

THE NATURE OF LEGAL ARGUMENT. By O. C. Jensen. Oxford: Basil Blackwell, 1957. Pp. 166. \$2.52.

As one of the initial efforts to apply modern logical analysis to legal problems, this thin volume seems destined for prominence in legal history. Although many lawyers and many logicians will have reservations about the details of what Professor Jensen has written, the implicit thesis of the book—that modern logical techniques can help clarify legal problems—will endure.

Jensen believes that the essential nature of legal argument has been misrepresented in the writings of jurists. He urges that the concepts, rules and methods of reasoning used in deciding legal cases need to be re-examined from a new standpoint. Such a re-examination exposes the confusion of thought which underlies the belief that legal decisions are logically inferred from legal principles. While such a recognition is basic, it is not new; the view that it is the legal incantations that produce court decisions has been questioned and obliterated elsewhere.<sup>1</sup> While clearly recognizing that legal argument often operates only as dust to be thrown in the eyes of those who use it, Professor Jensen suggests a novel justification:

Vague and inconsistent ideas can keep the mind strenuously and exasperatingly occupied as long as one is under the delusion that something definite, or indeed anything at all, can by [*sic*] extracted from them. Such preoccupation may, however, preclude snap judgments and establish an objective and impartial attitude while more obscure thought processes—perhaps better suited to the kind of problem dealt with—are producing the decision.<sup>2</sup>

In the wake of American legal realism, a new perspective has been generated, one which emphasizes policy considerations and minimizes the role of technical doctrine in legal decision-making. Jensen appears to achieve the latter part of this perspective by logical analysis; and this leads him to suggest also: "that legal decisions should be made with more explicit reference to the social and other ends to be served by our legal institutions, and that legal concepts and rules should be shaped and used with these ends kept more in the foreground."<sup>3</sup> But the author does not further develop this theme of clarifying society's goals.<sup>4</sup> Instead, he attempts to go back and patch up the sources of difficulty

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1. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

2. P. 146.

3. P. xiii.

4. Some pioneering efforts in the articulation of the goals of a free society are currently being made by Professors Harold D. Lasswell and Myres S. McDougal in the "Law, Science and Policy" seminar at Yale Law School. At the highest level of abstraction the fundamental goal is the promotion of human dignity. Spelled out in somewhat more detail at the next level, human dignity is promoted to the extent that there is achieved a wider shaping and sharing of the basic values sought by man: power, enlightenment, wealth, well being, skill, affection, respect and rectitude. For background, see Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

in legal argument by using logical analysis in an effort to remedy the vagueness and ambiguity that abound in legal concepts and rules. It is here that Professor Jensen's efforts stray off in a questionable direction. His underlying assumption—that modern logical tools can help deal with some legal problems—is sound.<sup>5</sup> Unfortunately, these tools do not help much on the kind of problem tackled in this book. The goal of stating legal rules and concepts with sufficient precision not only to give judges definite guidance but also to force them to decide one way rather than another<sup>6</sup> is probably impossible; and, even if possible, of dubious desirability. Professor Jensen seems to have fallen victim somewhat to the illusive search for certainty which Hans Reichenbach has so eloquently described.<sup>7</sup> Such aspirations need some tempering in the wisdom of Morris Cohen:

In general, in law as in politics and economics, the value of substituting definite knowledge for vague beliefs is obvious. The law, therefore, endeavors to delimit the boundaries of conflicting interests as sharply as the facts will allow. But here as elsewhere the drawing of sharp lines has its dangers, and every legal system does violence to the finer social susceptibilities by its ignoring of individual differences. Hard and fast rules also depress social initiative and make legalism a curse. Hence the best legal minds always recognize the necessity of equity or *epieike* which comes into play with the sense of justice of the individual judge.<sup>8</sup>

It should be noted, however, that Professor Jensen makes no claim that the legal problems dealt with in this first effort are the most fruitful ones for the application of modern logical analysis. He purports to do no more than open up a field of investigation.

