

Summer 1984

Public Policy: Contract, Abortion, and the CIA

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Recommended Citation

Paul H. Brietzke, *Public Policy: Contract, Abortion, and the CIA*, 18 Val. U. L. Rev. 741 (1984).

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PUBLIC POLICY: CONTRACT, ABORTION, AND THE CIA*

PAUL H. BRIETZKE**

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*Sections I & II of this article were delivered as my Inaugural Lecture, at the Valparaiso University School of Law on 25 April 1983. Invaluable comments by Paul Cox, Jack Hiller, Ken Klein, Rosalie Levinson, Peter Mutharika, John Potts, and Richard Stith are acknowledged gratefully, as are the creative investigations by my research assistants, George Terrell and Tim Thornton. Errors remain my responsibility.

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Public policy is "what governments do, why they do it, and what difference it makes."¹ It also gives rise to the most vague, fragmented, and inconsistent notions at work in our law today.² What public policy means and does can only be described at a sweepingly general level,³

1. T. DYE, POLICY ANALYSIS 1 (1976).

2. Public policy "is a catch phrase elusive of meaning without reference to the context in which it is used." Sterk, *Enforceability of Agreements to Arbitrate*, 2 *Cardozo L. REV.* 481, 483 (1981). See A. ETZIONI, *SOCIAL PROBLEMS*, 25-26 (1976); *infra* note 3.

3. At the Brookings Institute, the

word "policy" was repeated as often as a blind man swings a cane before him. Yet, wherever you searched for government policy, you discovered there was none. In science, education, welfare, nutrition, energy, health, and social services, the situation was always the same; there was no consistent comprehensive policy, but instead, many inconsistent, spotty policies.

Each arena had its own constituencies, programs, and statutes

Orlans, *An Anthropologist Without a Tribe*, 50 *AM. SCHOLAR* 465, 474-75 (1981). See G. SAWER, *OMBUDSMEN* 18 (2d ed. 1968) ("We have all, Micawber-like, been waiting for something to turn up"); *infra* note 28 and accompanying text. The policy arena reverberates with Saul Bellow's *Great Noise*: the noise of technology, money, advertising, miseducation, and the "terrible excitement and distraction generated by the crises of modern life Contributing to it are real and unreal issues, ideologies, rationalizations, errors, delusions, nonsituations that look real, nonquestions demanding consideration, opinions, analyses in the press, on the air, expertise, inside dope, a factional disagreement, official rhetoric. . . ." *Savaging the Schools*, *NEW REPUBLIC*, May 5, 1982, p. 7, at p. 9 (quoting Bellow). See A. ETZIONI, at 25-26 (quoted *infra* note 3).

3. Policies are "tentative theories—about the nature of social processes and the working of social institutions" Majone, *The Feasibility of Social Policies*, 6 *POLY SCI.* 49, 50 (1975). See A. ETZIONI, *supra* note 2, at 60. Some groups and individuals—particularly those nominally private "persons" that are large corporations—do, of course, exert considerable influence on public policy. See, e.g., C. LINDBLOM, *THE POLICYMAKING PROCESS* 72-89 (2d ed. 1980). Policy is made when a decision is meant to govern recurring situations, and where a concern with resolving competing values is expressed. Marcus, *Synthesis—Contributions of Economics and the Law to Administration*, in *COMPARATIVE ADMINISTRATIVE THEORY* 336, 338 (P. LeBreton, ed. 1968). All policies "are regulatory in nature. Whether they are individually described as promotional, facilitative, restrictive, directive, mandatory, or whatever, their broad purpose is to induce people to conduct themselves in accord with governmentally prescribed goals and standards." Anderson, *Public Economic Policy and the Problem of Compliance*, in *LAW AND CHANGE IN MODERN AMERICA* 110 (J. and M. Grossman, eds. 1971).

Inevitably, lawyers have also tried their hand at defining public policy. While it plays a larger role in French law (as, e.g., *bonnes moeurs*, *ordre public*), some find public policy to be "peculiarly English," the "particular genius" of the common law. D. LLOYD, *PUBLIC POLICY: A COMPARATIVE STUDY IN ENGLISH AND FRENCH LAW* 5 (1953) (citing Gutteridge and René David). A far less sanguine view is offered by Baron Parke, in *Egerton v. Earl Brownlow*, 4 H.L. Cas. 1, 123 (1853): "Public policy is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights . . ." This contrasts sharply with the view of public policy held by one of its chief American architects, Justice Cardozo: policy is synonymous with "social welfare," the "good of the collective body" achieved through an expediency or prudence, and an adherence to the community *mores* found in religion, ethics, and

yet almost everyone concludes that particular policies have failed us miserably since at least World War II. Our policy landscape is "littered with [such] multi-million dollar wrecks"⁴ as the Army's new Abrams battletank and the War on Poverty. In the words of Eugene Meehan, "the United States has provided . . . an appalling example of the bankruptcy of human imagination in the presence of great material prosperity and . . . some of the strongest evidence available in history for assuming an inability to handle wealth with foresight, intelligence, and humaneness."⁵ This is a damning yet fair indictment of the fallout from New Deal and Great Society reforms. An explosion in statutory reform after World War II prompted a revolution of rising expectations in governments' ability to solve our problems. However, a deep disillusion set in during the 1970's, when people realized that a problem cannot be resolved simply by throwing money at it and by enacting any old law.⁶ The media give examples⁷ daily of the policy stupidity evident in the state of our schools, prisons, mental institutions, and many other administrative arms of government.

society's sense of justice. Cardozo, *The Nature of the Judicial Process*, in SELECTED WRITINGS OF BENJAMIN NATHAN CORDOZO 107, 135 (M. Hall, ed. 1947). See also Symmons, *The Function and Effect of Public Policy in Contemporary Common Law*, 51 AUSTL. L.J. 185, 198 (1977) (quoting O. HOLMES, THE COMMON LAW (1881)): "The very considerations which the courts rarely mention and always with an apology, are the secret root from which the law draws all the juices of life. . . . Every important principle which is developed by litigation is . . . the result of more or less definitely understood views of public policy."

4. A. ETZIONI, *supra* note 2, at 61. *But see id.* at 25-26 (quoting Ben Wattenberg's distinctly minority view): The policy correctives needed are more of the same, and "the major danger today is only that we will be catch-phrased and crisis-mongered to death before all is done."

5. E. MEEHAN, REASONED ARGUMENT IN SOCIAL SCIENCE 190 (1981). As in Vietnam, we "stagger through history like a drunk putting one disjointed incremental foot after another." A. ETZIONI, *supra* note 2, at 87-88 (quoting Kenneth Boulding). See A. WILDAVSKY, SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS 4 (1979) (quoted *infra* note 28 and accompanying text); Beer, *The Idea of the Nation*, NEW REPUBLIC, July 19 and 26, 1982, 23, at 29 (emphasis supplied): "Considering where we started from some thirty years ago, our progress has been substantial. Still, few will assert that our *statecraft*—from poverty programs to affirmative action to busing—has been adequate to the objective. This problem still awaits its Alexander Hamilton." See *infra* note 29 and accompanying text.

6. See T. DYE, *supra* note 1, at 95; R. EYESTONE, FROM SOCIAL ISSUES TO PUBLIC POLICY 30 (1978) (just as there are business cycles, there seem to be cycles of governmental—including judicial—activism and quietism, or optimism and pessimism, based on shifting expectations about governments' abilities and shifting perceptions of social needs); E. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUES 267-68 (1973) (dashing of a "relativistic" political logic and of hopes raised by Kennedy, and emergence of public perceptions

The cumulative effects of so many policy blunders are stagnation, paralysis, and a growing public distrust of government and of its claims to expertise.⁸ Some lawyers, politicians, and policy analysts are busy trying to figure out what exactly is going wrong. This article is a modest contribution to their efforts, an examination of how some of these policy blunders have come about. I will argue that decisionmakers pose policy alternatives in an unnecessarily polarized, black-and-white fashion. There is far too little clear and hard thinking by lawyers, other social scientists, politicians, and political pressure groups. Much of what passes for their thinking is a rather simple-

of an "evergrowing governmental mendacity"); C. WEISS AND M. BUCUVALAS, *SOCIAL SCIENCE RESEARCH AND DECISIONMAKING* 6 (1980); *id.* (public disappointment with social scientists, especially economists, and their policies set in when the economic bubble bursts); Beckman, *Policy Analysis for the Congress*, 37 *PUB. AD. REV.* 237, 243 (1977) ("The recognition that good intentions have often fallen prey to messy problems of implementation, and at an enormous cost, has increased the level of skepticism within Congress. . . ."); Schick, *Beyond Analysis*, 37 *PUB. AD. REV.* 258 (1977). *See also* Hurst, *The Functions of the Courts in the United States*, 15 *L. AND SOC. REV.* 401, 453 (1980-81): since the innovative years of 1905-15, statutory law has loomed large "by direct impact and by providing the base and framework within which executive and administrative agencies added substance to public policy."

7. President Carter's [and Nixon's, Ford's and Reagan's] energy "policies" offer pointed examples of the almost infinite number of things that can go wrong in the absence of a creative policy leadership, *See, e.g.*, R. EYESTONE, *supra* note 6, at 150-52; Carron, *Congress and Energy: A Need for Policy Analysis and More*, 2 *POLY ANAL.* 283 (1976); Light, *The Carter Administration's National Energy Plan*, 7 *POLY STUD. J.* 68 (1978). *See, e.g.*, B. CASPER AND P. WELLSTONE, *POWERLINE* (1981) (decisions about powerline routes through Minnesota stupidly and cruelly ignored farmer needs and desires); A. WILDAVSKY, *supra* note 5, at 5 (health policies have us doing better and feeling worse, and, being neurotic about health, we insist on making government psychotic); *id.* at 112 (quoting cartoon caption) ("Warning: fools in government want you to quit smoking while they subsidize tobacco."). *See also* Gaylin, *Skinner Redux*, *HARPER'S*, Oct., 1973, 48, at 54; Hoffman, *Book Review*, *NEW REPUBLIC*, Mar. 3, 1982, 37 (discussing Jean Kirkpatrick's *Commentary* essay on totalitarian versus authoritarian states and the State Department's White Paper on El Salvador):

What is most depressing is our apparent inability to learn. We went through it in China in the 1940's, in Vietnam in the 1960's, and yet, like Orwell's estimable horse in *Animal Farm*, we act as if previous disasters resulted not from flawed premises, but from a mere failure to try hard enough.

8. T. LOWI, *THE END OF LIBERALISM* xii, 71 (1969); Auerbach, *The Relation of Legal Systems to Social Change* 1980 *WIS. L. REV.* 1227, 1333-36. *See* J. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 262 (1978): "Public skepticism of administrative expertise is part of a larger loss of faith in many traditional sources of public and social authority . . . [and] a larger pattern of social uneasiness over the impact . . . of large organizations, within both the public and private sectors." This is a common problem in many countries, of course: *see* J. HABERMAS, *LEGITIMATION CRISIS* (1976). *See also infra* notes 18, 255, and accompanying text.

minded classifying—a pigeonholing, really. Faced with a square peg and a round hole, theorists and decisionmakers alike are too quick to reach for a penknife and to whittle off the sharp edges, rather than trouble to ponder the nature of roundness and squareness. This process usually involves their lazy acceptance of a small number of legal categories, frequently two categories at a time: contract versus the total absence of contract, for example, or the “right” to an abortion versus the “right” to life. Such categories unnecessarily and prematurely limit the search for policy alternatives; the most relevant, realistic policy frequently escapes notice because it occupies a gray area, an uneasy middle ground in what may be termed a false dichotomy of black-and-white policy options.⁹

After an overview of the policy process, I will expand on these arguments as they concern contract law, the CIA, and abortion. These sections, II-IV, are lengthy, more or less self-contained studies of significant policy controversies. Together they illustrate the major weaknesses and defects in policy processes. These are discussed in the “Conclusion,” along with suggestions for reform.

I. THE POLICY PROCESS

Theorists, decisionmakers, and special interest groups meet, for what we hope will be the pursuit of the public interest, in the arena that can be termed the policy process. The arena includes traditional legal processes, but it is larger, more amorphous,¹⁰ and sometimes less

9. See *supra* notes 1-8 and accompanying text.

10. A policy “system,” relatively fixed patterns of interaction in the arena of government, exists apart from the “environment” and responds to environmental stimuli. Ripley, *et al.*, *Policy Making: A Conceptual Scheme*, AM. POL. Q. 3, 6 (1973); *id.* at 8 (environment defined). See T. DYE, *supra* note 1, at 20: “The smoke-filled room where patronage and pork were dispensed has been replaced with the talk-filled room, where rhetoric and image are dispensed.” See also Hurst, *supra* note 6; Stedman, *Political Parties, Interest Groups, and Public Policy*, in THE POLICY VACUUM 135, 164 (R. Spadaro, ed. 1975) (a rather extreme view) (what used to be called public law is now policy politics). But see E. MEEHAN, *supra* note 5, at 195: There is no one place where all relevant policy factors can be brought together and analyzed rationally. The first description of this amorphous system seems to be de Tocqueville’s (quoted by A. MELONE, LAWYERS, PUBLIC POLICY AND INTEREST GROUP POLITICS 3 (1979)): “Scarcely any political question arises . . . that is not resolved, sooner or later, into a judicial question. . . . The language of the law becomes . . . a vulgar tongue . . . [and] gradually penetrates . . . into the bosom of society. . . .”

Driven by a simple-minded conception of power, the legal realists sought to transform all of law into policy. This attempt at a “legal nihilism” failed when a New Deal reformism faded. Tushnet, *Post-Realist Legal Scholarship* 1980 WIS. L. REV. 1383, 1384-87. More recent formulations, such as Frederick Beutel’s *Experimental Jurisprudence*, have similarly registered few successes: see Tribe, *Policy Science: Analysis or Ideology*, 2 PHIL. AND PUB. AFF. 66, 82 (1972) (quoted *infra* note 25).

savory than conventional systems of legal rules. Two analysts¹¹ have, in fact, compared public policy to the lowly hot dog: the contents of both can be adjusted to suit the tastes and budgets of producers and consumers, and the acceptability of public policies and hot dogs alike requires that the consumer remain ignorant of their precise content and of the ways in which they are made. Policies nevertheless set the "tone" for our legal system by providing growth points for future legal development.¹² This tone certainly reflects political directions—even the Supreme Court is said to follow the election returns—but lawmakers have also looked to scientists and social scientists (rather than to philosophers or historians) for policy assistance. The hope has been to "use our [cumulative] societal knowledge to lick our social problems in the same way we conquered polio, tuberculosis, and malaria."¹³ Social scientists should be able to identify and measure social problems and the costs and benefits of alternative solutions, and then to help society to steer a safe course through conflicting goals and values, and between skepticism and dogma.¹⁴

Unfortunately, the reality of social science contributions to policymaking falls short of this promise. A glut of information yields little social science knowledge that is reliable and even less of a capacity to apply this knowledge systematically. Striving to be at the center of things, policy analysis has no conceptual or political center of its own.¹⁵ Assertions that social science analyses are scientific—rigorous, apolitical, and otherwise value-neutral—are seldom borne out

11. See A. MELTSNER, *POLICY ANALYSTS IN THE BUREAUCRACY* 72 (1976); A. WILDAVSKY, *supra* note 5, at 387 (observation tentatively attributed to a famous sausage-fancier, Chancellor Bismarck).

12. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 4 (1967) (quoting Cardozo on the judicial system, but comment applicable to policy generally). See Symons, *supra* note 3 (quoted *supra* note 3).

13. A. ETZIONI, *supra*, note 2, at 49. See, e.g. *Brown v. Board of Educ.*, 347 U.S. 483 (1954); T. DYE, *supra* note 1, at 3. This hope reflects the fact that the origins of policy "sciences" are the great successes registered during World War II by British and American physical scientists acting outside their chosen fields. Tribe, *supra* note 10, at 67. People are most reluctant to regard any social task as unmanageable. Institutions are man-made and, seemingly, they can be manipulated to achieve any result. Majone, *supra* note 2, at 50. The fact that we are "free to choose" (a phrase arguably trivialized by the Friedmans) is the essence of policy. Denial of that freedom amounts to a denial of responsibility, a willingness to allow things simply to happen. E. SCHUMACHER, *SMALL IS BEAUTIFUL* 191-93 (1974).

14. T. DYE, *supra* note 1, at 96 (citing Alice Rivlin); A. WILDAVSKY, *supra* note 5, at 19. See Dror, *Law as a Tool of Directed Social Change*, in *LAW AND SOCIAL CHANGE* 75, 76-79 (S. Nagel, ed. 1970); *infra* notes 24-25 and accompanying text.

15. T. DYE, *supra* note 1, at 96, 107; A. ETZIONI, *supra* note 2 at 61; E. MEEHAN, *supra* note 5, at 177; *id* at 178 (most social science "recommendations deserve to be

in practice.¹⁶ Different and often contradictory rules for defining a policy problem and its "best" solution are found in law, economics, diplomacy, environmental planning, civil engineering, etc. Many of these criteria are about as neutral as voter literacy tests were in the Old South. For example, violent crime may be viewed as caused by: a coddling of crooks, the inherently evil predisposition of people, racial and ethnic discrimination and the impatience of minorities with the pace of reform, urban disorganization and the disintegration of the family, poor policing, alienation or *anomie*, incipient revolution, lawlessness at the fringe of a "good" society, or almost any combination of the above.¹⁷ Obviously, the policy prescription chosen for dealing with crime will depend on which diagnosis is adopted. A policy confusion and drift result when no consensus over diagnosis and treatment is achieved among policymakers.

A. *Conflict and Confusion*

After the sun set on President Johnson's Great Society, decisionmakers came increasingly to distrust policy "experts" such as those found in the CIA. Congress, for example, continues to struggle with its shortcomings almost alone, out of what Representative Mike McCormack terms a sense of "confusion and frustration."¹⁸ In energy

ignored," given the high "survival capacity of pretentious nonsense"); Schick, *supra* note 6, at 260.

16. The social scientists' claim to being scientific has been under attack for many years. Much of their doctrine has been found to rest on reasonably (not conclusively) grounded empirical knowledge, *plus* professional and personal biases. C. LINDBLOM, *supra* note 31, at 22. See, e.g., J. SIGLER AND B. BEEDE, *THE LEGAL SOURCES OF PUBLIC POLICY* 9 (1977); Wolf, *Social Science and the Court; The Detroit Schools Case*, 42 *PUB. INTEREST* 102 (1976); *infra* note 17 and accompanying text. The same can be said of law and lawyers, of course. See A. MELONE, *supra* note 10, at 4. Policy analysts and lawyers use prescientific, Aristotelean notions of causation. The causal variables are only partly known, and things occur in a sequence of chain reactions with no simple answer to when and how they end. Nevertheless, the Cartesian dream, extrapolated from Newton's, is pursued: all is possible by subduing nature. Abelson, *Definition*, in 2 *ENCYCLOPEDIA OF PHILOSOPHY* 314, 316 (P. Edwards, ed. 1967); E. MEEHAN, *supra* note 4, at 140; A. MILLER, *DEMOCRATIC DICTATORSHIP: THE AMERICAN CONSTITUTION OF CONTROL* 158 (1981); A. WILDAVSKY, *supra* note 5, at 59.

17. See C. LINDBLOM, *supra* note 3, at 22. It is impossible to define policy problems in an apolitical fashion. Values are fluid in social science (and in law), they affect and are affected by policy decisions. A. ETZIONI, *supra* note 2, at 84. Different and often contradictory rules for identifying a policy problem, its solution, and evaluations of a solution are to be found in law, economics, diplomacy, environmental planning, civil engineering, etc. Anderson, *The Place of Principles in Policy Analysis*, 73 *AM. POL. SCI. REV.* 711, 714 (1979).

18. Quoted in Davidson, *Congressional Committees*, 2 *POLY ANAL.* 299, 308 (1976) (McCormack refers to energy policies, but comment applicable generally). The

legislation, public works projects, and many other areas, Congress tends to "fly blind," without benefit of rigorous policy analysis, and to rely on the executive, party leaders, and competing special interest groups to keep a policy program consistent. Policy goals are often confused because a program and its aims, if any, are poorly understood by all of the parties concerned. Knowing not what it wants to do, Congress frequently passes the buck to an administrative agency such as the CIA, under broad delegations of power. Many policies wind up in courts eventually, where vague opinions written to build majority coalitions frequently ignore the problems of policy and its implementation.¹⁹

An inter-professional backbiting between lawyers and other social scientists is much in evidence in attempts to deal with policy problems. For many social scientists, policy is much too important to be left to the superabundance of lawyers whose analyses are not trustworthy.²⁰ Some lawyers respond with the kinds of criticisms of social scientists I outline. All of this is unfortunate for the policy process, which is always the first casualty in what are really fratricidal wars between lawyers and other social scientists.²¹ There are many similarities in the approaches of lawyers and other social scientists, and the differences are or could be made fruitful for policy.²² It is

distrust of expertise is fueled by the failures of Great Society programs, especially those concerning space and Vietnam, and, more recently, by defects in energy and economic recovery programs. See Carron, *supra* note 6, at 293; Davidson, *passim*; Frye, *Congressional Politics and Policy Analysis*, 2 POLY ANALYSIS 265, 266-67, 270-74 (1976); Light, *The Carter Administration's Energy Plan*, 7 POLY STUD. J. 68 (1978); *supra* note 5; *infra* note 254 and accompanying text.

19. See G. EDWARDS, IMPLEMENTING PUBLIC POLICY 39-40 (1980); Thurber, *Congressional Budget Reform and New Demands for Policy Analysis*, 1 POLY STUD. REV. AN. 404, 416-417 (S. Nagel, ed. 1977). E.g., the House Public Works Committee is no simple, porkbarrel operation; a modicum of loose policy analysis is utilized. Army Corps of Engineers' cost/benefit analyses are adopted automatically, unless these are challenged by railroads (which oppose river navigation) or utilities (which oppose public power generation). Decisions are not based on the most favorable of cost/benefit ratios, but on whether the favored program can be plausibly portrayed as having a 1:1 ratio over time. Murphy, *Political Parties and the Porkbarrel*, 68 AM. POL. SCI. REV. 169, 181-83 (1974). See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

20. E.g., J. SIGLER AND B. BEEDE, *supra* note 16, at 5; Mayo and Jones, *Legal-Policy Decision Process*, 33 GEO. WASH. L. REV. 318, 378 (1964). See A. MELTSNER *supra* note 11, at 219-20; Beckman, *supra* note 6 at 243; Carron, *supra* note 7, at 296; Frye, *supra* note 18, at 281; Tribe, *supra* note 10, at 78.

21. J. SIGLER AND B. BEEDE, *supra* note 16, at xv: conflicts between law and policy studies lead to confusion, frustration and stalemate in devising and implementing policies.

22. As H.L.A. Hart observed in his Inaugural Lecture:

In law as elsewhere, we can know and yet not understand. Shadows often

commonly said, for example, that the social scientists' policy goal is efficiency while the lawyers' is that of securing rights or justice. The Chicago School of law and economics, and its critics, have had some success in bridging this gap (or false dichotomy) of rights and efficiency, but differences clearly remain. Is this so bad? Are rights always the basis for policy or do we always seek efficient solutions? CIA activities in the Shah's Iran and in Nicaragua today²³ suggest that neither efficiency nor rights are sought. What can be the objection to a middle ground, a more efficient justice or a more just efficiency, given that *either* state of affairs is in the public interest?²⁴

obscure our knowledge which not only vary in intensity but are cast by different obstacles to light. These cannot all be removed by the same methods and until the precise character of our perplexity is determined we cannot tell what tools we shall need.

H. HART, DEFINITION AND THEORY IN JURISPRUDENCE 1 (1953). See Rorty, *Philosophy in America Today*, 51 AM. SCHOLAR 183, 192 (1982):

The ability to construct a good brief, or conduct a devastating cross-examination, or find relevant precedents is similar to the ability that analytical philosophers think of as distinctively philosophical . . . [the ability] to see at a glance inferential relationships between all the members of a bewilderingly large set or propositions.

Policy analysis

tends to downgrade what *ought* to be in policy for what *is*, indicates a concern for the *ex post facto* explanation . . . , concentrates on *specific* policies rather than the overall nature of policy, treats policy as the *dependent* variable, essentially bypasses the *symbolic* for tangible or allocative factors of public policy, and only partially tests *feedback linkages*.

Spadaro, *Public Policy and the Political Scientist*, in THE POLICY VACUUM 1, 12 (R. Spadaro, et al., eds. 1975). Substitute "law" for "policy" in Spadaro's statement and the characterization remains just as accurate. See E. MEEHAN, *supra* note 5, at 178-80; M. SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES 90 (1968) (courts and agencies—and, I would add, lawyers and social scientists—strive "at least to appear to satisfy an unrealistic norm of rationality"); J. SIGLER AND B. BEEDE, *supra* note 16, at 8; *id.* at 9 (in Beutel's Experimental Jurisprudence, law should be subject to the same intellectual demands as social science with regard to isolating social problems, identifying law's actual effects, and explaining the reasons for changed behavior); C. WEISS AND J. BUCHVALIS, *supra* note 6, at 263-65, 268; Orleans, *supra* note 2 (quoted *supra* note 2).

23. See *infra* notes 130, 156, 164 and accompanying text.

24. See, e.g., L. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 63-64 (1975); J. SHKLAR, LEGALISM 113-15 (1964) (justice only one virtue among many; it comes into play in only two specific instances, yet it is the epitome of legal morality); Murphy, *Liberalism and Political Society*, 26 AM. J. OF JURISPRUDENCE 125, 130-32 (1981) (Dworkin's notion that rights prevail over policy reflects liberals' atomistic conception of social life, in which policies are not taken seriously); Stedman, *supra* note 10 (discussed *supra* note 10); Tribe, *supra* note 10, at 82 (quoted *infra* note 25). Compare Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, *passim* (1978) (efficiency should be a tie-breaker, used when other policy considerations are satisfied or evenly balanced) with Posner, *Some Uses and Abuses of Economics in Law*,

The pride and joy of many lawyers is that they deal with what judges and (other) politicians actually *do*, rather than with what these politicians *say* or, heaven forbid, with what social scientists say politicians do. This realism often proves refreshing: politicians do not always put their laws or their money where their mouths are, as the "pro-family" policies of the Carter and Reagan Administrations²⁵ illustrate—but, unfortunately, lawyers' approaches fail to capture the flavor of much policy. Many policies are embodied in laws which are enforced grudgingly, if at all, and which lose out during battles of the budget. Consider Prohibition. These salient aspects of a legal effectiveness tend to be studied by social scientists other than lawyers.²⁶

46 U. CHI. L. REV. 281, *passim* (1979) (efficiency should be the policy goal unless and until there is a consensus to the contrary). *But see, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 90-99 *passim* (1977); A. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF (1975).

Some would argue that we are unable to determine whether an efficient justice or a just efficiency is better, where these lead to different results, but this argument makes the best policy into the enemy of a merely better policy: "To justify any policy recommendation, one must argue that it is, *in some sense*, 'in the public interest,' that it is consistent with lawful rights, that it is fair and efficient in the use of resources." Anderson, *supra* note 17, at 713 (emphasis supplied). It is precisely because this is so difficult a task that insights should be gleaned eclectically from law, social sciences, and, indeed, anywhere else: "To diagnose the human condition is relatively easy [although some] may dispute the conclusions or inferences drawn from known facts. . . . It is another thing to prescribe . . . policies that are both desirable and feasible." A. MILLER, *supra* note 16, at 155.

