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GOODHART'S CONCESSION: DEFENDING RATIO DECIDENDI FROM LOGICAL POSITIVISM AND LEGAL REALISM IN THE FIRST HALF OF THE TWENTIETH CENTURY

A. INTRODUCTION

THE FIRST half of the twentieth century brought an explosion of interest and debate among English jurists over the notion of the *ratio decidendi* of a case.[1] There were at least three issues. First, Commonwealth judges were trying to figure out whether cases from courts of co-equal jurisdiction were binding on them, or merely persuasive authority.[2] Second, both Commonwealth judges and English legal theorists were struggling with how to determine the *ratio decidendi* in cases where judges in a court issue separate opinions.[3] What *ratio*, if any, can be derived from five separate judges' opinions in a case? Third, is *ratio decidendi* a meaningful and useful concept in any event? The first issue seems to have been solved.[4] The second issue is more of a Commonwealth problem than an American problem, and it has been suggested that English appellate courts follow the American practice of issuing joint opinions

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1. E.g. Arthur L. Goodhart, "Determining the *Ratio Decidendi* of a Case" (1930) 40 *Yale Law Journal* 161; A. L. Goodhart, "Precedent in English and Continental Law" (1934) 50 *Law Quarterly Review* 40; Lord Wright, "Precedents" (1943) *Cambridge Law Journal* 118, [1942] *University of Toronto Law Journal* 247; J. L. Montrose, "The Language Of, and a Notation For, the Doctrine of Precedent" (1953) 2 *University of Western Australia Law Review* (Part I) 301, (Part II) 504; J. L. Montrose, "*Ratio Decidendi* and the House of Lords" (1957) 20 *Modern Law Review* 124; A. W. B. Simpson, "The *Ratio Decidendi* of a Case" (1957) 20 *Modern Law Review* 413; J. L. Montrose, "The *Ratio Decidendi* of a Case" (1957) 20 *Modern Law Review* 587; A. W. B. Simpson, "The *Ratio Decidendi* of a Case" (1958) 21 *Modern Law Review* 155; A. L. Goodhart, "The *Ratio Decidendi* of a Case" (1959) 22 *Modern Law Review* 117; Julius Stone, "The *Ratio* of the *Ratio Decidendi*" (1959) 22 *Modern Law Review* 597. See also the following notes: C. J. Hamson, "Bell v Lever Bros" (1937) 53 *Law Quarterly Review* 118; J. H. C. M[orris], "The Authority of the Central London and High Trees Case" (1948) 64 *Law Quarterly Review* 28; R. E. Megarry, "The Authority of the Central London and High Trees Case" (1948) 64 *Law Quarterly Review* 29; J. H. C. M[orris], "The Authority of the Central London and High Trees Case" (1948) 64 *Law Quarterly Review* 193; R. E. M[egarry], (1948) 64 *Law Quarterly Review* 453.
2. E.g. *Young* v *Bristol Aeroplane Co* [1944] KB 718.
3. E.g. *Walsh* v *Curry* [1955] NI 112.
4. Rupert Cross and J. W. Harris, *Precedent in English Law* (4th ed., Oxford: Clarendon Press, 1991), 108–19.

to minimise it.[5] The third issue was sparked in 1930 by Arthur Goodhart's famous article "Determining the *Ratio Decidendi* of a Case."[6]

The thesis of this article is that Goodhart's theory of *ratio decidendi* was a response to two major intellectual trends that were in full bloom in the first part of the twentieth century, and which threatened the intelligibility of the concept of *ratio decidendi*: Legal Realism and Logical Positivism. A third and similar movement existed in political science: Behavioralism. I will argue that Goodhart tried to salvage the notion of *ratio decidendi* by making a huge concession to the Legal Realists, Logical Positivists, and Behavioralists. He conceded to the Legal Realists and Behavioralists the claim that what judges say in their legal opinions need not be taken to explain why they decide cases the way they do. And he did this by giving to Logical Positivism a way to articulate *rationes decidendi* with less metaphysical terminology than had been done in the past.

In legal theory there are two leading views of the *ratio decidendi* of a case. One is the classical theory which holds that the *ratio* is the rule or principle that the court deciding a case considers necessary for the result reached in the case. The other view is the Goodhart theory, which is that the *ratio* consists of the facts the judge in the precedent case believed were material, and the judge's decision based on those facts.[7] Here is how Cross and Harris articulate the classical theory: "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury."[8] An example of a *ratio decidendi* under the classical theory is: "A driver of a motor vehicle owes no duty of care in respect of his driving to persons outside the area of potential danger which ought reasonably to have been contemplated as the result of his negligence."[9] Here is the form of a *ratio decidendi* under the Goodhart theory: "In any future case in which the facts are *A*, *B* and *C*, the court must reach conclusion *X* . . ."[10] An understanding of the Goodhart theory requires a look at Goodhart's activities during the two years preceding the theory's publication.

B. GOODHART'S CONFRONTATION WITH AMERICAN LEGAL REALISM

Goodhart was an American who spent most of his career in England. Between 1928 and 1929, however, he was a visiting professor at Yale Law School. During this time he began to cross swords with the American Legal Realists. The confrontation began with Goodhart's 1928 article, "Three Cases on Possession".[11] The article discussed cases

5. See G. W. Paton and G. Sawer, "*Ratio Decidendi* and *Obiter Dictum* in Appellate Courts" (1947) 63 *Law Quarterly Review* 461, 483. But the problem can also surface in America, e.g. *Furman* v *Georgia* 408 US 238 (1972).
6. A. L. Goodhart, "Determining the *Ratio Decidendi* of a Case" (1930) 40 *Yale Law Journal* 161. This article also appears in Arthur L. Goodhart, *Essays in Jurisprudence and the Common Law* (Cambridge University Press, 1931), 1–26.
7. *Ibid.* 182.
8. Cross and Harris, above n4, 72.
9. *Ibid.* 71.
10. Goodhart, above n6, 179.
11. A. L. Goodhart, "Three Cases on Possession" (1928) 3 *Cambridge Law Journal* 195. This article also appears in Goodhart, *Essays in Jurisprudence and the Common Law* (Cambridge University Press, 1931), 75–90.

litigating the issues that arise when one finds lost property. If I find some money that has been dropped on the floor of your house, and we don't know who the money belongs to, do you get to keep it or do I? Goodhart's article attempts to extract principles of law from three cases. But the extraction is complicated due to different theories that judges and legal scholars have developed from reading the three cases. These various theories have arisen, according to Goodhart, from the fact that later courts and scholars have discovered different *rationes decidendi* from those that were in the minds of the judges originally deciding the cases. Goodhart reaches this conclusion because of his critical reading of the cases, and his focus on *ratio decidendi*. Thus Goodhart's technical reading of the cases in terms of their *rationes decidendi* was an important part of the article.

