant that on occasion, the "tangibles" would provide the point of departure from whence the judge reasons to the rule, instead of vice versa, and as Douglas pointed out in E.P.A. v. Mink, "the starting point of a decision usually indicates the result."[71] Again, this argument type is differentiated from rule-based arguments in terms of rhetorical emphasis, not on the basis of the absolute absence of reference to cases or statutes. Such reliance upon the predominant theme as the basis of the

---

[70]Karl Llewellyn, "Some Realism About Realism," Harvard Law Review 44 (1922), p. 1223.

[71]410 U.S. 73 (1973) at 105.

coding decision is usually necessary when (as in this study) the entire document is used as the coding unit.

Douglas invoked this argument form in 1947 in the case of Craig v. Harney when he pointed out that often the Supreme Court is required to make "an independent examination of the facts."[72] The facts requiring such an independent examination in this case related to a series of editorials rather vigorously attacking a judge in a local trial. The papers were charged with contempt, convicted, and appealed to the Supreme Court where through Douglas' majority opinion, their convictions were reversed. Looking to the editorials and their probable impact upon the judge's impartiality, Douglas wrote:

> . . . it takes more imagination than we possess to find in this sketchy and one-sided report of a case any imminent or serious threat to a judge of reasonable fortitude. . . . We agree with the court below that the editorial must be appraised in the setting of the news articles which both preceded and followed it. It must also be appraised in light of the community environment which prevailed at that time.[73]

The rule to which this analysis of the "tangibles" was intended to infer was the "clear and present danger test," but this argument was distinct from the Argument from Rule

---

[72]331 U.S. 367 (1947) at 373. [73]Ibid., at 375-376.

for it clearly emphasized the facts of the case and not the rule itself.

A similar result was reached in Douglas' oft-quoted dissent in Dennis v. United States, one of the leading Communist conspiracy cases of the 1950's. In Dennis, the Court sustained the convictions of twelve members of the Central Committee of the Communist Party of the United States for violating the membership clause of the Smith Act. Addressing himself to the notion of advocacy of abstract doctrine, Douglas asserted that "how it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery. . . . in America they [Communists] are miserable merchants of unwanted ideas; their wares remain unsold."[74] In the absence of evidence on the record that such advocacy would in fact result in the overthrow of our system of government, Douglas argued, the first amendment afforded protection to the defendants. Thus, the Exigential Argument from Context may be seen to reply upon factual evidence, or the lack of it, when such evidence is deemed relevant to the decision. Reference to

---

[74]341 U.S. 494 (1951) at 588-589.

a legal rule is often the result of such an argument, but is not the basis of it.

A final example of how Douglas argued from the exigencies of the instant case to a rule, with emphasis upon the former, also arose in the context of what Emerson called "the post-war hysteria known as McCarthyism."[75] The Court denied certiorari in Black v. Cutter Labs, a case involving the dismissal of an employee on the grounds that she was a security risk. Douglas argued that the case should be heard, and his opinion relied predominantly upon the Exigential Argument from Context:

> Cutter Laboratories is an important pharmaceutical factory. It may need special protection. It may need to establish safeguards against sabotage and adulteration. It may need special screening of its employees. But there is not a word in the present record indicating that it needs protection against Doris Walker. She has no criminal record, she is guilty of no adulteration, no act of sabotage. The factory in question has not been plagued with any such problem. It is only the fear that Doris Walker might at a future time engage in sabotage that is made the excuse for her discharge. I do not think that we can hold consistently with our Bill of Rights that Communists can be proscribed from making a living on the assumption that wherever they work the incidence of sabotage rises or that the danger from Communist employees is too great for critical industry to bear.

---

[75]Thomas I. Emerson, The System of Freedom of Expression (New York: Vintage Books, 1970), p. 112.

> The blunt truth is that Doris Walker is not discharged for misconduct but either because of her legitimate labor activities or because of her political ideology or belief. Belief cannot be penalized consistently with the First Amendment.[76]

The dominant theme of this opinion was thus an analysis of the factual situation--the tangibles--which then led to a generalized rule, in this case the first amendment.

An inductive internal dynamic thus differentiates the Argument from Context from the deductive internal dynamic of the Argument from Rule and the Argument from Ideal. In the first sub-species, the sociocentric, the same inductive progression underlies the argument--specific social situations, social contexts, social goals as manisfested in specific cases, lead to but do not rely upon, generalizations taking the form of common law, statutory, or constitutional rules. The relativistic sub-species of the Argument from Context uses inductive processes, but with a different result. Here the judge-rhetor reads the contrariety of situations, the aesthetic and/or epistemological variability inherent in value judgments, and reasons to the rule that there can be no rule to accomodate such disparate situations. Finally, the exigential Argument from Context is based upon factual

---

[76]351 U.S. 292 (1956) at 302-303.

phenomena and views them as controlling. The judge proceeds from such facts to a rule, and that sequence of the argument distinguished it from positivistic (i.e., syllogistic) arguments.

The Case for Rhetorical Genres in Judicial Opinion

The foregoing discussion of William O. Douglas' first amendment opinions has attempted to answer the first question posed in this dissertation: Can judicial opinion be generically classified according to the jurisprudential basis of its argument? On the Basis of analyzing two hundred and seven of William O. Douglas' first amendment opinions, there appears to be sufficient evidence for a qualified affirmative answer to that question.[77] The hypothetical definitions of the genres were drawn both from legal philosophy and rhetorical theory, and Douglas' actual rhetorical behavior was observed to be consistent with the hypothesized argument forms. But it is most important to note that rhetorical genres are also determined as much by rhetorical elements that are not present as by those that are. By avoiding or subordinating certain rhetorical responses to certain

---

[77]The qualifications of this affirmative answer will be taken up in Chapter V of this study.

situations, the remaining array of options is correspondingly limited, thereby contributing to a recurring pattern of rhetorical practice--a "cluster" in Edwin Black's term. The import of this observation for the present study is that the asserted exhaustiveness of the categories was demonstrated to be correct. No opinions were encountered that could not be coded as being predominantly founded in one of the hypothesized genres. It is fairly typical of content analytic studies to have a "miscellaneous" category to accomodate the "left overs"--the coding units that failed to fit any of the hypothesized classes. Of course, many of the opinions contained aspects of more than one genre, but first, none were encountered which were not predominantly warranted in one of the genres, and second, none were encountered which argued from warrants unrecognizable as one of the three hypothesized herein--there were no "left overs." The refusal to abandon a hypothesized category system when nature refuses to be tortured into it is a pitfall of social science encountered all too often; no reason for giving up on this category system was found.

The institutional constraints discussed at length in Chapter II were seen to cut across all three jurisprudential-rhetorical genres. Regardless of whether a justice argues

from Ideal, from Rule, or from Context, he remains constrained by the stylistic and mechanical conventions of the Court for which he speaks. He cannot disregard either statute, precedent, or Constitution; he cannot disregard the variety of audiences his opinion will have; and he rarely can disregard the opinions posted by his colleagues.

Thus all Supreme Court opinions may be said to belong to an "institutional" genre, but that alone does not constitute a rhetorical genre. For that, the mechanical and stylistic constraints inhering in the institution must merge with substantive philosophical and argumentative elements into an internal dynamic that pulls all the factors together into a coherent whole, a recognizable cluster formed along a rhetorical continuum. Three such clusters formed in Douglas' first amendment opinions. Whether we may, on this evidence, classify Douglas himself--whether in Richard Weaver's term we have a "characteristic major premise" recurring frequently enough to justify a claim that it "characterizes the user"[78]--was the second major question

---

[78]Richard Weaver, The Ethics of Rhetoric (Chicago: Henry Regenery Company, 1970), p. 56.

raised in this study, and we turn now to the evidence produced here for answering it.

Rule-Based Rhetoric and the First Amendment: The Douglas Dynamic

The second major question raised in this study asked: "are there generic clusters in William O. Douglas' first amendment opinions, and if so, what are they and how can they be characterized?" It was necessary to first establish whether there was reason to believe rhetorical genres existed at all in judicial opinion before moving to this question. The previous section of this chapter reported the results of analyzing his first amendment opinions and argued on the basis of that analysis that such genres probably do typify rhetorical responses to judicial exigencies. Assuming the validity of the category system which guided that analysis, the finding emerged that when addressing first amendment issues, Douglas adopted the Argument from Rule--the legal positivist warrant--in 56.5% of his opinions (see Table 1, p. 204).

To conclude from the quantitative domination of the Argument from Rule that Douglas was not the "supreme expositor from the bench of the philosophy of legal

realism,"[79] as Dean Sovern claimed, is a tempting, but not entirely warranted, conclusion. First, Sovern may only have meant that Douglas did it better than anyone else, a claim this researcher is not prepared to dispute. Second, until such time as comparison studies on other justices could be made to determine the extent to which they relied upon the Argument from Context--Justices like Holmes, Hughes, Cardozo, Brandeis, and Black, for example--we cannot say who couched his rhetoric in realist philosophy most often. Douglas may indeed have done so both better than anyone else and more often than anyone else as well, but presently we cannot say either with certainty. Third, to place disproportionate faith in quantitative evidence would be to assume incorrectly that frequency of occurrence is the most valid indicator of salience or significance of a content datum to the encoder. This study found, for example, that Douglas relied upon natural law arguments in only 8.7% of his first amendment opinions. The finding of a comparison study that Justice Rehnquist, for example, never relied upon such arguments, would cast a somewhat

---

[79]Michael I. Sovern, "Mr. Justice Douglas," Columbia Law Review 74 (1974), p. 345.

different light upon such a small figure. Similarly, if we discovered that Douglas' 8.7% figure represented a significantly greater reliance on natural law rhetoric than say Holmes or Hughes, then the importance of the mere presence of such arguments would transcend their relative frequency or infrequency, and much different critical responses would be in order. Finally, and most importantly, two points made earlier must be reiterated. First, reliance upon precedents, laws, and constitutional provisions is a way of arguing in an opinion which is largely expected by all audiences related to the Supreme Court as an institution, an expectancy forming perhaps the most powerful constraint on a justice's rhetorical options. Second, and following from the point just noted, rhetoric is not religion, a judge is not baptized into a jurisprudential faith from which he never wavers. Different exigencies produce different responses--when such responses cluster consistently over long periods of time and in many cases, they may form a genre, but not a denomination.