25. See *infra* notes 528-36 and accompanying text.

26. See Hurst, *Legal Elements in United States History*, in LAW IN AMERICAN HISTORY 3, 29-36, 60-64 (D. Fleming and B. Bailyn, eds., 1971) (legal records are solid evidence of what governments do because of the time, money, and, sometimes, courage required to invoke law; but these records are unrepresentative of what happens to, e.g., the poor; and the records say little about the appropriateness of policy judgments or the extent to which they are put into practice); L. LEDERMAN AND M. WINDUS, FEDERAL FUNDING AND NATIONAL PRIORITIES 4 (1971) (governments act primarily through legislation, regulations and court decisions, yet allocations of budgetary resources appear to be the best reflection of goals and priorities); J. SIGLER AND B. BEEDE, *supra* note 16, at 138-40 (most laws are only partially enforced—government being forced to settle for less than the law requires—because of the sheer bulk of law, cumbersome adjustments to new rules, overwork and understaffing, negotiated pleas and consent decrees, etc.); Schick; *supra* note 6, at 259; *infra* note 528 and accompanying text. Lawyers have difficulty dealing with underenforced, underfunded policies, the effects of which are chiefly symbolic: e.g., "a 'war on poverty' may not have any significant impact on the poor, but it reassures moral men, the affluent as well as the poor, that government 'cares' about poverty." T. DYE, *supra* note 1, at 20. See *id.* at 97. But a symbolic program sometimes becomes "real" over time, if constituent groups emerge to take its policies seriously. Laws can also have paradoxical effects, creating incentives to do the opposite of what good policy requires. This happened with regard to Prohibition, and to the Health Systems Agency Act of 1974 and its policies of deconsolidation.

A result-oriented, client-centered behavior is nevertheless typical both of lawyers and those social scientists who apply their knowledge to policy analysis. Both groups can use their expertise to prompt significant changes in society, but theirs is a by-and-large conservative influence. Both groups emphasize restraint, stability and predictability, in an effort to make sense of the relentless tinkering that seems to inhere in our politics, in our fondness for do-it-yourself projects, and in other facets of our national character.²⁷

We are left with precious little more than the cumulative side-effects from so much tinkering: that is, policy as its own cause. As Aaron Wildavsky observes:

The more the nation attempted to control public policy, the less control there seemed to be. [Accompanying the] expanding public sector was the feeling that unintended consequences were overwhelming the ability to cope. . . . The larger each policy grows in its own sector, the more it insinuates itself into the man-made environment with which we must contend.

More and more public policy is about coping with the consequences of past policies. . . .²⁸

The policy process draws strength and autonomy from the rich inner life of the agencies that administer and seek to perpetuate it.

ing costs and improving the delivery of health care. A. WILDAVSKY, *supra* note 5, at 302-05.

27. See J. SHKLAR *supra* note 24, at 106 (expressing the judicial creed, judges choose among political values, and usually in favor of stability, predictability and the impersonal administration of rules); A. WILDAVSKY, *supra* note 5, at 4 (bureaucracies—where lawyers and policy analysts figure prominently—are “at once the strongest stokers and and the most determined dampers of changes”); Beckman, *supra* note 5, at 243 (policy analysis tends to encourage “restraint and skepticism”); Tushnet, *supra* note 9, at 1387 (tinkering causes difficulties to migrate elsewhere, and it gives policy a conservative cast because a complex society does not readily submit to rational control). See also M. FREEMAN, *THE LEGAL STRUCTURE* 8 (1974):

Legal stability is the source of both strength and weakness. It enables the legal order to adapt itself smoothly and efficiently to varied circumstances. But there is a danger that it does this by excessive limitation to a narrow range of policies, divorced from the living context in which the concept arose.

28. A. WILDAVSKY, *supra* note 5, at 4. See C. LINDBLOM, *supra* note 3, at 4: policies to curb the CIA are required “largely because of prior decisions to use these agencies to implement national security policy. From the seedbed of implementation, new policy problems grow and are plucked for the agenda.” See also R. EYESTONE, *supra* note 6, at 60-61; *supra* note 2; *infra* notes 169-70 and accompanying text.

For example, national security is nowhere defined in our laws; it usually means what the CIA chooses to do in the name of national security.²⁹ Tradeoffs among various policies are inevitable: cleaner water winds up meaning dirtier air or land, among many other things. The current popularity of the "free" market as *the* policy solution ignores the facts that most markets never were free and are less so today because of governments' numerous policy interventions, particularly those that some liberals term corporate welfare policies. Having intervened, we cannot but intervene again lest another Depression or another Cuba result. But we seldom know where policy intervention will take us, or why. Interrelated policy, political and socio-economic changes frequently upset the few priorities Americans manage to set for themselves through democratic processes.³⁰

B. *The (Il)logic of the False Dichotomy*

Lawyers who examine the policy process are entitled to feel a bit depressed, for policy analysis shows law-jobs to be as difficult as they are important. How can problems of law and policy be cut down to size without treating them simplistically or, what amounts to the same thing, molding them into false dichotomies? Efforts here have been Herculean and successes few. Institutional arrangements and special rules of logic have been used to restrict what is considered, and how. Many budgetary processes, administrative agencies, interest

29. See *infra* notes 222-26 and accompanying text.

30. F. FROHOCK, PUBLIC POLICY 47-48 (1979); A. MILLER, *supra* note 16, at 164 (the "aspirin" theory of public policy—problems are "headaches" amenable to the "quick fix"—has many adherents); A. WILDAVSKY, *supra* note 4, at 62-65, 78 (*inter alia*, activities of the ICC and CAB offer many e.g.s of the solution becoming the problem; policy interdependence grows faster than knowledge, and the ability to affect other governmental policies is greater than the ability to affect society); C. WEISS AND M. BUCUVALAS, *supra* note 6, at 275 ("It is difficult to discern the origin of the initial [policy] idea, its nomadic course through bureaucratic warrens, its permutations, perturbations, and shifts of focus"); Mayo and Jones, *supra* note 20, at 360-62 (discussing Lindblom's ideas). See Light, *supra* note 18, at 70: (citing an article by Rossi and Wright):

A theorist may rely on market forces distorted by public policy induced incentives and disincentives to achieve desired outcomes. But there are usually missing links in the theoretical chain. . . . One has only to look at the horrendous implementation problems associated with the "controlled" experimental studies on income maintenance and housing allowances to discover how silly simple economic concepts can look when confronted with the complexity and subtlety of a social context.

See also R. EYESTONE, *supra* note 6, at 123-24: a long series of incremental changes in public housing policies increased their complexity while decreasing their effectiveness. Congress gave up and turned to "market" solutions by private developers, who took the profits and left the FHA (and the poor) "holding the bag."

groups, and legal rules exist almost solely to truncate the range of viable policy options. Separation of powers and administrative hierarchies in our federal system reinforce each decisionmaker's jealous maintenance of her policy "turf."³¹ Pointed illustrations are found in the squabbles within the CIA, and between it and other governmental organs.³²

The marvelous system Chief Justice Coke termed "the artificial reason of the law"³³ is used to simplify, *and* to oversimplify, analyses. There is a need to avoid distractions where the guidelines for decision are ambiguous or the relevant information is unavailable. But creativity is compromised in the process, when the mind's peregrinations are squeezed into particular channels of law and policy. Legal reasoning, like much of social science reasoning, constantly threatens to turn into a scholasticism, in which contacts with other fields weaken and recalcitrant facts and rival value judgments are outlawed.³⁴

31. L. FRIEDMAN, *supra* note 24, at 256; C. LINDBLOM, *supra* note 3, at 7; D. LLOYD, *supra* note 3, at 5; E. MEEHAN, *supra* note 5, at 90 (to operate properly, social science logic must be wholly self-contained); A. MELTSNER, *supra* note 11, at 123-29 (policy problems can be cut down to size by omitting a part, assuming away aspects after critical examination, and isolating technical and political components); DeLong, Book Review, 80 MICH. L. REV. 885, 887 (1982) (policy models often get made within the "closed box" of an administrative agency). Schick, *supra* note 6, at 259 (routine budget process a "funnel through which policy passes"). The classic example of a closed system is described by Halsbury, C.J., in *Janson v. Dreifontein* [1902] A.C. 484, 491: "I deny that any Court can invent a new head of public policy. . . ." (This may be more of an exercise in semantics than a practical restraint, however: LORD RADCLIFFE, *THE LAW AND ITS COMPASS* 55 (1960)). A more subtle but no less telling example is the closed system of economics analysis that increasingly influences decisions under the antitrust laws. To be "reasonably comprehensive," this "synthetic superstructure" and "subjective infrastructure" must be opened to include "the Buddhists, the Marxists, the new-wave radicals, the Austrian analytical school, the neoclassical school, the post-Keynesians, and others." Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, 12 SW. U.L. REV. 335, 340-41, (1980-81).

32. See *infra* notes 171-93 and accompanying text.

33. Prohibitions del Roy (1607) 12 Co. Rep. 63 (Coke responding to King James's demand to interpret laws from the throne). See P. NONET AND P. SELZNICK, *LAW AND SOCIETY IN TRANSITION* 62 (1978):

Artificial reason upholds the authority of received law by making it an indispensable ingredient of decision; in so doing, it displays its special ingenuity, the art of resolving contradiction, filling "gaps," and providing for needed legal change. [It] is the rhetoric of legal legitimacy. [It] binds itself to an expert technique of law-finding. At the same time, it vindicates the jurists' claim to autonomy."

34. P. DIESING, *PATTERNS OF DISCOVERY IN THE SOCIAL SCIENCES* 23 (1971) (dangers of "scholasticism" in social science, of an attention to smaller and smaller details within an unchanging theoretical frame); M. FREEMAN, *supra* note 27 (quoted

Law's artificial reason, like those of ethics and the social sciences, aims to justify and to improve choices. Having decided how to decide over the centuries, purveyors of this rather autonomous legal reason offer the means for evaluating the soundness of arguments and the acceptability of proofs. As an informal and *ad hoc* logic, law's artificial reasoning is open to the differing of reasonable minds. Its seemingly-modest ambition is to act "as a kind of geography, explaining the directive force of propositions and their relationship one with the other."³⁵

Policy considerations must be somehow organized before they will add up, even in our minimally-ordered jurisprudence.³⁶ How the organizational patterns are formed remains a mystery in part, but,

supra note 27); Marcus, *supra* note 3, at 337; A. WILDAVSKY, *supra* note 5, at 8, 387; Flynn, *supra* note 30, at 382; Lasswell and McDougal, *Jurisprudence in a Policy-Oriented Perspective*, 19 U. FLA. L. REV. 486, 500 (1966-67) (jurisprudence "stabilizes the way in which the world is experienced," limiting the tasks of lawyer and jurist). See J. SHKLAR, *supra* note 24, at 10: "The distrust of vague generalities, the preference for case-by-case treatment of all social issues, the structuring of all possible human relations into the form of claims and counterclaims under rules believed to be 'there'—these combine to make up legalism as a social outlook."

35. Guest, *Logic in the Law*, in OXFORD ESSAYS IN JURISPRUDENCE 176, 197 (1st ser., A. Guest, ed. 1961). See J. FARRAR, INTRODUCTION TO LEGAL METHOD 52 (1977) (quoting Wisdom) (legal reasoning is less like the links of a chain than the legs of a chair, and involves the weighing of several inconclusive items on each side); Guest, at 180, 182 (law's less a "dry logic" than an interpretation and semantics which ranges over all possible forms of argument, "partly deductive and partly inductive, partly reasoning by analogy and partly the product of intuition, emotion or prejudice"); G. RYLE, PHILOSOPHICAL ARGUMENTS 5 (1945) (arguments are effective as weapons only if logically cogent; "if they are so they reveal connexions, the disclosure of which is not the less necessary to the discovery of truth for being also handy in the discomfiture of opponents"); Vaupel, *Muddling Through Analytically*, in 1 POLY STUD. REV. AN. 44, 55 (S. Nagel, ed. 1977); P. WHEELWRIGHT, VALID THINKING 311 (1962); Murray, *The Role of Analogy in Legal Reasoning* 29 U.C.L.A. L. REV. 833, 834, 837-838, (1982); Rorty, *supra* note 22 (quoted *supra* note 22); Tribe, *supra* note 10, at 78 (the "central claim" of policy analysis is to enlarge the roles of logical reasoning, empirical knowledge, and consensual discourse).

36. Guest, *supra* note 35, at 196. See M. CARLEY, RATIONAL TECHNIQUES IN POLICY ANALYSIS 7 (1980); J. Commons, *Anglo-American Law and Economics* 4-5 ("a contribution to the Festschrift in honor of Friedrich von Wieser, 1926, to be revised"—mimeograph available in the Yale Law School Library) (cases are a method of experimental research, needing only a formula to bring them together in the unity of a science); F. FROHOCK, *supra* note 30, at 179; J. STONE, LEGAL SYSTEMS AND LAWYERS REASONING 236 (1964) ("even in cases of first impression, counsel are likely to fare better with holdings *sub silentio*, verbal analogies and syllogistic deductions, than with a straightforward argument based on the social facts to be regulated and the policies applicable thereto"); C. WEISS, AND M. BUCUVALAS, *supra* note 6, at 269; Murray, *supra* note 35, at 864; *id.* at 834-36 (legal realists criticized the use of logic in law, but their analyses flawed by assumption that logic must be mechanical, deductive, or both); Tribe, *supra*

in theory at least, they are constituted by the logical process of classification and, its mirror-image, division into subclasses. Classification is a simplified and reductionist procedure since, in law and politics, it is difficult to keep two or more things in mind at the same time and to balance them.³⁷ A few policy "jugglers" delight in doing this, but the overall tendency is to a laziness, to the dividing and classifying of phenomena on the basis of one principle at a time. Each step thus results in a "dichotomy" based on mutual exclusion by a binary logic; either you have it, a contract for example, or you don't.³⁸

note 10, at 82 (quoted *supra* note 10) See also Note—*The Weight of Authority*, in BASIC CONTRACT LAW 361, 362 (4th ed., L. Fuller and M. Eisenberg, eds. 1981): a classificatory system is essential to legal writing, unless each case is to be discussed at length on its merits. But "a lawyer must not confuse . . . an indexing scheme with a real insight into the judicial process." I would argue that, regrettably, the "indexing scheme" frequently is the "judicial process."

37. R. POUND. PUBLIC POLICY FORMATION AND ADMINISTRATION IN A DEMOCRACY 9 (1945) (Economics and Business Foundation Conference Proceedings, available in Yale Law School Library). See Brody, *Glossary of Logical Terms*, in 5 ENCYCLOPEDIA OF PHILOSOPHY 57, 60 (P. Edwards, ed., 1967) ("classification"); J. FARRAR. *supra* note 35, at 50 (the "mystery" studied under the theory of knowledge, of how we organize, discriminate among, and store, recall and communicate patterns); J. SHKLAR. *supra* note 24, at 10 (quoted *supra* note 35); Thompson, *Philosophical Approaches to Categories*, 66 MONIST 336 (1983) ('category' commonly a synonym for 'class' or 'type,' but, since Aristotle, categories have been determined by 'transcendental argument' concerning "the very conditions that determine a philosophy" rather than by empirical procedures); Vaupel, *supra* note 35, at 46 (literal Greek meaning of analysis is to separate the whole into component parts); Tribe, *supra* note 10, at 95. See also Dickinson, *Legal Rules: Their Function In The Process of Decision*, 79 U. PA. L. REV. 833, 850 (1931) (quoted in Guest, *supra* note 35, at 189):

Scientific thought concerns itself with analyzing and classifying the elements of given fact-situations and determining their relations to one another for the purpose of acquiring ability to predict the relations between these elements if recurring in a future situation. This procedure involves the same basic [judicial] thought processes . . . —the isolation of identities, their formulation in general propositions, and the applicability of these propositions to specific situations. Here, however, the resemblance ends.

38. Brody, *supra* note 37 ("dichotomy"); R. POUND, *supra* note 37; P. WHEELWRIGHT, *supra* note 35, at 80-82. See Hartshorne, *Categories, Transcendentals, and Creative Experiencing*, 66 MONIST 319, 323 (1983):

Many concepts are categorically universal besides verity, power, goodness, beauty. Thus always there is *diversity* as well as *unity*, *being influenced* as well as *influencing* (effects and causes), *novelty* as well as *repetition* or *permanence*, *chance* (Epicurus) or *contingency* as well as *necessity* or *law*, *later* as well as *earlier*, *subject* as well as *object* (or experience and its data), *dependence* as well as *independence*, *concrete* as well as "abstract," [sic]

A dichotomous classification or division—a "cutting in two"—requires knowledge of

Unfortunately, lawyers are frequently in a bind because other social scientists provide lawyers with too few good classification schemes. Classifications organize and simplify perceptions "by exclusion as well as inclusion, and the social sciences are ill-prepared to say that certain classes of perceptions could be excluded without significant loss."³⁹ As my analyses of contract law and policy will demonstrate,⁴⁰ schemes for classification can be, and frequently are unresponsive to socio-economic or technological changes, the prey of academic fads, dependent for their effect on vague or ambiguous categories, or otherwise shoddy. The rage to classify everything in law and policy as either black or white ignores claims, frequently legitimate claims, to an individualized treatment based on the peculiarities of the circumstances.⁴¹ Representative Les Aspin voices the kind of objection frequently heard in many policy areas: our national security "classification system . . . is bizarre and Byzantine and irrelevant to protecting the real secrets. . . . The administration will make public . . . things it wants to declassify and classify those things that are embarrassing,"⁴² and administration critics are bound by these judgments. This and other classifications schemes, such as the "trimesters"⁴³ against which attempts to regulate abortion are judged, influence behavior by generating expectations. Those whom

only one distinguishing characteristic at each level of a hierarchy. The broader the scope (denotation) of the characteristic, the less restricted the meaning (innotation), and vice versa. P. WHEELWRIGHT, at 80-82. Thus, the contract-no contract dichotomy is above offer-no offer, acceptance-no acceptance, etc., dichotomies in a hierarchy of legal reasoning.

39. E. MEEHAN, *supra* note 5, at 42 (terming concepts what I call classifications). Past "experiences with academic ossification suggests the wisdom of avoiding closure in such matters as long as possible." *Id.* See *id.* at 75; Korner, *Thinking, Thought and Categories*, 66 *MONIST* 353 (1983) ("Deductive organization and epistemic stratification constitute constraints on all . . . thinking, including thinking in and about categories.").

40. See *infra* notes 75-117 and accompanying text.

41. Evan, *Introduction*, in *LAW AND SOCIOLOGY* 1, 8 (W. Evan, ed. 1962); E. MEEHAN, *supra* note 5, at 40; C. WEISS AND M. BUCUVALAS, *supra* note 6, at 17. Robert Nisbet, asking *What to Do When You Don't Live in a Golden Age*, 51 *AM. SCHOLAR* 229 (1982), answers:

First be fruitless and reify. Snuff out the lives of particulars through suffocation by structures. . . . Agree with Blake: "I must create a system or be enslav'd by another Man's". . . . The rage to reification, for pretending that life and meaning exist in the most boneless of abstractions, is a special mark of ages. . . such as our own.

42. Aspin, in P. HACKES, *et. al.* *FOREIGN INTELLIGENCE: LEGAL AND DEMOCRATIC CONTROLS* 21-22 (Am. Enterprise Institute Forum No. 37, 1980).

43. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *infra* notes 397-400, 417-19, 504-08, 511-12 and accompanying text.

a classification favors will naturally demand that it be applied.⁴⁴ Special interest groups and individual litigants alike favor this technique. Where a conventional contract does not exist, for example, the litigant benefitting from this state of affairs will urge a simple contract/no-contract dichotomy upon the court.

Consistency is an important policy-making value. All documents marked "Top Secret" not only should but must be treated alike, as are all fetuses in their first trimester and, under the traditional scheme, all no-contracts. The compulsion to an intellectual consistency, this treating of like cases alike, furthers Equal Protection values and also serves to move classification schemes to ever-higher levels of generality.⁴⁵ Forced to choose between creating a new classification scheme and extending an old one, judges almost invariably⁴⁶ wield Occam's razor⁴⁷ and extend the old classification. (This is in sharp

44. See J. Commons, *supra* note 35, at 9-10 (Hohfeld's classification of cor-relatives describes not an ideal but an expectation, the "expected enforcement of the right of one is the expected enforcement of the duty of the other"); F. FROHOCK, *supra* note 30, at 65-66; E. MEEHAN, *supra* note 5, at 77. In the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the "Court split five to four. . . . No one spoke for a third view, probably for the understandable (if inadequate) reason that neither of the opposing set of litigants would have been aided by it." L. LUSKY, BY WHAT RIGHT 194 (1975), quoted in J. ELY, DEMOCRACY AND DISTRUST 22-23 (1980). Ely (*id.* at 23) sees a "middle ground between the chaos . . . complainants were inviting and the tautology to which the Court seems to have ended up lashing itself."

45. J. Commons, *supra* note 36, at 26; Anderson, *supra* note 17, at 715 (citing Barry and Rae); *id.* at 719 (treating likes alike is a maxim of justice, requiring justification as to what counts as likeness or dissimilarity). See J. FARRAR, *supra* note 35, at 50; *id.* at 62 ("Law tends toward the general, to reduce human behavior to general rules and principles and concepts for the purposes of social control"); Hartshorne, *supra* note 38, at 327 ("One source of error in the theory of categories is the failure to distinguish carefully between levels of abstractness.").

46. Once a classification is established (*e.g.*, the trimesters in *Roe*, *supra* note 43—see *infra* notes 397-400, 417-19, 504-08, 511-12 and accompanying text) it tends to remain in place and to be extended. See, *e.g.*, *infra* note 55. In law, restricting an existing classification without strong justification, and therefore excluding arguments by analogy, is seldom acceptable. Guest, *supra* note 35, at 192. Compare *Plumbing Shop, Inc. v. Pitts*, 67 Wash. 2d 514, 408 P.2d 382 (1965) (conventional application of traditional contract/no-contract dichotomy) with *Hoffman v. Red Owl*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965) (weird exception, a new classification-in-the-making applied to somewhat similar facts). See *infra* note 107. A major reason why the Burger Court has been criticized is that it has tacitly rejected many of the classifications and concepts established or fleshed out by the Warren Court. See Howard, *The Burger Court*, 43 L. AND CONTEMP. PROB. 7, 16 (1980) (A.E. Dick Howard is far from the most vociferous critic of the Burger Court).

47. William of Occam's (c. 1290—c. 1349) razor is a maxim: "Entities are not to be multiplied without necessity." It "is vain to do with more what can be done with fewer." B. RUSSELL, HISTORY OF WESTERN PHILOSOPHY 459, 462-63 (new ed. 1961).

contrast to practices in the other social sciences, where classifications proliferate to illustrate the ideas of various theorists.) In law, generalization proceeds under arguments by analogy⁴⁸ and by various shortcuts. Analogy is the most prevalent form of legal argument, precisely because of the "open texture" of classification categories: a polite description of their vagueness and ambiguity, characteristics which tend to foster oversimplification. According to Malcolm Sharp's critique of classification-by-analogy in contract law, the problem is that: "Everything in the world is like and unlike everything else. . . ."⁴⁹ A jumble of cases or other authorities which do not support a neat (deductive) syllogism can nevertheless be made amenable to arguments by analogy. To further an existing classification, short cuts are frequently used to force a generalization from a line of instances which really do not admit of generalization. The decisionmaker may tailor facts to fit the classification (as in the contract example we will examine⁵⁰), or part of the problem may be omitted, isolated as a

48. There "is a natural tendency to short circuit the process of abstraction and application [in deductive and inductive reasoning] and . . . argue more empirically from case to case." Guest, *supra* note 35, at 190. This process is usefully described by Aristotle (*discussed id.* at 190-91) in the *Analytica Priora*: Arguing by "example" (analogy) is "reasoning from part to part, where both particulars are subordinate to the same term and one of them is known." For comparisons with social science reasoning processes, see Blair and Maser, *Axiomatic Versus Empirical Models in Policy Studies*, 5 POLY STUDS. J. 282 (1977); Nisbet, *supra* note 40 (quoted *supra* note 40).

Legal argumentation by analogy has its enthusiastic supporters: See, e.g., Murray, *supra* note 35, *passim*; Harlan Stone, *The Common Law In The United States*, 50 HARV. L. REV. 4, 12, 14-16 (1936) (like judicial decisions, statutes should be points of departure for reasoning by analogy, in the process of creating a seamless web by adjudication). But analogy is one of the most commonly-abused ways of thinking. The validity of the analogy depends on the number of points of resemblance and their significance, something over which experts frequently disagree. W. FEARNSIDE, ABOUT THINKING 43, 266 (1980); E. LEVI, INTRODUCTION TO LEGAL REASONING 2 (1948); P. WHEELWRIGHT, *supra* note 33, at 80; Anderson, *supra* note 17, at 719 (discussed *supra* note 46). See *Omaha and Council Bluffs Street Ry Co. v. Interstate Commerce Comm.* 230 U.S. 324 (1913). Gross, *The Theory of Judicial Reasoning*, 66 KY. L.J. 801, 828 (1977-78) argues that liberal legal reasoning, especially analogy, "reflects the limitations of Cartesian self-conception" by being sequential, cumulative, posterior to value choice, and consciously directed. *Id.* These seem to be valid criticisms, yet Murray, *supra* note 33, at 868, finds each of them "incorrect or misleading." Unfortunately, the alternative to using tenuous generalizations and analogies is frequently one of decisions based on unsupported hunches. W. FEARNSIDE, at 270.

49. Sharp, *Reflections on Contract* 33 U. CHI. L. REV. 211, 216 (1966).

50. See *infra* notes 77-88 and accompanying text. See also J. Ely, *supra* note 41, at 19 (analyzing "liberty" and "property" interests, the Court looks quite silly while "drawing distinctions it is flattering to call attenuated and engaging in ill-disguised premature judgments on the merits of the case before it"); *id.* at 61 (in affirmative action cases like *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), the Court

"political question" immune to legalistic treatment (such as the accountability of the CIA⁵¹), or simply assumed away because it does not fit neatly into black-and-white categories. Decisionmakers use presumptions or legal fictions when arguments cannot be fully demonstrated or when arguments recur so frequently that they can be plausibly characterized as insignificant background to the matter under discussion.⁵²

From generalized classifications and the concepts embodied in them come the theoretical explanations offered by lawyers and by policy analysts.⁵³ The concepts screen and simplify perceptions, and are expected to somehow pull together certain facets of our shared experience and thus to influence our behavior. Justice, rights, and the public interest are the most generalized, and hence most important, of these in law. Although hotly disputed in fact, concepts such as the legal accountability of the CIA and the limited "right" to abortion are frequently treated as settled in law; to do otherwise would be to undermine many, hard-won principles embedded in a hierarchy of classification. Untidy and inconvenient elements in the analysis are usually pigeonholed rather than pondered, and the basic theory implicit in the classification is seldom re-examined.⁵⁴ Lynn Wardle argues

succumbs to the understandable temptation to vary the relevant tradition's level of abstraction to make it come out right."); *id.* at 215 n.86 (citing L. TRIBE, *American Constitutional Law*, 944-46 (1978)) (*inter alia*, it "makes all the difference in the world what level of generality one employs to test the pedigree of an asserted liberty claim."

51. See *infra* notes 265-305 and accompanying text.

52. J. Commons, *supra* note 36, at 24; A. MELTSNER, *supra* note 11, at 123-29; E. SCHUR, *LAW AND SOCIETY* 47 (1968) (citing Jerome Frank); P. WHEELWRIGHT, *supra* note 35, at 319-20; Hartshorne, *supra* note 38, at 327 (discussed in note 45, *supra*); Komesar, *In Search of a General Approach to Legal Analysis* 79 MICH. L. REV. 1350 (1981) (generalization, the systematic ordering of cases, is increasingly difficult because of the proliferation and the complexity of social issues); Murray, *supra* note 35, at 847. See Vaupel, *supra* note 35, at 45 (in policy analysis and decision, habit, intuition or some incomplete analysis frequently used in a process of "muddling through"); A. WILDAVSKY, *supra* note 5, at 9 (tendency for the alternative adopted, and evidence supporting it, to become the substance of rationality; "historical evolution, the short cuts, the blind alleys, the trial and error, . . . the crazy-quilt pattern of politics" are often ignored); Tribe, *supra* note 10, at 84-86 (quoted *infra* note 58).

53. See Abelson, *supra* note 16, at 316. This is all that "scientific" knowledge consists of in an Aristotelian logic. *Id.* See also A. ETZIONI, *supra* note 2, at 60; E. MEEHAN, *supra* note 5, at 15-19; *supra* note 16.