Goodhart's 1928 article is both interesting and important. What is interesting is that he appears to view the notion of *ratio decidendi* from the perspective of the classical theory. At one point Goodhart states that it is impossible to find a clear *ratio decidendi* in *Bridges* v *Hawkesworth*.[12] It would be odd not to be able to find a *ratio decidendi* under the Goodhart theory. It would be something like:

Fact I. Someone dropped his or her bank notes at *D*'s premises.
Fact II. *P* found the bank notes while doing business at *D*'s premises.
Fact III. The owner of the bank notes cannot be found.
Conclusion. The court must give title to the bank notes to *P*.

The article is important because it provoked an attack by an American Legal Realist, Joseph Francis.[13] It appears that Francis' article had a great influence on the development of Goodhart's theory of *ratio decidendi*.

Francis criticises Goodhart's analysis of the possession cases. Francis is not really interested in the legal principles involved in possession.[14] Instead he is critical of Goodhart's focus on the cases' *rationes decidendi*. Francis presents the Legal Realist thesis that judges first decide what conclusions they want to come to, and then later develop arguments to justify those conclusions.[15] He does not believe Goodhart is conscious of the fact that novel or doubtful cases are really decided by considerations of policy, and not by legal concepts.[16] Francis thus implies that Goodhart is a Conceptualist. Francis says that possession is really a group of operative facts to which legal consequences attach.[17] These operative facts will depend upon such things as the legal consequences the judge wants to occur, the judge's sense of justice, and his sense of contemporary values.[18] Therefore, the judge's background and training are important.[19] In other words, the facts that constitute possession will depend "as the behaviorists have it, upon the judge's 'behavior patterns' ".[20]

12. (1851) 15 Jur 1079, 21 LJQB 75; see Goodhart, above n11, 197.
13. See Joseph F. Francis, "Three Cases on Possession—Some Further Observations" (1928) 14 *St Louis Law Review* 11.
14. *Ibid*. 19.
15. *Ibid*. 22.
16. *Ibid*. 23.
17. *Ibid*. 22.
18. *Ibid*.
19. *Ibid*.
20. *Ibid*.

In at lease one respect Francis is being unfair to Goodhart by implying that Goodhart is a Conceptualist. As a Legal Realist, Francis is battling Conceptualism in the cause of legal reform. While Goodhart may or may not understand how judges reach their decisions, he is not a Conceptualist. Goodhart's statement that the principles of possession are unclear shows that he is not a Conceptualist. A Conceptualist would claim to know the necessary and sufficient conditions of the concept of possession.[21] So for a Conceptualist, the principles of possession would be clear. Goodhart's criticism of judges and scholars was not that they didn't get possession right. His point was that judges and scholars were not looking at *rationes decidendi* as they were seen by the judges deciding precedents.

In addition to Francis' breathtaking conclusion, "If it is true that the path of human progress is strewn with dead principles and dead concepts then I venture to suggest that the effort to find the *ratio decidendi* of a case will soon be viewed in the same light as a physiologist trying to locate the 'soul' ",[22] there are some other interesting items in his article. These include three references to Herman Oliphant's 1927 speech. In 1929 Goodhart gave two speeches that show that he had been thinking about both Francis' criticisms and Herman Oliphant.

In a speech given in April 1929, Goodhart cited Oliphant as one of the radical American theorists who advocate the complete abandonment of *stare decisis*.[23] Goodhart did not think that the gradual abandonment of *stare decisis* in America would necessarily be a bad thing given various facts about American legal culture.[24] But he thought that the abolition of the doctrine with nothing put in its place, such as the American Law Institute Restatements, would mean that there would be no limits to judicial legislation.[25] The problem with Oliphant was that his call for the abolition of the doctrine of precedent "resembles Rousseau's demand for a return to the law of nature—a law of nature which never existed except in the author's imagination".[26] In an address to the Federation of Bar Associations of Western New York, Goodhart attacked the thesis of some Legal Realists that judges deliberately make new law by way of rationalisations, and he attacked the thesis of other Legal Realists that judges alter the law unconsciously and self-deceptively.[27]

Goodhart's rejection of Legal Realism was thus based on rule of law considerations. He was concerned that the idea that judges had the power to make law has led to the view that judges should make new law in order to pursue social reform.[28] Goodhart rejected the position of some writers that judges decide cases by feeling as opposed to reason.[29] He acknowledged that in doubtful cases judges rely upon their moral,

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21. See H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 269.
22. *Ibid.* 24.
23. Arthur L. Goodhart, "Case Law in England and America" (1930) 15 *Cornell Law Quarterly* 173, 185–6. This article also appears in A. L. Goodhart, *Essays in Jurisprudence and the Common Law* (Cambridge University Press, 1931), 50–74.
24. *Ibid.* 186, 193.
25. *Ibid.* 191.
26. *Ibid.* 185.
27. Arthur L. Goodhart, "The New York Court of Appeals and the House of Lords" in Goodhart, *Essays in Jurisprudence and the Common Law* (Cambridge University Press, 1931), 268–81. I assume that this speech was given in 1929. It originally appeared in print in the August 1929 issue of the *Buffalo Law Journal*.
28. *Ibid.* 268.
29. *Ibid.* 269.

economic and political views. But he believed that in the vast majority of cases the law is so determinate that the judge has no choice but to state and apply the law.[30]

Goodhart's speeches were an explicit response to the views of Herman Oliphant and American Legal Realism, which had been reflected in Francis' article. The American Legal Realists were rule sceptics. They did not believe that cases were ordinarily decided by judges following rules. The *ratio decidendi* of a case is a rule or principle that is supposed to be binding law. But if judges do not decide cases by following rules, then *rationes decidendi* become meaningless as a *practical* matter. There was something more, however, in the work of Francis and Oliphant that threatened *rationes decidendi* as a *theoretical* matter. The Goodhart theory of *ratio decidendi* was to be able to deal with this threat as it would with Legal Realism. The threat was scientism.