But despite all these cautions, the fact remains that arguments typical of legal positivism and not legal realism dominated the first amendment opinions of Justice Douglas

throughout his tenure on the Court, and that is a finding at odds with the overwhelming body of critical comment regarding his philosophical orientation. If we adopt the skeptical attitude of the realists themselves, and insist that behavior alone counts above all else in the study of legal institutions, then the rhetorical behavior of William O. Douglas in his first amendment opinions must surely create some doubt about the extent to which he utilized legal realism.

The Rhetoric of Majority and Dissent: Measuring the Received Wisdom

The final question this study sought to answer was whether William O. Douglas argued from different rhetorical-jurisprudential bases in majority opinions than in non-majority opinions. Within the methodological framework employed in this study, the answer to that question is an emphatic no. The obvious disclaimer in order is that just as there are "as many ways of finding the ratio of a case as there are ways of finding a lost cat,"[80] there are as many ways of slicing a rhetorical cheese as there are

---

[80]Simpson, p. 159

critical mice to nibble at it. Replicability is not a prime objective of the critical method. But genre criticism, properly conceived and clearly operationalized, may hold more promise of getting critical responses to rhetorical artifacts somewhat more consistent with one another and thereby move us somewhat closer to the goal of theory building in rhetorical criticism and rhetorical practice. Another critic examining Douglas' first amendment opinions from a non-generic perspective might find differences between the rhetoric of majority and non-majority opinions, especially if that is what he was looking for. But by combining the genre approach derived from legal philosophy and rhetorical theory with the systematic and quantitative approach of content analysis, no such differences were found, despite the substantial and persuasive body of scholarship claiming that they should be there. The logic of this argument perhaps should be made explicit. If the category system adopted herein is valid (i.e., exhaustive of rhetorical options as manifested in jurisprudential orientation), and if it were followed uniformly in assigning coding units to categories, and if the statistical analysis of differences between categories were properly performed, then based on the present

analysis of Douglas' first amendment opinions, the received wisdom that the rhetoric of majority and non-majority opinions is vastly different is due for closer scrutiny. Such procedures might even prove to be replicable.

Tables 3, p. 207 and 4, p. 208 display the frequencies and percentages of majority and non-majority opinions respectively by genre. The chi square test[81] indicated that these frequencies represent differences significant at the $p < 0.001$ level, meaning that regardless of whether he was in the majority or dissent, Douglas displayed a dominant preference for rule-based arguments. Table 5, p. 209 however, displays what may be the most important finding of the present study. When the frequencies of majority opinions occurring in each genre are compared with the non-majority frequencies for each genre, differences in statistical significance at the $p < 0.05$ level were not found, meaning that whether he argued from Ideal, Rule, or Context, the opinion type was not a factor sufficiently strong to predict Douglas' generic choices.

---

[81]The chi square formula adopted in this study was taken from Frederick Williams, Reasoning With Statistics, 2nd ed., (New York: Holt, Rinehart, & Winston, 1979), pp. 106-110.

When his opinions were broken down into the four sub-types (see Table 6, p. 210), both of these findings held true, there was no significant difference between majority and non-majority rhetorical options--a uniform preference for the Argument from Rule across opinion types recurred. This genre accounted for no less than 50.5% of any opinion sub-type and reached a high of 73.3% in the case of procedural dissents. And finally, when the majority and non-majority groups were independently analyzed, the same result recurred, no statistically significant differences between the sub-types of either group were found (see Tables 7, p.211 and 8, p. 212).

Two inferences seem warranted from these data. First, even further reason to doubt the characterization of Douglas as a legal realist is now on the record. The four opinion types identified are exhaustive and the generic classifications are exhaustive and no differences of statistical significance emerged upon analyzing any combination of them. If, as assumed from the beginning of this study, a judge's opinions are the appropriate place to look for his legal philosophy and rhetorical proclivities, then these findings must be taken into account in any evaluation of Justice

Douglas. Second, these data raise serious questions about the often asserted differences between the rhetoric of majority and non-majority opinions. If replicability is not a goal of rhetorical criticism, accuracy certainly is and perhaps only through analyzing large numbers of objectively selected opinions--majority and dissent--can we get an accurate picture of their nature. This is clearly a case of bringing to fruition Edwin Black's summation of his case for genre criticism when he wrote that,

> . . . if one of the major objectives of rhetorical criticism is to enrich our understanding of the rhetorical uses of language critics can probably do their work better by seeing and disclosing the elements common to many discourses rather than the singularities of a few.[82]

The critic armed with a more narrow perspective may very well be unduly influenced by the grand language of a Cardozo or a Hughes and thus go out and "find" that dissents which "appeal to the brooding spirit of the law,"[83] are vastly different from majority opinions. But such research would tell us nothing of what was <u>not</u> found by <u>not</u> looking at large numbers of both majority and non-majority opinions. The genre approach, coupled with content analytic techniques

---

[82]Black, pp. 176-177. [83]Hughes, p. 68.

forces the critic to look at the dull as well as the stirring opinions and a more accurate critical appraisal emerges as a result.

A fairly common occurrence in studies of the scope of this one is to find more than one set out to find. Sometimes such findings are significant, sometimes trivial, most times interesting. It is not unheard of for the researcher to, post hoc, alter the intent of the study in order to accomodate the findings. That, however, was no temptation presently for the "extra" findings here came as no particular surprise. They do, though, provide some quantitative support, although qualified, for existing assertions that Douglas was a judicial "loner," meaning that he had a disproportionate incidence of dissents. Over his entire career, first amendment dissents outnumbered majority opinions by 120 to 87, a margin of 58% to 42%. The ultimate significance of that figure, of course, must await comparison studies reporting the frequency with which other justices dissented in first amendment cases. Furthermore, as Douglas aged on the job, the liklihood of his opinions being dissents grew, a finding probably more attributable to the changed make-up of the Court in his later years than to recaltricance on Douglas'

part. That William O. Douglas dissented from the majority of the Nixon Court more frequently than from the majorities of the Roosevelt or Warren Courts should be small wonder to most observers. Finally, Douglas recorded a marked increase in the occurrence of procedural dissents in the latter part of his career. The inference suggested by that datum clearly points to Justice Douglas' brethren rather than to some alleged obstinancy on his part: they no longer granted Supreme Court review to the kinds of first amendment cases he feld needed resolution. Interestingly, he marshalled some of his most precedent-laden opinions in these procedural dissents in the attempt to place on the record rule-based arguments for admitting as many free speech controversies as possible for judicial review.

Summary

This chapter has reported the results of analyzing two hundred and seven of William O. Douglas' first amendment opinions in the attempt to answer the three questions pursued in this study. On the basis of the analysis herein performed, a tentative affirmative answer to the first question of whether judicial opinion may be generically classified on the basis of jurisprudential-rhetorical orientation was

offered. Regarding the second question, of what generic clusters, if any, characterized Douglas' first amendment opinions, rather clear evidence emerged to support a claim that his rhetorical tendencies ran to legal positivism more frequently than to legal realism or natural law. And finally, the comparison of Douglas' majority and non-majority rhetoric yielded the unexpected result that no statistically significant differences in generic frequencies occurred.

As with any major study, doubts arise, disclaimers clamor for a hearing, and new questions, both substantive and methodological, come to mind. Those concerns make up Chapter V, and we now turn to them.

Table 1

Frequency of All Opinions by Genre

(N = 207)

Genre	Frequency
Argument from Ideal: The Natural Law Warrant	18 (8.7%)
Argument from Rule: The Positive Law Warrant	117 (56.5%)
Argument from Context: The Legal Realist Warrant	72 (34.8%)

Table 2

Yearly Distribution of Genres

Year*	Argument from Ideal	Argument from Rule	Argument from Context	Total for the Year
1943	0	2	0	2
1944	0	2	0	2
1945	0	2	1	3
1946	1	1	2	4
1947	0	0	2	2
1948	0	1	0	1
1949	1	0	1	2
1951	1	1	4	6
1952	3	1	3	7
1953	1	3	0	4
1954	0	1	1	2
1955	1	0	0	1
1956	0	0	2	2
1957	1	2	1	4
1958	0	4	0	4
1959	1	3	0	4
1960	0	1	0	1

Table 2 (Continued)

Year*	Argument from Ideal	Argument from Rule	Argument from Context	Total for the Year
1961	2	8	3	13
1962	2	1	0	3
1963	0	1	4	5
1964	0	1	0	1
1965	0	4	2	6
1966	0	3	7	10
1967	1	3	5	9
1968	0	7	6	13
1969	0	3	2	5
1970	0	2	2	4
1971	2	6	5	13
1972	0	19	7	26
1973	1	14	4	19
1974	0	17	6	23
1975	0	4	2	6
Grand Totals	18 (8.7%	117 (56.5%	72 (34.8%)	207

*LEXIS retrieved no cases for the years: 1939, 1940, 1941, 1942, or 1950.

Table 3

Frequency of Majority Opinions by Genre

(N = 87)

Genre	Frequency*
Argument from Ideal: The Natural Law Warrant	6 (7.0%)
Argument from Rule: The Positive Law Warrant	53 (61.0%)
Argument from Context: The Legal Realist Warrant	28 (32.0%)

*(These frequencies represent differences between genres significant at the $p < 0.001$ level.)

Table 4

Frequency of Non-Majority Opinions by Genre

(N = 120)

Genre	Frequency*
Argument from Ideal: The Natural Law Warrant	12 (10.0%)
Argument from Rule: The Positive Law Warrant	64 (53.3%)
Argument from Context: The Legal Realist Warrant	44 (36.7%)

*(These frequencies represent differences between genres significant at the $p < 0.001$ level.)

Table 5

Distribution of Genres by Opinion Type

Genre	Majority	Non-Majority
Argument from Ideal: The Natural Law Warrant	6 (7.0%)	12 (10.0%)
Argument from Rule: The Positive Law Warrant	53 (61.0%)	64 (53.3%)
Argument from Context: The Legal Realist Warrant	28 (32.0%)	44 (36.7%)
Total in Opinion Type	87 (100%)	120 (100%)

These frequencies represent differences between opinion types that are not significant at the $p < 0.05$ level.

Table 6

Distribution of Genres by Opinion Sub-Type

Genre	WOD for the Majority	WOD Concurring with Majority	WOD Dissenting From Majority	WOD Dissenting From Denial of Cert., etc.
Argument from Ideal: The Natural Law Warrant	2(7.7%)	4(6.6%)	11(10.5%)	1(6.7%)
Argument from Rule: The Positive Law Warrant	17(65.4%)	36(59.0%)	53(50.5%)	11(73.3%)
Argument from Context: The Legal Realist Warrant	7(26.9%)	21(34.4%)	41(39.0%)	3(20.0%)
Total in Opinion Type	26(12.6%	61(29.5%	105(50.7%)	15(7.2%)

These frequencies represent differences between opinion types that are not significant at the $p < 0.05$ level.