54. Abelson, *supra* note 16, at 314-15; Baum, *Comparing the Implementation of Legislation and Judicial Policies*, in EFFECTIVE POLICY IMPLEMENTATION 39, 48 (D. Mazmanian and P. Sabatier, eds. 1981); E. MEEHAN, *supra* note 5, at 58-59, 66; Anderson, *supra* note 17, at 716. In conventional legal analysis, the "intellectual problem is resolved when formal distinctions or equivalencies are succinctly put; the question of what difference it makes whether one or another formulation is accepted does not

that this has happened in abortion decisions,⁵⁵ presumably because the abortion debate generates much more heat than light.⁵⁶ Pigeonholing also economizes on decisionmakers' time and on other scarce resources such as creativity and tax money; the attitude is "let's get it out of the way" and new policy choices take the hindmost, unless these can be fitted into an existing classification. In such a strange system, the potential for biased analyses and decisions is enormous. There is a good deal of true believership at work, in saving the world through law (or a particular legal doctrine) or through national security intelligence, if you are a CIA employee. Classifications are composed less of objective truths than of the kinds of cultural manifestations that anthropologists study in so-called primitive societies.⁵⁷

seem to be a pertinent topic." Lasswell and McDougal, *supra* note 34, at 500. Arguably, these "distinctions or equivalencies" can be read as what I term as classifications or analogies. See E. MEEHAN, *supra* note 5, at 46 (too many definitions are nominal rather than real, immune to criticisms by reference to experience or observation); J. SHKLAR, *supra* note 24, at 33 (lawyers play a definition game, in which words always refer to identifiable entities); A. WILDAVSKY, *supra* note 5, at 205 (quoting Einstein) (seldom if ever "is the scientist aware of the eternally problematic character of his concepts"); Komesar, *supra* note 52, (discussed *supra* note 52).

55. See L. WARDLE, THE ABORTION PRIVACY DOCTRINE xv (1980):

[The doctrine] has survived intense professional and public criticism for more than seven years . . . and has expanded in scope to a degree of unanticipated breadth and complexity. [But is developed] largely without legal analysis, . . . [and produced] a regressive formalism characterized by the mechanical (and typically evasive) reliance on *stare decisis*. . . . [This is a] rigidly dogmatic treatment focusing on uniformity of results rather than consistency of rationale. [A]ttributes of principled analysis, impartial judgment and intellectually honest opinion writing [are neglected].

A doctrinal "sheltering" has resulted in rules of thumb, which are warped toward philosophical extremes by a lack of criticism by the lower courts, etc. *Id.* at 303-07.

56. See *infra* notes 424-35 and accompanying text.

57. M. FREEMAN, *supra* note 27, at 125 (judge torn between conformity to community standards and the wish to respect established laws); D. LLOYD, *supra* note 3, at 127 (English and French law implicitly relies on insights of the judge, as a typical representative of his generation); E. MEEHAN, *supra* note 5, at 58-59; *id.* at 157 (the 'state of the art', the "way in which normative matters are conceptualized and handled in current practice," a serious handicap to reasoned improvement); E. SCHUR, *supra* note 52, at 47 (quoting Jerome Frank, judges decide on the basis of a "subjective *gestalt*"); J. SHKLAR, *supra* note 24, at 106 (discussed *supra* note 27); C. WEISS AND M. BUCUVALAS, *supra* note 6, at 268. See C. LINDBLOM, *supra* note 3, at 22 (discussed *supra* note 16); Hartshorne, *supra* note 38, at 326 (quoted *infra* note 64); Lasswell and McDougal, *supra* note 34, at 498; Murray, *supra* note 34, at 840-42.

A good example of the culture-bound nature of classification is from a Chinese encyclopedia division of animals into:

(a) Belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs,

With tongue in cheek, we see decisionmakers apply a farflung Parsimonious Principle of Conserving Existing Concepts and Classifications. Facing the prospect of a constant tinkering, that is, of attempts to deal with a chaos of events and earlier policies, decisionmakers too often seek refuge in the apparent safety and stability of minor alterations in past policy. The range of policy options has been truncated for decisionmakers by the logic they have learned to apply, by the interests asserted by themselves and others, and by the ways institutions are designed. Regular application of "bright-line" classifications fosters the "either/or mentality" that conceals the sensible policy alternatives lurking in the gray areas between.⁵⁸ Thinking in extremes—that no contract exists, that all fetuses ought to have absolute rights to life, that CIA activities are illegal unless they fully preserve civil liberties—requires less mental energy than exploring all aspects of a problem. These extremes come about by presuming that a classification is exclusive and exhaustive, that its contraries are contradictory. Fixed sets of logical pigeonholes tantalize decisionmakers with simple solutions to complex problems, and deliver false dichotomies instead.⁵⁹

For logicians, the false dichotomy is an error termed the black-

(e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera*, (m) having just broken the water pitcher, (n) that from a long way off look like flies.

M. FOUCAULT, *THE ORDER OF THINGS* xv (1970) (quoting Borges and quoted in Tribe, *supra* note 10, at 76). Foucault notes "the exotic charm of [such] another system of thought" and "the limitation of our own, the stark impossibility of thinking *that*." *Id.*

58. Flynn, *Commentary*, 58 WASH. U.L.Q. 767, 769 (1980). (Flynn is discussing antitrust laws and policies, but his excellent analyses are arguably applicable to law and policy generally.) See *id.* at 781, 792 (existing schemes do not work well in all decisions over an extended period of time, yet they block the evolution of more sensible standards); Flynn, *supra* note 31, at 347 ("bright-line rules are barriers to meaningful thought and are soon obsolete in the face of relentlessly changing reality"); Tribe, *supra* note 10, at 95 (describing the integrity of the body—in abortion matters, etc.—as consisting of neighborhood and community "on-off" values with an evocative and emotive character); *supra* notes 28-30, 34, 47 and accompanying text. See also L. WRIGHT BETTER REASONING 162 (1982): "Boldly-drawn divisions inevitably ignore many subtle things. . . . [S]ometimes the damaged subtlety is crucial to the issue; it is *just* what cannot be ignored."

Decisionmakers are driven to collapse process into results, and then to collapse results into a "structureless mass." Reducing "complex structures to their separate parts, and then making key features to those parts comparable by establishing rates of exchange among them, is in many respects a profoundly limiting and distorting mode of analysis." Tribe, *supra* note 10, at 84-86.

59. S. ENGEL, *WITH GOOD REASON*. 72-73 (1976); R. OLSON, *MEANING AND ARGUMENT* 190 (1969). See A. WILDAVSKY, *supra* note 5, at 59 (quoting Mary Douglas).

and-white fallacy, the fallacy of bifurcation, a simple dualism, and so forth.⁶⁰ Legal analysis has ignored the dangers of the false dichotomy by and large, but there are a few jurisprudential treatments of legal "antimonies."⁶¹ False dichotomies are everywhere for the

60. F. DAVIS, ET AL. SOCIETY AND THE LAW 138 (1962) (severe, if not false, dichotomy between "is" and "ought" in law and the other social sciences); S. ENGEL, *supra* note 59, at 72 (fallacy of bifurcation presumes a classification to be exclusive and exhaustive, when other alternatives exist); Barker, *Internal Difficulties of Democracy*, in PRIVATE LIFE AND PUBLIC ORDER (T. Lowi, ed. 1968) (excerpts from Barker's *Reflections on Government* (1942)) (analyses based on social class amount to a "simple dualism" ignoring, e.g., voluntary membership in political parties); R. OLSON, *supra* note 59, at 190 (black and white fallacy, where contraries adjudged contradictory); G. RUNKLE, GOOD THINKING 39 (1978) (if listener declines to accept one extreme point, she is forced to accept the other because of the black and white fallacy). See W. FEARNSIDE, *supra* note 48, at 145-46 (disjunctive syllogism, a division of phenomena that leaves nothing over); K. MACHINA, BASIC APPLIED LOGIC 45-46 (1982) (fallacy of false dilemma, where only two alternatives considered viable); Parsons, *The Ideal Type and Generalized Analytical Theory*, in MAX WEBER'S IDEAL TYPE THEORY 56, 71 (R. Rogers, ed. 1969) (the basic dichotomy in social sciences, the false or theoretically unwarranted antithesis of rational/irrational); L. WRIGHT, *supra* note 58, at 160-61 (false dilemma, in which position seems stronger than it is because of misdescription, oversimplification); *infra* notes 61-63, 65 and accompanying text. See also W. FEARNSIDE, *supra* note 48, at 43 (false analogy, based on figurative resemblances which are not the "essential similarities within the respect compared"); E. MEEHAN, *supra* note 5, at 43 (fallacy of composition, where properties of one element attributed to the aggregate; and its mirror image, the division fallacy); R. OLSON, *supra* note 59, at 184 (fallacy of the neglected aspect, where argument believed to carry more weight than it does because relevant factors overlooked); *id.* at 190 (fallacy of false precision, where argument gains weight by being described in, e.g., mathematical terms); P. WHEELWRIGHT, *supra* note 35, at 330 (in the *a priori* dilemma of formal logic, "the alternates are logical contradictories, so that one or the other of them not only is but must be the case"); L. WRIGHT, *supra* note 5, at 164 (in evaluative characterizations, the "description seems reasonable enough . . . because it captures our settled assessment of the matter, but since that assessment is precisely what is at issue, an argument simply cannot begin there").

Logical dilemmas, and frequently dilemmas in real life, can be validly used to infer the consequences of various alternatives, if the premises are examined carefully. R. ANGELL, REASON AND LOGIC 151-52 (1964) *R. Olson, supra* note 59 at 191. Important premises have to be sufficiently independent of the conclusion to count as grounds for accepting the conclusion. An argument can be a fallacy in some contexts and not in others, a major reason why informal logic can never be precise. K. MACHINA, at 50-51. The false dichotomy arguably illustrates all three main types of material fallacy: confusion, presumption, and irrelevance. See P. WHEELWRIGHT, *supra* note 35, at 311. It can be rebutted by determining that the alternatives are not exclusive, "escaping between the horns," or by rejecting one or both of the alternatives, "taking the dilemma by the horn(s)." R. ANGELL, at 152.

61. See, e.g. W. FRIEDMANN, LEGAL THEORY 28-39 (4th ed., 1960) (*inter alia*, "antimonies" of natural law v. subjective will, charismatic v. intellectualized law, positivism v. idealism, stability v. change, collectivist v. individualist ideals, autocracy v. democracy, nationalism v. internationalism); Radbruch, *Legal Philosophy*, in THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DABIN 43, 107-12 (K. Wilk, trans. 1950) (*in-*

searching.⁶² Foreign policy and nuclear arms policy contribute more than their fair share of instructive examples. Many of these revolve around the hoary dichotomies of "better dead than Red" and "better Red than dead."⁶³ These kinds of false dichotomies can result from

ter alia, justice v. expediency); Fatouros, *The International Law of the New International Economic Order*, 17 WILLAMETTE L.J. 93, 105 (1980) ("form and substance, coercion and freedom, efficiency and justice"). See also J. ELY, *supra* note 44, at vii:

Contemporary constitutional debate is dominated by a false dichotomy. Either, it seems, we must stick close to the thoughts of those who wrote our Constitution's critical phrases and outlaw only those practices they thought they were outlawing, or there is simply no way for courts to review legislation other than by second-guessing the legislature's value choices.

The latter approach is associated with abortion: See *id.* at 2-3; *infra* notes 375-79, 397-405 and accompanying text. But see also W. FEARNSIDE, *supra* note 48, at 273 (quoting Aldous Huxley): "Paracelsus . . . owed his enthusiasm for antimony to a false analogy. Just as antimony purifies gold. . . in the same form and shape it purifies the human body." Asaro, *The Public/Private Distinction in American Liberal Thought: Unger's Critique and Synthesis*, 28 AM. J. JURISP. 118 (1983), argues (*id.* at 147) that R. UNGER, KNOWLEDGE AND POLITICS, (1975) exposes a "fallacy" or "false dichotomy" in a "liberal ideology . . . fraught with antimonies. . . ." These give rise to "a fundamental bifurcation characteristic of modern liberal consciousness and institutions— . . . between the universal and the particular, between society and the individual, between the public and the private. . . ." Asaro, at 120, discussing R. UNGER, at 45, *passim*. Unger and others have applied these insights to legal analyses: See, e.g., *id.*; *passim*; R. UNGER, LAW IN MODERN SOCIETY (1976); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); *infra* notes 384, 552, 563 and accompanying text.

62. False dichotomies, of the type "John is . . . a hero or a coward"/"a friend or not a friend," are common in many policy areas; the possibility that John is normal/indifferent is ignored. R. OLSON, *supra* note 59, at 191. See, e.g., Barker, *supra* note 60 (discussed *supra* note 60.); J. SHKLAR, *supra* note 24, at 118 (the policy of justice may, "in many . . . areas, lead to far worse social consequences than a policy of semijustice, in which several incompatible goals are allowed to live in compromise"); G. White, Paper Delivered to Plenary Session, AALS Conference, Cincinnati, January 7, 1983 (majority rule v. minority rights, technological advance v. preservation of humanist values); A. WILDAVSKY, *supra* note 5, at 223 (dichotomy between politics and administration, developed to legitimate rise of the supposedly neutral civil service, overwhelmed today by observation that statutory delegations are so vague that administrators plug in their own choices); White, *The Evolution of Reasoned Elaboration* 59, VA. L. REV. 279, 296 (1973) (dissolution of common values into "polar alternatives—permissiveness and regimentation, militancy and fatalism, cynicism and fantasy."); *supra* notes 23-24, and accompanying text (efficiency v. justice or rights). See also Wellington, *Common Law Rules and Constitutional Double Standards*, 83 YALE L. J. 221, 246-47 (1973):

If . . . an institution . . . had the job of finding the society's moral principles and determining how they bear in concrete situations, that institution would be sharply different from one charged with proposing policies. . . . It would provide an environment conducive to rumination, reflection, and analysis. "Reason, not Power" would be the motto over its door.

63. "Better pink than extinct" and "Better Finnish than finished" may gain

dumb slips, but are just as likely to emerge from "deep analyses" which have concerned many decisionmakers over a number of years.

Categories are frequently vague or ambiguous enough to permit policy to be pursued to the furthest extreme espoused by a powerful interest group and reachable by extending an existing classification: ever-expanding definitions of "national security" by CIA employees,

influence in the future, however. These polarized notions are self-satirizing, yet they broadly influence public life in general:

The red-or-dead conundrum distracts attention from real choices and is fit only for undergraduate debating societies. As the Church [of England] puts it, "Supporters of nuclear deterrence ought not to offer a choice between savagely repressive occupations on the one hand, and on the other, the present armed peace. . . , as though these were the only possible alternatives."

Jenkins, *Widening the Constituency of Concern*, MANCHESTER GUARDIAN WEEKLY, November 7, 1982, at 5, col. 2. See Gore, *The Fork in the Road*, NEW REPUBLIC, May 5, 1982, at 5:

Advocates of an across-the-board nuclear freeze and advocates of a massive nuclear weapons buildup now believe they are engaged in a debate with no middle ground. Each side sincerely believes that . . . [its] course . . . is the best way to prevent nuclear war, and each side accuses the other of harboring irrational fears that could serve to make nuclear war more likely.

Here is a good example, from someone who should know better: "The question of geopolitical balance is simply whether friendly or unfriendly nations will dominate the key regions of the Middle East, South Africa, and Asia. Habib, *American Foreign Policy Challenges for the 1980s*, 17 WILLAMETTE L.J. 27, 29 (1980). What if no one dominates or, like John (see *supra* note 62) they are indifferent? (Habib, *id.*, does go on to describe a "workable . . . compromise: a little containment, a little detente.") Implicit in Habib's statement are other false dichotomies: *e.g.*, "this debate is about whether the policy and world outlook of the Soviet leaders are inspired by a brutal urge to expand their Communist empire, or by a sense of profound insecurity." Seabury, *George Kennan v. Mr. 'X'*, NEW REPUBLIC December 16, 1981, at 17. This kind of thinking comes from "imagining the world . . . divided between all those unreasonable others . . . and our reasonable, humane selves. . . ." *Id.* at 20. *E.g.*, the Russians are told to read Kennan's new book "to see how their actions, excessive secrecy and attempts to export an ideology have fed a European-American paranoia. . . ." Weisner, Book Review, MANCHESTER GUARDIAN WEEKLY, January 2, 1983, at 18, col. 2. (Sauce for the gander?)

A major reason for their instability is that public opinion and our foreign policy regularly jump from one horn to the other on a false dichotomy:

No sooner did Americans decide that they mistakenly supported a dictatorial Shah in Iran than the hostage crisis created a new mood of belligerence. No sooner does this reverse the post-Vietnam attitude of caution toward participation in foreign conflicts than public concern sees El Salvador as a possible "new Vietnam." All this happens in less than four year's time!

Rubin, *A Centrist Foreign Policy*, NEW REPUBLIC, August 2, 1982, at 34. See Hoffman, *supra* note 7 (quoted *supra* note 7). Some leaps in logic are so rapid and radical

for example. The more general and symbolic the concept, due process for example, the more useful it is for filling gaps in law and policy, and for organizing politically-effective interests. A moral right, such as the fetus's right to life, may be confused, unconsciously or intentionally, with a legal right. The facts may be tailored or evidence suppressed (a common practice by the CIA); part of the problem omitted; presumptions, legal fictions and farfetched analogies adopted;⁶⁴ or question-begging epithets deployed.⁶⁵

In these ways, a classification can come to have a life of its own over time. It then gets mistaken for the reality it purports to describe. When this happens, lawyers and other policy analysts get sucked into a vortex of their own abstractions, where the gray areas of policy are no longer visible. Harold Laski put it well—in "any contact between life and logic, it is not logic that is successful."⁶⁶ Yet logic seems to win out in much of the argumentation and schooling in law and the other social sciences. Rules of the game compel decisionmakers to be seen to advance consistently toward an ideal rationality, in a

as to raise the suspicion that a dichotomy is being manipulated for some group's advantage: the regrettable death of two astronauts-in-training justifies massive increases in expenditures for space; the failure of helicopters in the Iranian desert shows the need for bigger (and less reliable) ones; the assassination of Sadat somehow intensifies our need to sell AWACs to the Saudis.

64. See F. DAVIS, *supra* note 54, at 142 (citing Llewellyn); K. MACHINA, *supra* note 60, at 39; R. NOLL, *On the New Deal and Other Deals* (Paper Presented to the Administrative Law Section of the A.A.L.S., Cincinnati, January 6, 1983); Anderson, *supra* note 17, at 714; *supra* notes 20, 31, 44, 52, 57 and accompanying text. See also Hartshorne, *supra* note 38, at 326:

As Pierce said, determinism is mere talk. It cannot be lived and hence cannot be genuinely believed. The probabilistic view can and must be lived by. Probability is not only "the guide of life," it should be seen, and many physicists now do see it, as the guiding idea in science also.

65. The fallacy of begging the question invites the prejudging of an issue. Slanted language reaffirms a position and appears to prove it without actually doing so. Reasoning is circular, in that the conclusion is stated in a premise (perhaps in a disguised fashion): e.g., miracles are impossible because they violate the laws of nature. S. ENGEL, *supra* note 60, at 79-81; K. MACHINA, *supra* note 60, at 48-49; R. OLSON, *supra*; note 59, at 189; G. RUNKLE, *supra* note 60, at 55; P. WHEELWRIGHT, *supra* note 35, at 320-22. See *id.* at 321 (citing Cardinal Newman's *Apologia* (1874)): "poisoning the well," putting the situation so as to preclude contrary evidence, is a commonly-used technique of legal argumentation.

66. Guest, *supra* note 35, at 176 (quoting Laski). See O. HOLMES, *supra* note 3, at 1 (*dictum* Holmes frequently ignored himself) ("The life of the law has not been logic: it has been experience"); Flynn, *supra* note 31, at 352 (if a court uses antitrust "abstractions as reflecting the 'is' of reality to determine the 'ought' of a dispute *sub judice*, the court is snared in a self-fulfilling, yet irrelevant and self-defeating enterprise"; Flynn, *supra* note 58, at 792-793.

world seemingly being made ever less rational by chaotic events and by policy as its own cause.⁶⁷ Unfortunately, decisionmakers get little aid or even comfort from social scientists, some of whom ignore the discomforts of the real world to pursue elegant theories of what policies out to be. Other social scientists restrict themselves to what policy actually is, frequently delighting in its irrationality and ignoring the possibilities for its improvement. These need not be mutually exclusive positions, of course, but the two "mind sets" do give rise to considerably different foci.⁶⁸ This is clearly evident when comparing the "Groupthink" practiced by CIA officials with the absolutist libertarian stance taken by American Civil Liberties Union officials on national security matters.⁶⁹

A severe, if not false, dichotomy between what "is" and what "ought" to be has bedeviled law and the other social sciences, ever since David Hume raised it to a first principle. Falling neatly between the "is" and the "ought," policy is the loser whenever the dichotomy is applied. What policy "is" should influence policy "oughts" by imposing constraints on what "can" realistically be done, and past "oughts" influence the "is" of policy today—at least to the extent that policy is its own cause. For example, black people know discrimination to be cruelly unjust, the unemployed know the economy to be arbitrarily harsh, and business people usually know when they intend

67. M. SHAPIRO, *supra* note 22, at 90 (quoted *supra* note 22); J. SHKLAR, *supra* note 24, at 113; *id.* at 33 (quoted *supra* note 54). R. UNGER, KNOWLEDGE AND POLITICS 95 (1975): "The characteristic predicament of the modern lawyer is to argue constantly about policy, as if rational choice were possible, yet to remain faithful to the idea that values are subjective."

68. Samuels, *Book Review*, 60 TEX. L. REV. 147, 169 (1981). A rationalist social science tends to be technocratic, to devise or assume clear and non-conflicting goals, and to then arrange them in a clear hierarchy which gets pursued by supposedly efficient means. The fact that this ideal rationality is not attainable because of the limits of time, information and intellect has led others to study the reality of decisionmaking, of "muddling through" on the basis of habit, snap judgments, holistic responses and incomplete analyses. Policies are then considered as ineluctably subjective and ideological and, when added up, as displaying neither rhyme nor reason. Matters are almost always left there, however. F. FROHOCK, *supra* note 30, at 178; C. LINDBLOM, *supra* note 3, *passim* (the doyen of the "is" of policy school); E. MEEHAN, *supra* note 5, at 90-91; Parsons, *supra* note 60 at 70-71; *id.* at 71 (discussed *supra* note 60); R. UNGER, LAW IN MODERN SOCIETY 10-11 (1976); Vaupel, *supra* note 35, at 45-46, *passim*; A. WILDAVSKY, *supra* note 5, at 19, 109, 112, 124; Anderson, *supra* note 17, at 711; Mayo and Jones, *supra* note 20, at 360.

In the law, there are similarly incompatible intellectual-psychological types: those who fall into despair if their moral convictions are not anchored to a universally valid moral order, and those who find a state of doubt positively enjoyable. J. SHKLAR, *supra* note 24, at 37.

to contract. This knowledge affects their actions, the thoughts and actions of others, and, thus, the law and policy of a corrective justice.⁷⁰

My survey of the policy process demonstrates that Lord Radcliffe's traditional view of public policy, as admitting no evidence because it bursts "out of the inner certainties" of the law,⁷¹ cannot be sustained. Law's "inner certainties" turn out to be extremely fragile, and, for that very reason, should be repeatedly analyzed rather than simply conserved. But Flaubert's *la rage de vouloir conclure* usually operates instead; the mania for *the* all-encompassing solution (such as the abolition of legal abortions or the CIA's desire to eliminate Soviet influence worldwide)⁷² proves an obstacle to realistic policy strategies and leisurely analyses. Advocates and decisionmakers squirt ink like so many cuttlefish. Words are long, the imagery stale, the idioms exhausted in policy statements of imprecision and, frequently, insincerity.⁷³ Much floundering about and gibberish is to be found in analyses of, for example, abortion and the CIA.⁷⁴ Similar tendencies can also be traced through the ancestral homeland of policy in the common law: contract.

II. CONTRACT: *ESCAPING BETWEEN THE HORNS OF THE FALSE DICHOTOMY*⁷⁵

Most of the experience of contract policymaking belongs to the

69. See *infra* notes 211-17 and accompanying text.

70. F. DAVIS, *et al.*, *supra* note 60 at 138 (cited *supra* note 60); J. ROBINSON, FREEDOM AND NECESSITY 123 (1970); Flynn, *supra* note 58, at 783 (law must both guide and reflect reality); Flynn *supra* note 31, at 352 (quoted *supra* note 60); Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976). See B. Smart, SOCIOLOGY, PHENOMENOLOGY, AND MARXIAN ANALYSIS 45 (1976) (quoting Louis Althusser) ("nothing takes so long to resolve as a problem which does not exist or is badly posed"); Spadaro, *supra* note 22 (quoted *supra* note 22); Lasswell and McDougal, *supra* note 34, at 500-01 (in a contextually oriented jurisprudence, logical facility is supplemented by policy-relevant criteria to diminish "the likelihood, that professional tools of legal thinking will sink into ritual incantations"); Tribe, *supra* note 10, at 99 (in many situations, personal and social choice is exercised not to implement a given value system but to define and sometimes deliberately change values).

71. LORD RADCLIFFE, *supra* note 31, at 38.

72. See *infra* notes 187-94 and accompanying text.

73. See G. Orwell, *Politics and the English Language*, in COLLECTED ESSAYS 353, 355, 364 (1961); Coser, *Book Review*, THE NEW REPUBLIC, July 19 and 26, 1982, 40 (reviewing Albert Hirschman's *Shifting Involvements*, which criticizes development economics theories on the basis of Flaubert's idea of *la rage*); Flynn, *supra* note 31, at 342-43. See *supra* notes 41-42, *infra* note 151, and accompanying text.

74. See A. MILLER, *supra* note 16, at 211; *infra* notes 120, 181-85, 429-32 and accompanying text.

75. For a somewhat similar analysis, see Unger, *supra* note 61, at 616-33.

courts. Willing to labor in this field for several centuries, courts have fine-honed a rather technocratic approach to setting policy and devised rough ideas about some of the practical consequences of passing between the horns of the contract/no-contract dichotomy. Most lawyers would also find an abundant judicial capacity to evaluate the moral and symbolic qualities of contract policies, a capacity which is the cause and effect of judges being left relatively free from legislative or administrative intervention in contract law.

Until early in the twentieth century, there was little concern over the legitimacy and competence of judicial policymaking in contract. Success was seen to turn not on exerting political muscle but on a judicial lucidity: a vividness of characterization of the issues and a useful distribution of emphasis. Attempts at lucidity often strike different people differently, and, in a pluralistic judicial system, it is difficult to tell whether a few decisions will amount to a change of policy.⁷⁶

A. *An Illustration of Circular Reasoning*

My example⁷⁷ of the false dichotomy in contract law takes us into the wheeler-dealer, Hollywood world of Howard Hughes, who was alive but an *eminence grise*—as you might expect. A man named Skirball wanted to produce a movie based on John O'Hara's best seller, *Appointment in Samarra*. Skirball bought the film rights to the book and had the screenplay written. He began negotiations with, among others, Howard Hughes' underling (Rogell) at R.K.O. Studios. Hughes, never appearing but pulling strings, expressed interest in the project if Gregory Peck would star. Peck was under contract to David O. Selznick, who was willing to "lend" Peck to R.K.O. But it seemed that Peck might prove a reluctant chattel. Lengthy negotiations ensued between Rogell and Skirball, until they reached a point where it was

76. See I. BERLIN, *The Concept of Scientific History*, in CONCEPTS AND CATEGORIES 103, 132 (H. Hardy, ed. 1981) (characteristics of effective writings about "human life," which presumably include some contract decisions); Carter, *When Courts Should Make Policy*, in PUBLIC LAW AND PUBLIC POLICY 141, 146-47 (J. Gardiner, ed. 1977); O. HOLMES, *supra* note 3 (quoted *supra* note 3); G. JACOBSON, PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT 89 (1977) (Cardozo and Pound took most of their *e.g.s* from private law, where their pragmatic morality was at home); D. LLOYD, *supra* note 3, at 5; HURST *supra* note 26, at 406, 453; Newman, *The Renaissance of Good Faith in Contracting in Anglo-American Law*, 54 CORNELL L. REV. 553 (1969); Shand, *Unblinking the Unruly Horse*, 30 CAMB. L. J. 144, 144 n.2 (1972); *But see also infra* notes 426-27, 435-36, 508-13 and accompanying text.