C. SCIENTISM IN TWENTIETH CENTURY LEGAL THEORY

"The spirit of the times is scientific" is the first sentence of a 1933 law review article written by Professor Yntema.[31] And that spirit was present in Francis' article attacking Goodhart where there is a reference to jurisprudence as a science.[32] In 1929 Goodhart was not unaware of that spirit: "Unfortunately, it is of frequent occurrence that the cases which are of the greatest importance to law as a *science* are argued by lawyers of the second class."[33] That spirit was also clearly present in Oliphant's 1927 speech:

> But there is a constant factor in the cases which is susceptible of sound and satisfying study. The *predictable* element in it all is what courts have done in response to the stimuli of the facts of the concrete cases before them. *Not the judges' opinions*, but which way they decide cases will be the dominant subject matter of any truly *scientific* study of law.[34]

In 1941 Huntington Cairns said that all social sciences study human behaviour, and so if jurisprudence is scientific it will study behaviour too.[35] In 1929 Cassius Keyser had explained why judicial *behaviour* is the subject of legal science. Every branch of science studies natural phenomena, and so if the study of law is to be a science then it too must study natural phenomena. And judicial behaviour is the natural phenomenon that will be the subject matter of legal science.[36] Keyser states that science allows prediction: "An attempt to predict based on legal science or a branch thereof employs the assumption or postulate that a given pattern of judicial behavior will repeat itself when the corresponding stimuli and conditioning circumstances repeat

30. *Ibid.*
31. Hessel E. Yntema, "The Implications of Legal Science" (1933) 10 *New York University Law Quarterly* 279, 279.
32. See Francis, above n13, 22.
33. Goodhart, above n23, 192 (emphasis added).
34. Herman Oliphant, "A Return to *Stare Decisis*" (1928) 14 *American Bar Association Journal* 71, 159 (emphasis added).
35. Huntington Cairns, *The Theory of Legal Science* (Chapel Hill: University of North Carolina Press, 1941, repr. South Hackensack, NJ: Rothman, 1969), 1–2.
36. Cassius J. Keyser, "On the Study of Legal Science" (1929) 38 *Yale Law Journal* 413, 415.

themselves."[37] We shall turn to the topic of prediction later, but let us first note that this talk of stimuli and conditioning brings to mind Behaviorism.

Behaviorism is a school of thought in psychology. It has a counterpart in political science, however, known as "Behavioralism".[38] Behavioralists aim to explain what people do rather than what people say they do.[39] That Oliphant is a Behavioralist is shown in a statement that Goodhart thought important enough to quote in "Determining the *Ratio Decidendi* of a Case":

> Why has not our study of cases in the past yielded the result now sought? The attempt has been made to show that this is largely due to the fact that we have focused our attention too largely on the *vocal behavior* of judges in deciding cases. A study with more stress on their *non-vocal behavior*, i.e., what the judges actually do when stimulated by the facts of the case before them, is the approach indispensable to exploiting scientifically the wealth of material in the cases.[40]

Francis had complained that "scarcely anything is being done on either side of the Atlantic towards a scientific study of this non-vocal behavior of judges".[41] To better understand the nature of the scientism creeping into jurisprudence in the first half of the twentieth century, we need to know more about the dominant philosophy of science of the time: Logical Positivism.

D. LOGICAL POSITIVISM

Logical Positivism represents an attempt to give knowledge a scientific basis. The idea was to free knowledge of metaphysics by using empirical observation and logical analysis. The Logical Positivists were influenced by Hume's anti-metaphysical empiricism.[42] Logical Positivism was a continuation of Comte's scientific positivism.[43] Comte wanted to eliminate metaphysical and theological notions from science in favour of an empirical approach.[44] Comte's positivism held that science was to describe phenomena in observation terms, and it was to be predictive.[45] Logical Positivism was the dominant view of science from the 1920s to about 1970, when people realised that it had hitched its wagon to the wrong horse. That horse was the verification principle of meaning.

The verification principle of meaning was the tool that was supposed to remove metaphysics from science. Summarised, the principle is as follows: "The meaning of a proposition is its [empirical] method of verification."[46] This means that a sentence

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37. *Ibid*. 418.
38. Alexander Rosenberg, *Philosophy of Science* (Boulder, CO: Westview Press, 1988), 52.
39. *Ibid*.
40. Oliphant, 161, emphasis in original, cited in Goodhart, above n6, 168 n35. For a review of the recent work of the Behavioralists in law see Howard Gillman, "What's Law Got to Do with It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making" (2001) 26 *Law and Social Inquiry* 465–504.
41. Francis, above n13, 23.
42. E. H. C. Hung, *The Nature of Science: Problems and Perspectives* (Belmont, CA: Wadsworth Publishing, 1997), 323–5.
43. *Ibid*. 323.
44. *Ibid*. 320.
45. *Ibid*. 321.
46. *Ibid*. 325.

is defined by reference to things or procedures that can be observed. These procedures will allow us, in principle, to determine whether the sentence has meaning. If no procedure can be devised to verify the truth or falsity of the sentence, then the sentence is meaningless, and hence metaphysical. But even in such a case we will still have learned something valuable. This is because the verification of meaning principle shows that metaphysical statements have no meaning.[47] If a procedure can be devised and carried out, then the procedure will tell us whether the sentence is false, or whether there are grounds for believing that the sentence is true. Let us look at an example.