Table 7

Distribution of Majority Opinion Sub-Type by Genre

Genre	WOD for the Majority	WOD Concurring With Majority
Argument from Ideal: The Natural Law Warrant	2 (7.7%)	4 (6.6%)
Argument from Rule: The Positive Law Warrant	17 (65.4%)	36 (59.0%)
Argument from Context: The Legal Realist Warrant	7 (26.9%)	21 (34.4%)

These frequencies represent differences between sub-types of majority opinions that are not significant at the $p < 0.05$ level.

Table 8

Distribution of Non-Majority Opinion Sub-Type by Genre

Genre	WOD Dissenting From Majority	WOD Dissenting from Denial of Cert., etc.
Argument from Ideal: The Natural Law Warrant	11 (10.5%)	1 (6.7%)
Argument from Rule: The Positive Law Warrant	53 (50.5%)	11 (73.3%)
Argument from Context: The Legal Realist Warrant	41 (39.0%)	3 (20.0%)

These frequencies represent differences between subtypes of non-majority opinions that are not significant at the $p < 0.05$ level.

CHAPTER V

IN RETROSPECT

Introduction

For each of the three questions pursued in this study, this chapter identifies qualifications and implications of the findings reported, suggests further substantive questions to be pursued in each area, and offers methodological refinements that would enhance scholarly efforts to cope with related future questions. This study closes with an Epilogue which addresses the nature of doing a study of a person like William O. Douglas.

Rhetorical Genres in Judicial Opinion

That rhetorical genres exist in judicial opinion in the form of Argument from Ideal, Argument from Rule, and Argument from Context seems evident. The first qualification of this claim, of course, flows from the limitations of case study. To infer from one justice, particularly one like Douglas, to all others is questionable. But two central issues must

be kept in mind. First, case studies are not designed to provide final answers, only initial clues. The clues here are strong. Legal philosophy offers no schools of thought other than the three developed in this study and the legal philosopher best equipped to draw out the rhetorical implications of his discipline, Chaim Perelman, has argued that the essential nature of philosophy is its attempt to urge, by argument, a certain view of the world upon its consumers.[1] Second, although Douglas is probably an unrepresentative case, the same can be said of any justice who ever served--there is no "typical" Supreme Court justice. But they do all serve the same Supreme Court--they all serve an institution and a legal system with certain endemic characteristics and to that extent any justice, no matter how atypical he may appear, can provide some insight into the nature of the system he serves.

A second general qualification of the generic claim made here has to do with the nature of the exigencies to which Douglas was responding. All the evidence offered herein is based upon rhetorical responses to first amendment exigencies. One aspect of this disclaimer is that these

---

[1]See footnote 54. Chapter II.

issues were perhaps more personally salient to Douglas than to other justices, a consideration which could color the results of an analysis such as this. Another aspect of this disclaimer is that despite the fact that an analysis of only first amendment opinions achieves more precision than other studies have, it is still quite a broad brush with which to paint. First amendment law divides into speech, press, assembly, establishment, exercise, and petition clauses, each of which may possibly inspire different responses because of the vastly different exigencies which may typify them. The present study made no distinction on the basis of these different areas of law for to do so would have rendered the project virtually impossible of completion by a single scholar working with such a large number of opinions. However, there is a thread running through these diverse elements of the first amendment which justifies treating them together. The "personal fulfillment" dimension of the first amendment, as Emerson put it,[2] cuts across all these areas of law in Douglas' approach. Whether the instant case arose from controversies involving

---

[2]Thomas I. Emerson, "Justice Douglas' Contribution to the Law: The First Amendment," Columbia Law Review 74 (1974), p. 356.

sidewalk oratory, religious pamphleteering, or labor union organizing, Douglas saw the situations as kin: They all represented individual citizens striving through expression to gain a measure of dignity, to improve their lives, to spread the truth as they saw it. Thus, although the first amendment's penumbra covers a variety of rights, we are warranted in treating them as a sufficiently similar class of exigencies for purposes of genre criticism.

One central implication of the existence of rhetorical genres based upon legal philosophy inhering in judicial opinion seems apparent: Jurisprudence should not be a means of labeling a justice, but rather a means of classifying his arguments. Because Douglas relied predominantly upon the Argument from Rule, it does not follow, ipso facto, that he is a legal positivist. Because he relied occasionally upon natural law rhetoric does not automatically support a claim that he subscribed to that jurisprudence in any life-long way. And because he issued opinions aimed at engineering social goals, that alone does not place him in the camp of the legal realists. These philosophical variations are best understood as variant rhetorical responses to variant legal situations--a jurisprudential set of topoi--to which the

judge-rhetor may refer. They are "the available means of persuasion in any given case," not a mold from which the judge may never escape. By understanding jurisprudence in a rhetorical light, we probably can better evaluate the judge, his arguments, and the legal philosophy as well.

Two general areas of new substantive questions seem ripe for study. The first is to explore other Supreme Court justices' generic tendencies in order to further discover the extent to which rhetorical genres typify judicial opinion. This study has provided sufficient reason to believe that such genres exist; comparison studies on other justices offer the only way of determining whether the present case study typifies behavior or captures an atypical one. A second way of enhancing the validity of the present generic claim would be to perform the same analysis on a substantial body of Douglas' opinions from a different area of law. Would he argue differently upon complex monetary or fiscal issues; would the areas of substantive and procedural due process give rise to rhetorical responses similar to those of first amendment cases; would environmental law, because of its relatively recent emergence upon the constitutional scene, by typified by a greater reliance upon

Argument from Context or would Douglas' intense feelings in the area engender stirring natural law arguments? These are questions of equal significance to the present study that must await a future day, but their answers alone can confirm or dispute the ones offered here.

For each of the three questions pursued in this study, one primary methodological refinement seems desirable: the size of the coding unit needs to be reduced. By reducing the size of the coding unit from the entire opinion to some smaller lexical or syntactic structure, such as the "assertion" as devised by Osgood, Saporta, and Nunnally,[3] two advantages would accrue. First, multiple coders could be employed because they would not be required to read hundreds of pages of text in order to make coding decisions. Further, with explicit and clear coding instructions, little or no knowledge of legal philosophy or rhetorical theory would be required. This expertise would dictate the composition of the coding instructions, of course, but the coders themselves would not need it. The use of multiple coders would allow for inter-coder reliability measures to be performed,

---

[3]Charles Osgood, Sol Saporta, Jum C. Nunnally, "Evaluative Assertion Analysis," Litera III (1956), pp. 47-102.

a check obviously not possible with a single coder. A second major advantage of reducing the size of the coding unit would be to allow for sampling from large and diverse bodies of documents. Once the primary researcher reduced the coding units to assertion-sized statements, comparison studies could be made upon various areas of law within the work of one justice, or between the opinions of two or more different justices. Such comparisons would not only be extremely interesting and valuable in and of themselves, but would provide further data for determining the validity of the classificatory scheme itself.

Qualifying the Douglas Dynamic

The second question this study sought to answer asked what generic clusters, if any, characterized the judicial rhetoric of William O. Douglas. Based on the analytic system adopted herein, the conclusion was reached that arguments typical of legal positivism dominated Douglas' opinions in all stages of his career and in all types of opinions. Two disclaimers similar to those above are in order. First, the validity of the category system is only assumed at this stage of its development. This researcher believes it possesses face validity, but until other analyses

of other justices reveal similar clusters of arguments, the system's validity must remain assumptive. Second, again this analysis was limited to first amendment cases, a factor which could conceivably influence the rhetorical responses of a judge. The finding, for example, that Douglas relied heavily upon rule-based arguments in many diverse areas of law would obviously lend strength to the claim that he is a positivist. But for now, the point made above must be recalled: legal philosophy best describes rhetoric, not rhetors. Even this claim, though, needs tempering.

The single most important implication of the finding that Douglas relied predominantly upon the Argument from Rule is the apparent necessity to reevaluate the widespread belief that he was best classified as a legal realist. The question must first be put: what is required to sustain a claim that a justice <u>is</u> a realist or a positivist or a natural lawyer? This study suggests that those who have placed Douglas with the legal realists have ignored that question and have either taken him at his word or have believed previous commentators placing him there. The best answer seems to be that both the students of Douglas and

and the students of Richard Weaver should amend their position to read: "a characteristic major premise characterizes its user for today only." Judicial philosophy is best understood as argument and it therefore is the best way to characterize a judge; but a judge may make diverse rhetorical choices over a long career, obviously Douglas did, and therefore the only meaningful descriptive-critical statements are those which say: "at this time and to this extent a particular justice relied upon a particular genre predominantly." Thus the minimal requirement for characterizing a judge as a devotee of a particular jurisprudence is that he argued from its tenets in some substantial, long-term, or quantitatively significant fashion. Until such data are on the record, critics must temper the sweep of their conclusions.

The primary question remaining unanswered in this study is: do these findings hold true in areas of law other than the first amendment? The quantitative distribution of generic choices Douglas made in arguing freedom of expression cases was fascinating; whether it was representative is another question. The rights of criminal defendants was an area of law Douglas held to be vitally important. How

would he argue cases focusing upon fundamental constitutional issues such as habeas corpus, right to counsel, or search and seizure? These ideals, along with freedom of speech and press, are deeply embedded in our Anglo-American heritage: would he see them as ontologically wedded to the Constitution and its subordinate positive laws--the Thomist version of natural law--or would he also marshall the statutes and precedents in their cause he did for the first amendment? In Sierra Club v. Morton,[4] Douglas argued that, like the corporation, "valleys, alphine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life," should have standing to sue in their own behalf. Is this novel approach to the sociology of law the sine qua non of Douglas' rhetoric in environmental law, or was that famous dissent only a flight of rhetorical fancy? These and many other questions can and now should be asked in diverse substantive areas of law covered in the long career of Justice Douglas.

The same methodological refinement--reducing the unit of analysis from the complete opinion to a more manageable size--would yield desirable results in further research on

---

[4]405 U.S. 727 (1972).

questions of this sort also. For example, a randomly arranged set of assertion-sized statements representing several diverse areas of law could be presented to coders for judging. A finding of similarity or difference of generic responses to different legal exigencies could thus be determined with increased expediency and reliability. Validity of the measure could be enhanced because of the smaller the size of the coding unit, more units may be presented to coders at one session, and as the data base grows in size and scope, so grows the validity of the findings based upon it.