77. *Gold Seal Productions v. R.K.O. Radio Pictures*, 134 Cal. App. 2d 843, 286 P.2d 954 (1955) [hereinafter cited as *Skirball*].

now or never for these negotiations. Selznick's offer to lend Peck expired at noon. Rogell and Skirball agreed to pay Skirball \$125,000, plus 20% of profits earned by the film. Skirball asked if the other terms would be "exactly the same" as in the last picture he made for R.K.O. and, "if the deal is a deal with or without Peck. Rogell replied 'Yes.' Then Skirball stuck out his hand and said, 'We have a deal.' Then Rogell stuck out his hand and said, 'We have a deal.' Those present 'shook hands all around'"⁷⁸ and Hughes approved the deal over the phone.

R.K.O. immediately gave wide publicity to its new film project, starring Gregory Peck. Skirball and Rogell later stipulated that the picture budget would not exceed \$1,250,000, and two draft contracts were prepared, but not signed, on the basis of Skirball's last picture contract and R.K.O.'s standard forms. At this point, Gregory Peck refused to act in the film; consequently, Hughes backed out, and R.K.O. backed its way into a lawsuit brought by Skirball. Having tried to sell the "Samarra" film project to other studios, Skirball found them unwilling to take Hughes' well-publicized castoff.

Only a lawyer could cabin the issues arising from this dispute in the question: Is there a contract or not? Yet this is the way the *Skirball* court dealt with the dispute, when all but the *cognoscenti* would conclude that Skirball and Rogell were in the gray area, exactly half-way between "no-contract" and "contract" as the law understands them. Rogell and Skirball had agreed on the film's story line (subject to script changes), one star (subject to his truculence), the overall budget, and Skirball's compensation. In the nature of things, a near-infinite of such contract terms as budget headings, shooting schedules, T.V. rights to the film, director and casting decisions, could not be "exactly the same" as in Skirball's last picture for R.K.O. The parties had been negotiating almost daily for three months and were still not ready to set their "deal" in concrete—sign a "contract"—when, one month after the handshakes, Hughes backed out. Missing details notwithstanding, the court held Rogell and Skirball's "deal" to be a contract, and awarded Skirball \$250,000.⁷⁹

78. *Skirball*, at 134 Cal. App. 2d ____, 286 P.2d 959.

79. *Id.* at 968-72. See, e.g., *Int'l Telemeter Corp. v. Teleprompter Corp.*, 592 F.2d 49 (1979) (enforcement of complex patent litigation settlement where several drafts were exchanged but defendant's new management refused to sign); *Viacom Int'l Inc. v. Tandem Productions, Inc.*, 526 F.2d 593, 595-96 (2d Cir. 1975) (oral distribution and syndication rights agreement for T.V. program, "All in the Family," held enforceable); *Reprosystem v. SCM Corp.*, 522 F. Supp. 1257 (S.D.N.Y. 1981) (negotiation and drafting process in sale of a business similar to *Skirball*) (discussed *infra* notes 82-83, 85, 87, 98, 102, 104); *Lee v. Joseph E. Seagram and Sons, Inc.*, 413 F. Supp. 693 (S.D.N.Y.

The *Skirball* court's reasoning is of a type familiar to lawyers, and is essentially circular—question-begging. A deal is a contract⁸⁰ if the parties *intend* it to be; that is, if they intend their arrangements to have *legal* consequences.⁸¹ Intentions are not determined by asking the parties about them after the fact, given the danger of self-serving statements, but by the court's drawing of *reasonable* inferences from the parties' conduct.⁸² The basis for judicial inferences are, in turn, the terms the parties appeared to agree during negotiations. So, the answer to the question, "Do the terms agreed on by the parties

1976), *aff'd*, 552 F.2d 447 (2d Cir. 1977) (oral agreement to give opportunity to purchase liquor distributorship, with an approximate profit potential and at a reasonable price, sufficiently definite to enforce); *American Cyanamid Co. v. Elizabeth Arden Sales Corp.*, 331 F. Supp. 597 (S.D.N.Y. 1971) (letter agreement to buy "far flung . . . large and sophisticated business" enforceable despite several significant terms being left open for subsequent negotiation); *Pepsico, Inc. v. W.R. Grace Co.*, 307 F. Supp. 713 (S.D.N.Y. 1969) (joint press release announcing "agreement in principle" created implied obligation to negotiate definitive agreement in good faith); *Itek Corp. v. Chicago Aerial Industries, Inc.*, 248 A.2d 625, (Del. 1968) (agreement, with "letter of intent" signed, held enforceable after seller accepts better offer in bad faith); *Woodard v. Schwartz*, 5 Cal. Rptr. 231, (Dist. Ct. App. 1960) (an enforcement of negotiations for share of business profits "similar" to *Skirball*) (discussed *infra* notes 83, 86, 98); *Columbia Pictures Corp. v. DeToth*, 87 Cal. App. 2d 620, 197 P.2d 580 (1948) (discussed *infra* note 85).

80. "A contract is an agreement giving rise to obligations which are enforced or recognized by law." G. TREITEL, *THE LAW OF CONTRACTS* 1 (4th ed. 1975) (English treatise). See J. CALAMARI and J. PERILLO, *THE LAW OF CONTRACTS* 1 (2d ed. 1977); 1 WILLISTON, *CONTRACTS* § 1 (3d ed. 1957); Restatement (Second) of Contracts § 1 (1979). This is subject to two qualifications: that intent may be judged objectively (see *infra* note 82), and that congeries of standards of behavior—including policies—must be observed by the parties. G. TREITEL, at 1-2. The chief purpose of contract law is to make secure the promisee's "reasonable expectations." A. CORBIN, *CORBIN ON CONTRACTS* § 112 (1 vol. ed. 1952). See A. GOODHART, *ENGLISH LAW AND MORAL LAW* 10 (1953).

81. The "first essential element in the formation of an informal contract is mutual assent:" the "expression of agreement" between the parties—the "intention to be legally bound." J. MURRAY, *MURRAY ON CONTRACTS* 28, 31 (1974). See *Skirball*, at 134 Cal. App. 2d ____, 286 P.2d 966; A. CORBIN, *supra* note 80, at § 29 (quoted *infra* note 86). The problem is that "parties . . . rarely think of legal consequences much less express them when they manifest their mutual assent. . . ." J. MURRAY, at 30. This was certainly true in *Skirball*, although *Skirball* did try to make clear his desire to hold RKO to the "deal," Peck or no Peck.

82. I.e.: "What is looked to . . . is not the parties' after-the-fact professed subjective intent but their objective intent. . . . If the parties' expressions and conduct would lead a reasonable man to determine that they intended to reach a binding agreement, their agreement will be enforced." *Reprosystem*, *supra* note 79, at 1275. All acts, phrases, or other expressions are examined in light of "the attendant circumstances, the situation of the parties, and the objectives they were striving to obtain." *Id.* See A. CORBIN *supra* note 70, at § 29; G. TREITEL, *supra* note 80, at 2. This was done by the *Skirball* Court, although it was perhaps too rudimentary to merit discussion.

amount to a contract?" is: "That depends on the terms the parties agreed." Put another way, the completeness of negotiations determines the parties' intent, which determines whether negotiations were complete.⁸³

Notwithstanding the traditional view that *all* terms must be agreed before a contract is formed,⁸⁴ the *Skirball* court took a more

83. *City Stores, Co. v. Ammerman*, 286 F. Supp. 766, 772 (D.D.C. 1967) (quoted *infra* note 85) (case discussed *infra* notes 85, 102); *Skirball*, at 134 Cal. App. 2d ____ 286 P.2d 966 (quoted in note 84, *infra*). See, *Woodward*, *supra* note 79, at 231 (case "similar" to *Skirball*): Defendant makes two separate contentions which are really intertwined, "for in large measure his contention that there was no meeting of the minds [roughly, no intent to create legal relations] is dependent on the fact that their attempts to agree upon the terms to go into the writing were unproductive." See also *Kleinschmidt Div. of SCM Corp. v. Futuromics Corp.*, 41 N.Y.2d 972, 973, 395 N.Y.S.2d 151, 363 N.E.2d 701, 702 (1977) (quoted with approval in *Reprosystem*, *supra* note 79, at 1275):

Under the Uniform Commercial Code [2-204(3)], if the parties have intended to contract, and if an appropriate remedy may be fashioned, a contract for sale does not fail for indefiniteness if terms, even important terms, are left open. . . . It is no longer true that dispute over material terms inevitably prevents formation of a binding contract. What is true . . . is that when a dispute over material terms manifests a lack of intention to contract, no contract results.

Is this a distinction without a difference, permitting the court to reason in a circle, in that "formation of a binding contract" is known to require an "intention to contract?" See *supra* note 81. In fairness to the court, the Official Comment to 2-204(3) is scarcely more lucid: "The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite the omissions."

As noted in *Reprosystem*, at 1277, the "objective manifestations . . . must be weighed by the court and the line drawn between competing principles. . . ." These, I argue, are the contract/no-contract horns of the dichotomy. The requirement of definiteness is implicit in a more fundamental requirement, protecting the promisee's reasonable expectations. E. FARNSWORTH, *CONTRACTS* 192 (1982). See *supra* note 80. A court is thus likely to tailor its findings on definiteness according to whether or not it wishes to protect the promisee. See also J. ELY, *supra* note 44, at 19: "whether it's a property interest [protected under the Constitution] is a function of whether you're entitled to do it, which means the Court has to decide whether you're entitled to it before it can decide whether you get a hearing on the question whether you're entitled to it."

84. See, e.g., *Ridgeway v. Wharton*, 6 Clark's H.L. Cases 238, 305 (1857) (per Wensleydale, L.J.) ("An agreement to be finally settled must compromise all the terms which the parties intend to introduce into the agreement.") This view is retained by a few courts today: see, e.g., *Plumbing Shop*, *supra* note 46; E. FARNSWORTH *supra* note 83, at 202 ("traditional premise."). This may be a less demanding premise than appearances suggest, since a court has a fair amount of leeway in determining what becomes a "term" during oral negotiations. Also, *Plumbing Shop*, e.g., permits the court to imply some of the terms on the basis of trade usages and business customs.

modern view which requires that only *essential* terms must be agreed.⁸⁵ Whether this has happened is a question of fact answered in the trial court, whose findings will be affirmed on appeal if "supported by the evidence"⁸⁶—as they were held to be in *Skirball*. Thus an appellate

85. *Skirball*, at Cal. App. 2d ____, 286 P.2d 966, quoting *Thompson v. Schurman*, 65 Cal. App. 2d 432, 440, 150 P.2d 509, 513 (1944): "The question as to whether an oral agreement, including all the essential terms and conditions thereof, which according to the mutual understanding of the parties is to be subsequently reduced to writing shall take effect forthwith as a completed contract depends on the intention of the parties. . . ." The Rogell-Skirball negotiation "was in practical effect a complete statement of the terms of the contract." *Skirball* at 134 Cal. App. 2d ____, 286 P.2d 967. *Reprosystem*, *supra* note 79, at 1275, goes further, approving the "essential terms" test but adding that "in New York and across the country a binding contract can be formed despite 'material open issues'" (quoting *Kleinschmidt*, *supra* note 83, quoted *supra* note 83). See, e.g., *id.* at 1277 (quoted *supra* note 83); *id.* (quoted *infra* note 87); *City Stores*, *supra* note 83:

Defendants . . . contend that this contract should be governed by the rule that where material terms remain to be decided by the parties, there is no contract. . . . However, as the authorities cited by the defendants clearly reveal, that rule applies only where the parties fail to reach an enforceable agreement, that is an agreement for a valuable consideration which is binding on both parties. 1 Williston on Contracts § 103 (Jaeger 3d Ed. 1957).

See Restatement (Second) of Contracts § 33(2) (1979); text accompanying *supra* note 83. Ever the pragmatist, J. MURRAY, *supra* note 81, at 743, makes the point that if the gaps in the manifestation of assent are too great or too many the court will feel unable to fill the gaps. He argues that most cases support the presumption (my term—see *supra* notes 77-84 and text accompanying) that a contract exists as soon as agreement is reached (i.e., even before a written memorial is executed) in the absence of evidence convincing the court to the contrary. A few cases would support a contrary presumption, but this is "unwarranted." *Id.* at 34-35.

Skirball, at ____, 286 P.2d 966, does quote a case, virtually undistinguishable on its facts, which requires that "all" terms and conditions be orally agreed: *Columbia Pictures*, *supra* note 79. See note 74, *supra*. The same requirement is stated in *Thompson* at 440, 150 P.2d 513. It may be that the *Skirball* court wanted to blur the category it applied, given the then-state of California precedent and the nature of the Rogell-Skirball negotiations.

86. *Skirball*, at ____, 286 P.2d 966. See *Woodward*, *supra* note 69, at 232 (in a fact situation "similar" to that in *Skirball*, "the trial court was fully warranted in concluding that the execution of a writing was never intended by either party to be a condition precedent to the coming to life of the agreement."); A. CORBIN, *supra* note 80, at § 29 (business is done "in a very informal fashion" and a "transaction is complete when the parties mean it to be complete"—"a mere matter of interpretation," a "question of fact"); *id.* at § 30 (we therefore shouldn't worry if decisions conflict, since questions of law are not involved—and, I would add, existing classifications are conserved); G. TREITEL, *supra* note 80, at 41 (similarly ducking thorny problems by terming them questions "of construction in each case; and little purpose would be served by multiplying examples."). In *Skirball*, much of the parties' behavior subsequent to the handshakes, particularly RKO's publicizing of its "Samarra" with Peck as a star, is "strongly evidential" of an intent to create legal relations. See A. CORBIN, at § 29. But other aspects of the parties' behavior points in the other direction. Some courts

court can, within reason, place its case on either the contract or the no-contract horn of the dichotomy. The court can reason in a circle; it can decide which "terms" are to be "essential," a vague notion which confers a great deal of discretion on the court; and then determine whether "the evidence", as tailored a bit by trial or appellate judge perhaps, supports the trial court's "reasonable" inferences.⁸⁷

Although this process may be intellectually respectable, it is a far from satisfying way to escape the effects of a false dichotomy.⁸⁸ As Charles Knapp notes, "the common law's dichotomy of contract/no-contract does not exhaust the catalog of possible intentions."⁸⁹ The orthodox catechism of an abrupt transition from the no-liability, no-compensation world of the no-contract to the immediate existence of full contractual duties, entitling the innocent party to full compensation in the event of breach, is clearly contrary to business realities and expectations.

Business relations are usually very informal, as in *Skirball*, turning on a sense of honor based on experience or friendship, rather than on a naive or a line-drawing by some future court.⁹⁰ How, then,

describe the standard of appellate review more carefully without, however, significantly cabining their discretion. *E.g.*, *Field v. Golden Triangle Broadcasting, Inc.*, 451 Pa. 410, ___, 305 A.2d 689, 692 (1973): "[U]nless it appears that he has clearly abused his discretion or committed an error of law [citing cases] and . . . the findings have the full force of a jury verdict and if supported by sufficient evidence and if affirmed by the court en banc, [the decision below] will not be disturbed on appeal." Those courts that require "all terms" to be agreed are more willing to say, as a matter of law, that a contract does or does not exist.

87. See *Reprosystem*, *supra* note 79, at 1277 (quoted *supra* note 83); *id.* ("Implicit here . . . is my conclusion that none of the contract terms which remained open after consensus was reached . . . were such, taken separately or together, as to prevent the agreement from taking effect."); *supra* notes 50-52 and accompanying text. Just as a finding of unconscionability can be disguised as a traditional finding of failure of consideration or lack of mutual assent (J. MURRAY, *supra* note 81, at 737), so can facts in the middle ground be pushed into the contract or no-contract category. What is done may depend on whether the court is willing to take the time and trouble in, e.g., a routine case. E. FARNSWORTH, *supra* note 83, at 193 (discussing U.C.C. 2-204(3)). This discretion may "permit courts to pay lip service to the sacred dogma of freedom of contract while performing their basic task of administering justice." J. MURRAY, at 737. The court did this in *Skirball*: see *infra* text following note 107. This subterfuge is explained by Atiyah, *Judges and Policy*, 15 ISRAEL L. REV. 346, 361 (1980) (quoted in text accompanying *infra* note 91).

88. See *supra* notes 75-76 and accompanying text.

89. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673, 678 (1969). Corbin and Murray adopt four-fold classifications which are less parsimonious (of course) and carry less explanatory power. See A. CORBIN, *supra* note 80, at § 30; E. MURRAY, *supra* note 80, at 31-33; *infra* notes 114 and accompanying text.

90. A. CORBIN, *supra* note 80, at § 29; E. FARNSWORTH, *supra* note 83, at 106; Knapp, *supra* note 89, at 674-76, 679-80, 689, 726. On grounds of "commercial conve-

did the false dichotomy come to the common law? Patrick Atiyah offers one explanation:

[T] here was a strong elitist tradition in English law [and, I would add, in the American contract law based on it] until relatively recent times. Saying one thing, and doing another, or keeping quiet about powers of mercy or equity, was an important contribution to the mystique of the law.⁹¹

B. Freedom of Contract⁹² and its Derogation

By the middle of the nineteenth century, something called freedom of contract was at the center of the common law's mystique. As we became "a commercial center with a capitalist ethic," freedom became the rallying cry and freedom of contract "the ideological principle,"⁹³ the master policy that set the tone for a developing common law. This policy accords individuals the broadest possible latitude to arrange their own affairs. It is a canon of judicial non-interference, a deference to private parties in the public interest. To be as free as possible, there must be a precise point and time when I choose to commit myself on my own terms, and a correlative "freedom from" contract until then. This commitment is thought to be free of risks other than my own stupidity, which is very much my own problem.

nience," business people often "make agreements binding in principle without being able at the time precisely to settle all the details." G. TREITEL, *supra* note 80, at 43. This is arguably what happened in *Skirball*. But see also E. FARNSWORTH, at 241 (quoted *infra* note 102).

91. ATIYAH, *supra* note 88. See D. HAY, ALBION'S FATAL TREE 55 (D. Hay, P. Linebaugh, J. Rule, E. Thompson & C. Winslow, eds. 1975) (law's "very inefficiency, its absurd formalism, was part of its strength as ideology."); Walker v. Keith, 382 S.W.2d 198, 204 (Ky. 1964) (quoted *infra* note 94); *infra* note 115 and accompanying text.

92. The classic (but appropriately vague) definition is: [I]f there is one thing more than another public policy requires, it is that men [N.B.] of full age and competent understanding shall have the utmost liberty of contracting." Printing and Numerical Register Co. v. Sampson, L.R. 19 Eq. 462, 465 (1875) (Jessel, M.R.).

93. J. CALAMARI & J. PERILLO, *supra* note 80, at 5. (referring to England, but comments equally applicable to the U.S.). Contract becomes the principle of order par excellence, the safeguard of peace and stability, and the only legitimate means to a social integration which illustrates the natural identity of interests in society. Kessler & Sharp, *Contract as a Principle of Order*, in SOCIETY AND THE LEGAL ORDER 155, 157 (R. Schwartz & J. Skolnik, eds. 1970). The philosophical bases of freedom of contract are those of the open society: the sanctity of promise, individual sovereignty and responsibility secured by a nightwatchman state and judiciary, and an economic efficiency (supposedly) secured by catering to the needs of trade. See J. CALAMARI & J. PERILLO, at 7-11. For modern-day analyses in this vein, see, e.g., F. HAYEK, LAW, LEGISLATION AND MORALITY: RULES AND ORDER (1973); B. NOZICK, ANARCHY, STATE AND UTOPIA (1974); R. POSNER, ECONOMIC ANALYSIS (2d ed. 1977).

I am not committed unless and until the other party is also committed. Once this happens, a subsequent breach entitles me to a judicial remedy which is assumed to be effective.⁹⁴

As the *Skirball* case shows, this dichotomous precision is frequently unattainable in the real world. Yet freedom of contract and the false dichotomy that makes it effective so captured the judicial imagination that there was precious little room for other policies. Admittedly, judges described these residual policies in the Grand Manner—"No polluted hand shall touch the pure fountains of justice,"⁹⁵ for example—but the effect of these policies seems very narrow to us.

Aside from freedom of contract, so pervasive as to seem to lose its status as a policy, judges were deeply suspicious of public policy: it is "a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law."⁹⁶

94. *Underwood v. Barker*, 1 Ch. 300, 305 (1899) (Lindley, M.R.); E. FARNSWORTH, *supra* note 83, at 106-08, 132-33, 335; C. FRIED, *CONTRACT AS PROMISE* 13 (1981); LORD RADCLIFFE, *supra* note 312, at 61 (freedom of contract as master policy); Symons, *supra* note 2, at 194; text accompanying *supra* note 12. See Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 572 (1933): "Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience. For this reason we cannot accept Dean Pound's theory that all promises in the course of business should be enforced." Judicial statements of freedom of contract are frequently cast in the form of: "Our role is not that of contract maker; we merely give legal effect to bargained-for contractual relations." *Plumbing Shop*, *supra* note 74, at 514, 408 P.2d 383. In *Walker*, *supra* note 91, the court refused to undertake the "paternalistic task" of fixing the rent at which a lease should be renewed: "courts sometimes must assert their right not to be imposed upon. . . ." Imagine a court feeling "imposed upon," when its aid is sought in a dispute! It "is a first principle of liberal political morality that we be secure in what is ours. . . ." C. FRIED, at 7. This leaves open the central question of most lawsuits: What is it that is "ours?" A lease extension in *Walker*? The policy issue is whether there exists a reasonably certain and sensible answer to this question.

95. *Collins v. Blantern* (1767) 2 Wilson 341, 350, (Wilmot, C.J.). Whether this is because the hand is polluted or the fountains pure, or both, is never made clear. It does make a difference, when policies come to be applied. Shand, *supra* note 76, at 148-52. See *Holman v. Johnson* (1775) 1 Cowper 341 (Mansfield, L.J.) ("The principle of public policy is "that no "court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."); E. FARNSWORTH, *supra* note 83, at 331 (a collection of policies based on moral values—against gambling, impairment of families, etc.—on economic notions—against restraints on trade and sales of property—and on protection of governmental institutions); D. LLOYD, *supra* note 3, at 147.

96. *Richardson v. Mellish*, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824). See *Egerton*, *supra* note 3 (quoted *supra* note 3). The statement in *Richardson* by Burroughs, an otherwise unremarkable judge, has been occasionally reinterpreted as a "challenge" rather than "an invitation to remain pedestrian," in a nation of horse-lovers (LORD RADCLIFFE, *supra* note 31, at 46). With "a good man in the saddle, the unruly

Public policy did offer a few additional reasons for pigeonholing a fact situation as a no-contract, but there were no positive protections for the "other" party who could not find them in "his" freedom of contract.⁹⁷ Applying this view of policy, we would quickly pigeonhole the Skirball-Rogell negotiations into the no-contract category because they constitute a mere "agreement to agree."⁹⁸ Rogell had not, in other words, deprived R.K.O. of its freedom from contract.

The false dichotomy of contract did not remain frozen in place, however; the *Skirball* court did, after all, find a contract rather than

horse can be kept in control. It can jump over obstacles." *Enderby Town F.C. Ltd. v. The Football Assn. Ltd.* (1971) Ch. 591, 606 (Denning, L.J.—who else).

Traditional notions of public policy are conceived narrowly: D. LLOYD, *supra* note 3, at 147-48. Public policy is a "reserve power . . . used sparingly in England and France" alike, because of a traditional lawyers' conservatism, the judicial dislike of being overruled, and the difficulties of ascertaining a clear policy rule in any particular case. *Id.* But the French "jurisprudence" has proved readier than the common law to allow moral factors to override the doctrine of freedom of contract." *Id.* at 68. This is perhaps because English public policy (other than freedom of contract) was thought a "hunch," the insightfulness thought typical of the judge's generation and community (*id.* at 127) but terribly elitist in fact. See also *id.* at 28; LORD RADCLIFFE, at 38. E.g., Ronald Dworkin views policies as "rules *manques*," as extra-legal standards applied according to each judge's own lights so as to water down (Dworkin's) principles. Shand, *supra* note 77, at 145. See R. DWORKIN, *supra* note 24; LORD RADCLIFFE, *supra* note 31, at 52.

97. E. FARNSWORTH, *supra* note 83, at 326; LORD RADCLIFFE, *supra* note 31, at 37-38, 52-53; Symmons, *supra* note 3, at 194-95. A contract is unenforceable on policy grounds "only . . . if its harmful tendency is its probable and not merely its possible consequence." G. TREITEL, *supra* note 80, at 286, citing (*id.* at 286 n.74) *Fender v. St. John Mildmay* (1938) A.C. 1, 13: Statements that the contract is "void" or "unenforceable . . . only emphasize that no specific legal wrong is involved." There is a "harmful tendency" in *Skirball*—Hughes' backing out was rather naughty—but it is difficult to get too upset about it (unless you're Skirball or a Peck fan) and "no specific legal wrong is involved." *But see also infra* note 115 and accompanying text.

98. An "agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms." *Ridgeway*, *supra* note 84. Until all terms are settled, each party "is at perfect liberty to retire from the bargain." *Id.* See *Reprosystem*, *supra* note 79, at 1276; *Plumbing Shop*, *supra* note 46; *Walker*, *supra* note 91; *Woodward*, *supra* note 79, at 232 (quoted *supra* note 86); J. CALAMARI & J. PERILLO, *supra* note 80, at 13; G. TREITEL, *supra* note 80, at 40-41; *supra* note 84. There is an excellent discussion, and collection of cases for and against the "agreement to agree" doctrine in Knapp, *supra* note 89, at 676, 679-80 n.27, 682, 682 n.34, 683 n.37. More precisely, there is an agreement to agree, under the traditional scheme, in *Skirball* because: all terms were not agreed, the negotiations assumed a written contract would be drafted later, and this far-from-typical contract (outside the movie industry) involves complex matters and large sums. The bargain would thus be one usually put into writing, subject to a possible "business custom" of being bound by handshake. See *Mississippi & Dominion S.S. Co. v. Swift*, 86 Me. 248, 29 A. 1063, 41 Am. St. Rep. 545 (1894).

an agreement to agree. Like the economic and political *laissez faire* on which it is based, freedom of contract postulates an ideal rationality unattainable in the real world. This became more and more evident as socio-economic changes resulted in further departures from the ideal. On the one hand, the kind of complex, delicate and large-scale negotiations seen in *Skirball* could not be captured by the courts' rigid rules of offer and acceptance. On the other hand, freedom of contract turned out to be meaningless for people unable to capitalize on economic advantages during negotiations. A few judges realized that the courts had become prisoners of their own abstractions and had mistaken "a fashion of economic thinking or social philosophy for the basic public faith to which they are committed."⁹⁹

This realization came sooner and more forcefully to the legislatures that cheerfully began to infringe freedom of contract. Acting to protect certain groups from the exploitation that was their "freedom," legislatures came to require that some prices and practices be somewhat reasonable. Forced to deal with these interventions, more constructively after the Supreme Court's "switch in time" in 1937, judges often felt themselves relegated to the role of interstitialists. Paradoxically, this subordinate role resulted in a renaissance of judicial policymaking. The categories of public policy were no longer thought closed, once legislatures and "realist" judges cooperated to remove the cap from policy. Courts extended legislative policies into new areas by analogy, just as they had been extending common law policies into the areas of tort and property. Policy was no longer deemed the "hunch" of an elitist judge, but became a more coherent body of rules manipulable under *stare decisis* and canons of statutory interpretation. Manipulation took the form of pragmatic applications of rooted classifications, as a precondition to changing the classifications themselves.¹⁰⁰

99. LORD RADCLIFFE, *supra* note 31, at 64. See J. CALAMARI & J. PERILLO, *supra* note 80, at 6; E. FARNSWORTH, *supra* note 83, at 111 (quoting Rudolf Schlesinger); *id.* at 332; *supra* notes 66-67 and accompanying text. Among the first to recognize this was Holmes, J. See, e.g., his dissent from a decision invalidating a statute because, *inter alia*, it infringed freedom on contract: *Lochner v. New York*, 198 U.S. 45, 74 (1905). The fuller use of policies other than freedom of contract, by legislatures and courts, waited upon the demise of "Lochnerizing" in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

100. See J. CALAMARI & J. PERILLO, *supra* note 80, at 6; J. Commons, *supra* note 36, at 5-6; E. FARNSWORTH, *supra* note 83, at 330; G. JACOBSON, *supra* note 76, at 129; Kessler & Sharp, *supra* note 93, at 156; D. LLOYD, *supra* note 3, at 121 ("Public policy . . . is a part of the common law like any other topic, such as . . . tort, and is to be developed by the systematic extension of binding precedents according to the ordinary common law pattern."); *id.* at 127 (discussed *supra* note 96); G. TREITEL, *supra*

This precondition to change sometimes seems perpetual; the contract/no-contract dichotomy remains barely afloat in our contract jurisprudence today, despite its heavy freedom of contract cargo and its having sprung many leaks such as the *Skirball* case. Four alternative approaches constantly threaten to sink the basic dichotomy altogether. (There may be more or less than four alternatives, depending on how you classify—and that is a large part of the problem.) Each of these alternatives could have been applied in *Skirball*, with varying degrees of ingenuity. None were, however.¹⁰¹

First, many courts have rediscovered the requirement that contract negotiations and performance be in good faith. Were it imposed, this good faith requirement would have damned Hughes' renegeing in *Skirball*. Good faith has no necessary connection with contract law and its nineteenth century assumption of an arms-length bargaining, for the good faith doctrine is grounded in Roman law and a medieval

note 80, at 3; J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 185 (1966) (applying policy, a judge sometimes acts as a "paramount censor with power to override 'individual rights'"); Knapp, *supra* note 89, at 675 (the "rigidity" of the contract/no-contract dichotomy "is weakened by garden-variety 'legal realism,' which readily admits that [the decision] . . . will in some immeasurable but important respect turn on the 'moral' or 'ethical' quality of the conduct of the parties . . ."); Shand, *supra* note 76, at 157 (rigor of policy rules relaxed, not on the basis of policy itself but by using fictions to avoid applying policies); *id.* at 165 ("broad and vaporous" policy reduced to predictable and obligatory rules); Symmons, *supra* note 3, at 185-87; *id.* at 187 (analogy, between operation of policy in contract and in tort, not always seen as exact by courts). It was part of traditional dogma to "deny that any court can invent a new head of public policy." *Janson v. Dreifontein* [1902] A.C. 484, 491 (Halsbury, C.J.). That "which is against public morals and public decency should be subject to the condemnation of courts in all generations. Righteousness is the same today as it was yesterday." *Critchfield v. Bermudez Paving Co.*, 174 Ill. 466, 482, 51 N.E. 552, 557 (1898). Judges "are more to be trusted as interpreters of the law than as expounders of . . . public policy." *In re Mirams* [1891] 1 Q.B. 594, 595 (Cave, J.). This is because policy is "a doctrine regarded as rather for the legislature. . . ." *Hyams v. Stuart-King* [1908] 2 K.B. 696, 727. But these conventions are rather ill-defined. The notion of closure of the heads of public policy turns out to be a semantic persiflage rather than a practical restraint (LORD RADCLIFFE, *supra* note 31, at 55): "A far more rigid classificatory system that either French or English law can . . . provide would be imperative before there can be any prospect of its constituting an effective fetter on judicial discretion." D. LLOYD, *supra* note 3, at 114. As legislatures came regularly to abrogate the tenets of freedom of contract, courts were encouraged to exercise the discretion that freedom of contract made them forget.