Consider the sentence: "This vase is fragile." "Fragile" is a metaphysical term to the extent that the property of being fragile cannot be observed. But the sentence "This vase is fragile" is meaningful because it can be defined in a way that allows us to observe what it means. Under the verification principle of meaning the meaning of the sentence, "This vase is fragile", is the method of its verification.[48] Its method of verification is dropping the vase on the floor.[49] We create a "meaning statement" like this: " 'This vase is fragile' means that if this vase is dropped onto the floor, then it will break."[50] If we drop the vase on the floor and it breaks, then there is some reason to accept the sentence as true. Our hypothesis has been confirmed, at least to some degree. If the vase does not break, then the sentence is false. So even though the property of being fragile is unobservable, and hence metaphysical, there is no harm in using the term because we have reduced it to observational terms.[51] Note also that the verification of meaning principle is predictive. The sentence "If this vase is dropped onto the floor, then it will break" makes a prediction as to what will happen if the vase is dropped.

Not only was Logical Positivism the dominant view of science when Yntema said that the spirit of the age is scientific, but the verification principle of meaning even made its way into legal theory during the first half of the twentieth century. For example, Julius Stone suggests that one role of logic in the law is the confirmation of hypotheses.[52] In Carnap-like fashion Stone states, "And unless they are capable of such verification one way or the other they seem for our practical purposes in the law meaningless or strictly nonsensical".[53] Cairns contended that the task of jurisprudence was to formulate valid propositions about the "realm of law", and that hypothesis and verification is the desirable method.[54] Adopting the Logical Positivist position, Cairns stated that if an hypothesis could not be framed so that it could be either confirmed or disproved, then it is "empirically meaningless".[55] "In such a case it is part of the realm of myth and outside the domain of science."[56]

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47. See Rudolf Carnap, "Testability and Meaning" (1936) 3 *Philosophy of Science* 419, 421.
48. Hung, above n42, 325.
49. This example is based on *ibid.* 325.
50. *Ibid.* 325.
51. *Ibid.* 326.
52. Julius Stone, *The Province and Function of Law* (Sydney: Associated General Publications, 1946, repr. Buffalo, NY: Hein, 1968), 145.
53. *Ibid.* 145.
54. Cairns, above n35, 70.
55. *Ibid.* 74.
56. *Ibid.* 75.

An example of the type of proposition that Cairns thought was subject to verification is this one: "The Constitution is the supreme law of the land, and the supreme law of the land must be observed by the Supreme Court."[57] Of course the concept of "the supreme law of the land" is metaphysical. It cannot be seen.[58] We can, however, inspect the operations of the Supreme Court.[59] "If those operations are in conformity with an implication of the proposition that the Constitution is the supreme law of the land the *probability* is that the hypothesis is valid."[60] A more comprehensive discussion of the verification principle of meaning applied to legal propositions, however, was given by one of the greatest legal sceptics ever, Scandinavian Legal Realist Alf Ross.

In his fascinating 1959 book, *On Law and Justice*, Ross explains the verification principle of meaning, and applies it to the law. He contrasts the scientific claim "this is chalk" with the claim "the world is governed by an invisible demon".[61] He explains that if the latter claim does not have any verifiable implications, it is metaphysical and "banned from the realm of science".[62]

> The interpretation of the doctrinal study of law presented in this book rests upon the postulate that the principle of verification must apply also to this field of cognition-that the doctrinal study of law must be recognized as an empirical science. This means that the propositions about valid law must be interpreted as referring not to an unobservable validity or "binding force" derived from *a priori* principles or postulates but to social facts. It must be made clear in what procedure the doctrinal propositions can be verified; or what their verifiable implications are.[63]

For Ross, an example of a proposition that can be verified would be: "section 62 of the Uniform Negotiable Instruments Act is *valid* law at the present time of a certain state."[64] Ross says that the real content of this proposition is a *prediction* that when the relevant facts are brought before a court, and section 62 has not been modified, "the directive to the judge contained in the section will form an integral part of the reasoning underlying the judgment".[65] Let us consider an example to see how this works.

California Vehicle Code section 22349 subdivision (a) states: "Except as provided in Section 22356, no person shall drive a vehicle upon a highway at a speed greater than 65 miles per hour." We turn this rule into a logical proposition, "California Vehicle Code section 22349 is a valid law in California". This proposition is our hypothesis, which we will label "H". If this proposition is true, we can predict that a judge will punish someone who breaks the rule. We will label this prediction "P". If the prediction comes true, it confirms our hypothesis. If the prediction fails to come true, it will

57. Cairns, above n35, 74.
58. *Ibid.* 75.
59. *Ibid.*
60. *Ibid.* (emphasis added).
61. Alf Ross, *On Law and Justice* (Berkeley: University of California Press, 1959), 39–40.
62. *Ibid.* 40.
63. *Ibid.*
64. *Ibid.* 42 (emphasis added).
65. *Ibid.*

falsify our hypothesis. These two possibilities are represented by the argument forms set out below.

P is true—	*P* is false—
If *H*, then *P*.	If *H*, then *P*.
P.	Not *P*.
H.	Not *H*.
The Fallacy of Affirming the Consequent	Modus Tollens

As empiricists we are going to have to go to court to make the necessary observations. So we go to a courtroom, and wait to see what happens to a person convicted of violating section 22349. Finally we see a woman admit that she was travelling at 75 miles per hour, and then plead guilty to a charge of violating the section. We then have to watch as the judge gives her a $275 fine. *P* is true. Therefore, we have confirmation that *H* is true.

Now we do not know for sure whether *H* is true. The argument representing our observations takes the form of the Fallacy of Affirming the Consequent, and is therefore deductively invalid. But reasoning in the form of the Fallacy of Affirming the Consequent can have some inductive strength.[66] When it does, it is known as "abduction".[67] Thus *P*'s truth has given us a reason for accepting *H*'s truth. Had *P* been false, however, we would have concluded that *H* was necessarily false because our reasoning would have followed the valid modus tollens form. This is what Stone was referring to when he said that logic can be used in the confirmation of hypotheses.