The Rhetoric of Majority and Dissent: Qualifications, Implications, and Further Research

The final question this study pursued asked whether William O. Douglas argued from variant generic bases in majority and non-majority opinions. Rather compelling statistical evidence emerged supporting an affirmative answer to that question. But again, disclaimers are necessary.

First, as pointed out in Chapter IV, critics may approach rhetorical artifacts from many diverse perspectives, and if they do, diverse critical insights would ensue. The

analytic method adopted herein was a hybrid of critical and content analytic techniques and it found no differences between majority and non-majority rhetoric. A critic viewing judicial rhetoric through the lens of neo-Aristotelian methods might see differences. A Burkeian critic, especially if he or she defined the "agency" as opinion type (majority or non-majority), would almost certainly find differences. But on the one hand, the traditional critic must find effects and a dissent is by definition a sort of defeat. On the other hand, Kenneth Burke only gave his followers five dimensions of rhetorical acts to analyze and his category system may well prejudice results, particularly if it is used as a set of critical cookie cutters. This researcher remains satisfied that genre criticism coupled with quantitative measures offers an approach superior to others for certain tasks. Its qualitative dimensions are capable of apprehending intrinsic aspects of many discourses, placing them side by side, and moving toward an appreciation of the essential nature--the internal dynamic--of a class of documents. Its quantitative dimension adds a measure of objectivity to criticism that is lacking in most approaches. Only by quantifying rhetorical constituents of a class of

documents may we even approach validity measures other than intuitive ones. Only by quantifying certain characteristics in a sub-population can we make objective comparisons with other sub-populations. In short, this hybrid holds promise of bearing critical fruit of a much more useful variety than some of its ancestors, namely progress toward establishing the essential nature of various kinds of discourse.

A second disclaimer due here speaks again to the inherent limitations of case study. This study established that Douglas manifested no differences between majority and non-majority opinions, but that provides little grounds for inferring the same conclusion to other justices. Should future studies find the generalization that no differences in fact exist to be true, then we must discard the received wisdom of the opposite generalization that different rhetorical elements inhere in majority than non-majority opinions. What the present study has done is offer good reason for performing such studies. Douglas is without doubt one of the more significant justices in the Court's history and his opinions have been and will continue to be the object of critical scrutiny for many years. If his opinions contradict the received wisdom, then it requires reevaluation.

Two areas of further research are suggested by the finding that no significant differences exist between majority and non-majority opinions. One is to test this finding in areas of Douglas' judicial career other than first amendment law. Exigencies arising in different constitutional settings may produce characteristically different rhetorical responses from majority rhetors than from dissenters. That possibility should be explored. Second, the career opinions of other justices should be analyzed to determine whether they resort to different generic options when with the majority than the dissent. Only if major studies of large samples of opinions produced by many justices in many areas of law are performed can we truly know what generalizations are in order about judicial rhetoric.

Such studies would be facilitated by the same methodological refinement suggested previously--reducing the size of the coding unit. Particularly when multivariate research designs are called for, such as simultaneously comparing several justices' opinions in several areas of law, several opinion types, and several time frames, large numbers of coding units would be required and small coding units would facilitate the analysis.

Epilogue

Somewhere in my graduate career a professor remarked in class that an exciting and rewarding mode of study was to "get inside the head of a great man or woman and stay there for a time." Examples like Karl Wallace's extended study of Francis Bacon were given. Doing so, it seems, is rather like the practice of the ancient sophists and the modern Jesuits of having their students memorize the speeches of great orators until something of the greatness "rubs off." Longtitudinal studies force one over the gray patches as well as the purple, the perfunctory as well as the inspired, but only through long and intensive "inside the head" studies of great figures can one stand a chance of genuine insight, or perhaps obtain a glimpse of the internal dynamic of the person as well as the work.

With William O. Douglas, one first sees a master lawyer and an inspiring intellect. But one soon also sees something of a humorist, a satirist. One imagines him occasionally peering from between the lines of stare decisis with a wink in his eye. Often one sees a Jonathan Edwards exhorting his flock with messianic zeal that they hang by a thread over the pit of repression and totalitarianism. At times one sees

a social engineer carefully measuring the stress points in the structures of the culture and prescribing remedies. But what one realizes only after being inside the head of Douglas for a year or two is that you are also inside his heart. One comes to understand that whether he refers to eternal law, to last year's precedent, or to next year's society, he never loses sight of the individual human beings living and working under a regime of law and he strives always to keep as much of that regime off their backs as possible. Insights like that can make a dissertation personally as well as professionally worthwhile.

APPENDIX A

TABLE OF CASES CODED AS NATURAL LAW, THE "ARGUMENT FROM IDEAL" (n = 18)

Girouard v. United States, 328 U.S. 61 (1946)

Terminiello v. Chicago, 337 U.S. 1 (1949)

Joint Anti-Facist Refugee Committee v. McGrath, Attorney General, 341 U.S. 123 (1951)

Carlson v. Landon, 342 U.S. 524 (1952)

Beauharnis v. Illinois, 343 U.S. 250 (1952)

Public Utilities Commission of the District of Columbia v. Pollak, et al, 343 U.S. 451 (1952)

Poulos v. New Hampshire, 345 U.S. 395 (1953)

Peters v. Hobby, et al, 349 U.S. 331 (1955)

United States v. International Union United Automobile, Aircraft, and Agricultural Implement Workers of America, 352 U.S. 567 (1957)

Frank v. Maryland, 359 U.S. 360 (1959)

McGowan v. Maryland, 366 U.S. 420 (1961)

Scales v. United States, 367 U.S. 203 (1961)

Engel v. Vitale, 370 U.S. 421 (1962)

Arlan's Department Store of Louisville, Inc. v. Kentucky, 371 U.S. 218 (1962)

Walker v. City of Birmingham, 388 U.S. 307 (1967)

Gillette v. United States, 401 U.S. 437 (1971)

Clay aka Ali v. United States, 403 U.S. 698 (1971)

Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973)

APPENDIX B

TABLE OF CASES CODED AS LEGAL POSITIVISM, THE "ARGUMENT FROM RULE" (n = 117)

Murdock v. Pennsylvania, 319 U.S. 105 (1943)

Schneiderman v. United States, 320 U.S. 118 (1943)

Follett v. Town of McCormick, SC, 321 U.S. 573 (1944)

United States v. Ballard, 322 U.S. 78 (1944)

Bridges v. Wixon, 326 U.S. 135 (1945)

Associated Press v. United States, 326 U.S. 1 (1945)

Mabee v. White Plains Publishing Company, 327 U.S. 178 (1946)

Saia v. New York, 334 U.S. 558 (1948)

Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951)

Gelling v. Texas, 343 U.S. 960 (1952)

Fowler v. Rhode Island, 345 U.S. 67 (1953)

United States v. Rumely, 345 U.S. 41 (1953)

Corona Daily Independent v. City of Corona, 346 U.S. 833 (1953)

Superior Films, Inc. v. Department of Education of Ohio, Division of Film Censorship, 346 U.S. 587 (1954)

International Brotherhood of Teamsters Local 695 v. Vogt, Inc. 354 U.S. 284 (1957)

Roth v. United States, 354 U.S. 476 (1957)

Perez v. Brownell, Attorney General, 356 U.S. 44 (1958)

First Unitarian Church of Los Angeles v. County of Los Angeles, 357 U.S. 545 (1958)

Speiser v. Randall, 357 U.S. 513 (1958)

Beilan v. Board of Public Education, School District of Philadelphia, 357 U.S. 399 (1958)

Cammarano v. United States, 358 U.S. 498 (1959)

Kingsley International Pictures Corporation v. Regents of the University of the State of New York, 360 U.S. 684 (1959)

Smith v. California, 361 U.S. 147 (1959)

Uphaus v. Wyman, Attorney General of New Hampshire, 364 U.S. 388 (1960)

Braden v. United States, 365 U.S. 431 (1961)

Wilkinson v. United States, 365 U.S. 399 (1961)

Louisiana, ex rel Gremillion, Attorney General v. N.A.A.C.P., 366 U.S. 293 (1961)

Noto v. United States, 367 U.S. 290 (1961)

Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961)

International Association of Machinists v. Street, 367 U.S. 740 (1961)

Killian v. United States, 368 U.S. 231 (1961)

Garner v. Louisiana, 368 U.S. 157 (1961)

Russell v. United States, 369 U.S. 749 (1962)

Sherbert v. Verner, 374 U.S. 398 (1963)

Garrison v. Louisiana, 379 U.S. 64 (1964)

Freedman v. Maryland, 380 U.S. 51 (1965)

Zemel v. Rusk, Secretary of State, 381 U.S. 1 (1965)

Lamont, D.B.A. Basic Pamphlets v. Postmaster General, 381 U.S. 301 (1965)

Griswold v. Connecticut, 381 U.S. 479 (1965)

Elfbrandt v. Russell, 384 U.S. 11 (1966)

Ashton v. Kentucky, 384 U.S. 195 (1966)

Georgia v. Rachel, 384 U.S. 780 (1966)

Time, Inc. v. Hill, 385 U.S. 374 (1967)

Whitehill v. Elkins, President of University of Maryland, 389 U.S. 54 (1967)

W.E.B. DuBois Clubs of America, et al v. Clark, Attorney General, 398 U.S. 309 (1967)

Schneiderman v. Smith, Commandant, United States Coast Guard 390 U.S. 17 (1968)

Epton v. New York, 390 U.S. 29 (1968)

Hart v. United States, 391 U.S. 956 (1968)

Zigmond v. Selective Service Local Board #16, et al, 391 U.S. 930 (1968)

Flast v. Cohen, Secretary H.E.W., 392 U.S. 83 (1968)

Williams v. Rhodes, Governor of Ohio, 393 U.S. 23 (1968)

Oestereich v. Selective Service System Local Board #10, Cheyenne, WY, 393 U.S. 233 (1968)

Citizen Publishing Company, et al v. United States, 394 U.S. 131 (1969)

Brandenburg v. Ohio, 395 U.S. 444 (1969)

Byrne v. Karalexis, 396 U.S. 976 (1969)

Jones v. State Board of Education of Tennessee, 397 U.S. 31 (1970)

Walz v. Tax Commission of City of New York, 397 U.S. 664 (1970)

Samuels v. Mackell, 401 U.S. 66 (1971)

Younger v. Harriss, 401 U.S. 37 (1971)

Tilton v. Richardson, 403 U.S. 672 (1971)

New York Times v. United States, 403 U.S. 713 (1971)

Dun and Bradstreet v. Grove, 404 U.S. 898 (1971)