101. Two of these alternatives (contract implied in law and promissory estoppel) were adopted by the trial court, along with the finding of an enforceable express contract (*Skirball*, *supra* note 77, at ____, 286 P.2d 959, 962-63) in a scattergun imposition of liability on R.K.O. The appellate Court ignored these alternatives holdings, however. A fifth alternative, fraud, has been omitted from my discussion because it has long been recognized as a cause of action sounding in tort.

ecclesiastical desire to sanction departures from tenets of the Christian faith.¹⁰² Second, in place of or in addition to implying good faith obligations, a court may imply a contract or some of its key terms out of the parties' conduct, their past dealings, relevant business customs, etc. A fair amount of sleight-of-hand is frequently involved in this departure from a strict dichotomy, and it would have been possible to imply a few terms to "fix up" the negotiations in *Skirball* or, perhaps, discover a business custom among Hollywood wheeler-dealers to bind themselves with a handshake.¹⁰³ Even if such a custom

102. The delay in importing good faith requirements into contract law can be blamed on the "dichotomy" between law (where most contracts cases originate) and equity (where the good faith doctrine originates). Newman, *supra* note 76, at 557. This is a false dichotomy in the U.S. In the few states where law and equity were applied by separate courts, such courts were fused soon after independence. There is thus little reason not to merge these separate bodies of rules into a unified contracts jurisprudence. See J. FARRAR, *supra* note 35, at 58-60 (quoting Keeton and Sheridan, in part). It is "some reflection of the business ethics fostered by a system of individual competition that the parties . . . are permitted" by courts of law "to deal at arms length." It is thought to be "smart business" to buy land that you know to contain oil for a song. E. FARNSWORTH, *supra* note 83, at 241. While the requirement of good faith encounters "the not unusual reluctance of law to abandon its accustomed approaches," the "winds of change have at least raised a corner of the moral curtain." Newman, at 553-54. Courts will punish bad faith where it is clearly present and approaches non-performance in seriousness. Knapp, *supra* note 89, at 727. Parties who withdraw merely because they have found a better deal or (as in *Skirball*) have a change of heart are acting in bad faith, while those who withdraw after substantial fruitless negotiations are not. *Id.* at 720-21. (There is, of course, a large grey area between these two poles.) See, e.g., *Reprosystem*, *supra* note 79, at 1280 ("under New York law, every contract carries with it an implied obligation of good faith."); *Pepsico*, *supra* note 79; *Itek*, *supra* note 79; *City Stores*, *supra* note 83 (specific performance—negotiating a lease in good faith—ordered where landlord backed out of rather vague agreement after receiving better offer); *Heyer Products, Co. v. United States*, 135 Ct. Cl. 63, 14 F. Supp. 409 (1956) (bidder for government contract has right to have bid "honestly considered" in good faith); *Hoffman*, *supra* note 46 (discussed *infra* note 107); Uniform Commercial Code § 1-103 (1952); *id.* at § 2-103(1)(b) ("reasonable commercial standards of fair dealing in the trade" required—arguably, a rather undemanding standard); *id.* at § 2-305, Official Comment 6; Restatement (Second) of Contracts, § 205 (1979); Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 359-60 (1969). See also Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958) (discussing statutory duty in labor contracts). A few cases insist on a more demanding duty: best efforts (e.g., *Stoddard v. Ill. Improvement and Ballast Co.*, 275 Ill. 199, 113 N.E. 913 (1916)) or reasonable efforts (e.g., *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917)).

103. The court did not inquire into this possibility, despite the importance of Hollywood to the California economy, and despite the existence of a *Hollywood Reporter* (in addition to a *California Reporter*). There was a course of dealings between R.K.O. and *Skirball*, who had made several pictures for R.K.O., but the court only inquired into the implications his last picture contract had for the "Samarra" deal. It is clear that, having found an express contract, the *Skirball* court saw no need to imply a

cannot be discovered, a wheeler-dealerism capable of injuring even the sophisticated Skirball should arguably be curbed. This brings us to the third alternative, which is avowedly based on policy considerations. Its names, quasi-contract or contract implied in law, belie its tenuous connections with the contract dichotomy and its historically separate development from contract law and its policies.¹⁰⁴ Skirball would have been unlikely to succeed under quasi-contract since, with a few exceptions,¹⁰⁵ courts have denied recovery in the absence of defendant's unjust enrichment. Defendant R.K.O. gained nothing from Skirball's loss, a loss which just leaked away. Recovery would nevertheless be possible under the fourth alternative, the court of last resort and the last resort of courts: promissory estoppel. Traditional notions here have been engulfed by their "Restatement," a radical law reform effort with the explicit policy rationale of avoiding "injustice."¹⁰⁶ Under

contract or its key terms. *But see* Saliba-Kringlen Corp. v. Allen Engineering Co., 15 Cal. App. 3d 95, 92 Cal. Rptr. 799 (1971) (business custom that construction subcontractor's oral bid is binding, even though only price term settled and other complex terms are to be agreed later); *Plumbing Shop* supra note 46; *Berwick and Smith Co. v. Salem Press, Inc.*, 331 Mass. 196, 117 N.E. 825 (1954); Uniform Commercial Code: official Draft §§ 2-204, 205, 208 (1952); *id.* at 2-204, Official Comment ("commercial standards of . . . indefiniteness" tolerated—an Aristotelian insistence on only that degree of precision which circumstances permit); *id.* (quoted in note 83, supra); Restatement (Second) of Contracts § 221-22 (1979); J. MURRAY, supra note 81, at 743 (discussed supra note 85); Frackman, *The Failure to Pay Wages and Termination of Entertainment Contracts in Hollywood*, 52 S. CAL. L. REV. 333, 335 (1979); Knapp, supra note 89, at 678, 692.

104. *See, e.g., Reprossystem*, supra note 79, at 1259 (unjust enrichment alleged, but not really dealt with by court); *Bastian v. Gafford*, 98 Idaho 324, 563 P.2d 48 (1977) (contract implied in fact, my second alternative, distinguished from contract implied in law); *In re Crisan Estate*, 362 Mich. 569, 107 N.W.2d 907 (1961) (hospital entitled, on policy grounds, to recover under contract implied in law, even though patient never regains consciousness and thus never voluntarily assents to bargain).

The trial court in *Skirball*, supra note 77, at ____, 286 P.2d 963, hints at its willingness to imply a contract in law while noting that Skirball "has suffered unjust and unconscionable injury," but the appellate court ignores this possibility.

105. *See, e.g., Kearns v. Andree*, 107 Conn. 181, 139 A. 695 (1928). There, recovery is based on a reliance rather than a restitution interest, which shades over into my fourth alternatives: *see, e.g., Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965).

106. *See* Restatement (Second) of Contracts § 90(1) (1979) (revised from the similar Restatement (First) of Contracts (1934) (emphasis supplied):

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding *if injustice can be avoided only by enforcement of the promise*. The remedy granted for breach may be limited as justice requires

(The italicized portion emphasizes that promissory estoppel is the last remedial resort.) *See also* Knapp, supra note 89, at 687: "Promissory estoppel is now employed with increasing frequency . . . to justify the awarding of a remedy . . . where a bargain is under negotiation but no final argument had been reached." On the pre-§ 90(1) doc-

this alternative, Skirball would be seen to have reasonably foregone his opportunity to contract with other studios in reliance on his "deal" with R.K.O. The court would then be indifferent to the question of whether or not a contract existed, so long as R.K.O. is found to have made a promise. Courts differ as to how definite this promise must be, but many otherwise strict courts would allow Skirball to recover. The sum of money recovered would probably be lower than in Skirball's breach of contract action.¹⁰⁷

The main purpose of these four alternatives to the dichotomy is to move certain fact situations from where they really belong in the traditional scheme of things—the no-contract category or the dichotomy's uneasy middle ground—and into a realm which resembles the contract category. While these alternatives all have ancient roots, they are distinctly modern in breadth of formulation and in frequency of use. The same can be said of other alternatives which promote movement in the opposite direction, from contract or the middle ground and into the no-contract category. These include the doctrines

trine, *see, e.g.*, *Ricketts v. Scotchorn*, 57 Neb. 51, 77 N.W. 365, 42 L.R.A. 794, 73 Am. St. Rep. 491 (1898); *Devecman v. Shaw*, 69 Md. 199, 14 A. 464, 9 Am. St. Rep. 422 (1888).

107. In *Skirball*, *supra* note 77, at ____, 286 P.2d 963, the trial court held: "Defendant is estopped to deny that plaintiff and defendant had a valid oral contract." The appellate court ignored this plausible holding, presumably because it awarded Skirball some of his expectation damages—a larger sum than that represented by his reliance damages. *See Wheeler*, *supra* note 105 (promissory estoppel a defensive doctrine which cannot be used aggressively to recover lost expectations—profits, etc.); *Skirball* at ____, 286 P.2d 968-72; Restatement (Second) of Contracts, § 90(1), Reporter's Note (the last sentence of § 90(1), note 106, *supra*, was added to suggest that damages should be determined by the reliance measure). *Cf. Wheeler* (promise must be intended to affect legal relations) *with Hoffman*, *infra*. *But see, e.g.*, *Chrysler Corp. v. Quimby*, 144 A.2d 123 (Del. 1958) (limited expectation damages awarded on basis of promissory estoppel, when rather vague promise made not to terminate car dealership franchise). Section 90(1) thus represents a kind of middle ground, between full compensation and no compensation, under the false dichotomy. This is, in part, the basis for the flexible damages calculation called for in *Hoffman*, *supra* note 46. This case "has attracted the attention of commentators and may ultimately provoke a significant reappraisal of attitudes toward the bargaining process." E. FARNSWORTH, *supra* note 83, at 192. In *Hoffman*, plaintiff received the rather vague promise of a grocery store franchise. Under defendant's urging, plaintiff went to considerable effort and expense to polish his managerial skills. Defendant kept insisting that plaintiff raise more and more capital until plaintiff could not afford the franchise. With "admirable candor, the court makes no attempt to obscure the facts that [agreement] . . . had not been reached" because defendant's promise was too indefinite to constitute an offer. Knapp, *supra* note 89, at 688. *Hoffman* thus suggests "that one may in some circumstances come under a duty to bargain in good faith. . . ." *Id.* Breach of this duty results in liability, "at least to the extent of compensating the detrimental reliance of the injured party." *Id.* *See Henderson*, *supra* note 102, at 357-60. *Hoffman* thus represents a fusion of my first and fourth alternative approaches: *see supra* notes 102, 105-6 and accompanying text.

of fraud, duress, unconscionability, failure of consideration, and mistake. Despite the many and sometimes divergent policies underlying these alternatives, the net effect of all of this movement to and fro is a relative doctrinal stability, a conservation of the contract/no-contract dichotomy in the face of many case outcomes which seem to contradict it. Judges are understandably reluctant to abandon the simplicity, generality, certainty, and stability that freedom of contract appears to bring to the law through the dichotomy. But there is also a growing willingness to "do right" in particular situations, even if this means manipulating the dichotomy while purporting to respect it (as in the *Skirball* case), or more or less ignoring the dichotomy and adopting an alternative approach. Judges pass regularly between the horns of the false dichotomy of contract, acting in ways that defy description by a coherent set of legal principles. Parties to a dispute seldom know whether a court will apply, manipulate, or ignore the dichotomy, since policy is as much its own cause as it is the effect of resolving a particular dispute. Judges are frequently keen to "use" a case to fill gaps or manipulate holes in a dichotomy stretched so thin that new holes immediately open up elsewhere.¹⁰⁸ As things stand,

108. See J. Commons, *supra* note 36, at 24; J. FARRAR, *supra* note 35, at 62, 66; E. FARNSWORTH, *supra* note 83, at 510; M. FREEMAN, *supra* note 26, at 8; W. HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915, 290 (1964); North, *Reflections on International Intelligence Operations*, in SURVEILLANCE AND ESPIONAGE IN A FREE SOCIETY 178, 196 (R. Blum, ed. 1972) (quoted in *infra* note 170); LORD RADCLIFFE, *supra* note 31, at 51 ("There is indeed a wider gap than rhetoric can fill between treating as law each judges' fancies as to what the public good requires and maintaining as part of the law some overriding principles of moral import to which even the assertion of private rights must be subordinated."); *id.* at 57, 61-63; G. TREITEL, *supra* note 80, at 317; *supra* notes 8, 20, 27, 34, 44, 47 and accompanying text. This process of applying policy is, for Corbin and Cardozo, the central problem of judicial creativity. See 6 CORBIN ON CONTRACTS 446-47, 454 (1951); J. STONE, *supra* note 100, at 191-92. I argue that this process has failed: some play in the joints is necessary in any system of rules, but the huge holes in contract law result in an incoherence and unpredictability. Courts are, however, quite creative in attempting to paper over these holes. See, e.g., *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 554, 236 A.2d 843, 857 (1967) (quoted with approval in *Toker v. Westerman*, 113 N.J. Super. 452, 456, 274 A.2d 78, 81 (1970) (emphasis supplied): "Although courts continue to recognize that persons should not be unnecessarily restricted in their freedom to contract, there is increasing willingness to invalidate unconscionable provisions which clearly tend to injure the public in some way." There is no continuity in fact, since there has been an explosion in what are found to be necessary restrictions; the likelihood that a nineteenth century court would "invalidate unconscionable provisions" approaches the vanishing point. See also, e.g. J. MURRAY, *supra* note 81, at 736: "Traditionally, the essence of contract . . . lies in volition, that free exercise of will by parties who are on a relatively equal footing . . ." It is unlikely that a nineteenth century court would accept the qualification of the last seven words; as Murray remarks (*id.*, quoting *Coppage v. Kan.*, 236 U.S. 1, 17 (1914)), such courts upheld freedom of contract while

there is a real danger of a new false dichotomy emerging, between what Kessler and Sharp term the "diametrically opposed poles" of freedom of contract versus an increased judicial and legislative control over the bargain.¹⁰⁹

John Dawson observes that a "double standard of contract morality is a clumsy and ineffective way of alleviating hardship or discouraging sharp bargainers. . . . The interesting question is whether we . . . have become prisoners of our own system—or, more accurately, whether we have become confused by our lack of system."¹¹⁰ The false dichotomy has lost enough of its force to become implausible as the conceptual center of contract law. This is all but explicitly recognized in the spate of recent attempts to reformulate contract law as promise, as tort,¹¹¹ and so forth. The most interesting and useful of these efforts, Ian Macneil's,¹¹² is arguably the most dangerous because it proposes a fresh dichotomy between "transactional" and "relational" "poles" of contract behavior. Opposing these efforts is the Chicago School of law and economics, whose descriptions of contracts as wealth-maximizing exchanges, evaluated on the basis of the parties' consent, have the effect of breathing fresh life into freedom of contract and its traditional dichotomy.¹¹³

simultaneously holding legitimate "those inequalities of fortune" felt to flow inevitably from the exercise of property rights. Ideas concerning legitimacy and inevitability have changed radically—see *supra* notes 99-100 and accompanying text—and judges have been far from immune to these changes.

109. Kessler and Sharp, *supra* note 93, at 155.

110. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495, 535-37 (1959) (footnote omitted). See Newman, *supra* note 76, at 564 (applying Dawson quote to a dichotomy between what I have analyzed as freedom of contract and the alternative approach of implying good faith obligations); *supra* note 102 and accompanying text. See LORD RADCLIFFE, *supra* note 31, at 62-63:

A really satisfactory jurisprudence has never developed, and probably never will, partly because . . . the courts have come to persuade themselves that in the name of good order they have some primary duty to uphold freedom of contract, rather than a duty to work out a theory of contract as a whole which starts from the necessity of a fundamental decency in private relations.

Written in 1960 and primarily about English courts, this statement retains vitality in contemporary America.

111. C. FRIED, *supra* note 94 (contract as promise); G. GILMORE, *THE DEATH OF CONTRACT* (1974) (contract as tort, by and large). See *supra* note 15 and accompanying text. But see also LORD RADCLIFFE, *supra* note 31, at 62-63 (quoted *supra* note 110).

112. I. MACNEIL, *THE NEW SOCIAL CONTRACT* (1980).

113. Reports of the "death of contract" proved much exaggerated, once Posner and his colleagues took hold of it. See, e.g., R. POSNER, *supra* note 93. Law and economics helps make a dichotomy out of efficiency and justice: preferring the former, it makes some of us feel compelled to choose the latter. See *supra* note 24 and accompanying text.

Charles Knapp has done yeoman's service in finding a relevant and respectable passage between the horns of the false dichotomy. When the parties find themselves in the "half-way house" between contract and no-contract, Knapp correctly concludes that they feel 'morally' or 'ethically' bound, committed to the deal in what may be a limited way. In this common situation, enough authority exists for courts to enforce a "contract to bargain." This prescribes neither an absolute duty to perform a contract nor an absolute duty to agree to perform. Rather, it creates a "duty to go forward": to bargain in good faith for as long as can be reasonably required under the circumstances. To the objection that Knapp's third category of a contract to bargain would spawn uncertainty comes the decisive response that this would be nothing compared to present uncertainties in judicial behavior.¹¹⁴ A still broader approach would continue to homologize equitable concepts with the doctrines of contract law, as in Chancellor Kent's rectifications of a *lex imperfecta*:

There are many duties that belong to the class of imperfect obligations, which are binding on conscience but which human laws do not, and cannot undertake directly to enforce. But when the aid of a court of equity is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway.¹¹⁵

114. Knapp, *supra* note 89, at 676, 679, 681, 684-85, 720. See *id.* at 691-92, *passim* (dealing with traditional objections based on illusory promises, the absence of intent or consideration, an agreement to agree, and uncertainty and indefiniteness); *id.* at 698-719, *passim* (illustrative cases); *id.*, at 720. But see also. 2 J. KENT, COMMENTARIES 490 (12th ed. 1873) (quoted *infra* note 115 and text accompanying). The only criticism I have of Knapp's fine article is that it revives the traditional dichotomy with one, seemingly unnecessary, sentence: "The additional element of willingness to be bound must also appear, either from the words of the writing itself or from the surrounding circumstances . . ." Knapp, at 720.

115. 2 J. KENT, *supra* note 114. The "equity power is extraordinary and its use is limited to cases where legal remedies are inadequate and where the harm threatened is irreparable." Kallay, *Book Review*, 20 CAL. WEST. L. REV. 156 (1983). According to Alexander Hamilton, "courts of equity existed to afford relief from 'hard bargains' and cases of fraud, accident, trust or hardship." *Id.* at 157 (citing THE FEDERALIST, No. 80). Some would like to retain this limited and conservative view of equity: "Cut from these moorings, the equity power cannonades through public and private life with a tyrannical whimsy that, in some quarter, is spoken of as 'judicial activism.'" Kallay, at 156 (discussing G. MCDOWELL, EQUITY AND THE CONSTITUTION xv, 3-4, 125-27 (1982)). On this view, such legal innovations as *Brown v. Board of Education* 347 U.S. 483 (1954) and the Field Code of Civil Procedure can be blamed on a 'sociological equity.' Kallay, at 159 (discussing G. MCDOWELL, at 88-93, 97-98). With respect, the function of equity was, and continues to be, to decrease the extremity of result from the application of such dichotomous categories as contract v. no-contract and liberty v. equality.

Knapp's article has proved influential but far from decisive for, as Felix Cohen observes, "[l]egal philosophy is not a bad play in which each actor clears the stage by killing off his predecessors."¹¹⁶ Judicial activism in the refinement of contract policies, and of Knapp's contract to bargain in particular, is certainly no vice.¹¹⁷ For example, the finding of a contract to bargain would have made an excellent conclusion in *Skirball* because it represents what the parties were doing in fact until Howard Hughes backed out. Courts have known all along that a transaction is complete when the parties mean it to be so; yet, despite centuries of judicial experience, we have no firm ideas about when and how this happens. Sociologists, psychologists and economists rarely deign to examine so mundane and practical a matter, but they should. Business people have learned to expect little from judges and still less from (other) social scientists. Business deserves better.

III. THE CIA: *FINDING* THE HORNS OF THE FALSE DICHOTOMY

We all deserve better than the policies applied by and to the CIA, for reasons which are less clear and which are studied less often by lawyers than policies concerning contract or abortion. Intelligence policies must be described in detail so that the horns of the dichotomy can be found; unlike those concerning contract and abortion, past and present lines of policy are uncertain and shrouded in secrecy. People "who are free to talk about [the CIA]. . . are seldom in a position to know, and those in a position to know are not often free to talk."¹¹⁸

See M. GINSBERG, ON JUSTICE IN SOCIETY 95-101 (1965); Grey, *supra* note 70; *infra* notes 269, 345, 524-26 and accompanying text.

116. Cohen, *Field Theory and Judicial Logic*, 59 YALE L. J. 238, 267 (1950).

117. Judicial restraint, the "impersonal, neutral submission to the rules" (J. SHKLAR, *supra* note 24, at 106), is inappropriate where rules and policies are uncertain and ill-suited to the times—as in contemporary contract law. Restraint sets "up some kind of 'keep-off' notice against those very activities of policy choice-making which [are] . . . inseparable from appellate judicial functions." J. STONE, *supra* note 100, at 668. It promotes friendly relations with other branches of government—not a very significant concern in contract. However, restraint, or deference, says little about justice through law for litigants or about coherent growth in the law. *Id.*, at 668-70. Contract is an appropriate realm for judicial activism because the court needs no control over the purse and very little over the sword to enforce its pronouncements. Courts must sit back and await fact situations appropriate for policy-making, but contract (like abortion and the CIA) is a "hot" area which quickly throws up many such cases. While compliance with contract policies by those affected by them is far from automatic, there is little of the open defiance found in the areas of, e.g., school prayers or police arrest procedures. See Baum, *supra* note 54, at 46-47, 49. See also *infra* notes 265-68, 424, 428-35 and accompanying text. It may sometimes be necessary for judges to sweep "all the chessmen off the board." L. HAND, THE SPIRIT OF LIBERTY 131 (1952). This is what Currie, C. J., comes close to doing in *Hoffman*: see *supra* note 107.

118. North, *supra* note 108, at 178. Those few who know and who feel free

Relegated to the former category, my analyses are somewhat incomplete. This certainly makes them no worse than other analyses, however, and I have tried to reduce the political bias likely in so contentious an area of policy.¹¹⁹ Much of what may seem my liberal bias is a necessary irreverence for sacred conservative doctrines about intelligence, the kind of irreverence I applied to contract doctrines. Just as the outcome is affected by treating contract policies as instances of "polluted hands" touching "pure fountains," so it matters whether an action is adjudged a "mission" by the "intelligence community" against "terrorists" or another "dirty trick" by the "CIA establishment" against "freedom fighters."¹²⁰

to talk, whistleblowers, are treated with unremitting harshness under rather farfetched interpretations of law. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Haig v. Agee*, 453 U.S. 280 (1981) (extraordinarily broad *dicta* applied to an egregious fact situation); *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam); *infra* notes 270-76, 288-97 and accompanying text. This may be a misguided, short-sighted policy, to the extent that the publicizing of past failures can spur reforms which improve performance in the future. *See* Thomson, *Resigning from the Government and Going Public*, in *SURVEILLANCE AND ESPIONAGE IN A FREE SOCIETY* 385 (R. Blum ed. 1972) (intense career and psychological pressures make whistle blowing unlikely). *But see also* Turner & Thibault, *Intelligence*, *FOREIGN POLICY*, 122, 135 (Fall, 1982) (former CIA officials):

Since Watergate and Vietnam, American society has virtually enshrined the so-called whistle blowers as heroes. Some of them may have done great service for their country. But others are simply self-serving individuals promoting their own special causes. Fortunately . . . very little information harmful to U. S. intelligence interests has been revealed.

119. In an attempt to delineate a common ground of policy (*see infra* notes 217-26, 236-59 and accompanying text), I compare perennial criticisms from the Left (*see, e.g., infra* notes 135, 209-13 and text accompanying) with the relatively new complaints by the Right (*see, e.g., infra* notes 109, 122 and text accompanying).