E. SCEPTICISM ABOUT *RATIO DECIDENDI*

Such radical empiricism creates problems for many legal concepts. Ross says that the concept of "justice" makes sense when it refers to the application of correct law to an individual case.[68] "Justice" makes sense when used this way because it "refers to observable facts".[69] But when "justice" is applied to describe a rule or a system of rules, Ross will assign the concept to the realm of myth: "To invoke justice is the same thing as banging on the table: an emotional expression which turns one's demand into an absolute postulate."[70] And it is no surprise that the concept of *ratio decidendi* will receive similar treatment. In a discussion that recites the criticism Oliphant directed at the classical theory of *ratio decidendi* in his 1927 speech, Ross declares:

> the doctrine of *stare decisis* is in reality an illusion. It is an ideology upheld for certain reasons in order to conceal from its supporters and others the free, law-creative function of the judge, and to convey the delusive impression that

66. William Hughes, *Critical Thinking: An Introduction to the Basic Skills* (3rd ed., Peterborough: Broadview Press, 2000), 219.
67. Scott Brewer, "Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy" (1996) 109 *Harvard Law Review* 923, 945–9.
68. Ross, above n61, 284.
69. *Ibid*.
70. *Ibid*. 274.

> he applies only already existing law which can be settled by virtue of a set of objective rules as indicated in *stare decisis*.[71]

Cairns believed that Oliphant had shown that the concept of a *ratio decidendi* was nonsensical.[72] Cairns thought that Oliphant had shown *ratio decidendi* to be a meaningless concept because numerous principles can be considered the basis of a particular judgment.[73] I call Oliphant's argument "The Argument from the Generality of Principles," and I present a version of it later. The present point is that Logical Positivists like Cairns and Ross thought that *ratio decidendi* was a metaphysical concept. As such, it was to be assigned to the realm of myth to reside among unicorns, leprechauns, and dragons.

Not all Logical Positivists were Legal Realists, and not all Legal Realists were Logical Positivists. So when Legal Realists like Jerome Frank and Karl Llewellyn talk of prediction they are not referring to the verification principle of meaning. In fact Frank, with insight, rejected the scientism of his time. He was sceptical of the possibility of the law becoming a science.[74] (And of course the Logical Positivists and Behavioralists would have loved to have made mincemeat out of the psychoanalytic principles that influenced Frank.) For Llewellyn, one observes the regularity of the behaviour of officials and then predicts what they will do in the future.[75] Even though some Legal Realists like Ross, Underhill Moore[76] and Walter Cook,[77] were Logical Positivists, Legal Realism and Logical Positivism should be seen as independent movements which existed at the same time, and which called into question traditional legal concepts. The important point here is that both of these intellectual currents called into question the concept of *ratio decidendi*. And both of these movements were in full force when Goodhart produced "Determining the *Ratio Decidendi* of a Case". Goodhart's article appeared in the same year as Karl Llewellyn's *The Bramble Bush*, and Jerome Frank's *Law and the Modern Mind*. We have already seen that, for Goodhart, rule of law values were at stake. We will now consider Goodhart's response to these threats.

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71. *Ibid.* 88. Ross's extreme version of Legal Realism recalls the views of the intellectual giant who had such a great influence on Logical Positivism, David Hume: "If direct laws and precedents be wanting, imperfect and indirect ones are brought in aid; and the controverted case is ranged under them by analogical reasonings and comparisons, and similitudes, and correspondencies, which are often more fanciful than real. In general, it may safely be affirmed that jurisprudence is, in this respect, different from all the sciences; and that in many of its nicer questions, there cannot properly be said to be truth or falsehood on either side. If one pleader bring the case under any former law or precedent, by a refined analogy or comparison; the opposite pleader is not at a loss to find an opposite analogy or comparison: and the preference given by the judge is often founded more on taste and imagination than on any solid argument. Public utility is the general object of all courts of judicature; and this utility too requires a stable rule in all controversies: but where several rules, nearly equal and indifferent, present themselves, it is a very slight turn of thought, which fixes the decision in favour of either party." David Hume, *Enquiries Concerning Human Understanding and Concerning the Principles of Morals*, L. A. Selby-Bigge and P. H. Nidditch (eds.), (3rd ed., Oxford: Clarendon Press, 1975), 308–9.
72. Cairns, above n35, 80.
73. *Ibid.*
74. Jerome Frank, "What Courts Do in Fact" (Part II) (1932) 26 *Illinois Law Review* 761, 773–8.
75. K. N. Llewellyn, *The Bramble Bush* (New York: Oceana Publications, 1930), 4.
76. Underhill Moore considered himself a Logical Positivist. See John Henry Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill: University of North Carolina Press, 1995), 320 n154.
77. See Walter Cook, "Walter Wheeler Cook" in *My Philosophy of Law: Credos of Sixteen American Scholars* (Boston, MA: Boston Book Club, 1941, repr. Littleton, CO: Rothman, 1987), 56–7.

F. GOODHART'S CONCESSION

In his 1930 article on *ratio decidendi* Goodhart repeated his concern about Oliphant's view. The idea that a court's opinion could be *completely* ignored "seems to be the view of a certain American school of legal thought represented by Professor Oliphant".[78] While it was to this type of thinking that Goodhart wanted to reply, it is interesting how far Goodhart went to accommodate Oliphant's scepticism.

1. GOODHART'S CONCESSION TO LEGAL REALISM AND BEHAVIORALISM

In his 1927 speech Oliphant spoke about judges' "vague and shifting rationalizations".[79] For Oliphant the *facts* that influence judges are more important than what judges have to say.