Lee v. Runge, 404 U.S. 887 (1971)

Diffenderber v. Central Baptist Church of Miami, FL, 404 U.S. 412 (1972)

California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972)

Board of Regents of University of Texas System v. New Left Education Project, 404 U.S. 541 (1972)

Parisi v. Davidson, 405 U.S. 34 (1972)

Monger v. Florida, 405 U.S. 958 (1972)

Eisenstadt, Sheriff, v. Baird, 405 U.S. 438 (1972)

Chapman v. California, 405 U.S. 1020 (1972)

Cole v. Richardson, 405 U.S. 676 (1972)

Evansville v. Delta Airlines, 405 U.S. 707 (1972)

Andrews v. Louisville and Nashville Railroad, 405 U.S. 320 (1972)

Socialist Labor Party v. Gilligan, Governor of Ohio, 406 U.S. 583 (1972)

Colten v. Kentucky, 407 U.S. 104 (1972)

United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297 (1972)

Laird, Secretary of Defense v. Tatum, 408 U.S. 1 (1972)

Kleindienst, Attorney General v. Mandel, 408 U.S. 753 (1972)

Gravel v. United States, 408 U.S. 606 (1972)

Board of Regents of State Colleges, et al v. Roth, 408 U.S. 564 (1972)

Nebraska State Board of Education v. School District of Hartington, 409 U.S. 921 (1972)

President's Council, District 25 v. Community School Board #25, 409 U.S. 998 (1972)

Sigler v. Berrigan, 410 U.S. 902 (1973)

Doe v. Bolton, 410 U.S. 179 (1973)

Lemon v. Kurtzman, 411 U.S. 192 (1973)

United States v. Orito, 413 U.S. 139 (1973)

Miller v. California, 413 U.S. 15 (1973)

United States Civil Service Commission v. National Association of Letter Carriers, A.F.L.-C.I.O., 413 U.S. 548 (1973)

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973)

Meinhold v. Taylor, 414 U.S. 943 (1973)

Patrick v. Field Research Corporation, 414 U.S. 922 (1973)

Yale Broadcasting Company v. F.C.C., 414 U.S. 914 (1973)

Stokes v. Bruce, 414 U.S. 893 (1973)

Trinkler v. Alabama, 414 U.S. 955 (1973)

Carlson v. Minnesota, 414 U.S. 953 (1973)

New Rider v. Board of Education of Independent School District #1, Pawnee County, OK, 414 U.S. 1097 (1973)

Reynolds v. Tennessee, 414 U.S. 1163 (1974)

Teleprompter Corporation v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974)

Johnson v. Robison, 415 U.S. 361 (1974)

Lubin v. Panish, 415 U.S. 709 (1974)

California Bankers Association v. Schultz, Secretary of Treasury, 416 U.S. 21 (1974)

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)

Procunier v. Martinez, 416 U.S. 396 (1974)

Alee v. Medrano, 416 U.S. 802 (1974)

Wheeler v. Barrera, 417 U.S. 402 (1974)

Parker v. Levy, 417 U.S. 733 (1974)

Pell, Segal, and Jacobs v. Procunier, 417 U.S. 817 (1974)

Spence v. State of Washington, 418 U.S. 405 (1974)

Gertz v. Welch, 418 U.S. 323 (1974)

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)

Old Dominion Branch #496 v. Austin, 418 U.S. 264 (1974)

Cantrell v. Forest City Publishing Company, 419 U.S. 245 (1974)

Buckley v. A.F.T.R.A., 419 U.S. 1093 (1974)

Pryba v. United States, 419 U.S. 1127 (1975)

Board of School Commissioners of Indianapolis v. Jacobs, 420 U.S. 128 (1975)

United States v. New Jersey State Lottery Commission, 420 U.S. 371 (1975)

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)

APPENDIX C

TABLE OF CASES CODED AS LEGAL REALISM, THE "ARGUMENT FROM CONTEXT" (n = 72)

Thomas v. Collins, 323 U.S. 516 (1945)

Hannegan v. Esquire, 327 U.S. 146 (1946)

A.F.L. v. Watson, Attorney General, 327 U.S. 582 (1946)

United Public Workers of America, et al v. Mitchell, 330 U.S. 75 (1947)

Craig v. Harney, 331 U.S. 367 (1947)

Fisher v. Pace, 336 U.S. 155 (1949)

Feiner v. New York, 340 U.S. 315 (1951)

Tenney v. Brandhove, 341 U.S. 367 (1951)

N.L.R.B. v Denver Building and Construction Trades Council, 341 U.S. 675 (1951)

Dennis v. United States, 341 U.S. 494 (1951)

Adler v. Board of Education of the City of New York, 342 U.S. 485 (1952)

Harisiades v. Shaugnessy, Director of Immigration and Naturalization, 342 U.S. 580 (1952)

Zorach v. Clauson, et al, 343 U.S. 306 (1952)

United States v. Harriss, 347 U.S. 612 (1954)

Railway Employees Department, A.F. of L. v. Hanson, 351 U.S. 225 (1956)

Black v. Cutter Labs, 351 U.S. 292 (1956)

Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957)

Times Film Corporation v. City of Chicago, 365 U.S. 43 (1961)

Lathrop v. Donohue, 367 U.S. 820 (1961)

Poe v. Ullman, 367 U.S. 497 (1961)

N.A.A.C.P. v. Button, 371 U.S. 415 (1963)

Bantam Books v. Sullivan, 372 U.S. 58 (1963)

Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963)

School District of Abington Township, PA v. Schempp, 374 U.S. 203 (1963)

United States v. Seeger, 380 U.S. 163 (1965)

American Committee for the Protection of Foreign Born v. Subversive Activities Control Board, 380 U.S. 503 (1965)

Rosenblat v. Barr, 383 U.S. 75 (1966)

Ginzburg v. United States, 383 U.S. 463 (1966)

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966)

Degregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966)

Mills v. Alabama, 384 U.S. 214 (1966)

City of Greenwood v. Peacock, 384 U.S. 808 (1966)

Adderly, et al v. Florida, 385 U.S. 39 (1966)

Thorpe v. Housing Authority of City of Durham, 386 U.S. 670 (1967)

Turner, et al v. New York, 386 U.S. 773 (1967)

Jacobs, et al v. New York, 388 U.S. 307 (1967)

Hackin v. Arizona, 389 U.S. 143 (1967)

Becker v. Philco Corporation, 389 U.S. 979 (1967)

Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968)

Ginsberg v. New York, 390 U.S. 629 (1968)

Zwicker, et al v. Boll, District Attorney of Dane County, 391 U.S. 353 (1968)

Amalgamated Food Employees Local 590, et al v. Logan Valley Plaza, et al, 391 U.S. 308 (1968)

United States v. O'Brien, 391 U.S. 367 (1968)

Board of Education v. Allen, 392 U.S. 236 (1968)

Hadnott, et al v. Amos, Secretary of State of Alabama, 394 U.S. 358 (1964)

Watts v. United States, 394 U.S. 705 (1969)

Cole v. Richardson, 397 U.S. 238 (1970)

Stotland v. Pennsylvania, 398 U.S. 916 (1970)

Dyson v. Stein, 401 U.S. 200 (1971)

United States v. White, 401 U.S. 745 (1971)

Ehlert v. United States, 402 U.S. 99 (1971)

Lemon v. Kurtzman, 403 U.S. 602 (1971)

Pryor v. United States, 404 U.S. 1242 (1971)

Wisconsin v. Yoder, 406 U.S. 205 (1972)

Moose Lodge #107 v. Irvis, 407 U.S. 163 (1972)

Kois v. Wisconsin, 408 U.S. 229 (1972)

Healey v. James, 408 U.S. 169 (1972)

Grayned v. City of Rockford, 408 U.S. 104 (1972)

Branzburg v. Hayes, 408 U.S. 665 (1972)

California v. Larue, 409 U.S. 109 (1972)

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973)

Pittsburg Press Company v. Pittsburg Commission on Human Relations, 413 U.S. 376 (1973)

United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123 (1973)

Broadrick v. Oklahoma, 413 U.S. 601 (1973)

American Party of Texas v. White, 415 U.S. 767 (1974)

Karlan v. City of Cincinnati, 416 U.S. 924 (1974)

Arnett, Director of Office of Economic Opportunity, et al v. Kennedy, 416 U.S. 134 (1974)

Hamling v. United States, 418 U.S. 87 (1974)

Wolff v. McDonnell, 418 U.S. 539 (1974)

Secretary of Navy v. Avrech, 418 U.S. 676 (1974)

Southeastern Promotions v. Conrad, 420 U.S. 546 (1975)

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975)

APPENDIX D

TABLE OF CASES RETRIEVED BY LEXIS AND JUDGED "NOT RELEVANT" (n = 94)

Jones v. Opelika, 316 U.S. 584 (1942)

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)

Malinski, et al v. New York, 324 U.S. 401 (1945)

Screws, et al v. United States, 325 U.S. 91 (1945)

Markham v. Cabell, 326 U.S. 404 (1945)

Nippert v. City of Richmond, 327 U.S. 416 (1946)

Ballard v. United States, 329 U.S. 187 (1946)

United States v. United Mine Workers of America, 330 U.S. 258 (1947)

United States v. Paramount Pictures, 334 U.S. 131 (1948)

Lichter, et al v. United States, 334 U.S. 742 (1948)

Ludeke v. Watkins, 335 U.S. 160 (1948)

Rochin v. California, 342 U.S. 165 (1952)

Doremus v. Board of Education of Hawthorne, 342 U.S. 429 (1952)

Bode v. Barrett, Sec. of State, 344 U.S. 583 (1953)

Barsky v. Board of Regents of the University of the State of NY, 347 U.S. 442 (1954)

Galvin v. Press, 347 U.S. 522 (1954)

Ullman v. United States, 350 U.S. 422 (1956)

Kent v. Dulles, Secretary of State, 357 U.S. 116 (1958)

Uphaus v. Wyman, Attorney General of New Hampshire, 360 U.S. 72 (1959)

Bates v. City of Little Rock, 361 U.S. 516 (1960)

Parker v. Ellis, 362 U.S. 574 (1960)

Kimm v. Rosenberg, 363 U.S. 405 (1960)

Fleming, Secretary H.E.W. v. Nestor, 363 U.S. 603 (1960)

Hanna v. Larche, 363 U.S. 420 (1960)

Cohen v. Hurley, 366 U.S. 117 (1961)

Nostrand v. Little, 368 U.S. 436 (1962)