120. *Cf* F. DONNER, *THE AGE OF SURVEILLANCE* xiv (1980) (Director, ACLU project on Political Surveillance) ("Like other dubious enterprises, intelligence has resorted to a claimed professionalism—and in particular a cosmetic vocabulary—as a badge of legitimacy.") *with supra* notes 73-74, 95-96 and text accompanying. While "dirty tricks" by a "CIA establishment" suggests wrong-doing by a tightly-knit group of Machiavellian True Believers, "missions" by a "community" suggests the behavior of small town churchgoers who water their lawns. *See* F. DONNER, at 464, 466. Both are right and wrong characterizations of a very complex organization: Many *off-duty* agents do go to church and water the lawns of suburban Virginia, for example. But extreme examples of a bureaucratic afflatus debase the language and corrupt our thinking about distasteful realities. Aggression involving assassination ("termination with extreme prejudice") becomes the sanitary sounding "reinforced protection reaction raid." *Id.* at 465; P. KOSTINEN, *THE MILITARY-INDUSTRIAL COMPLEX* 102 (1980). Breaking and entering is "sur-reptitious entry," "securing a residence" or "highly confidential coverage" (which includes bugging and wiretapping). Attorney General Levi set up a "special review group" (committee on bugging and wiretapping) to ensure "the minimum physical intrusion necessary" (little burglaries). D. WISE, *THE AMERICAN POLICE STATE* 146 (1976). "Plausible deniability" involves lying. The "need to know" is really the need not to know,

Clearly, the CIA is concerned with intelligence. Raw data is collected, interpreted and evaluated to make predictions. These predictions are then presented as "CIA views," which have the organizational muscle behind them to make a political impact. The way things are organized,¹²¹ covert operations¹²² are also part of the CIA's intelligence brief. The CIA's role in government illustrates, in an extreme and exaggerated form, the ways policymakers in all complex organizations rely on experts for intelligence information and the implementation and evaluation of decisions.¹²³ The CIA is part of the executive branch, of course, despite owing some responsibilities to

so as to engage in "plausible deniability." F. DONNER, at 464; Raskin, *Democracy Verses the National Security State*, 40 L. AND CONTEMP. PROB. 189, 206 (1976) (quoting Richard Barnet). Some "senators said they didn't want to know. One senator said 'If you're going to have a Central Intelligence Agency, you just have to close your eyes.'" Hall, *Taking Care of Company Business*, MANCHESTER GUARDIAN WEEKLY, Nov. 28, 1982, 16, at 17, col. 5 (former CIA Director Colby, interviewed in a film, *On Company Business*, reviewed by the Washington Post).

121. Under the National Security Act of 1947, the CIA is "to correlate and evaluate intelligence relating to the national security," 50 U.S.C. § 403(d)(3) (1976), and to "perform such other functions and duties relating to intelligence . . . as the National Security Council may from time to time direct." *Id.*, at § 403(d)(5). J. BERMAN AND M. HALPERIN, *THE ABUSES OF THE INTELLIGENCE AGENCIES* 100 (1975). This is the subsection used to justify covert activities, subject to a few subsequent amendments. *See id.* (quoting then-Director of the CIA Colby's 1975 testimony to Senate Appropriations Committee) (The CIA is "to conduct clandestine operations to collect foreign intelligence, carry out counter-intelligence responsibilities abroad, and undertake—where directed—covert foreign political or paramilitary operations."); Hilsman, *Intelligence Through the Eyes of the Policy Maker*, in *SURVEILLANCE AND ESPIONAGE IN A FREE SOCIETY* at 163 (R. Blum, ed. 1972) (Director of State Dept. Intelligence and Assistant Sec'y for East Asian Affairs, under Kennedy).

Many conservative critics of the CIA's present posture, whose views are usefully collected in *INTELLIGENCE REQUIREMENTS FOR THE 1980's* (R. Godson, ed. 1979), favor expansion of covert operations. *See e.g.*, Miler, *Counterintelligence*, in *id.* at 47, 50 (retired CIA Counterintelligence Chief) (the CIA's primary functions are to protect secrets and "insure that our institutions are free from foreign penetration and influence"); Tovar, *Covert Action*, in *id.* at 65, 77 (ex-member, CIA Covert Action Staff) (U. S. must reconstitute the ability to use force, by the CIA rather than the Defense Department, on grounds of "expertise, institutional membership, and organizational flexibility").

122. *See infra* notes 164-70 and text accompanying.

123. H. WILENSKY, *ORGANIZATIONAL INTELLIGENCE: KNOWLEDGE AND POWER IN GOVERNMENT AND INDUSTRY* ix, 110 (1967). *See* E. LEWIS, *AMERICAN POLITICS IN A BUREAUCRATIC AGE*, *supra* note 107, at 158-61, 168-69; (1977); Casey, *The State of Intelligence*, INTELLIGENCE REPORT, June, 1981, 1, at 1-2 (published by the ABA Standing C-ee on Law and National Security) (quoted *infra* note 130); Colby, *Intelligence in the 1980's*, INTELLIGENCE REPORT, May, 1981, at 3 (Colby is a former CIA Director) ("The profession and discipline of 'intelligence' faces a major turning point in the 1980's"); H. WILENSKY, at viii-ix ("intelligence," "the information—questions, insights, hypotheses, evidence relevant to policy, should ideally be timely, reliable and wide-ranging"); *id.* at 66 (quoting President Kennedy, speaking after the Bay of Pigs) ("You always assume

Congress and, perhaps, to the courts and the public. The CIA can, in fact, be taken as representative of all of executive branch intelligence activities.¹²⁴ At the center of military and foreign policy (and, more darkly and at least on occasion, of domestic policies),¹²⁵ the CIA's

that the military and intelligence people have some secret skill not available to ordinary mortals." See also *supra* notes 18-19 and text accompanying.

124. Florence, *Issues in Classifying and Protecting National Defense Information*, in *SURVEILLANCE AND ESPIONAGE IN A FREE SOCIETY* 128 (R. Blum, ed. 1972). Denial of information to the public has become a way of life in public bureaucracies." *Id.* See, e.g., F. DONNER, *supra* note 120, at xii: "No aspect of our common life has been so battered by misconduct and betrayal as our commitment to the fullest measure of political freedom. [There has been a] secret war waged continuously for over fifty years against all shades of dissenting politics by the domestic intelligence community."

125. The Government's budget typically describes "National Security" as encompassing programs "designed to preserve the freedom and territorial integrity of this nation and its allies." L. LEDERMAN AND M. WINDUS, *supra* note 16, at 31 (quoting *The Budget in Brief, Fy 1969* 24 (1968)). Much, but far from all, of the secret CIA budget is drawn from this Heading. The CIA accounts for only about one-sixth of the intelligence budget, yet it forms the "nucleus" of the intelligence establishment. Walden, *Restructuring the CIA*, in *SURVEILLANCE AND ESPIONAGE IN A FREE SOCIETY* 219 (R. Blum, ed. 1972). The "truth is that every post-World War II president . . . has been tempted to restrict freedom in the name of national security." Halperin, *National Security and Civil Liberties*, *CIVIL LIBERTIES*, May, 1982, at 1, 3 (May, 1982).

For example, the 1975 Report by the Rockefeller Commission found that President Johnson pressed the CIA to find foreign links with the domestic peace movement. D. WISE, *supra* note 120, at 194. The CIA has viewed the prohibition on domestic intelligence collection "as a sort of public relations placebo and, on another plane, as an intelligence problem to be solved by deceptive intelligence." F. DONNER, *supra* note 120, at 269. In testimony before the Senate Appropriations Committee in 1975, CIA Director Colby stated that the six domestic divisions of the CIA had 64 offices in American cities. While the domestic improprieties listed by Colby occupy 45 pages, he concluded that they were not "massive." D. WISE, *supra* note 120, at 188, 193. The CIA has cooperated with the FBI, the IRS, the Secret Service, etc. in order to learn more about Americans lawful political activities. J. BERMAN AND M. HALPERIN, *supra* note 121, at 1.

The National Security Act of 1947 "legitimated secrecy and intelligence as a necessary form of government" through the CIA and the National Security Council (NSC). A. MILLER, *supra* note 16, at 207. Many believe that the CIA frequently dominates the National Security Council's deliberations. These deliberations result in policy recommendations to the president, and in coordination of the national security policies and functions of other governmental agencies. J. BERMAN AND M. HALPERIN, *supra* note 121, at 168-69 (quoting Report of the Committees on Civil Rights and on International Human Rights, New York Bar Association). See *Casey Calls for Freeing Intelligence Agencies of FOIA Restrictions*, *INTELLIGENCE REPORT*, Oct. 1982, 1, at 2. The "theology" of keeping a distance between intelligence and foreign policy is a "fashionable formalism." T. HUGHES, *THE FATE OF FACTS IN THE WORLD OF MEN* 5 (1976) (Foreign Policy Association Headline Ser. No. 233). (Hughes is President, Carnegie Endowment, and former Director, State Dept. Intelligence). Military and intelligence activities "overlap extensively;" an Iranian hostage rescue may involve either or both types of activity. Highsmith, *Note*, 19 *HARV. J. ON LEGIS.* 327, 331 (1982). See H. WILENSKY, *supra* note 123,

views are heavily influenced by the many false dichotomies found in these areas.¹²⁶

A false dichotomy which dominates thinking *about* the CIA can be discovered once the veils of secrecy and organizational politics are lifted a bit, as I will argue.¹²⁷ The germ of this dichotomy can be found in the thinking of many CIA officials. Former CIA Director Stansfield Turner, who starts off by quoting George Washington, illustrates the line of reasoning followed by many in the Agency:

“The necessity of procuring good intelligence is apparent and need not be further urged—all that remains for me to add is that you keep the whole matter as secret as possible.” America’s first president perhaps did not anticipate how difficult it would later become to reconcile the necessity for secrecy in intelligence activities with the constitutional provisions for open government. . . .[S]ecrecy can easily undermine individual rights in the name of protecting them. Consequently, every American administration has had to seek a balance between secrecy and openness.¹²⁸

at 128; “the head of state who intervenes in Vietnam or Cuba is unlikely to be clear about goals, costs or performance. Defenses of nations against structural or doctrinal roots of intelligence failures in the area of foreign policy are, therefore, universally weak and preconceptions are enduring.” See also J. BERMAN AND M. HALPERIN, *supra* note 121, at 108 (quoting former CIA Director Colby); Paramilitary operations are the only alternative “between a diplomatic protest and sending in the Marines.”) Some would hold the CIA to be an integral part of Harold Lasswell’s “garrison state” or of the “military-industrial complex.” The latter is a notion developed by President Eisenhower, in a 1961 speech for television. See P. KOSTINEN, *supra* note 120, at ix, 8-10; E. LEWIS, *supra* note 123, at 121-23, 146. The military-industrial complex is no conspiracy, but the outcome of many “individual and basically unrelated decisions, which taken together have the effect of a conspiracy without there ever being one.” The Society’s military-industrial complex spurs ours, and vice versa. Aspin, *Foreward*, in P. KOSTINEN, *supra* note 120, at vi (member, House Intelligence Subcommittee). This sounds like the oligopolistic interdependence theory of antitrust liability, and it presumably has analogous strengths and weaknesses.

126. See, e.g. *supra* note 63; *infra* notes 187-92.

127. See *infra* notes 140-261 and text accompanying.

128. Turner and Thibault, *supra* note 118, at 122; Moorehead, *Operation and Reform of the Classification System*, in *SECRECY AND FOREIGN POLICY* 87, 89, 102-05 (T. Franck & E. Weisband, eds. 1974) (quoting Arthur Schlesinger, Jr.); *id.* (quoting Potter Stewart) (“secrecy can be preserved only when credibility is truly preserved.”); See H. WILENSKY, *supra* note 123, at 125 (“all democratic societies face the necessity of defending citizens against abuses of official power”); *id.* at 130-31 (quoted *infra* note 196; Shenefield, *Law, Intelligence and National Security*, INTELLIGENCE REPORT, Sept. 1980, 1 (Associate Attorney General’s address to the Aug., 1980 ABA Annual Meeting); Smith, *Attorney General Discusses Intelligence Capabilities*, INTELLIGENCE REPORT, Feb. 1982, 1; *infra* note 145.

President Kennedy, having paid respects to George Washington, spoke in the same vein:

Clearly, the two principles of an informed public and of confidentiality within the government are irreconcilable in their purest form, and a balance must be struck. [But the obligation] to protect certain information . . . has become particularly acute in recent years as the United States has assumed a powerful position in world affairs, and as world peace has come to depend in large part on how that position is safeguarded. We are also moving into an era of delicate negotiations. . . .¹²⁹

The question of who strikes this balance and how is a thorny one, something which is not always appreciated by intelligence experts. For example, the National Security Council once asked President Nixon to strike this balance *by amending an executive order*.¹³⁰ The initial response by many lawyers would be that this is a job for the Supreme Court, particularly in light of the Burger Court's fondness for balancing that is evident in the area of abortion, but this does not seem to be the right answer either.¹³¹

President Kennedy's words were lifted almost verbatim by Nixon, while introducing an executive order about document classification,¹³²

129. Franck and Weisband, *Executive Secrecy in Three Democracies*, in *SECRECY AND FOREIGN POLICY* 3, 5 (T. Franck and E. Weisband, eds. 1974) (quoting Kennedy, with the order of statements reversed). See H. WILENSKY, *supra* note 123, at 66 (quoted *supra* note 123). But see also Hardy, *A Tug of War: The War Powers Resolution and the Meaning of "Hostilities,"* 15 *PAC. L. J.* 267 (1984) (quoting Letter from Abraham Lincoln to William Herndon, Feb. 15, 1848) (reprinted in R. BASLER, *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 451-52 (1953)):

Kings had always been involving their people in wars, pretending . . . that the good of the people was the object. This, our Convention undertook to be the most oppressive of all kingly oppressions; and they resolved to so frame the Constitution that no one should hold the power of bringing this oppression upon us.

130. Florence, *supra* note 124, at 128 (quoting 1972 NSC staff recommendation to amend E.O. 10501).

131. See *infra* notes 420-23 and text accompanying.

132. See Moorehead, *supra* note 128, at 99, 102-05 (member, House Intelligence Subcommittee, quoting Nixon's introduction of E.O. 11652, 37 *Fed. Reg.* No. 48, 5209-18, Mar. 10, 1972). This Order made for less secrecy in government, nominally at least. But under it, a president could still stay in office for two terms and have another candidate of his party elected, before damaging information about blunders and malfeasances is declassified. Moss, *The Abuse of Security*, in *SURVEILLANCE AND ESPIONAGE IN A FREE SOCIETY* 120, 122 (R. Blum, ed. 1972) (member, House of Representatives).

and they could easily have been spoken by Reagan.¹³³ These views may reflect a present or emerging national consensus,¹³⁴ or there may be thumbs on the scales when the "balance between secrecy and openness" is struck. In any event, this balance teetered uneasily during the last decade:

For the American intelligence community, the 1970's was a decade to forget. One scandal after another basked in the spotlight of national attention, and by the end of the decade, the accumulated destruction was considerable. Ruined careers, curtailed powers, and diminished public confidence lay amid the wreckage.

The 1980's promise great change for the intelligence community. The political mood of the country, as the [1980] elections evidence, has shifted dramatically. The people no longer want to hear about corruption and its reform; rather, it is time, they say, to let the professionals do their job.¹³⁵

133. See, e.g., Dennet, *Comment*, 19 *Harv. J. ON LEGIS.* 393, 404 (1982) (some cites omitted): One response to criticisms of bills to amend the Freedom of Information Act is that the basic disclosure policy that guided [its] enactment was mistaken and should be ignored or discarded. However, the Reagan Administration and even some of the Act's strongest critics realize that the real problem is to strike a new balance among the concededly important interests at stake. Thus, the congressional deliberations on amending the Act are taking place in a framework that accepts the Act's original purpose and focuses on the balancing of competing values.

This seems an evenhanded account of the current state of play and, *inter alia*, Dennet cites Deputy Assistant Attorney General Grogan, on the "Solomon-like problem" of striking this balance. *Id.* at 404 n. 64.

134. See Turner and Thibault, *supra* note 118, at 137. *But see* Colby, in P. HACKES, *supra* note 42, at 11-12 (the late 1940's intelligence consensus has disintegrated); *infra* notes 213 and text accompanying.

135. Medow, *The First Amendment and the Secrecy State*. 130 *U. PA. L. REV.* 775 (1982) (an arguably balanced view). As a result of the headline to headline, "scandal to scandal progress of the CIA in the mid-1970's, it became known to the Church Committee as a "rogue elephant" out of control. Uhlmann, *Approaches to the Reform of the Intelligence Community*, in *INTELLIGENCE REQUIREMENTS FOR THE 1980's* 9 (R. Godson, ed. 1979) (former Assistant Attorney General for Legislation). See T. HUGHES, *supra* note 125, at 3. An early 70's thaw in the Cold War "defoliated" the world of some CIA officials and threatened them with obsolescence. D. WISE, *supra* note 120, at 207. It was difficult, in "an era of detente," to identify an 'enemy' which justified the recreation of intelligence capabilities. *Discussion*, in *INTELLIGENCE REQUIREMENTS FOR THE 1980's* 44, at 45 (R. Godson, ed. 1979). (Some would object to the notion that capabilities had to be re-created, and some would add that detente led the CIA to exacerbate Cold War tensions, with effects observable today.) The outcome was a "sensational" mid-70's revision of "our twenty-five-year consensus as to what intelligence

This new political mood notwithstanding, there is much disagreement over the best way to organize the tasks performed by the CIA. It was initially represented to Congress, in 1947, as an above-board tool for research and analysis, a place where elderly emigres clip *Pravda* articles. Technological change soon made this image irrelevant, and secret presidential authority was given for covert operations as early as 1948.¹³⁶ Many conservatives favor the continued integration of informational and covert activities within the CIA, on efficacy grounds. A retired Chief of CIA Counterintelligence argues, for example, that the coordination of tasks and agencies cannot be legislated: "Each case has to be treated individually."¹³⁷ This amounts to Tennyson's "wilderness of isolated instances" which, like a pluralism of contract rules and policies, greatly reduces opportunities for a coordinated supervision and control. Some moderates and liberals see a schizophrenic CIA, in which a legitimate "interface" between infor-

was all about." Colby, in P. HACKES, *supra* note 42, at 2. There was a stricter control of covert operations, an end to glaring illegalities, a modest restructuring, and a more serious effort at congressional oversight. Hughes, *supra* note 125, at 3. Conservatives reacted sharply, picturing the CIA as, e.g., "struggling to gain sustenance from a rotting root system." Miler, *supra* note 121, at 49. While legislation ensured "that the United States government cannot violate individual privacy in this country, several foreign intelligence services do so daily with few objections raised. In effect *we* are the enemy." *Discussion*, in INTELLIGENCE REQUIREMENTS FOR THE 1980's, at 45. Some see a "revolution" in intelligence in the 1980's, but others disagree strongly. See Casey, *supra* note 123 (quote *supra* note 123); *id.* ("If successfully navigated, the 1980's "will mark the culmination of the growth of a truly American intelligence system"); Shattuck, *Comments*, in P. HACKES, *supra* note 42, at 16 (ACLU representative). Concern "that intelligence communities might abuse secrecy began to diminish. The county was shaking itself free of the inhibiting consequences of its debacle in Vietnam. . . ." Turner and Thibault, *supra* note 118, at 123. Prospects "for a balanced judgement are considerably better than they were three years ago." *Id.* at 138. See Uhlmann, *supra* note 135, at 12. This is a very controversial conclusion politically. The technocratic assessment is that "intelligence agencies are not so much increasing their budgets as they are building back to where they were before they got cut during the 1970's. Southerland, *America's Spies*, in THE CHRISTIAN SCIENCE MONITOR, Oct. 28, 1982, 1, at 12, col. 1 (interview with CIA director Casey).

136. D. WISE, *supra* note 120, at 185-86. See *supra* notes 121, 125. The emergence of covert operations may mean that, "[u]nintentionally, the United States accepted the communist definition of 'intelligence' and began to ape the adversaries in doctrine and practice." Ransom, *Can the Intelligence Establishment be Controlled in a Democracy*, in SURVEILLANCE AND ESPIONAGE IN A FREE SOCIETY, 205, 206. (R. Blum, ed. 1972) (Vanderbilt political science professor).

137. Miler, *supra* note 121, at 63. Miler's discussion concerns the People's Temple in Guyana. He argues that the CIA felt unable to act because Americans were involved, and the FBI did not act because a foreign-based religious organization was involved. *Id.* With respect, this *may* be a rationalization of an inattention. These niceties have not stopped *both* the FBI and CIA from acting (and sometimes coming into conflict) where *they* felt it necessary to do so.

mational and covert operations exists yet combining these operations results in a "mutually 'spoiling' arrangement" overall.¹³⁸ Others would go further to abolish or narrowly limit covert operations.¹³⁹ An examination of informational and covert operations, and of the internal controls over them, if any, will show that conservatives do not have the better arguments here. Combined operations frequently result in a manipulation of the events to be reported and in a reportive manipulation—attempts to make things come true through wishful thinking and doing, and by circular reasoning. As Frances Fitzgerald argues, deception can become self-deception; the liar then becomes a fool. The vital questions of which intelligence, by and for whom, frequently go unanswered.¹⁴⁰

A. *Information and Secrecy*

The centrist position on the CIA is that its primary function of collecting, processing, analyzing and evaluating information must be clarified and reasserted. All policy is based on information, and most of this information comes to the CIA from such commonly-available sources as newspapers. A skillful espionage operation or electronic surveillance may be crucial on occasion, but very little important information is obtained from most of these operations. The information collectors nevertheless suffered from disclosures of what their covert operations colleagues had been doing; CIA Director Casey estimates that fifty percent of personnel and forty percent of funding were lost during the 1970s.¹⁴¹ As a result, relatively little information is collected

138. Ranson, *supra* note 136, at 217. *See id.* at 206 (quoted *supra* note 136).

139. *See, e.g.,* Halperin, *supra* note 125, at p.2, col. 3 (quoted *infra* text accompanying note 213).

140. *See* T. HUGHES, *supra* note 112, at 35; H. WILENSKY, *supra* note 110, at 23-24, 30; *Senate Hearings Continue on Domestic Security Guidelines*, INTELLIGENCE REPORT, Dec. 1982, at 2; *supra* notes 60-67, 72-74 and text accompanying. *Compare infra* notes 170-90 and text accompanying, *with supra* notes 82-87, 101-08 and text accompanying. Like most of us, intelligence officials maintain images of what is and what ought to be, and act to decrease the gap between images. North, *supra* note 108, at 198. Unfortunately, this is frequently done by assuming that the "ought"—including communism as responsible for all the world's ills—and the "is" are identical. *See supra* note 70 and text accompanying; *infra* notes 187-94 and text accompanying.

141. Quoted in Southerland, *supra* note 135, at p. 12, col. 1. *See* Hilsman, *supra* note 121, at 164-65; T. HUGHES, *supra* note 125, at 4; Smith, *supra* note 128, at 2 (excerpt from speech by Reagan's Attorney General to Los Angeles World Affairs Council, Dec. 18, 1981) ("President Reagan inherited an intelligence community that had been demoralized and debilitated by six years of public disclosures, denunciation, and . . . budgetary limitations."); Southerland, at p. 12, col. 1 (quoting unnamed "expert") (our signal and photo intelligence are among the best, but in human intelligence "we're lucky if we're among the top 10."); *id.* (paraphrasing Casey) (because of money and

about new economic and social trends, or about matters in the Third World not thought to be manipulated by the Soviets. The rise of Islamic fundamentalism was nearly missed altogether, for example. CIA officials admit to a shortage of linguists, areas specialists, and technical experts.¹⁴²

Except for last-minute items of critical importance, the CIA does not disseminate raw (uninterpreted) data. Information is almost always turned into CIA views. These reflect what many see as a CIA "mind-

manpower cuts, the major analyses known as "national estimates" frequently fail to cover Third World affairs).

The "real issue now is the quality of intelligence much more than the control of abuses. . . ." Aspin, *supra* note 42, at 32. It is difficult to evaluate the quality of the CIA's work compared to that of other government agencies, but we have seen examples of extremely good and extremely bad work from the CIA. *Id.* This may be so, but the evidence of past abuses—in areas where information gathering shades into covert activities—is massive. Attorney General Levi admitted to 8,239 national security wiretaps domestically and 2,465 buggings, from 1940 to 1975. *Wise, supra* note 120, at 145n (quoting Levi). See J. BERMAN AND M. HALPERIN, *supra* note 121 (quoted *supra* note 121). Herman Schwartz's study of wiretaps made in 1970-71 shows that they yielded little information and were very expensive, in terms of intelligence resources used and the extent of invasions of privacy. Harris, *Internal Security Practices of the United States*, in *SURVEILLANCE AND ESPIONAGE IN A FREE SOCIETY* 61, 65 (R. Blum, ed. 1972).

Ever since passage of the Communication Act of 1934, intelligence agencies and, usually, the Justice Department interpreted statutes as blank checks which allow domestic surveillance when national security is invoked. D. WISE, *supra* note 120, at 97. The position, until recently, was as follows:

Executive Order 12036, under which the CIA conducts surveillance of Americans, requires the agencies to develop implementing directives and secure approval for them from the attorney general. [This was done] in August of 1979. Yet despite the fact that the guidelines are unclassified, the CIA neither made them public nor even announced they existed. [When] a formal request was made under the [Freedom of Information Act] . . . the agency did not release all of the guidelines. . . .

FOIA Testimony presented, INTELLIGENCE REPORT, Sept. 1981, 1 at 4 (statements by staff counsel, ACLU, before Senate Select C-ee on Intelligence, July 21, 1981).

142. Pforzheimer, *AFIO Holds Annual Convention*, INTELLIGENCE REPORT, Nov. 1982, at 3 (quoting speech of Adm. Bobby Inman, Deputy Director of the CIA (ret.), to the Association of Former Intelligence Officers, Oct. 2, 1982). *But see also* Casey, *supra* note 110 (CIA Director's speech to U.S. Chamber of Commerce, Apr. 28, 1981):

Over the years Dick Helms and my other predecessors have . . . developed a great center of scholarship and research, with as many doctors and masters of every kind . . . as any university campus.

They have produced a triumph of technology. . . .

In addition . . . , we ask scientists and a wide variety of experts, scholars and practitioners to serve on advisory panels . . . and we contract with think tanks and a wide variety of business corporations to do specialized research for us.

set" or "Groupthink" which frequently results in important information being overlooked or misinterpreted.¹⁴³ In any event, the CIA is subject to many of the vagaries of policy analysis discussed earlier.¹⁴⁴ Information overloads cannot be dealt with effectively by the CIA, particularly during the frequent crises when effective communication is most needed. Most of the CIA's generalizations are forced from a narrow empiricism, and many of these turn out to be poor predictors of the course of future events. Other generalizations become self-fulfilling prophecies—with a little help from covert operations colleagues. According to Harold Wilensky, these vagaries foster "foolish ideas about the proper organization and possibilities of intelligence."¹⁴⁵

143. Aspin, *supra* note 42, at 33. See Harris, *supra* note 141, at 71; T. HUGHES, *supra* note 125, at 9; *infra* notes 180-90 and text accompanying. Some would see this mind-set as stemming from the loyalty-security programs of the 1950s: from "ideological roots in hyperpatriotism, xenophobia, isolationism, fundamentalism, populism, and the fear of revolution; and from the "structural roots" of legislators' insecurity of status and tenure, and from cleavages "between presidents and Congress and between intellectuals and politicians." See H. WILENSKY, *supra* note 123, at 117 (citing study by Edward Shils). Like the FBI, the CIA has arguably fallen prey to the "collage syndrome," the "development of a data base beyond the scope of their mission or functional needs." F. DONNER, *supra* note 120, at 270. See H. WILENSKY, at 143: McCarthyism demonstrates the fallacy of "'all the facts'—the idea that raw or unevaluated facts should be piled up in the files of intelligence agencies for possible use in some loosely defined emergency. . . ."

144. See *supra* notes 4, 16, 35-37, 52, 54, 57 and text accompanying. National security intelligence does have some advantages over other forms of policy analysis, however: it has a political center (in the organizational muscle of, e.g., the CIA) and a conceptual center in an anti-communism. Compare *supra* note 15 and text accompanying with *infra* notes 173, 178, 183-94 and text accompanying.

145. Harris, *supra* note 141, at 67 (citing Barton Whaley, *Strategem* (1969)) ("Indiscriminate data collection makes it harder to identify key warnings and makes it easier for adversaries to deceive warning systems."); North, *supra* note 108, at 185; H. WILENSKY, *supra* note 123, at 62, 64; *id.* at 143; Casey, *supra* note 123 ("facts can confuse," and the wrong photo "is not worth a thousand words."). See F. DONNER, *supra* note 120, at 270 (quoted in note 132, *supra*); D. WISE, *supra* note 120, at 159 (Howard Hunt knew nothing about Watergate wiretaps—his job was to photograph documents, and after 20 years, Hunt thought of himself as a specialist rather than as a burglar); *supra* note 58 and text accompanying; *infra* text accompanying note 161.