> The thesis is that facts are the only stimuli capable of scientific study as a basis of prediction. Prior rationalizations are rejected *for this purpose* because the facts prevail when they diverge from the prior generalizations and for each rationalization indicating one result, a contradictory one indicating the oposite [sic] result can usually be found.[80]

Goodhart accepts the thesis that facts trump rationalisations. He states that much of the law of torts has been developed by bad arguments, and much of property law is based on incorrect history.[81] And after quoting two articulations of the classical view of *ratio decidendi*, Goodhart rejects the classical view: "There may be no rule of law set forth in the opinion, or the rule when stated may be too wide or too narrow."[82]

In a footnote, Goodhart, mentioning both Francis and Oliphant, notes the Behavioralist thesis that the important thing in a precedent is what judges do, not what they say.[83] And Goodhart agrees with Francis' claim that the *ratio decidendi* is not necessarily found in a judge's statement of the law, but he then adds: "This, however, does not in any way conflict with my view that, in determining the principle of a case, we are bound by the judge's statement of the material facts on which he has based his judgment."[84] The Behavioralists and some of the Legal Realists want to ignore the judge's vocal behaviour. This gets beyond false rationalisations and overbroad principles. Judicial behaviour then is something that a scientific jurisprudence predicts. And Goodhart is willing to deny the significance of most judges' vocal behaviour. He is as content to get rid of rationalisations as Oliphant. This is Goodhart's concession. It is a concession to both Legal Realism and Behavioralism. He gives the Legal Realists the claim that rationalisation and overbroad principles do not explain case outcomes. And he concedes to Behavioralism that judges are greatly influenced by facts.

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78. Goodhart, above n6, 168.
79. Herman Oliphant, "A Return to *Stare Decisis*" (1928) 14 *American Bar Association Journal* 71, 159.
80. *Ibid*. n5 (emphasis in original).
81. A. L. Goodhart, "Determining the *Ratio Decidendi* of a Case" (1930) 40 *Yale Law Journal* 161,164.
82. *Ibid*. 165.
83. *Ibid*. 166 n20.
84. *Ibid*.

But concession is not capitulation. Goodhart has at least one role for vocal behaviour. Goodhart says that Oliphant's view is that judges' opinions can be *completely* ignored.[85] For Goodhart, what judges *say* about what they consider to be the material facts of the cases they decide is important.[86] Goodhart's judge is more conscious of deciding cases than is Oliphant's judge. Goodhart says that the judge "reaches a conclusion upon the facts *as he sees them*".[87] When it comes to facts, Goodhart's judge actively "chooses those which he considers material and rejects those which are immaterial, and then bases his conclusion upon the material ones".[88] But Oliphant's judge might respond to the stimulation of the facts with less awareness of what he is doing. While Oliphant says that judges make choices, they may do so consciously or unconsciously.[89] The result of this difference between Oliphant and Goodhart is that the concept of *ratio decidendi* has meaning for Goodhart: "The first and most essential step in the determination of *the principle of a case* is, therefore, to ascertain the material facts on which the judge has based his conclusion."[90] But Oliphant is sceptical of the notion of the principle of a case.[91]

In an essay on social science method, Llewellyn warned against confusing the realm of the Is with the realm of the Ought.[92] An example of the confusion is "the still prevailing practice among lawyers of looking more sharply at the rule a court purports to lay down than at *the outcome of the case upon the facts*".[93] Looking at the outcome of a case upon the facts partially describes the Goodhart theory of *ratio decidendi*. So at first glance Goodhart's theory appears to be a Legal Realist theory.

But despite his concession to Legal Realism and Behavioralism, Goodhart's view of *ratio decidendi* was not accepted by the Legal Realists. Llewellyn, who disagreed with both Goodhart and Oliphant on the force of precedent, called Goodhart's 1930 article an "indiscretion".[94] Llewellyn felt that Oliphant failed to see enough "guidance" in a precedent, and that Goodhart saw too much.[95] And one can easily see why Llewellyn felt the way he did. Goodhart's discussion of the case law assumes that there are binding precedents. For example, speaking of *People* v *Vandewater*[96] he says, "The case is, therefore, a *binding precedent* in all future cases in which either orderly or disorderly illicit drinking places are kept".[97] Such a view is at odds with Legal Realism. Llewellyn disagreed with Goodhart that a case stands for a single *ratio decidendi*.[98] According to Llewellyn, the doctrine of precedent includes "techniques for narrowing or evading, techniques for extending, techniques for shifting direction, as well as

85. A. L. Goodhart, "Determining the *Ratio Decidendi* of a Case" (1930) 40 *Yale Law Journal* 168.
86. *Ibid.* 169.
87. *Ibid.* (emphasis added).
88. *Ibid.*
89. Oliphant, above n79, 160.
90. Goodhart, above n81, 169 (emphasis added).
91. Oliphant, above n79, 72–3.
92. Karl N. Llewellyn, "Legal Tradition and Social Science Method—A Realist's Critique" in *Essays on Research in the Social Sciences* (Washington, DC: The Brookings Institution, 1931), 89, 98.
93. *Ibid.* 103 (emphasis added).
94. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston, MA: Little, Brown, 1960), 18 n11a.
95. *Ibid.* 14 n9.
96. 250 NY 83, 164 NE 864 (1918).
97. Goodhart, above n81, 174 (emphasis added).
98. Llewellyn, above n92, 107 n8.

techniques for staying put".[99] Because precedents are ambiguous and never fixed, different rules can be derived from them.[100] Furthermore, Llewellyn felt that the judge's determination of which facts are material is in part a function of the result the judge wants to reach in the case.[101] But let us now consider how Goodhart's concession comported with the more general philosophy of science of his day: Logical Positivism.

2. Goodhart's Concession to Logical Positivism

Goodhart's theory of *ratio decidendi* cleverly complied with Logical Positivism's requirement to replace metaphysical terms with observational terms. Let us take as an example the *ratio decidendi* of a case Goodhart discusses: the famous case of *Riggs* v *Palmer*.[102] In *Riggs* v *Palmer*, Francis Palmer made a will giving his grandson Elmer the greater part of his estate.[103] After making the will, however, Francis indicated that he intended to revoke the gift to Elmer.[104] So, to prevent the revocation, and obtain possession of the estate, Elmer murdered Francis.[105] Suit was filed by Francis' daughters to have the will cancelled in so far as it gave property to Elmer.

The classical view of the *ratio decidendi* of *Riggs* v *Palmer* is set out by Goodhart: "The court held that a legatee, who had murdered his testator, could not take under the will, because no one shall be permitted 'to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime'."[106] *One* candidate for the *ratio decidendi* under the Goodhart view would be:

Fact I. *D*'s grandfather willed his estate to *D*.
Fact II. *D* killed his grandfather.
Fact III. *D* killed his grandfather with the intention to inherit his grandfather's estate.
Conclusion. The judge must annul the will.