Los Angeles Meat and Provision Drivers Union v. United States, 371 U.S. 94 (1962)

Shotwell Manufacturing v. United States, 371 U.S. 341 (1963)

Gideon v. Wainwright, 372 U.S. 335 (1963)

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964)

United States v. Welden, 377 U.S. 95 (1964)

Aptheker v. Secretary of State, 378 U.S. 500 (1964)

Bell v. Maryland, 378 U.S. 226 (1964)

Hamm v. City of Rock Hill, 379 U.S. 306 (1964)

Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965)

Evans v. Newton, 382 U.S. 296 (1966)

Harder v. Virginia Board of Elections, 383 U.S. 663 (1966)

N.A.A.C.P. v. Overstreet, 384 U.S. 118 (1966)

Osborn v. United States, 385 U.S. 323 (1966)

Garrity, et al v. New Jersey, 385 U.S. 493 (1967)

Cooper v. California, 386 U.S. 58 (1967)

Boutilier v. Immigartion and Naturalization Service, 386 U.S. 118 (1967)

Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967)

Berger v. New York, 388 U.S. 41 (1967)

Katz v. United States, 389 U.S. 347 (1967)

Ferrell v. Dallas Independent School District, 393 U.S. 856 (1968)

Powell v. McCormick, Speaker of the United States House of Representatives, 395 U.S. 486 (1969)

Levy v. Parker, Warden, et al, 396 U.S. 1204 (1969)

Jones v. Lemond, Commanding Officer, 396 U.S. 1227 (1969)

United States v. Knox, 396 U.S. 77 (1969)

Bryson v. United States, 396 U.S. 64 (1969)

Reetz v. Bozanich, 397 U.S. 82 (1970)

Association of Data Processing Services v. Camp, 397 U.S. 150 (1970)

Dandridge v. Williams, 397 U.S. 471 (1970)

Adickes v. S. H. Kress and Co., 398 U.S. 144 (1970)

Chandler, United States District Judge v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970)

Oregon v. Mitchell, Attorney General, 400 U.S. 112 (1970)

Wyman v. James, 400 U.S. 309 (1971)

Wisconsin v. Constantineau, 400 U.S. 433 (1971)

Perez v. Ledesma, 401 U.S. 82 (1971)

Boddie v. Connecticut, 401 U.S. 371 (1971)

United States v. Vuitch, 402 U.S. 62 (1971)

McGautha v. California, 402 U.S. 183 (1971)

Native American Church of Navajoland, Inc. v. Arizona Corporation Commission, 405 U.S. 901 (1972)

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)

Freeman v. Flake, 405 U.S. 1032 (1972)

Johnson v. Louisiana, 406 U.S. 356 (1972)

Murel v. Baltimore, 407 U.S. 355 (1972)

Gelbard v. United States, 408 U.S. 41 (1972)

Russo v. Byrne, 409 U.S. 1219 (1972)

Sarnoff v. Schultz, Secretary of Treasury, 409 U.S. 929 (1972)

Tidewater Oil Company v. United States, 409 U.S. 151 (1972)

United States v. Kraus, 409 U.S. 434 (1973)

United States v. Mara, 410 U.S. 19 (1973)

Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356 (1973)

Ortwein v. Schwab, 410 U.S. 656 (1973)

Doe v. McMillan, 412 U.S. 306 (1973)

United States v. State Tax Commission of Mississippi, 412 U.S. 363 (1973)

City of Kenosha v. Bruno, 412 U.S. 507 (1973)

Heller v. New York, 413 U.S. 483 (1973)

Holtzman v. Schlesinger et al, 414 U.S. 1316 (1973)

O'Shea and Spomer v. Ezell Littlejohn, 414 U.S. 488 (1974)

Renogiation Board v. Bannercraft, 415 U.S. 1 (1974)

DeFunis v. Odegaard, President of University of Washington, 416 U.S. 312 (1974)

Schlesinger, Secretary of Defense v. Reservists Committee to Stop the War, 418 U.S. 208 (1974)

United States v. Richardson, 418 U.S. 166 (1974)

In Re Grand Jury Proceedings (Lewis, Applicant), 418 U.S. 1301 (1974)

Portland Cement v. Cargill, Inc., 418 U.S. 919 (1974)

Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974)

United States v. Wilson, 420 U.S. 332 (1975)

United States v. Tax Commission of Mississippi, 421 U.S. 599 (1975)

Doran v. Salem Inn, 422 U.S. 922 (1975)

The Village Voice v. Rinaldi, No. 75-224 (1975)

E. W. Scripps Company and John Doe v. Thomas H. Maloney and Sons, No. 74-1647 (1975)

APPENDIX E

STYLE	CITE	DATE	NOTES	GENRE

BIBLIOGRAPHY

A. BOOKS

Abraham, Henry J. The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France. 3rd ed. New York: Oxford University Press, 1975.

Barker, Lucius J. and Barker, Twiley W., Jr. Freedom, Courts, Politics: Studies in Civil Liberties. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1965.

Barrett, Edward L., Jr. and Bruton, Paul W. Constitutional Law: Cases and Materials, 4th ed. Mineola, New York: The Foundation Press, Inc., 1973.

Barron, Jerome A. Freedom of the Press for Whom?: The Right of Access to Mass Media. Bloomington: Indiana University Press, 1973.

Berelson, Bernard. Content Analysis in Communication Research. Glencoe, Ill.: Free Press, 1952.

Berns, Walter. Freedom, Virtue, and the First Amendment. Baton Rouge: Louisiana State University Press, 1957.

Beth, Loren P. The Development of the American Constitution: 1877-1917. New York: Harper and Row, Publishers, 1971.

Bitzer, Lloyd F. and Black, Edwin. The Prospect of Rhetoric: Report of the National Developmental Project on Rhetoric. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1971.

Black, Edwin. Rhetorical Criticism: A Study in Method. New York: The Macmillan Co., 1965.

Black's Law Dictionary, 4th rev. ed. St. Paul: West Publishing Co., 1968.

Bosmajian, Haig A. Obscenity and Freedom of Expression. New York: Burt Franklin and Co., 1976.

Bosmajian, Haig. The Language of Oppression. Washington, D. C.: Public Affairs Press, 1974.

Bosmajian, Haig A. The Principles and Practice of Freedom of Speech. Boston: Houghton Mifflin, 1971.

Bowen, Catherine Drinker. Yankee From Olympus: Justice Holmes and His Family. Boston: Little, Brown and Company, 1944.

Brownfeld, Allan C. Dossier on Douglas. Washington, D. C.: The New Majority Book Club, Inc., 1970.

Cahill, Fred V., Jr. Judicial Legislation: A Study in American Legal Theory. New York: The Ronald Press Company, 1952.

Cameron, James R. Frederick William Maitland and the History of English Law. Norman: University of Oklahoma Press, 1961.

Campbell, Karlyn Kohrs and Jamieson, Kathleen Hall, eds. Form and Genre: Shaping Rhetorical Action. Falls Church, VA: The Speech Communication Association, 1978.

Cardozo, Benjamin N. Law and Literature and Other Essays and Addresses. New York: Harcourt, Brace and Company, 1931.

Cardozo, Benjamin N. The Nature of the Judicial Process. New Haven: Yale University Press, 1921.

Chafee, Zechariah, Jr. Free Speech in the United States. Cambridge: Harvard University Press, 1941.

Chandos, John, ed. To Deprave and Corrupt . . .: Original Studies in the Nature and Definition of Obscenity. London: Souvenir Press, 1962.

Clark, Tom C. "Inside the Court." in Andrew M. Scott and Earle Wallace, eds., Politics U.S.A.: Cases on the American Democratic Process, 2nd ed. New York: The Macmillan Company, 1965.

Cohen, Morris L. Legal Research in a Nutshell. St. Paul, Minn.: West Publishing Co., 1971.

Cohen, Morris R. Law and the Social Order. New York: Harcourt, Brace, and Co., 1933.

Cope, Alfred Haines, and Krinsky, Fred. Franklin D. Roosevelt and the Supreme Court, rev. ed. Lexington, Mass.: D. C. Heath and Company, 1969.

Corwin, Edward S. Liberty Against Government: The Rise, Flowering, and Decline of a Famous Juridical Concept. Baton Rouge: Louisiana State University Press, 1948.

Countryman, Vern. Douglas of the Supreme Court: A Selection of His Opinions. New York: Doubleday, 1959.

Countryman, Vern. The Judicial Record of Justice William O. Douglas. Cambridge: Harvard University Press, 1974.

Countryman, Vern. The Douglas Opinions. New York: Random House, 1977.

Cox, Archibald. The Role of the Supreme Court in American Government. New York: Oxford University Press, 1976.

Cox, Archibald. The Warren Court: Constitutional Decisions as an Instrument of Reform. Cambridge: Harvard University Press, 1968.

Crane, R. S., ed. Critics and Criticism. Chicago: The University of Chicago Press, 1952.

Davis, Abraham L. The United States Supreme Court and the Uses of Social Science Data. New York: MSS Information Corporation, 1973.

d'Entreves, A. P. Natural Law: An Introduction to Legal Philosophy. 2nd ed. London: Hutchinson University Library, 1970.

Dworkin, R. M., ed. The Philosophy of Law. London: Oxford University Press, 1977.

Dworkin, Ronald M. Taking Rights Seriously. London: Gerald Duckworth & Co., Ltd., 1977.

Ehrlich, Eugene. Fundamental Principles of the Sociology of Law. Cambridge, Mass.: Harvard University Press, 1936.

Emerson, Thomas I. The System of Freedom of Expression. New York: Vintage Books, 1970.

Emerson, Thomas I. Toward a General Theory of the First Amendment. New York: Random House, 1966.

Emerson, Thomas I., Haber, David, and Dorsen, Norman. Political and Civil Rights in the United States, 3rd ed. Boston: Little, Brown and Co., 1967.

Frank, Jerome. Law and the Modern Mind. New York: Bretano's, 1930.

Frank, John P. "William O. Douglas." in The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions. Leon Friedman and Fred L. Israel, eds., with an Introduction by Louis H. Pollak. New York and London: Chelsea House Publishers in Association with R. R. Bowker Company, 1969.

Friedman, Leon, ed. Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55. With introductions by Kenneth Clark and Yale Kamisar. New York: Chelsea House Publishers, 1969.

Friendly, Fred W. The Good Guys, The Bad Guys and the First Amendment. New York: Random House, 1975.

Frye, Northrop. Anatomy of Criticism: Four Essays. Princeton: Princeton University Press, 1959.