The first of the book's three major parts is devoted to a discussion of logic and the law with the evident purpose of persuading lawyers that contempt for logic provides no ground for professional pride. By way of illustration, Jensen excerpts from legal literature several significant misconceptions about logic and, in so doing, introduces the book's central theme. He posits that, despite superficial similarities and the claims of some jurists to the contrary, the reasoning process of judges in court cases is not primarily a logical process (either deductive or inductive), but rather a process of classification. To sharpen the contrast between legal and logical argument, a brief account of induction and two kinds of deduction is presented in chapter 2. These provide a basis for comparison with selected examples of legal argument presented later in the book.

The second and third parts, comprising nearly four fifths of the entire text, illustrate, in the fields of tort and criminal law, Professor Jensen's contentions

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5. See Allen, *Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents*, 66 YALE L.J. 833 (1957).

6. P. 146.

7. REICHENBACH, *THE RISE OF SCIENTIFIC PHILOSOPHY* ch. 3 (1st paper-bound ed. 1958).

8. COHEN, *A PREFACE TO LOGIC* 93 (1956 ed.).

about the nature of legal argument. Drawing on English, American and South African case law, he convincingly demonstrates the vagueness and ambiguity of such legal concepts as proximate cause, last clear chance, contributory negligence, remoteness of damage, and intervening cause. Ultimate evaluation of the extent to which the discussion presented in the second part clarifies these concepts is better left to torts specialists. The impressions of this writer (as one who is not prejudiced by excessive knowledge in this field) are that, except for the discussion of causation, the analysis does not make much headway. The impossibility of the task undertaken is even more clearly manifested in the third part which deals with the distinction between "criminal attempt" and "preparation." After correctly showing that "commencement of the consummation" and similar legal "tests" are so imprecise that they allow a decision to go either way, the author holds out the hope for "some rule sufficiently definite for a court to distinguish in the light of it certain acts as 'attempts.'"<sup>9</sup> He observes that, absent such a rule, the decisions are arbitrary and "there is no criterion for distinguishing certain stages of an uncompleted act as mere preparation and the rest as an attempt."<sup>10</sup> But the same uncertainty inheres in the rule which Professor Jensen ultimately adopts: ". . . whether the conduct of the accused had given conclusive evidence of a settled criminal purpose unlikely to be restrained by conscience or ordinary prudence . . ."<sup>11</sup> What is somewhat overlooked in such efforts to achieve certainty is that no rule can provide judges an escape from the agony and responsibility of making a decision. Neither modern logic nor ancient wisdom nor the intuition of a legal genius can locate such a juridical lodestar. And to hint that modern logic can make headway on "apparently intractable" problems may be a disservice to the worthwhile task of convincing lawyers (and curriculum decision-makers) that modern logical analysis can be of worthwhile assistance on some everyday legal problems. Modern logic unquestionably has achieved astounding results in a wide variety of other fields,<sup>12</sup> and may reasonably be expected to prove fruitful in law, as well. Modern logic can help clarify, but it cannot transform legal decision-making into an entirely automatic process that dispenses with human judgment altogether. Yet some aspects of legal decision-making are sufficiently routine to be amenable to the automatic processing of electronic computers. Modern logical analysis can help separate such routine aspects from those that actually require human judgment. The delicate task of those who advocate the use of modern logic in law is to develop among lawyers realistic perspectives of this new tool's potential. Excessive claims do not help develop such perspectives.

The choice of an inappropriate problem for analysis by the new tools, however, is probably not the major flaw of this book. What is lacking most is that

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9. P. 148.

10. *Ibid.*

11. P. 163.

12. *E.g.*, biology, neurophysiology, engineering, psychology and philosophy. See FITCH, *SYMBOLIC LOGIC* 5 (1952), and references cited therein.

Professor Jensen has not explicitly articulated just which modern logical system he uses to make his analysis and just how he uses it. It is clear, however, that what has been undertaken is a *modern* logical analysis.<sup>13</sup> If the hope is for a scientific application of modern logic to legal problems through the undertaking of similar investigations by others, the system used certainly must be brought out into the open. At this stage of the art it is necessary to present more than just the results of the analysis.