The "ideals of neutral competence and objective sources of knowledge in the formulation of public policy are probably as significant in modern American political culture as the ideals of freedom of expression are on representative democracy." E. LEWIS, *supra* note 123, at 161. Unfortunately, the CIA and other government agencies frequently fall short of this mark while making policy into its own cause:

Information is now, as before, a source of power, but it is increasingly a source of confusion. The proliferation of both technical and political-ideological information and a chronic condition of information overload have exacerbated the classic problem of intelligence. An increasing share of organizational resources goes to the intelligence functions; structural

Once collected and analyzed, information is kept as secret as possible; secret from foreign enemies, of course, but also from the American people and, occasionally, from legitimate decisionmakers who might do the CIA injury. Americans have a love/hate relationship with secrecy. Uniquely publicity-conscious, we also idolize recluses like Garbo and J. Edgar Hoover and try to maintain privacy in everyday life. Intelligence officials are fond of pointing out that such "other" professionals as doctors and clergy also maintain a secrecy. Clearly, the CIA is only one of many governmental agencies which are annoyingly secretive.¹⁴⁶ These led Louis Brandeis to argue: "Sunlight is . . . the best of disinfectants; electric light the most efficient policemen."¹⁴⁷ The CIA is all in a darkness, however, a state of affairs fostered by law for the most part. The 1949 Central Intelligence Agency Act exempts the CIA from federal laws requiring disclosure of personnel, names and budgets. By statute the CIA Director must curtail the flow of information to protect methods and sources. The Espionage Act, an ineffective statute, impossible to interpret, imposes heavy punishments on the disclosure of secrets, but it is both ineffective and impossible to interpret.¹⁴⁸ The current trend is toward more

sources of intelligence failures become more prominent; doctrines of intelligence—ideas about how knowledge should be tapped and staff services organized—become more fateful.

H. WILENSKY, *supra* note 123, at 174. The "tyranny of technique" frequently prevails within the CIA. *Id.* at 183. *See id.* at 128 (quoted *supra* note 125).

146. H. WILENSKY, *supra* note 123, at 127-28; Casey, *supra* note 125, at 6 ("Why should national security information be entitled to any less protection" than that granted to doctors, etc?). *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 4.04 (1972) (quoting Chief Counsel of the Comptroller of the Currency): "banking agencies . . . have long maintained systems of secret evidence, secret law, and secret policy." Trial-type hearings are of limited utility under such circumstances, as practices within the ICC and CAB demonstrate. *Id.* In the FTC, litigated cases are but the tip of the iceberg. Informal decisions have at least as great an impact on the development of law and policy. Too much "business is conducted in secret, and too much . . . time is spent on efforts to maintain the artificial and unnecessary curtain of secrecy . . ." *Id.* at § 4.06. (quoting former FTC Commissioner Elman).

147. L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (1933). *See* K. DAVIS, DISCRETIONARY JUSTICE 226 (1969): "Openness is a natural enemy of arbitrariness, a natural ally in the fight against injustice."

148. J. BERMAN AND M. HALPERIN, *supra* note 121, at 101; Hughes, *The Power to Speak and the Power to Listen*, in *SECRECY AND FOREIGN POLICY* 13, 16 (T. Franck and E. Weisband, eds. 1974); *supra* note 288. The Espionage Statutes, 18 U.S.C. §§ 793-98 (1976), criminalize the disclosure of certain categories of information "with the intent or reason to believe that the information is to be used to the injury of the United States or to the advantage of a foreign nation." *Id.* at § 794. The reporter who uncovered the 1920's Teapot Dome Scandal could have been prosecuted under this Section. Moorehead, *supra* note 128, at 97. Otherwise, the statutes are largely ineffective—it is difficult to prove the requisite intent against any but classic spies

secrecy: "The Reagan Administration has eliminated the provision of previous executive orders making the [CIA Director] . . . the intelligence community's spokesman to the media. It has also drastically curtailed the release of unclassified intelligence reports to the public."¹⁴⁹

The classification of documents under law illustrates most of the pathologies discussed in this article. What Flaubert terms the rage to classify¹⁵⁰ is so potent that hundreds of thousands of minor officials wield a delegated presidential authority to advertise the importance of a document (and hence their own, "top secret" importance). A bias toward secrecy is reinforced by penalties for disclosure and underclassification which are much heavier than penalties for overclassification. The latter penalties are rarely exacted, in any event. In 1974, there were twenty million classified Air Force documents, 99 percent of which could be made public in absolute safety; the State Department held about 35 million classified documents and the Archives were responsible for about 436 million classified pages.¹⁵¹

(such as Julius and Ethel Rosenberg, who may have been innocent). See Martin, *National Security and the First Amendment*, 68 ABA J. 680, 682 (1982). The Statutes pose "forbidding problems of interpretation," such as that of somehow limiting the breadth of the language, "connected with the national defense" found in § 793. The legislative history of the Statutes is "more that usually confused," and they are "hardly adequate to inform, much less to reconcile sensibly, the competing demands of national security and public debate. . . ." Schmidt, *The American Espionage Statutes and Publications of Defense Information*, in *SECRECY AND FOREIGN POLICY* 179, 183-84, 192 (T. Franck and E. Weisband, eds. 1974). (Columbia Law School Dean). The Justice Department takes espionage cases seriously, but alleged spies are frequently not prosecuted because intelligence agencies refuse to declassify the information needed to secure a conviction. Glennon, *Liaison and the Law: Foreign Intelligence Agencies' Activities in the United States*, 25 HARV. INT. L.J. 1, 33 (1984) (discussing a 1977 Report of the Senate Subcommittee on Secrecy and Disclosure).

149. Turner and Thibault, *supra* note 118, at 132. Intelligence officials "can sanitize most reports . . . with minimal deletions and editing." *Id.* See Southerland, *supra* note 135, at 12, col. 2 ("the halt in publication of analytical reports has made it more difficult for an outsider to judge the quality of CIA reporting."). See also *infra* notes 316-22 and text accompanying.

150. See *supra* text accompanying note 72. See also *supra* notes 41-42, 44-47 and text accompanying.

151. Moorehead, *supra* note 128, at 87 (citing William Florence, a retired Air Force documents classification expert). See Espionage Act, 18 U.S.C. § 798 (1976) (imposing stiff penalties on those who "knowingly and willfully" communicate certain kinds of classified information to unauthorized persons); Florence, *supra* note 124, at 128 (quoted *supra* note 124 and accompanying text); *id.* at 134 (growing obsession with document—rather than information—classification); Moorehead, *supra* note 128, at 109 (overclassification "gradually but surely weakens and eventually destroys the integrity and effectiveness of the system"); F. ROURKE, *SECRECY AND PUBLICITY* 63-99, 107 (1961); H. WILENSKY, *supra* note 123, at 43 (quoted *infra* note 169); *id.* at 139. An Interagency

These totals must be much larger today, in the midst of the Xerox Revolution. In 1982 and without feeling the need for a minority report, a House committee had "no doubt whatever that classification authority is used to protect information that does not require protection in the interest of national defense or foreign policy. This has been a consistent finding of presidents, Congressional committees, commissions and other observers."¹⁵² In a more pragmatic vein, "classification controls . . . impede and delay the . . . distribution of truly damaging information, although one can predict that it will inevitably be disclosed at some not-too-distant time in some form by some person."¹⁵³ Classifications are modest hurdles for a foreign "enemy" but, under them, the American public finds out last, if at all.

Classification Review Committee, headed by Ambassador John Eisenhower, was created to monitor Nixon's classification scheme: E.O. 11652. Moorehead, *supra* note 128, at 113. I have been unable to trace any recorded contribution of this Committee. On August 16, 1982,

the House Government Operations Committee released a report [with no minority report] highly critical of President Reagan's new executive order on security classification (E.O. 12356).

[T]he Reagan administration had made only minimal effort to consult with congress or the public. . . .

[M]any provisions in the Reagan executive order . . . parallel provisions of the Carter order. Both prohibit the use of classification to conceal violations of law . . . [inefficiency,] . . . administrative error, or the use of classification to prevent embarrassment or to restrain competition or to protect basic scientific research information not clearly related to the national security.

[The Carter order favored disclosure where there was a "reasonable doubt" about classification.] The Reagan order conversely says that where reasonable doubt exits . . . , the information should be safeguarded as if it were classified pending a determination within 30 days by *the original classification authority*. Similarly, if there is a doubt about the appropriate level of classification, the information shall be safeguarded at the higher level pending a final determination.

The committee report criticized E.O. 12356 for failing to address the problems of overclassification, [quoting] a 1979 GAO report and other reports. . . .

House Committee Critical of Classification Order, INTELLIGENCE REPORT, Sept. 1982, 4, at 4-5 (emphasis supplied—"the original classification authority" will arguably display a consistent bias toward classification and overclassification, to augment its power and prestige, and to conceal blunders).

152. *Id.* at 5.

153. Martin, *supra* note 148, at 685. See Moorehead, *supra* note 128, at 109 (quoted *supra* note 151). But see, e.g., Tovar, *supra* note 121, at 79 (exposure through error or stupidity a recognized intelligence hazard, but cooperation can't be obtained where danger exists of exposure by government official or former CIA employee).

The purported justifications for so much secrecy are the frequent need to act swiftly, the protection of intelligence methods, the protective cover needed by domestic and foreign informers, and protection of the information itself. These aims could be achieved at much lower levels of secrecy. For example, Kenneth Davis argues that where informers are not secret agents the public interest in security would benefit from requiring some tale-bearers to appear in the open and submit to cross examination.¹⁵⁴ The CIA candidly admits that there is much "misperception" among informers about the extent of disclosure in America, a condition which cannot be cured by still more secrecy. There is, of course, a need for confidential communication and passionate debate behind closed governmental doors. There are countervailing needs, however, for public debate and a governmental accountability to the public. These cannot be balanced adequately against the need for secrecy because of an inability, institutionalized under law, to distinguish true secrets from the "false" secrets that protect the political interests of those in power rather than the public interest. The latter secrets proliferate under canons of a "plausible deniability" and the "need to know."¹⁵⁵ For example, attempts to interdict North Vietnamese supply routes in Laos started out as a CIA caper. Our widened involvement continued to be shrouded in a CIA secrecy, the White House clinging "to the transparent fiction that American involvement is limited to noncombatant support to native forces defending their remote jungle homeland. . . ."¹⁵⁶ When "things

154. K. DAVIS, *supra* note 146, at § 7.15. See Halpern, *Clandestine Collection*, in INTELLIGENCE REQUIREMENTS FOR THE 1980's, 35, 39-40 (R. Godson, ed. 1979); *Congress Considers Amendments to Freedom of Information Act*, INTELLIGENCE REPORT, Aug. 1981, 1, at 12 (testimony by Adm. Inman, then Deputy Director of CIA).

155. Franck and Weisband, *supra* note 129, at 11; Franck and Weisband, *Disemblement, Secrecy and Executive Privilege in the Foreign Relations of Three Democracies*, in *SECRECY AND FOREIGN POLICY* 399, 435-38 (T. Franck and E. Weisband, eds. 1974); P. WALKER, *THE CABINET* 27 (rev. ed. 1972); H. WILENSKY, *supra* note 123, at 138-39; *FOIA Testimony Presented*, *supra* note 141, at 3. See *McGehee v. Central Intelligence Agency*, 51 U.S.L.W. 2421 (D.C. Cir., Jan. 4, 1983) (quoted *infra* note 160). Two retired CIA officials argue that:

Even with the purest of intentions, there is a danger that these departments [State and Defense] will release only selective information favoring their policy objectives. A better answer is for the DCI [CIA Director] to take the initiative by releasing whatever will be useful to the public. The director should not let himself be pressured into supporting administration policy. . . .

Turner and Thibault, *supra* note 118, at 133. (This leaves discretion in an arguably inappropriate place, and it is doubtful whether a CIA director could withstand administration pressures.) *But see also infra* note 357 and text accompanying.

156. Ashmore, *The Policy of Illusion, the Illusion of Policy*, *CENTER MAGAZINE*, May 1970, 2, at 4.

go seriously wrong," as they often do, and did in Vietnam, "the surfeit of villains and paucity of heroes place a profound strain on the entire system."¹⁵⁷ The public blames all experts and politicians equally, since the divisions and dissensions within the administration have been concealed behind a monolithic secrecy. Many of those at fault can then exonerate themselves by pleading a lack of information.¹⁵⁸

Secrecy spawns other vices, too. It reinforces the specialists' desire to make expertise the measure of life (rather than making life the measure of expertise). A rigid compartmentation of knowledge and functions limits the number of CIA officials who know of a particular matter to as few as a dozen. Acute coordination difficulties occur and, for those knowing of an important matter, a significant power results.¹⁵⁹ A major reason for CIA opposition to the Freedom of Information Act¹⁶⁰ (FOIA) is that:

A relatively simple FOIA request may require as many of 21 Agency record systems to be searched, a difficult re-

157. Franck and Wiesband, *supra* note 129, at 9. See T. HUGHES, *supra* note 125, at 24 ("Prominent among our many crises over Vietnam was the crisis of its nonexplainability.")

158. See *id.*; Franck and Weisband, *supra* note 154, at 420 (information becomes a "sacred cow"); *supra* note 8 and text accompanying. Excusing yourself on grounds of a lack of information has its corollary: the fewer the restrictions on clandestine collection the better, since "we would be spared the charge of intelligence failure whenever something happens in the world that could or could not be predicted." Halpern, *supra* note 154, at 40-41.

159. J. FREEDMAN, *supra* note 8, at 52 (quoting Harold Laski); Turner and Thibault, *supra* note 118, at 124.

160. 5 U.S.C. §§ 552 et. seq. (1966). This was the first amendment to the 1946 Administrative Procedure Act 5 U.S.C. §§ 700 et seq. (1976), Pub. L. 80-487, July 4, 1966, 80 Stat. 250. It did not change the Act's basic procedures because Congress was reluctant to tamper with anything so fundamental. J. FREEMAN, *supra* note 8, at 131.

In 1967, President Johnson set the pattern of executive branch behavior, when he refused to allow a reporter to see the draft of the remarks he delivered while signing the FOIA. Franck and Wiesband, *supra* note 129, at 3-4. Futile attempts, in 1982, to amend the FOIA, so as to make disclosure of intelligence information less likely, are usefully collected in: Dennett, *supra* note 133, at 401-05; *Law and National Security, 1982*, INTELLIGENCE REPORT, Jan. 1983, 1 at 11. The "next battle on secrecy will focus on the [FOIA]. . . [It will extend] beyond national security to the whole question of access to government information." Halperin, *supra* note 125, at 3, col. 2. See McGehee, *supra* note 155: "It has often been observed that the central purpose of the FOIA is to open up the workings of government to public scrutiny. [A]n informed electorate is vital to the proper operation of a democracy." A more specific goal implicit in the foregoing is to give citizens access to the information on the basis of which government agencies make their decisions, thereby equipping the populace to evaluate and criticize these decisions. *Id.* See also *infra* note 285.

quest over 100. The "need to know" principle, also, means that CIA employees normally have access only to information necessary to perform their assignment. Thus, . . . searching for documents in response to an FOIA request, people who would otherwise never have access to compartmented information necessarily see such documents. . . .¹⁶¹

Many imaginative and independent-minded analysts would find it impossible to work in such an atmosphere, which appeals more to cautiously mediocre "raw empiricists, or conventional 'backstoppers.'"¹⁶²

Paradoxically, excessive secrecy also spawns many of the "leaks" that have claimed much presidential and media attention in recent years. Executive control over secrecy permits an administration to leak and even to declassify information favorable to itself. Retaliatory leaks, by opponents of the administration or its policies, are the inevitable result. Fears that these leaks are only "the tip of the Ellsberg" lead to scattergun attempts by the administration to "plug" the leak, efforts which terrorize the bureaucracy to no good effect. Fortunately, truly damaging secrets (as opposed to those embarrassing to particular politicians) are almost never disclosed during the political games of the leak. A certain number of leaks seem an inevitable reaction to the strains of maintaining a united policy front.¹⁶³

161. *Congress Considers Amendments to Freedom of Information Act*, *supra* note 154, at 12 (excerpts from testimony of Adm. Inman, then-Deputy Director of the CIA, to the Senate Judiciary Subcommittee on the Constitution and the Senate Intelligence Committee). FOIA protections against intelligence abuses are unnecessary, as congressional oversight provides adequate protections. *Id.* at 8 (Asst. Attorney General Rose's testimony). See *infra* notes 279-87 and text accompanying. *But see* Colby, in P. HACKES, *supra* note 46, at 26: much of the substance, if not the sources, of information can be disclosed. This would enable the CIA to get badly-needed analytical help from academics. *Id.*

162. H. WILENSKY, *supra* note 123, at 176-77, 179. See T. HUGHES, *supra* note 125, at 59 (quoted *infra* note 175); H. WILENSKY, at 174, 183 (quoted in *supra* note 145).

163. See Aspin, *supra* note 42, at 21-22 (quoted *supra* text accompanying note 42); Franck and Weisband, *supra* note 154, at 436-40; de Smith, *Official Secrecy and External Relations in Britain*, in *SECRECY AND FOREIGN POLICY* 312, 316-18 (T. Franck and E. Weisband, eds. 1974); *id.* at 317 (quoting James Callaghan, who later became Prime Minister) ("briefing is what I do and leaking is what you do."); P. WALKER, *supra* note 155, at 29-30. Leaks place government on the horns of a dilemma: none of the 30 leaks referred to the Justice Department by 1977 were investigated because the agencies refused to declassify the information that the Department viewed as necessary for a successful prosecution. Glennon, *supra* note 148 (discussing 1977 Report of the Senate Subcomm. on Secrecy and Disclosure). See Turner and Thibault, *supra* note 118, at 125: Despite recent steps to make the CIA's "internal procedures more open, the danger of leaks remained small because intelligence agencies in general are highly conscious of security. The most significant danger of such steps is rather that

B. CIA Policies as Their Own Cause

Despite best efforts at secrecy, much information about CIA covert operations has been made public—particularly through the efforts of the Church Committee.¹⁶⁴ Committees of the Bar Association of New York have found particular CIA covert operations to be “patently unconstitutional”¹⁶⁵ (despite their being non-justiciable, political questions), and an associate editor of the *Washington Post* offers contemporary Nicaragua as a case study in the CIA’s ineffectiveness:

In the best tradition of American involvement in such situations, . . . the clandestine war in Nicaragua is producing a result precisely the opposite of what was intended. American intervention has strengthened the Sandinistas at home, while giving them excuses to impose increasingly authoritarian controls on the population and to use Cuban advisors in large numbers. Nicaraguans who bitterly oppose the Sandinistas ridicule American policy as clumsy and counterproductive.

Even the American embassy reckons the Sandinistas would win a popular election today.¹⁶⁶

they may encourage undue caution . . .” *But see also* Franck and Weisband, *supra* note 129, at 9: “The cost of excessive secrecy is excessive leaking of confidential information—with its possible threat to national security.”

164. Senate Select Committee to Study Government Operations with Respect to Intelligence Activities, S. Rep. 94-755, Bks. I-V, Apr. 26, 1976.

165. Quoted in J. BERMAN AND M. HALPERIN, *supra* note 121, at 70 (Civil Rights and International Human Rights Committees):

The Bay of Pigs invasion, for example, was a usurpation by the Executive of Congress’ power to raise and support Armies . . . and to ‘declare War.’ Similarly unconstitutional was the recruiting and supporting over a period of years of a large army in Laos without congressional knowledge. Both the Cuban and Laotian operations might have been justifiable had they involved the need to act promptly to repel sudden attacks upon the United States. The planning of both operations, however, took sufficiently long as to eliminate any reason for not involving Congress.

In still other actions, such as those in Chile, the CIA conducted activities which apparently breached treaties ratified by the Senate. In ratifying these treaties, the Senate was exercising its constitutional power to set the standards which guide the President in the conduct of foreign policy. The CIA’s violation of these treaties contravened the standards established by the Senate and undermined its constitutional role.

The difficulty with this argument is, of course, that political authorities have been unwilling and/or unable to declare a covert operation unconstitutional and to make this declaration stick. *See infra* notes 227-31 and text accompanying.

166. Kaiser, *Yankees are a Sandinista’s Best Enemy*, *MANCHESTER GUARDIAN*

Despite this kind of evidence on the law and policy of covert operations, they seem very popular with the Reagan Administration. There, conservatives dominate national security policy, and many conservatives find covert operations to be viable alternatives to a liberal advocacy of reforms in a foreign government and its policies.¹⁶⁷ It seems that moderates and liberals are justified in their search for new curbs on covert operations. Like wars, covert actions rarely solve anything and should therefore be used only just short of war. In his *Decline and Fall*, Gibbon recognized something that the CIA and its conservative supporters have not: nothing is "more contrary to nature than the attempt to hold in obedience distant provinces."¹⁶⁸ Opera-

WEEKLY, Feb. 6, 1983, at 17, col. 1 (excerpted from the WASHINGTON POST). See *id.* at col. 4 (quoted *infra* text accompanying note 252).

167. Rubin, *supra* note 63, at 36. See Miler, *supra* note 121, at 50 (counterintelligence may be nativist and isolationist, in the sense that covert operations serve as alternatives to innovative diplomatic initiatives); *Casey Confirmation Hearing*, INTELLIGENCE REPORT, Feb. 1981, 4, at 5:

Questioned by Walter Huddleston (D-Ky.) about "covert actions" and secret operations, [CIA Director] Casey affirmed the views of the Murphy Commission "generally." The Commission had concluded that prohibition of covert action could put the nation and its allies at a dangerous disadvantage, but that it should be utilized in such areas where it is clearly essential to vital U.S. interests. Casey, when pressed by Senator Biden (D-Del.), explained, "There is a point at which rigid accountability, detailed accountability can impair performance."

Halperin, *supra* note 125, at p. 3, col. 3, argues that:

The Reagan Administration views covert action as something you do because it's the most efficient way to proceed. Most efficient often means avoiding public debate in the United States, avoiding the opposition of other agencies, like the State Department, which may not be enthusiastic about the policy, and avoiding Congressional opposition.

The Administration's is a conservative viewpoint, represented here by Barnett, *A Geopolitical Overview*, INTELLIGENCE REPORT, Apr. 1981, at 5 (Director, National Strategy Information Center):

[T]he threat to world stability stems not only from Soviet warships . . . or from uncontrollable populations. It arises from a working system which the U.S. has tended to ignore—the Nazis believed in it profoundly and the KGB believes in it—covert action and political warfare operations. [We] need . . . to revitalize our freshly disabled CIA and . . . vigorously reenter the world of transnational politics.

(The last few words are promising candidates for Euphemism of the Decade.) There has been a clear shift in congressional opinion toward a larger legitimate scope for covert activities, which should be subject to a less searching outside scrutiny. Aspin, *supra* note 42, at 4-5. See *id.* at 5-6 (comments by Colby and Robert Bork). Tovar, *supra* note 153, at 67 finds that, regrettably, covert action "shows all the earmarks of a dying "art-form." The CIA's ability to use force must be reconstituted. Then, it must be used or it will atrophy. *Id.* at 75, 77. See Miler, *supra* note 121.

168. Quoted in Rubin, *supra* note 63, at 36. See Ransom, *supra* note 136; D.

tions like the CIA's in Nicaragua allow Americans (and the Soviets) to be tarred with a broad "Imperialist" brush overseas. This characterization is plausible enough to have a significant effect. While one covert action, "considered in isolation, might seem worth the cost of slightly tarnishing our image abroad, the cumulative effect of several hundred blots was to blacken it entirely."¹⁶⁹

Unless covert actions are curbed at some stage, policy will continue to be its own cause. Having intervened, the CIA feels that it cannot but intervene again to destabilize regimes (such as Libya's) becoming ever more unfriendly because of past CIA interventions, to stabilize regimes (such as the Shah's in Iran) which have little reason to exist apart from prior CIA interventions on their behalf, and to counter the Soviet's interventions that are causes and effects of our own interventions (such as trading "our" Ethiopia for the "Soviet's" Somalia).¹⁷⁰

The main reason why the CIA's policy is its own cause is that this satisfies the CIA's organizational imperatives. Liberals and conservatives agree that the CIA suffers from many bureaucratic pathologies. While no two critics are in exact agreement as to what these are, social science organization theories offer a *somewhat* neutral description of the problem: to a large extent, the CIA's organizational structure determines its policy content. A CIA "Groupthink"¹⁷¹ operates under an organizational logic designed to truncate, unduly and prematurely, the range of viable policy options. A narrowly hierarchical and rigidly compartmented CIA bureaucracy suppresses or ignores the individualization of issues and opinions, in an attempt to

WISE, *supra* note 120, at 409 (covert operations should be banned in peacetime, since it "has been amply demonstrated by now that the cost of covert operations to our own system is too high."); Highsmith, *supra* note 125, at 331-32 (many statutes related to national security should be reformulated because clarity and enforceability lacking). Many conservatives agree that clear definitions of the permissible limits of covert activities are desirable. See Colby, in P. HACKES, *supra* note 123 at 4 (there should be a CIA Charter, under which the executive proposes and Congress disposes); *Discussion*, in INTELLIGENCE REQUIREMENTS for the 1980s 80 (R. Godson, ed. 1979).

169. Hilsman, *supra* note 121, at 176.

170. P. BRIETZKE, LAW, DEVELOPMENT, AND THE ETHIOPIAN REVOLUTION 39-46 (1982). See H. WILENSKY, *supra* note 123, at 174 (quoted *supra* note 145); *supra* notes 28-30 and text accompanying. North, *supra* note 108, at 196 argues that, in organizations like the CIA: "Action at one point in a system . . . that attempts to relieve one kind of distress often produces an unexpected result in some other part of the system." See also *supra* note 108 and text accompanying.

171. I.e., errors in decisionmaking based on group conformity in thinking. See I. JANIS AND L. MANN, DECISIONMAKING (1977); Heller, *Not All the Sheep Were on the Falklands*, MANCHESTER GUARDIAN WEEKLY, February 6, 1983, at 7, cols. 3-5; *infra* notes 183-85 and text accompanying.

attain speed and efficiency. The CIA, like most large organizations, resists change aggressively, in spite of a constant desire to expand its activities. This desire is reflected in a more or less united pursuit of power, which masks the bureaucratic infighting that frequently distorts informational and covert operations.¹⁷² One effect of these organizational pathologies is a CIA that is all but immune to control, by outsiders or insiders. In America, we try to fetter administrative discretion with a regularity and an openness wholly alien to the CIA, under what Kenneth Davis terms "open plans, open policy statements, open rules, open findings, open reasons, open precedents, and fair informal discretion."¹⁷³

The organizational problems to be solved within the CIA are: drawing competent and unbiased intelligence analyses from a compartmentalized body of knowledge, getting these analyses to the relevant decisionmakers, and helping to implement their decisions. The sources of failure are legion, and most relate to common organizational "patterns of behavior variously described as 'trained incapacity' (by Veblen), 'occupational psychosis' (by Dewey), and 'professional deformation' (by Warnotte)."¹⁷⁴ Even if intelligence starts out as accurate and timely, it almost inevitably becomes distorted and stale

172. See Graham, *Analyses and Estimates*, in INTELLIGENCE REQUIREMENTS FOR THE 1980s 21, 22-28 (R. Godson, ed., 1979) (Lt. Gen., ex-Defense Intelligence Agency Director, and co-chair, Peace Through Strength) (peddling hardware and the management of technical systems, the "CIA spread out and tried to realize a vision of itself as the paramount influence in American intelligence"); Turner and Thibault, *supra* note 118, at 134 (CIA resists change because "no change . . . comes easily to a large bureaucracy where traditions run deep and dialogue is constrained."). See J. FREEDMAN, *supra* note 8, at 38. All "governments . . . are plagued by the pathologies of hierarchy, agency rivalry, and secrecy; all generate an urgent demand for 'all the facts' and 'shortrun estimates.'" H. WILENSKY, *supra* note 123, at 128. In most countries, "the institutionalization of intelligence . . . has become so irreversible, the processes themselves so pervasive, the products so indispensable, the penalties for spurning them so disagreeable and most of the intelligence officers so durable, that the policy-maker must suffer intelligence gladly." T. HUGHES, *supra* note 125, at 22. In the U.S., the growth in the CIA's size, budget, and power has paralleled that of the rest of the executive branch for the last forty years. D. WISE, *supra* note 120, at 404.