George, A. L. "Quantitative and Qualitative Approaches to Content Analysis." in I. de S. Pool, ed., Trends in Content Analysis. Urbana: University of Illinois Press, 1959, pp. 7-32.

Gillmor, Donald M. and Dennis, Everette E. "Legal Research and Judicial Communication," in Steven H. Chaffee, ed. Political Communication: Issues and Strategies. Beverly Hills and London: Sage Publications, 1975. pp. 283-305.

Golding, Martin P. Philosophy of Law. Englewood Cliffs, NJ: Prentice-Hall, Inc., 1975.

Golding, M. P., ed. The Nature of Law: Readings in Legal Philosophy. New York: Random House, 1966.

Gray, John Chipman. The Nature and Sources of Law. New York: Columbia University Press, 1910.

Grey, David L. The Supreme Court and the News Media, Evanston: Northwestern Univ. Press, 1968.

Guillen, Claudio. Literature as System: Essays Toward the Theory of Literary History. Princeton: Princeton University Press, 1971.

Haiman, Franklyn S. Freedom of Speech: Issues and Cases. New York: Random House, 1965.

Haiman, Franklyn S. The First Freedoms: Speech, Press, and Assembly. New York: The American Civil Liberties Union.

Haiman, Franklyn S., ed. To Protect These Rights. Skokie, Ill.: National Textbook Co., 1977.

Hart, H. L. A. The Concept of Law. London: Oxford University Press, 1961.

Hernadi, Paul. Beyond Genre: New Directions in Literary Classifications. Ithaca and London: Cornell University Press, 1972.

Holsti, Ole R. Content Analysis for the Social Sciences and Humanities. Reading, Mass.: Addison-Wesley Publishing Company, 1969.

Jackson, Percival E. Dissent in the Supreme Court: A Chronology. Norman: University of Oklahoma Press, 1969.

Jackson, Robert H. The Struggle for Judicial Supremacy. New York: Alfred A. Knopf, 1941.

Kelsen, Hans. What is Justice? Justice, Law, and Politics in the Mirror of Science. Berkeley and Los Angeles: University of California Press, 1957.

Konefsky, Samuel J. The Legacy of Holmes and Brandeis: A Study in the Influence of Ideas. New York: The Macmillan Company, 1956.

Krieger, Murray, ed. Northrop Frye in Modern Criticism: Selected Papers from the English Institute. New York: Columbia University Press, 1966.

Lasswell, H. D., Lerner, D., and Pool, Ithiel, de Sola. The Comparative Study of Symbols. Stanford: Stanford University Press, 1952.

Levy, Edward H. An Introduction to Legal Reasoning. Chicago: University of Chicago Press, 1949.

Mason, Alpheus T. Brandeis: A Free Man's Life. New York: The Viking Press, 1946.

Mason, Alpheus T. The Supreme Court from Taft to Warren, rev. ed. Baton Rouge: Louisiana State University Press, 1968.

McBride, H. E. Impeach Justice Douglas. New York: Exposition Press, 1971.

McCloskey, Robert G. The American Supreme Court. Chicago: The University of Chicago Press, 1960.

McCoy, Ralph E., ed. Freedom of the Press: An Annotated Bibliography. Carbondale: Southern Illinois University Press, 1968.

Mendelson, Wallace. Justices Black and Frankfurter: Conflict in the Court. Chicago: The University of Chicago Press, 1961.

Miller, Arthur Selwyn. The Supreme Court: Myth and Reality. Westport, Connecticut: Greenwood Press, 1978.

Murphy, Paul L. The Constitution in Crisis Times: 1918-1969. New York: Harper and Row, Publishers, 1972.

Murray, Michael. Modern Critical Theory: A Phenomenological Introduction. The Hague: Martinus Nijhoff, 1975.

Nelson, Harold L., and Teeter, Dwight L. Law of Mass Communications: Freedom and Control of Print and Broadcast Media, 2nd ed. Mineola, New York: The Foundation Press, Inc., 1973.

North, R. C., Holsti, Ole R., Zaninovich, M. G., and Zinnes, Dina A. Content Analysis: A Handbook with Applications for the Study of International Crisis. Evanston, Ill.: Northwestern University Press, 1963.

O'Neil, Robert M., ed. Free Speech: Responsible Communication Under Law. Indianapolis: Bobbs-Merrill Co., 1972.

Osgood, Charles E., Suci, George J., and Tannenbaum, Percy H. The Measurement of Meaning. Urbana: University of Illinois Press, 1957.

Outler, Albert C., Thomas S. K. Scott-Craig, Edwin W. Patterson, Arthur L. Harding. Natural Law and Natural Rights. Dallas: Southern Methodist University Press, 1955.

Pegis, Anton C., ed. Introduction to Saint Thomas Aquinas. New York: The Modern Library, 1945, 1948.

Pool, Ithiel de Sola. ed. Trends in Content Analysis. Urbana. University of Illinois Press, 1959.

Pound, Roscoe. An Introduction to the Philosophy of Law. New Haven: Yale University Press, 1922.

Pritchett, C. Herman. The Roosevelt Court: A Study in Juricial Politics and Values. New York: The Macmillan Company, 1948.

Rembar, Charles. The End of Obscenity. New York: Simon and Schuster, 1968.

Rosen, Paul L. The Supreme Court and Social Science. Urbana: University of Illinois Press, 1972.

Rumble, Wilfrid E., Jr. American Legal Realism: Skepticism, Reform, and the Judicial Process. Ithaca, NY: Cornell University Press, 1968.

Schauer, Frederick F. The Law of Obscenity. Washington, D.C.: The Bureau of National Affairs, Inc., 1976.

Schwartz, Bernard. The Bill of Rights: A Documentary History. New York: Chelsea House Publishers in association with McGraw Hill Book Company, 1971. 2 volumes.

Simon, Yves R. The Tradition of Natural Law: A Philosopher's Reflections. New York: Fordham University Press, 1965.

Simpson, A. W. B. "The Ratio Decidendi of a Case and the Doctrine of Binding Precedent." in Oxford Essays in Jurisprudence. Ed. A. G. Guest. London: Oxford University Press, 1961., pp. 148-175.

Stone, P. J., Dunphy, D. C., Smith, M. S., and Ogilvie, D. M. The General Inquirer: A Computer Approach to Content Analysis in the Behavioral Sciences. Boston: The M.I.T. Press, 1966.

Swisher, Carl Brent. Stephen J. Field: Craftsman of the Law. Hamden, Conn.: 1963.

Tapp, June Louin and Levine, Felice J., eds. Law, Justice, and the Individual in Society. New York: Holt, Rinehart, and Winston, 1977.

Wasserstrom, Richard A., ed. Morality and the Law. Belmont, California: Wadsworth Publishing Company, Inc., 1971.

Weaver, Richard M. The Ethics of Rhetoric. Chicago: Henry Regnery Company, 1953.

Wigdor, Alexandra K. Study of the Records of Supreme Court Justices. Washington, D.C.: National Study Commission on Records and Documents of Federal Officials, 1977.

Williams, Frederick. Reasoning With Statistics. 2nd ed. New York: Holt, Rinehart, and Winston, 1979.

Wolfman, Bernard, Silver, Jonathan L. F., and Silver, Marjorie A. Dissent Without Opinion: The Behavior of Justice William O. Douglas in Federal Tax Cases. Philadelphia: University of Pennsylvania Press, 1975.

B. DOUGLAS' WORKS

Douglas, William O. (with C. M. Shanks). Cases and Materials of the Law of Management of Business Units. Chicago: Callaghan and Co., 1931.

Douglas, William O. (with C. M. Shanks). Cases and Materials on the Law of Financing Business Units. Chicago: Callaghan and Co., 1931.

Douglas, William O. (with C. M. Shanks). Cases on the Law of Corporate Reorganization. St. Paul: West Publishing Company, 1931.

Douglas, William O. (with C. M. Shanks). Cases and Materials on Business Units, Losses, Liabilities, and Assets. Chicago: Callaghan and Co., 1932.

Douglas, William O. Democracy and Finance. New Haven: Yale University Press, 1940.

Douglas, William O. Being an American. New York: J. Day Co., 1948.

Douglas, William O. Of Men and Mountains. New York: Harper, 1950.

Douglas, William O. Strange Lands and Friendly People. New York: Harper, 1951.

Douglas, William O. Beyond the High Himalayas. Garden City: Doubleday, 1952.

Douglas, William O. North from Malaya. Garden City: Doubleday, 1953.

Douglas, William O. An Almanac of Liberty. Garden City: Doubleday, 1954.

Douglas, William O. We the Judges: Studies in American and Indian Constitutional Law from Marshall to Mukherjea. Garden City: Doubleday, 1956.

Douglas, William O. Russian Journey. Garden City: Doubleday, 1956.

Douglas, William O. West of the Indus. Garden City, Doubleday, 1958.

Douglas, William O. The Right of the People. Garden City: Doubleday, 1958.

Douglas, William O. Exploring the Himalaya. New York: Random House, 1958.

Douglas, William O. My Wilderness: East to Kathadin. Garden City: Doubleday, 1960.

Douglas, William O. America Challenged. Princeton: Princeton University Press, 1960.

Douglas, William O. The Rule of Law in World Affairs. Santa Barbara: Center for the Study of Democratic Institutions, 1961.

Douglas, William O. The Pacific West. Garden City: Doubleday, 1960.

Douglas, William O. Muir of the Mountains. Boston: Houghton Mifflin, 1961.

Douglas, William O. A Living Bill of Rights. Garden City: Doubleday, 1961.

Douglas, William O. Democracy's Manifesto. Garden City: Doubleday, 1962.

Douglas, William O. Mr. Lincoln and the Negroes. New York: Atheneum, 1963.

Douglas, William O. The Anatomy of Liberty. New York: Trident Press, 1963.

Douglas, William O. Freedom of the Mind. Garden City: Doubleday, 1964.

Douglas, William O. A Wilderness Bill of Rights Boston: Little, Brown, 1965.

Douglas, William O. The Bible and the Schools. Boston: Little, Brown, 1966.

Douglas, William O. Farewell to Texas: A Vanishing Wilderness. New York: McGraw-Hill, 1967.

Douglas, William O. Towards a Global Federalism. New York: New York University Press, 1968.

Douglas, William O. Points of Rebellion. New York: Random House, 1970.

Douglas, William O. International Dissent: Six Steps Toward World Peace. New York: Random House, 1971.

Douglas, William O. Holocaust or Hemispheric Cooperation: Cross Currents in Latin America. New York: Random House, 1971.