There are some indications in the first part that the analytic system used is propositional calculus. In distinguishing syllogistic from other logical reasoning, the examples given of nonsyllogistic logical reasoning are all drawn from propositional calculus.<sup>14</sup> What is not made entirely clear is that both syllogistic reasoning and propositional calculus are what Professor Jensen calls "logics of factual statements" as distinct from what he calls "logics of norms." He correctly indicates that the logic of norms is more like that of propositional calculus than that of the syllogism. But this is not developed further because Professor Jensen feels that the logic of norms is still a "very controversial topic" (*i.e.*, unsettled) and therefore inadvisable to get involved with at this point. But, for lawyers, this is the very area where careful investigation is likely to produce fruitful results.

The reasons for suspecting that focusing future research on the normative logics will prove fruitful are found in the writings of Wesley N. Hohfeld and George H. Von Wright. Hohfeld developed two sets of fundamental legal relationships which he regarded as "the lowest common denominators" of all legal discourse.<sup>15</sup> The relationships in the right-set he called "rights," "duties," "privileges" and "no-rights"; those in the power-set, "powers," "liabilities," "immunities" and "disabilities." Von Wright constructed a logical system dealing with prescriptive discourse, including such concepts as "permission," "obligation" and "forbidden."<sup>16</sup> The parallels between the fundamental legal relationships in Hohfeld's right-set and the concepts of Von Wright's normative logic are evident. Hohfeld's "duty" is Von Wright's "obligation," and

13. This seems clear from such statements as:

. . . I have concentrated on those patches of the law which are full of words with little or no substance . . . [T]here are, no doubt, large areas of the law that do not need to be harrowed by logical analysis. (p. xv.)

At any rate, a court case when first looked at from the standpoint of modern logic does resemble some strange conjuring performance. (p. 1.)

It is the other kind of reasoning and judgment, namely, that which is the settling of a question of law which will be examined here in the light of modern logic and semantics. (p. 2.)

A brief account . . . will suffice to show that the logical analysis we have given of South African cases applies equally well to English and American ones. (p. 150.)

14. Pp. 22-24.

15. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

16. Von Wright, *Deontic Logic*, 60 MIND 1 (1951); VON WRIGHT, AN ESSAY IN MODAL LOGIC (1951).

"privilege" is the same as "permission." For purposes of clarifying the language of law, the implications of this linkage between the two systems are significant. With a small group of concepts, Hohfeld has provided a legal language which facilitates a precise description of the process of legal decision; and Von Wright has provided a rigorous logical basis for one set of those concepts. Professor Alan Anderson, who is currently constructing another logical system which will extend deontic logic to include the concepts in Hohfeld's power-set, has already shown that the deontic logic of Von Wright is, indeed, merely an extension of propositional calculus.<sup>17</sup> Such efforts are more likely to lead to significant progress in clarifying language for describing the legal decision process than efforts which avoid "logics of norms." Since the important aspects of legal decision-making are clearly normative in character, a normative logic is required to deal with these adequately. More sensitive analytic tools than those used by Professor Jensen are needed. But of even greater importance, just which tools are being used and how they are employed should be revealed so that they can be subjected to critical appraisal.

Both logicians and lawyers are likely to find the quality of this book somewhat uneven. Many passages display unusual capacities of wisdom and insight. The light these shed should not be obscured by the apparent trivial errors and dubious assertions.

With respect to modern logic and the development of realistic perspectives among lawyers about it, this book will probably be helpful in several respects. In the legal literature, logical reasoning is generally equated with syllogistic reasoning. Professor Jensen does explain that syllogistic reasoning is not the only form of logical analysis.<sup>18</sup> What could have been emphasized even more is what a vast extension and improvement of Aristotelian logic is the symbolic logic of today. Reichenbach indicates the contrast more appropriately:

But how different is the theory of classes developed by the mathematicians of the nineteenth century from the class calculus of the Aristotelian logic! It is incomprehensible why the Aristotelian class logic still fills the usual textbooks on logic in an era which differs from that of Aristotle about as much as the railroad from the oxcart.<sup>19</sup>