The classical *ratio* contains several metaphysical terms. These include "advantage", "own", "wrong", "claim", "iniquity", "acquire", "property", and "crime". But these metaphysical terms are stripped from the Goodhart *ratio*. The Goodhart *ratio* is more austere. And yet the metaphysical remains. The relation designated by "Grandfather's" is metaphysical, but might be reduced to observational terms along the lines suggested by Ross. There might be a similar solution to the problem presented by "annul", and "inherit". But it's doubtful whether there is a solution to eliminate the metaphysics in "intention". The complete elimination of metaphysical terms was a problem that the Logical Positivist could not solve even in the natural sciences, let alone in a normative enterprise like the study of law. This problem led to the demise of Logical Positivism.

Nevertheless, the Goodhart *ratio* is clearly more "scientific" than the classical *ratio*, given the meaning of "scientific" in 1930. Goodhart's material-facts approach to *ratio*

99. *Ibid*.
100. *Ibid*. 108.
101. *Ibid*. 113.
102. 115 NY 506, 22 NE 188 (1889), see Goodhart, above n81, 166–7.
103. 115 NY at 508.
104. *Ibid*. 508–9.
105. *Ibid*.
106. Goodhart, above n81, 166.

decidendi was designed to be a scientific response to the rule scepticism of Legal Realism and Behavioralism. His theory of *ratio decidendi* was designed to preserve the rule of law. Judicial legislation is checked because there are binding precedents after all. The doctrine of the separation of powers can be defended scientifically. The discussion that Goodhart stimulated gave rise, however, to criticisms of his approach. A particularly interesting one was Julius Stone's objection.

G. THE GENERALITY DILEMMA

I call Stone's argument "the Argument From The Generality Of Facts". To fully appreciate its impact we need first to take a look at an example based on the Argument From The Generality Of Principles. The Argument From The Generality Of Principles is directed at the classical view. A version of the argument appears in Oliphant's 1927 speech, and so pre-dates the Goodhart view.[107] I will present a version of the argument similarly to the way Stone presents his: based on the famous case of *Donoghue* v *Stevenson*.[108] That case held that a manufacturer of ginger beer was liable in tort for damages suffered by a person who drank a bottle of ginger beer with a decomposed snail in it.

According to the Argument From The Generality Of Principles, there is a problem with determining the classical *ratio decidendi* because of the different levels of generality at which one might choose the principle of the case. Here are *some* of the candidates for a classical *ratio* for a case like *Donoghue* v *Stevenson*:[109]

(1) A manufacturer of ginger beer owes a duty of care not to physically injure a woman who might consume its product, and so must make sure that no decomposing snails are in its bottles of ginger beer delivered to consumers.

(2) A manufacturer of a drink owes a duty of care not to physically injure an adult who might consume its product, and so must make sure that there are no decomposing organisms in its bottles delivered to consumers.

(3) A manufacturer of any food owes a duty of care not to physically injure any person who might consume its product, and so must make sure that there are no harmful substances in its products delivered to consumers.

(4) A manufacturer of any product owes a duty of care not to injure any person who might use its product, and so must make sure that the product is manufactured so that no harm can occur to a consumer who uses the product in a reasonable way.

Many more candidates may be constructed based on a greater or lesser generality of the various facts and concepts upon which the proposed principle is based. And so Oliphant asks this sceptical question: "Where on that graduation of propositions are

107. See Oliphant, above n79, 72.
108. [1932] AC 562.
109. I say a case "like" *Donoghue* v *Stevenson* because my examples do not cover all the relevant elements of that case.

we to take our stand and say, 'This proposition is the decision of this case within the meaning of the doctrine of *stare decisis*'?"[110] The Logical Positivist analysis of this problem would be that the statement, "The *ratio decidendi* is the principle of the case" is meaningless because the notion of the principle of the case is vague. Because of its vagueness, the statement has no method of verification.[111]

In the Argument From The Generality Of Facts, Stone gives various examples of nine different fact categories.[112] I will use only a few of his examples to construct my Goodhart *rationes*.

(1) Fact I. *D* distributed a bottle of ginger beer it produced with a decomposed snail in it.
Fact II. *P*, a woman, drank the bottle of ginger beer with the decomposed snail in it, and got sick.
Conclusion. *D* is liable to *P*.

(2) Fact I. *D* distributed a bottle of a drink it produced with a decomposed organism in it.
Fact II. *P*, an adult, drank the drink with the decomposed organism in it, and got sick.
Conclusion. *D* is liable to *P*.

(3) Fact I. *D* distributed food it produced with a harmful substance in it.
Fact II. *P* consumed the food with the harmful substance in it, and got sick.
Conclusion. *D* is liable to *P*.

(4) Fact I. *D* distributed a product it produced.
Fact II. *P* used the product in a reasonable way and was injured.
Conclusion. *D* is liable to *P*.

We can now see that Oliphant and Stone have sandwiched the defender of *ratio decidendi*. The Argument From The Generality Of Principles is directed at the classical view. But when Goodhart moves to defend *ratio decidendi* with his material-facts theory, he is hit with the Argument From The Generality Of Facts. So there is a dilemma. No matter which of the two theories of *ratio decidendi* one adopts, it does not appear that there is clearly one *ratio* that states the law. Given the vagueness, *ratio decidendi* is a metaphysical concept. From the perspective of those concerned with the rule of law, there may be too much room for judges to choose a *ratio*, and so the concept of *ratio decidendi* might appear to block judicial legislation weakly, if at all.