Douglas, William O. Three Hundred Year War--A Chronicle of Ecological Disaster. New York: Random House, 1972.

Douglas, William O. Go East, Young Man: The Early Years. New York: Random House, 1974.

C. JOURNALS

Anderson, John R. "The Audience as a Concept in the Rhetoric of Perelman, Johnstone, and Natanson, Southern Speech Communication Journal 38 (Fall 1972), pp. 39-50.

Ares, Charles E. "Constitutional Criminal Law." Columbia Law Review 74 (April 1974), pp. 362-366.

Becker, Lawrence C. "Analogy in Legal Reasoning." Ethics 83 (April 1973), pp. 248-255.

Bingham, Joseph W. "What is the Law," Michigan Law Review 11 (1912), pp. 2-115.

Black, Hugo L. "William Orville Douglas," Yale Law Journal 73 (1964), pp. 915-916.

Bryant, Donald C. "Letter to Thomas L. Tedford." Free Speech Yearbook (1970), p. v.

Casper, Gerhard. "The Liberal Faith: Some Observations on the Legal Philosophy of Mr. Justice William O. Douglas," Federal Bar Journal 22 (1962), pp. 179-194.

Castro, Donald F. "Tragedy, The Generic Approach: A Metacritical Look." Genre 7 (September 1974), pp. 250-271.

Cohen, William. Introduction to "Mr. Justice Douglas: Three Decades of Service." U.C.L.A. Law Review 16 (1969), pp. 701-703.

Countryman, Vern. "Business Regulation." Columbia Law Review 74 (April 1974), pp. 366-371.

Dearin, Ray D. "The Philosophical Basis of Chaim Perelman's Theory of Rhetoric." Quarterly Journal of Speech 55 (October 1969), pp. 213-224.

Dorsen, Norman. "Equal Protection of the Laws." Columbia Law Review 74 (April 1974), pp. 357-362.

Dworkin, Ronald. "Judicial Discretion." The Journal of Philosophy 60 (October 10, 1963), pp. 624-638.

Emerson, Thomas I. "Justice Douglas' Contribution to the Law: The First Amendment." Columbia Law Review 74 (April 1974), pp. 353-357.

Epstein, Leon D. "Justice Douglas and Civil Liberties." Wisconsin Law Review 125 (1951), pp. 125-157.

Fortas, Abe. "Mr. Justice Douglas." Yale Law Journal 73 (1964), pp. 917-919.

Goodhart, Arthur L. "Determining the Ratio Decidendi of a Case." Yale Law Journal 40 (December 1930), pp. 161-183.

Haiman, Franklyn S. "Outline for Contemporary Problems in Freedom of Speech." Free Speech Yearbook. (1970), pp. 5-6.

Haiman, Franklyn S. "Freedom of Speech as an Academic Discipline." Free Speech Yearbook (1976), pp. 1-6.

Haiman, Franklyn S. Review of Obscenity and Freedom of Expression by Haig A. Bosmajian, Quarterly Journal of Speech 63 (October 1977), pp. 332-333.

Haiman, Franklyn S. "Speech v. Privacy: Is There a Right Not to be Spoken To?" Northwestern University Law Review (May-June 1972), pp. 153-199.

Holmes, Oliver Wendell, Jr. "The Path of the Law." Harvard Law Review 10 (1897), pp. 457-468.

Hunsaker, David M. "Syllabus for Freedom and Responsibilities of Speech." Free Speech Yearbook (1970), pp. 28-43.

Hunsaker, David M. "The Rhetoric of Brown v. Board of Education: Paradigm for Contemporary Social Protest." Southern Speech Communication Journal 43 (Winter 1978), pp. 91-109.

Jamieson, Kathleen M. "Antecedent Genre as Rhetorical Constraint." Quarterly Journal of Speech 61 (December 1975), pp. 406-415.

Jamieson, Kathleen. "Generic Constraints and the Rhetorical Situation." Philosophy and Rhetoric 6 (Summer 1973), pp. 162-170.

Johannesen, Richard L. "Syllabus for the Social Influence of Speech." Free Speech Yearbook (1970), pp. 7-10.

"Jurisprudence Symposium." Georgia Law Review 11 (September 1977), pp. 969-1424.

Karst, Kenneth L. "Invidious Discrimination: Justice Douglas and the Return of the 'Natural-Law-Due-Process Formula." U.C.L.A. Law Review 16 (1969), pp. 716-750.

King-Farlow, John. "Saying, Doing, Being, and Freedom of Speech." Philosophy and Rhetoric 2 (Winter 1969), pp. 37-48.

Kister, Kenneth F. "Syllabus for Intellectual Freedom and Censorship." Free Speech Yearbook (1970), pp. 11-27.

Le Duc, Don R. "'Free Speech', Decisions and the Legal Process: The Judicial Opinion in Context," Quarterly Journal of Speech 62 (October 1976), pp. 279-287.

Llewellyn, Karl N. "A Realistic Jurisprudence--The Next Step." Columbia Law Review 30 (1930), pp. 431-464.

Llewellyn, Karl N. "Some Realism About Realism," Harvard Law Review 14 (1922).

Loreau, Max. "Rhetoric as the Logic of the Behavioral Sciences." Translated by Lloyd I. Watkins and Paul D. Brandes. Quarterly Journal of Speech 51 (December 1951), pp. 455-463.

Moore, Underhill. "Rational Basis of Legal Institutions." Columbia Law Review 23.

Mussellman, Francis H. "Computers: A Boon to Legal Research." Legal Economics (Winter 1976), pp. 7-8, 11-12, 33.

Osgood, Charles, Saporta, Sol, and Nunnally, Jum C. "Evaluative Assertion Analysis," Litera III (1956), pp. 47-102.

Parker, Douglas H. "Rhetoric, Ethics, and Manipulation." Philosophy and Rhetoric 5 (Spring 1972), pp. 69-87.

Powe, L. A., Jr. "Evolution to Absolutism: Justice Douglas and the First Amendment." Columbia Law Review 74 (April 1974), pp. 371-411.

Reichert, John F. "'Organizing Principles' and Genre Theory." Genre 1 (January 1968), pp. 1-12.

Rodell, Fred. "As Justice Bill Douglas Completes His First Thirty Years on the Court: Herewith a Random Anniversary Sample, Complete With Casual Commentary, of Divers Scraps, Shreds, and Shards Gleaned from a Forty-Year Friendship." U.C.L.A. Law Review 16 (1969), pp. 704-715.

Rodgers, Raymond S. "' Congress Shall Make No Law. . .': A Computer-Assisted Content Analysis of the Decisions of Justice William O. Douglas on the Issues of Obscenity and Pornography." Free Speech Yearbook (1977), pp. 91-101.

Rotenstreich, Nathan. "Argumentation and Philosophical Clarification." Philosophy and Rhetoric 5 (Winter 1972), pp. 13-23.

Rubin, Jerome S. and Woodward, Robin L. "Lexis: A New Tool for Tax Research." The Journal of Corporate Taxation 1 (Spring, 1974), pp. 42-55.

Schutz, W. C. "On Categorizing Qualitative Data in Content Analysis." Public Opinion Quarterly 22 (1958), pp. 503-515.

Sesonske, Alexander. "Saying, Being and Freedom of Speech," Philosophy and Rhetoric 1 (January 1968), pp. 25-37.

Shiner, Roger A. "Freedom of Speech-Acts." Philosophy and Rhetoric 3 (Winter 1970), pp. 40-50.

Vivas, Eliseo. "Literary Classes: Some Problems." Genre 1 (April 1968), pp. 97-105.

Ware, B. L. and Linkugel, Wil A. "They Spoke in Defense of Themselves: On the Generic Criticism of Apologia." Quarterly Journal of Speech 59 (October 1973), pp. 273-283.

Warren, Earl. Introduction to "Mr. Justice Douglas: Three Decades of Service." U.C.L.A. Law Review 16 (1969), pp. 699-700.

Warren, Earl. "Mr. Justice Douglas." Columbia Law Review 74 (April 1974), pp. 342-343.

Way, H. Frank, Jr. "The Study of Judicial Attitudes: The Case of Mr. Justice Douglas." Western Political Quarterly 24 (1971), pp. 12-23.

Wrage, Earnest. "Public Address: A Study in Social and Intellectual History." Quarterly Journal of Speech 33 (1947), pp. 451-457.

D. MAGAZINES

Commager, Henry Steele. "Choosing Supreme Court Justices." The New Republic, May 2, 1970, pp. 13-16.

Crawford, Kenneth. "Impeach Douglas?" Newsweek, May 4, 1970, p. 37.

"Final Judgment," Newsweek, November 24, 1975, pp. 45-47, 69-70.

"Impeach Douglas?" Time, April 27, 1970, pp. 21-22.

"Let's Get Douglas." The New Republic, May 2, 1970, pp. 9-10.

"Mr. Douglas' Revolution." The National Review, May 5, 1970, p. 481.

"Representative Ford's Charges Against Justice Douglas." U.S. News & World Report, April 27, 1970, pp. 67-71.

"The Douglas Dossier." Newsweek, April 27, 1970, pp. 29-33.

E. UNPUBLISHED MATERIAL

Bailey, Dennis L. "Rhetorical Genres in Early American Public Address." Ph.D. dissertation, The University of Oklahoma, 1971.

Brooks, Robert D. "An Alternative for Retention: Genre Studies and Speech Communication." Unpublished paper presented at the Central States Speech Association Convention, April, 1974, Milwaukee, Wisconsin.

Hopkirk, John W. "William O. Douglas--Individualist: A Study in the Development and Application of a Judge's Attitudes." Ph.D. dissertation, Princeton University, 1958.

James, Dorothy Bructon. "Judicial Philosophy and Accession to the Court: The Cases of Justices Jackson and Douglas." Ph.D. dissertation, Columbia University, 1966.

Measell, James S. "Whither Genre? (Or Genre Withered?)" Unpublished manuscript. Detroit: Department of Speech Communication and Theatre, Wayne State University.

Meek, Roy Lee. "Justices Douglas and Black: Political Liberalism and Judicial Activism." Ph.D. dissertation, University of Oregon, 1964.

Patton, John H. "Generic Criticism: Typology at an Inflated Price." Paper delivered at the Central States Speech Association Convention, Chicago, April 3, 1976.

Pollock, Paul King. "Judicial Libertarianism and Judicial Responsibilities: The Case of Justice William O. Douglas." Ph.D. dissertation, Cornell University, 1968.

Resnik, Soloman. "Black and Douglas: Variations in Dissent." Ph.D. dissertation, New School for Social Research, 1970.