In one important respect, Professor Jensen's brief discussion of the "logic of norms" is misleading. He asserts: "It is to be expected that we cannot perform on norms, injunctions and kindred utterances, the same logical operations in accordance with the same rules that we can perform on factual statements."<sup>20</sup> Many logical operations and rules, however, are usually assumed to be valid for both "factual statements" and "normative statements."<sup>21</sup> Deontic

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17. ANDERSON, *THE FORMAL ANALYSIS OF NORMATIVE SYSTEMS* (Tech. Rep. No. 2, Contract SAR/Nonr-609(16), Office of Naval Research, Group Psychology Branch, 1956).

18. See P. 11.

19. REICHENBACH, *op. cit. supra* note 7, at 224.

20. P. 19.

21. See text accompanying note 17 *supra*.

logic is merely an extension of propositional calculus. And, if logic-D is an extension of logic-P, then all the theorems of logic-P are also theorems of logic-D (although the reverse need not be true). Also, it would be more appropriate to speak of the "logics of norms" to be sure that nobody is misled into thinking that there is only one.

There is also a trivial error, which is undoubtedly just an oversight, in one of the syllogistic arguments presented: "Put symbolically, the legal argument is: All *S* is *P*; this is *S* (is not *S*); therefore, *this* is *P* (is not *P*)."<sup>22</sup> A careful reading of the parenthetical alternative discloses the error. All Swedes are Persons but although this (Norwegian) is not a Swede, that does not mean that this (Norwegian) is not a Person. Also, some logicians are apt to wonder about the author's frequent appeal to common sense.<sup>23</sup> For some, at least, a person interested in logic is appropriately characterized as one who "has a common sense enough to wish to learn more than common sense can teach him."<sup>24</sup>

Undoubtedly many readers will find themselves in agreement with Jensen's comments about the legal decision process:

It is a pity that this [inchoate sociological] knowledge, which probably does influence a judge's decisions, has to work under cover of a verbal ritual which is not so much a method of deliberating on legal (and that means, fundamentally, on social) problems as a means of concealing the absence of a method.<sup>25</sup>

Phrases like 'direct result' and 'remote consequences' enable a court of law to seem to give intelligible reasons for its decision without actually doing so . . . . [W]e are given no intelligible test by means of which to distinguish direct from indirect consequences; we are merely being fobbed off with a metaphor.<sup>26</sup>

His elaboration of the resemblance of a court case to some strange conjuring performance is apt to provoke nodding smiles from some sage heads:

The case the judge has before him is the hat, and his decision is the rabbit that has to be extracted from it. He expends a great deal of effort uttering incantations because he believes, as indeed most people do, that only thus will the correct rabbit be produced. But does he not flick the rabbit out of his sleeve, and might he not save time and energy by doing so without all the flourishes were it not that according to conventional ideas about legal proceedings this would be regarded as cheating, for legal rabbits ought not to be produced in this way?<sup>27</sup>

Revealed in these passages is a clear understanding that it is not the legal doctrines that decide cases, that to deal satisfactorily with the choices posed

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22. P. 20.

23. *E.g.*, pp. 104, 105, 114.

24. REICHENBACH, *op. cit. supra* note 7, at viii.

25. P. 163.

26. Pp. 105-06.

27. P. 1.

in individual cases requires "some consideration of the social ends to be attained and the best means of attaining them."<sup>28</sup>

Thirty years ago Walter Wheeler Cook asked some searching questions about the scientific study of law:

When about a generation ago the case method of studying law was introduced we were told that by its use the study of law had been made truly scientific. It was claimed that in the legal field it is the equivalent of the laboratory method in the physical sciences. That the lawyers produced under this method are better technicians than those turned out by the textbook and lecture methods, there can be no doubt. Whether, in a larger sense, they are scientifically trained members of a learned profession, is at least open to question. As one reads current legal discussions, whether in judicial opinions, textbooks, or periodicals, or listens to papers at bar association meetings, his doubt as to the scientific character of the legal thinking resulting from current legal education is increased.