In my view, Stone's argument is more powerful than Oliphant's. Under the classical theory the court deciding a precedent case is to determine the *ratio decidendi*. That may not always be an easy job, but the court should be able to come up with a plausible argument supporting a principle of the case at some level of generality. But it is much more difficult to come up with a plausible argument supporting a Goodhart

110. Oliphant, above n79, 73.
111. See Rudolf Carnap, "The Elimination of Metaphysics through Logical Analysis of Language" in A. J. Ayer (ed.), *Logical Positivism* (New York: The Free Press, 1959), 60, 64–5.
112. J. Stone, "The *Ratio* of the *Ratio Decidendi*" (1959) 22 *Modern Law Review* 597, 603–4.

ratio by reading an appellate court opinion. For one thing, the courts do not construct explicit Goodhart *rationes*. Goodhart himself was aware of this problem: "It is only the strong judge, one who is clear in his own mind as to the grounds of his decision, who invariably says, 'on facts *A* and *B* and on them alone I reach conclusion *X*'."[113]

Nevertheless, Goodhart's view of *ratio decidendi* will inevitably be relevant and important to certain areas of law. Goodhart's view gives insight into judicial opinions in areas of the law that have for one reason or another not developed the rules and principles that can easily serve as *rationes decidendi*. For example, if there is an area of the law that rarely gives rise to appellate court opinions, it might not have enough theory to serve as a source for *rationes decidendi*. This situation may also arise in a new area of the law where courts do not have sufficient experience to create rules and principles. But it appears that the situation might always be present in those areas of the law where it is simply not practical to develop rules and general principles regardless of how old the area of law is.

Consider, for example, the difficulty of developing general theory in areas where concepts like "fairness", "justice" or "reasonableness" play a central role. In these areas judicial outcomes may depend largely upon the material facts of the individual case. American search and seizure law is an area of the law where police conduct is very often judged on the facts and circumstances found in individual cases because of the Fourth Amendment of the United States Constitution's requirement that searches and seizures be *reasonable*. For example, in deciding whether a delay of between 15 and 20 seconds between the moment police officers knocked on a door and announced their intention to serve a search warrant and the moment they knocked the door down with a battering ram was a reasonable length of time under the Fourth Amendment, the United States Supreme Court in 2003 repeated its traditional view that reasonableness is a function of specific facts.

> Although the notion of reasonable execution must therefore be fleshed out, we have done that case by case, largely avoiding categories and protocols for searches. Instead, we have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.[114]

And in the same year we see the same approach taken to a different area of the law by Lord Ward of the English Court of Appeal.

> This is not intended to be an all-encompassing test. It is, in my judgment, impossible to lay down a rigid rule as to where the boundaries of procedural irregularity lie, or when the principles of natural justice are to apply, or what makes a hearing unfair. Everything depends on the subject matter and the facts and circumstances of each case.[115]

113. Goodhart, above n81, 173.
114. *United States* v *Banks* 540 US 31, 35–6 (2003).
115. *Sheridan* v *Stanley Cole (Wainfleet) Ltd* [2003] All ER 1181, 1191.

An example of a focus on a fact-specific inquiry can be seen in *People* v *Fein*,[116] where the California Supreme Court reversed the defendant's conviction of possessing illegal drugs on the ground that the evidence against the defendant had been illegally seized by the police. One of the issues was whether there was "reasonable cause" to arrest the defendant. Two informants had told the police that "Al" was selling dangerous drugs at a certain apartment. The prosecution argued that there would be reasonable cause to arrest the defendant if there was adequate corroboration of the informants' tip. And the prosecution argued that sufficient corroboration was to be found in some suspicious noises that the police heard coming from within the apartment after the police had knocked and announced their presence. The noises consisted of the sounds of people moving and running about the apartment, and a sound like a plastic vial hitting the floor. After referring to the relevant *facts* of four cases that had held that suspicious conduct observed by the police may corroborate an informer, the court rejected the prosecution's argument. "*Without attempting to set forth a rule of general application*, we believe that the sounds heard by the arresting officers did not sufficiently corroborate the informers' statements that defendant was selling narcotics."[117]

Restitution law is another example where *rationes* may best be thought of in terms of material facts. Historically there are different reasons to explain why the law of restitution did not develop enough theory to be the source of rules and principles that could easily play the role of *rationes decidendi*. Centuries ago, theory was not needed because the original writs that were used to bring cases to court required certain factual, not conceptual, conditions to be met.[118] And in later years the law of restitution evolved from the attitudes of jurors who had to decide cases based on the facts.[119] At present, the authorities tell us that the law of restitution has more of a theoretical underpinning. It is based on the principle of unjust enrichment.[120] But it is likely that the "unjust" in the principle of unjust enrichment requires case outcomes to be decided on the basis of specific facts, as opposed to rules and general principles. So, even if the classical *ratio decidendi* plays a greater role in the law as a whole, there are areas of the law to which Goodhart's view is relevant and important.

H. GOODHART'S LEGACY

Given the concession to Legal Realism, it is not surprising that the courts themselves have not explicitly adopted Goodhart's method. Oddly, however, the California Court of Appeal purported to adopt Goodhart's theory in *Achen* v *Pepsi-Cola Bottling Co of Los Angeles*.[121] That court is, like Oliphant and Goodhart, apparently sceptical of judicial rationalisation: "The principle of a case is not found in the reasons given in the opinion or in the law therein set forth."[122]

116. 4 Cal 3d 747, 484 P 2d 583, 94 Cal Rptr 607 (1971).
117. 4 Cal 3d at 753; 484 P 2d at 587; 94 Cal Rtpr at 611 (emphasis added).
118. J. H. Baker, "The History of Quasi-Contract in English Law" in W. R. Cornish *et al.* (eds.), *Restitution Past, Present and Future* (Oxford: Hart Publishing, 1998), 39, 40, 53–6.
119. *Ibid.* 54.
120. Lord Goff and Gareth Jones, *The Law of Restitution* (4th ed., London: Sweet & Maxwell, 1993), 12–16.
121. 105 Cal App 2d 113, 124; 233 P 2d 74, 81 (1951).
122. *Ibid.*

Legal theorists have shown more interest in Goodhart's view than the courts have. Unlike the various articles and notes to appear in Commonwealth publications, Goodhart's article appeared in an American journal. But, notwithstanding it publication in the *Yale Law Journal*, Goodhart's article does not appear to have created much interest in America. American legal practice does not reveal much interest in the technical and non-rhetorical aspects of legal argument. I speculate that this lack of interest might be part of the legacy of Legal Realism. The Legal Realists were certainly not interested in *ratio decidendi*. But Goodhart's article stimulated a rich literature of useful inquiry and debate in the British Commonwealth. For that reason it has much value.