At the present moment there are signs of unrest and dissatisfaction on the part of a few of the more thoughtful teachers of law. What, they are asking, would be involved in a truly scientific study of law? Can truly scientific methods of study be applied in our field of work?<sup>29</sup>

One of Cook's suggestions is especially interesting:

[I]t is obvious that what is demanded is not merely a broadening of the present vocational curriculum, organized as that is on the basis of the old logic, or the addition of a graduate school of law to the vocational school, but rather an entirely new and different approach to legal problems. First and foremost, the members of such a group would need to have and to give their students a clear conception of what the scientific study of anything involves, and of the available tools for pursuing it in the legal field. This would require them to take account of modern investigations into logic and human reasoning, and to survey in general outline at least the development of science and scientific method. Only in this way, it is believed, can there be formulated an adequate conception of the technique involved in the scientific study of legal phenomena, and of the limitations of the technique; only in this way can there be secured the necessary degree of objectivity required for the study of legal problems.<sup>30</sup>

The significance of Professor Jensen's book is more in what it portends than in what is done within its 166 pages. The tools of modern logic are beginning to have a telling effect in clarifying communication in many compartments of intellectual activity. There is little reason to expect that a profession that holds itself out as expert in the art of communication will long remain insulated from the use of such tools.<sup>31</sup> The efforts in this book are best viewed as an initial,

28. P. 109.

29. Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303 (1927), reprinted from 15 Johns Hopkins Alumni Magazine (March 1927).

30. *Id.* at 308.

31. Professor Jensen makes it clear that training in modern logic would be useful to lawyers—a helpful supplementary tool to legal training, but not a replacement for it: "The main purpose of this work, however, is to point to the logical source of some legal difficulties, and not to try to solve the lawyer's problems for him; for it is he who has the

tentative stab at demonstrating the utility of modern logical analysis to lawyers. In calling attention to this potential, Professor Jensen has helped to further the task of studying law scientifically.

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MEDICAL NEGLIGENCE. By the Rt. Hon. Lord Nathan, P.C., with the collaboration of Anthony R. Barrowclough. London: Butterworth and Co., 1957. Pp. xxxii, 218. \$7.00.

SINCE the end of World War II there has been a growing clamor in the medical profession in the United States concerning what is alleged to be an oppressive increase in malpractice actions in this country.<sup>1</sup>

It seems that American doctors are not alone in their fears. In this fine little volume Lord Nathan asserts that, "Since the National Health Service Act became operative in 1948 there has been a remarkable, and in some ways alarming, flood of such cases; and that notwithstanding that the hospitals are the same hospitals as before, and the medical men are, so to speak, the same medical men."<sup>2</sup>

In his book Lord Nathan has prepared, with the aid of Mr. Anthony Barrowclough, an excellent collection of nearly all of the recent appellate decisions in the field of medical negligence in Britain. The volume should be a valuable addition to the library of any American practitioner interested in the field.

The author adopts a functional breakdown in treating his subject. There are chapters on the standard of care and on liability in contract as well as tort. These are followed by materials on different types of negligent conduct such as in diagnosis, use of anesthetics and other drugs, operating room procedures, injections, treatment of burns, and consent problems. There are also chapters on *res ipsa loquitur* and on hospital liability.

The similarities between the English law examined by Lord Nathan and prevailing American holdings are readily evident. Some of the contrasts are perhaps more interesting and thought-provoking, however. The most striking difference appears quite early in the book in a discussion of the negligence standard of care. In the United States all but Minnesota and California apply the "community test" for malpractice: a physician is measured according to the accepted standards of care and skill exercised by doctors practicing in his own or a similar community. This test has never been accepted in Britain. There the standard is the basic negligence test of the reasonable man: the physician is held to the degree of care and skill commonly exercised, in the

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legal knowledge which, in addition to some competence in modern logical analysis, is required for a satisfactory solution." P. xiv.

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1. REGAN, DOCTOR AND PATIENT AND THE LAW 8 (3d ed. 1956); Wachowski and Stronoch, *The Radiologist and Professional Medical Liability*, 30 TEMP. L.Q. 398 (1957).

2. P. vi.