173. K. DAVIS, *supra* note 146, at § 4.02. See *id.* at § 4.04 (structuring discretion means regularizing it and requiring that thought be devoted to long-term objectives); E. LEWIS, *supra* note 123, at 161 (quoted *supra* note 145); *supra* notes 144-63 and text accompanying. Davis's comments can be used effectively to criticize assertions like those of Wiseltier, *The Great Nuclear Debate*, THE NEW REPUBLIC, Jan. 10 and 17, 1983, 7, at 12: "The persecutions of CONTELPRO originated in a political style and a personality disorder that cannot be laid at the Defense Department's door." This is true in one sense, but the absence of fetters on discretion makes it possible for a "personality disorder" to have this particular effect.

174. J. FREEDMAN, *supra* note 8, at 39. See P. MCGARVEY, CIA: THE MYTH AND THE MADNESS 4 (1972); H. WILENSKY, *supra* note 123, at 126.

on its way through the CIA. Excessive secrecy in a rigidly compartmented CIA exaggerates the distorting effects that hierarchy, centralization, and internal and external rivalries have on intelligence in all organizations. The great number of specialized ranks in a tall and narrow CIA pyramid could well have been designed to maximize obstruction and obfuscation. People who see little opportunity for job promotions or otherwise attaining a broader perspective tend to serve out their time in provoking the jurisdictional squabbles that keep everyone in their place. Many CIA subordinates have the opportunity to screen out information that does not fit their preconceptions or power needs, and to alter the background against which information will be presented. Kurds or Cruise missiles look very different to different CIA departments, a situation which causes many "riders" to be attached to and removed from information on its migratory journey.¹⁷⁵

In contrast with what happens in our best agencies, such as the SEC, the absence of clearly defined CIA goals, of precise and detailed

175. North, *supra* note 108, at 185-87, 192-94; H. WILENSKY, *supra* note 123, at ix, 41-42, 57, 175-77; Turner and Thibault, *supra* note 118, at 124. See Graham, *supra* note 172, at 25 (preoccupation with being close and visible to policy makers spawns formalistic, or worse, short-term reports); *id.* (intelligence analysis and bureaucratic routine or politics are "mortal enemies"); T. HUGHES, *supra* note 125, at 59 (quoting Isaiah Berlin) (a paradoxical consequence of increasingly specialized knowledge is a dependence "upon a collection of ill coordinated experts, each of whom sooner or later becomes oppressed and irritated by being unable to step out of his box and survey the relationship of his particular action to the whole."); Uhlmann, *supra* note 135, at 19 ("bureaucratic infighting within the CIA has been one of the causes of the decline of clandestine collection and covert action."); Hughes, *supra* note 148, at 19; H. WILENSKY, at 43 (in a hierarchy, "information is a resource that symbolizes status, enhances authority, and shapes careers," and men on the way up restrict certain information to please others and preserve comfortable work routines); *id.* at 58 (acquisition of unnecessary responsibility—"empire building"—provokes cries of duplication and inefficiency); Turner and Thibault, at 125; *id.* at 133 (quoted *supra* note 155); *Congress Considers Amendments to the Freedom of Information Act*, *supra* note 154; *id.* (quoted in text *supra* note 154); *supra* note 30 and text accompanying. H. WILENSKY, at 58, describes "the dilemma of centralization:"

if intelligence is lodged at the top, too few officials . . . with too little accurate and relevant information are too far out of touch and too overloaded to function effectively; on the other hand, if intelligence is scattered throughout too many subordinate units, too many officials and experts with too much specialized information may engage in dysfunctional competition, may delay information as they consult with each other, and they may distort information as they pass it up.

Organizational pathologies are so numerous and interwoven in the CIA that it tends to obtain all of the disadvantages, and few of the advantages, of both centralization and decentralization. The remedy is significant organizational change: see *infra* notes 362-65 and text accompanying.

written rules about reaching these goals, and of a routine monitoring of subordinates' performance mean that CIA officials often flounder about or go off on frolics of their own. Such controls as exist are frequently not applied by superiors who have their own axes to grind, or who are too busy or unable to penetrate the veil of secrecy to find out what is going on.¹⁷⁶ Intelligence programs with imperceptible beginnings thus gain a momentum of their own that it takes too much paperwork to stop. For example, the ill-fated "Pueblo" mission resulted from a young lieutenant's ill-informed decision (with perfunctory approval from busy superiors) that too little attention was being paid to North Korea.¹⁷⁷

Ironically, hasty CIA decisions made under pressure are frequently of better quality than the leisurely ones; participants are forced to be more creative, and many bureaucratic bottlenecks are bypassed in the interests of speed and secrecy. Bypassing then becomes a regular feature of bureaucratic life in the CIA's atmosphere of constant crisis. The bureaucratic reality of the CIA is thus one of a complex organizational flow chart with a controlled chaos superimposed. Everyone speaks and no one listens, while jurisdictional rivalries and policy means and ends are brokered in a secret market where bureaucratic power is the common currency. The CIA would function no more consistently than many an "underdeveloped" Third World bureaucracy, were it not for the fact that internecine quarrels quickly disappear when the question arises of how big and strong the CIA ought to be. Competitions for resources and for new programs keep CIA officials busy concealing its inadequacies and ferreting out the weaknesses of rival organizations. The CIA is often successful in these competitions because its power stems from so frequently being the first to have, analyze, and act upon important information. As a large bureaucracy where traditions run deep and discussions are constrained, the CIA uses its resources to resist significant changes. With exceptions during the late 1970s that proved to have little permanent impact, the wider government has preferred to face a chaos of world events with a stable CIA run by officials with long service records, rather than to engage in organizational experiments.¹⁷⁸

176. See K. DAVIS, *supra* note 146, at § 4.08; K. DAVIS, *supra* note 147, at 223; Raskin, *supra* note 120, at 189 (national security state "linked to the rise of a bureaucracy that administered things and people in interchangeable fashion without concern for ends or assumptions.").

177. P. MCGARVEY, *supra* note 174, at 100-01. See G. EDWARDS, *supra* note 19, at 132; Miler, *supra* note 121, at 63 (discussed *supra* note 137).

178. See Hilsman, *supra* note 121, at 172; Hughes, *supra* note 108, at 19; Miler, *supra* note 121, at 63; North, *supra* note 108, at 196, 199; Uhlmann, *supra* note 135,

The Agency is far from all-powerful, of course, and it frequently tailors intelligence to fit client preconceptions and needs, particularly in response to presidential pressures. The CIA is frequently able to push policy in directions favorable to its organizational needs, however. When this happens, policymakers often feel hemmed in by an intelligence that limits the range of options. After the Bay of Pigs, for example, President Kennedy took particular care that standing orders and informational and covert operations did not leave him without decisionmaking alternatives.¹⁷⁹

Liberals and moderates offer unflattering portraits¹⁸⁰ of the influence the CIA has on its officials' thinking, through secrecy and the conformitarian recruitment and indoctrination policies common to many large organizations. Many conservatives would disagree with some of these characterizations, but a rough consensus that a Groupthink operates in the CIA can be discerned. Janis and Mann's Groupthink notion is a very useful concept because it adroitly explains the recurring failures to warn commanders of a possible attack on Pearl Harbor, Truman that Chinese troops were massing during MacArthur's rush to the Yalu, Kennedy that the Bay of Pigs would be a disaster, and the British that a Falklands/Malvenas invasion was imminent.¹⁸¹

at 11 (quoted *infra* note 219); H. WILENSKY, *supra* note 123, at 8-12, 46-48, 76, 175-78; Turner & Thibault, *supra* note 118, at 124-25, 134.

179. Aspin, *supra* note 42, at 32-33; G. EDWARDS, *supra* note 19, at 135; Hilsman, *supra* note 121, at 173; T. HUGHES, *supra* note 112, at 21; Hughes, *supra* note 125, at 18; E. LEWIS, *supra* note 123, at 207; Turner and Thibault, *supra* note 118, at 133 (The CIA Director "should not let himself be presented into supporting administration policy or intimidated into withholding information when policy makers do not like his news."); *supra* note 31 and text accompanying.

180. See, e.g. F. DONNER, *supra* note 120 at xiii (the "nativist anti-radicalism" of the CIA's "passionate tribal constituency"); T. HUGHES, *supra* note 125, at 17 (intelligence officials "culture-bound, bureaucratically-staked, umbilically connected [and] . . . career-limited"); Miler, *supra* note 121, at 50 (discussed *supra* note 167); Ransom, *supra* note 136, at 206 (intelligence officials' views reflect a new, post World War II form of manifest destiny, compounded of idealism, balance of power politics, and concern about access to raw materials); H. WILENSKY, *supra* note 123, at ix (for intelligence officials, anti-intellectualism, a narrow empiricism, and heavy reliance on experience exist in odd combination with demands for a scientific precision); *id.* at 117 (citing Shils' study of 1950s loyalty-security programs) (intelligence secrecy has its "ideological roots in hyperpatriotism, xenophobia, isolationism, fundamentalism, populism, and the fear of revolution."); *id.* at 119 (an ethnocentrism in American intelligence results in stereotypes of foreigners—occasionally, a major source of intelligence failure); Raskin, *supra* note 120, at 189 (the national security state—of which the CIA is an important part—emerges from war and nuclear technology, from the fear of revolution and change, and from the economic instability of capitalism).

181. I. JANIS AND L. MANN, *supra* note 171; Heller, *supra* note 171. I. JANIS, GROUP THINK (2d ed. 1982) has just appeared. See G. PRANGE, AT DAWN WE SLEPT (1981); H.

Conservatives would add to this list CIA failures accurately to assess events in Iran and in Egypt prior to the 1973 war with Israel, Soviet military power and intentions in Czechoslovakia in 1968 and in Africa today, and the impact of socialism in Chile and Italy.¹⁸² In these and many other policy areas, CIA officials give loyal but irrational support to pre-determined organizational commitments. A political and intellectual “permafrost” sets in. This “permafrost” includes:

1. An illusion of invulnerability, shared by most or all of the members, which creates excessive optimism and encourages taking extreme risks;

2. Collective efforts to rationalize in order to discount warnings which might lead the members to reconsider their assumptions before they recommit themselves to their past policy decisions;

3. An unquestioned belief in the group’s inherent morality, inclining the members to ignore the ethical or moral consequences of their decisions.

4. Stereotyped views of rivals and enemies as too evil to warrant genuine attempts to negotiate, or as too weak or stupid to counter whatever risky attempts are made to defeat their purposes;

5. Direct pressure on any member who expresses strong arguments against any of the group’s stereotypes, illusions, or commitments, making clear that such dissent is contrary to what is expected of all loyal members;

6. Self-censorship of deviations from the apparent group consensus, reflecting each member’s inclination to minimize to himself the importance of his doubts and counterarguments;

7. A shared illusion of unanimity, partly resulting from this self-censorship and augmented by the false assumption that silence implies consent;

8. The emergence of self-appointed “mindguards”—

WILENSKY. *supra* note 123, at 41-42, 49; Mott, *Review*, INTELLIGENCE REPORT, Apr. 1982, at 3; Steele, *The Prospect of Constant Alert*, MANCHESTER GUARDIAN WEEKLY, Jan. 30, 1983, at p. 1, col. 2-4, at col. 2; *supra* note 180.

182. See Casey, *Opening Statement Before the Senate Select Committee on Intelligence, January 31, 1981*, INTELLIGENCE REPORT, Feb. 1981, at 3.

members who protect the group from adverse information that might shatter their shared complacency about the effectiveness and morality of their decisions.¹⁸³

There is much evidence of these "symptoms" of Janis and Mann's Groupthink in the writings of others, about the CIA¹⁸⁴ and about policy

183. Heller, *supra* note 171, at col. 5 (summary of symptoms of Janis and Mann's Groupthink). Clearly, all conservatives would not agree with all of these characterizations.

184. See, e.g., W. COLBY, HONORABLE MEN 213-14 (1978) (some CIA officials took high-level "expressions of official hostility as a suggestion, consent or even authority to mount operations aimed at assassinating Castro."); G. EDWARDS, *supra* note 19, at 31-32; Franck and Weisband, *supra* note 129, at 8-9; Graham, *supra* note 172, at 25 (discussed *supra* note 175); D. HALBERSTRAM, THE BEST AND THE BRIGHTEST 358 (1972) (The "job is . . . to get along with superiors"—an "Air Force intelligence officer will not . . . say that bombing does not work."); T. HUGHES, *supra* note 125, at 43 (blandness and extra ambiguities added during intelligence officials' search for unanimity); Hughes, *supra* note 125, at 16; D. MARTIN, WILDERNESS OF MIRRORS 226 (1980) (quoted *infra* note 237); North, *supra* note 108, at 186 (ancient custom of executing bearers of bad news survives in reluctance to convey unpleasant intelligence information or interpretations with which superiors will disagree); H. WILENSKY, *supra* note 123, at 16, 19, 23 (like all experts, intelligence officials defend established policies and give us intelligence "Edsels" based on window dressing, slogans such as "Sino-Soviet bloc," stereotypes, and simplifications); *id.* at 54, 175 (men of good will will obfuscate and exaggerate agreement with rivals on behalf of an "ultimate consensus" which fosters "intelligence fantasies" and illusions of reliable information); *id.* at 58 (CIA data collection too far from the outlet of useful policy, and this encourages agreed-on estimates concealing strong disagreement); *id.* (illusion of security and reliable information results in, e.g., Bay of Pigs); *id.* at 63 (resentment toward outsiders and exaggerated belief in practical experience among intelligence officers); *id.* at 174 (quoted *supra* note 145).

When intelligence officials go beyond their substantive depths, their interests become painfully clear. For example, an Air Force general once argued that U-2 flights are legal if they occur over countries we do not recognize. T. HUGHES, *supra* note 125, at 25-26. Soviet intelligence also suffers from a Groupthink, which is a cause and effect of the CIA's. See, e.g., *Interview Given by First Defector from Arbatov's "American Institute"*, INTELLIGENCE REPORT, Sept. 1981, 6, at 7 (Galina Orionova) [hereinafter cited as *First Defector*]: ". . . ISKAN [Institute] researchers would still try to please their bosses, never mind their own feelings. Otherwise, they knew their career would be ruined." See also *id.* (quoted *infra* note 191).

Some intelligence officials are aware of these problems within the CIA. E.g., Casey, *supra* note 123, at 2:

We need to resist the bureaucratic urge for consensus.

We don't need analysts spending their time finding a middle ground or weasel words. . . . Their time needs to go into evaluating information [and uncovering] . . . valid and meaningful differences [of interpretation]. . . . The search for consensus cultivates the myth of infallibility. It implicitly promises a reliability that cannot be delivered.

See Turner and Thibault, *supra* note 118, at 131 ("Past mistakes have frequently resulted from insularity and from an absorbing dedication to getting the job done."); *id.* at 133; Medow, *supra* note 135, at 820 (one "may almost instinctively translate

analysis generally.¹⁸⁵ In contrast with what the fields of contract and abortion seem to require, there is little need for the certainty of "stare decisis" applications of "precedents" by the CIA. There is, rather, a need for individualized analyses of the peculiarities found in particular foreign and military policy imbroglios. The CIA tends to a simple-minded "us" and "them" pigeonholing, however, of "freedom fighters" versus "terrorists," for example. (The policy-as-its-own-cause circle is then completed by covert CIA operations which encourage "them" to act more and more like our enemies.) Rather than re-examine cherished preconceptions, CIA officials usually seek out the apparent security of what has been done before. For example, a few journalists and academics produced assessments of our Vietnam policies which were much more accurate than the CIA's, despite the CIA's superior access to information. Rather than review its own analyses, the CIA chose to investigate the journalists and academics instead. The constant flux of world events is downplayed in the artificial reason by which the CIA alone evaluates the reliability of its information and the soundness of its analyses. Most of these evaluations are kept secret, and the wider government and public are thus unable to determine whether real or fantasy intelligence is being propagated.¹⁸⁶

New threats are constantly being perceived by the CIA, of course: terrorism, new tides of nationalism in the Third World, theft of new technologies, economic aggression, and resource shortages contrived, perhaps, by new OPECs. But a close reading of official and quasi-official pronouncements¹⁸⁷ reveals that, while the existence and identity of an enemy in these areas may be unclear to others, the

an attack on the CIA Agency into an attack on national security"); *supra* note 143 and text accompanying.

185. See *supra* notes 27, 30-31, 34-35, 41, 47, 52, 54, 57-58 and text accompanying.

186. See H. WILENSKY, *supra* note 123, at 175-77; *supra* note 185; *supra* notes 81-85, 94-101, 108-110, 170, 180-84 and text accompanying.

187. See, e.g., Barnett, *supra* note 167, at 5-7; *id.* at 5 (quoted *supra* note 167); Casey, *supra* note 123, at 2-3; Casey, *supra* note 125, at 2, 5; *supra* notes 58, 63 and text accompanying. See also H. WILENSKY, *supra* note 123, at 119; *supra* notes 58-60 and text accompanying. A subtle e.g. is offered by Casey, *supra* note 125, at 1:

Recently I had our cartographers prepare a map to show the Soviet presence in its various degrees of influence. They colored in red . . . the nations under a significant degree of Soviet influence. When the map was finished, 50 nations were in red. Ten years ago, in a similar map I had prepared, only half as many of the nations of the world were colored in red.

That "degrees of influence" are "various" is admitted by Casey, but the result looks like, and is undoubtedly treated like, a pre-World War II map of, e.g., the red-colored British Empire—a supposed monolith. Presumably, adding our "degrees of influence" to the map would result in large blocs of blue, and the CIA's color of choice for remaining countries would be pink.

CIA is certain that the enemy is the Soviet Union. The richness of the natural variety in foreign affairs is lost, and analytical creativity is compromised, because the CIA as an organization is interested almost exclusively in *Soviet* sponsorship and coordination of terrorism, in *Soviet* manipulation of aspirations in the Third World, in *Soviet* technological theft and economic devilry. This is an illustration of what Flaubert termed the quest for *the* all-encompassing solution, to our military and foreign policy problems,¹⁸⁸ the solution increasingly rejected by even our most loyal allies.¹⁸⁹ The quest reflects "something nearly evangelical: a profound conviction that communism is . . . [an "evil Empire"] that takes its guidance, wherever and in whatever form it may appear, from the rulers in Moscow; and that those rulers, whoever they may be at any time, are committed to worldwide ideological conquest."¹⁹⁰ Our intelligence policies are thus essentially reactive to CIA perceptions of Soviet policy;¹⁹¹ our fear of "them" feeds on their fear of "us," and vice versa, of course, in worldwide cycles

188. See *supra* note 73 and text accompanying. See also *supra* note 38 and text accompanying.

189. A recent Gallup poll in Newsweek found that 43 per cent [of West Germans] distrusted the United States and the Soviet Union equally, a higher proportion than in France or Britain.

The same poll found that 57 per cent of West Germans thought that Western Europe would be safer if it moved toward neutralism in the East-West conflict (The poll also found surprisingly high totals for the same view in Britain, 45 per cent, and France, 43 per cent.)

While confidence in the Americans has fallen, fear of the Russians has gone down. . . . The crises in Afghanistan and Poland reinforced a perception of Soviet weakness, not of strength.

Steele, *Germany and America*, MANCHESTER GUARDIAN WEEKLY, Feb. 13, 1983, 10, col. 1-5, at col. 3. These attitudes, and American public opinions, are easily misunderstood by American officials. See, e.g., text accompanying *infra* notes 251-53.

190. Geyelin, *Not Dreamt of in His Philosophy*, MANCHESTER GUARDIAN WEEKLY, Feb. 6, 1983, 16, col. 3-5, at col. 4 (discussion, excerpted from the WASHINGTON POST, of President Reagan's "inflexible" worldview). Overwhelmingly, this is also the view of CIA officials, which is one reason why Reagan wants to strengthen their hand: See Halperin, *supra* note 125, at p.3, col. 3 (quoted *supra* note 167); *supra* notes 31, 34, 63, 167, 180, 183 and text accompanying.

191. E.g., Tovar, *supra* note 153, at 69-70. See D. MARTIN, *supra* note 184, at xi: "The battle is devious and the outcome ambiguous. Complexity and perplexity abound. The record is abstruse and, above all, obscure." The CIA's victories are Pyrrhic, defeats are resounding, and what "the KBG has not done, the CIA has managed to do to itself." *Id.* See also *First Defector*, *supra* note 184:

Watergate came to us at ISKAN [see *supra* note 184] as a shock. There were even suggestions that we had to stop talking of the weaknesses of American democracy and start talking of its strength. . . . Afterwards, . . . the anti-CIA hysteria . . . received a lot of pleasantly surprised attention. But I do not know of any "programme" to enhance the anti-CIA

of policy as its own cause. Unwittingly, "the United States accepted the communist definition of 'intelligence' and began to ape the adversaries in doctrine and practice."¹⁹² This is a game we "lose by winning. For, in time, if we accept the values of the enemy as our own, we will become the enemy."¹⁹³

C. *Exploring the False Dichotomy*

The CIA is a prisoner of its false, "us" and "them" dichotomy, false because the United States is not inherently all-good, the Soviet Union is not inherently all-bad, and the rest of the world does not split neatly in two monolithic, warring camps. The CIA itself is neither all-good nor all-bad, and therein lies another false dichotomy: a secret and hence unaccountably good CIA, versus the openness and hence the accountability of the (potentially) bad CIA.¹⁹⁴ Everybody talks about striking a balance between these policies,¹⁹⁵ but nobody does much about it in fact, as we have seen. There have been temporary political coalitions in favor of a particular balance. No balance has been meaningfully institutionalized through law.¹⁹⁶ Many conservative and liberal

campaign. The prevailing official view was that "they were exposing and ruining themselves—let them."

There is, of course, a parallel in arms policy: "The Other side is allowed to raise the ante, and to dictate the size and style of our forces. It is not on the basis of this version of deterrence, then, that the arms race may be restrained." Wiesletier, *supra* note 173, at 36.

192. Ransom, *supra* note 136, at 206. See Glennon, *supra* note 148, at 41 (America's true national security needs are related to "preserving the privacy of the individual rather than interests of the State" that is only a "mental construct;" these needs are "quickly forgotten against a backdrop of geo-political games where, on boards in policymakers' minds, one anthropomorphic state befriends another, betrays another, or bedevils another."); *infra* notes 225-26 and text accompanying.

193. D. WISE, *supra* note 120, at 412. See D. MARTIN, *supra* note 184, at 226 (quoted *infra* note 237).

194. See *supra* notes 61, 63, 90, 186-91 and text accompanying. See also H. WILENSKY, *supra* note 123, at 176-77 (discussing in detail "Doctrines that maximize [intelligence] distortion and blockage (e.g., misleading dichotomies):

"Facts" to "fill in gaps" vs. "evaluated facts" . . . "Intelligence" ("information gathering") . . . vs. "operations" (clandestine operations). "Overt" vs. "covert" intelligence. The notion that secret sources are superior. The "right to know" (vs. executive privacy in decision process and accountability for effects). Prediction or estimate vs. analysis and orientation.

195. See *supra* notes 128-29, 132-34 and text accompanying.

196. See *supra* note 37 and text accompanying; *infra* notes 222-34 and text accompanying. The balance is commonly struck by a temporary coalition of the executive branch and one or more of the following: Congress, the press, and interest groups. Franck and Weisband, *supra* note 154, at 404. This coalition is "built upon a common national team-interest and fear of defeat. . . ." Such a coalition favors "secrecy even

diagnoses of CIA shortcomings are correct, yet false dichotomies have hindered the search for creative solutions. From Kenneth Davis' perspective,

the main part of the problem has been to try to accommodate the national security interest and that of the individual; the weaknesses and failures have not involved subordination of the interest of the individual to that of the nation but have involved doing less to protect the individual interest than can be done without impairing the national interest.¹⁹⁷

The long-term effects of occasional exposés and governmental and public debates have been to make the CIA slightly less effective without making it significantly more accountable. Secrecy remains.¹⁹⁸ Past CIA mistakes "raise gnawing questions about intelligence breakdowns, confused or distorted evaluations, misinterpretations, . . . the ignoring of valuable information,"¹⁹⁹ and counterproductive covert operations. We may hope that CIA officials have learned from mistakes, taken greater account of human rights at home and abroad, and implemented internal

at the cost of the public's right to know and participate," subject to the "occasionally umpiring role of electorates and courts." *Id.* at 405. H. WILENSKY, *supra* note 123 at 130-31, argues that—

The dilemmas of intelligence in a democratic society are most evident in three areas: the maintenance of democratic control of secret intelligence agencies and secret police; the effects of patterns of secrecy and publicity on the development of an enlightened public opinion; and the efficacy of alternate means for discovering truth in the administration of justice—adversary and inquisitorial procedures, the testimony of unchecked experts, and scientific methods. The ideal is to strike a balance in which constraints on the proliferation of secret police, secret agents, and secret files are matched by constraints on the spread of punishing publicity and, further, to devise procedural safeguards that insure the privacy and liberty of the individual confronting a bureaucratic world.

Clearly, there are no regularized institutions or legal rules under which these dilemmas can be resolved. See Colby, *supra* note 123, at 4: "Institutionalization of American intelligence within the constitutional framework" has "not been completed."

197. K. DAVIS, *supra* note 146, at § 7.15. See *infra* note 523 and text accompanying (similar shortcomings in abortion policies).

198. Florence, *supra* note 124, at 128 (quoted in text accompanying *supra* note 124); Ransom, *supra* note 136, at 205 (intelligence "establishment" wields "power without accountability or responsibility—in the democratic sense"); Uhlmann, *supra* note 135, at 11 (the debate has focused on Church Committee's characterization of CIA as a "rogue elephant," rather than on solutions); Halperin, *supra* note 135, at col. 2 (quoted *supra* note 160); *supra* notes 146-63, *infra* notes 235-39, and text accompanying.

199. North, *supra* note 108, at 179. See H. WILENSKY, *supra* note 123, at 191.

reforms, but we have no way of knowing whether this is so under the veil of CIA secrecy.²⁰⁰

The CIA exerts a strongly conservative influence on our foreign and military policies, and it is thus not surprising that many conservatives are fervent supporters of the CIA.²⁰¹ For these conservatives (and for many moderates and some liberals), almost any threat to the dominant world position America attained after World War II is an extremely serious crisis. A coalition is usually mustered to take whatever steps are *perceived* as necessary to deal with the *perceived* crisis. (Courts almost always uphold these kinds of actions after the fact, even if rights are infringed in the process.²⁰²) Threats to national

200. F. DONNER, *supra* note 120, at 453 ("secrecy permits intelligence to function without accountability or control by the constitutional standards that prohibit interference with political expression."); Walden, *supra* note 125, at 234; H. WILENSKY, *supra* note 123, at 136 ("Not enough is known about the work of the FBI"—and, I would add, the CIA—"in record keeping, operations, or intelligence to judge its conformity to due process").

201. See Franck and Weisband, *supra* note 154, at 404-05 (discussed *supra* note 196); A. MILLER, *supra* note 16, at 207; *supra* notes 27, 175 and text accompanying. F. DONNER, *supra* note 120, at 452-53 argues that:

Intelligence as a means of containing movements for change, as a system of control, is simply too powerful a weapon in a highly conservative economic and social order lightly to be abandoned. The continued worldwide erosion of capitalist economic and social structures has clothed the defense of the status quo with a new urgency. . . .

See also D. WISE, *supra* note 120, at 311 (quoting Thomas Emerson): "At worst it [the FBI] raises the specter of a police state. [I]n essence the FBI conceives itself as an instrument to prevent radical social change. . . . [T]he Bureau's view of its function leads it beyond data collection and into political warfare." (Some have argued that the CIA has sometimes had the parallel function of regulating internal affairs under the foreign affairs prerogative.) *But see also infra* note 235 and text accompanying.

202. See F. CASTBERG, FREEDOM OF SPEECH IN THE WEST 411-18 (1960); C. MCLWAIN, CONSTITUTIONALISM, ANCIENT AND MODERN 139-40 (rev. ed. 1947); G. MARSHALL, CONSTITUTIONAL THEORY 32 (1971) (quoting Sir William Anson); A. Miller, *supra* note 16, at 97; Brietzke, *The "Seamy Underside" of Constitutional Law* (forthcoming) (and sources cited therein); *infra* notes 264-302 and text accompanying. See also, e.g., United States v. O'Brien, 391 U.S. 367 (1968) (Government's substantial interest in assuring continued availability of draft cards outweighs first amendment freedom to burn one of these cards); Barenblatt v. United States, 360 U.S. 109 (1959) (no first amendment right to remain silent on conviction for contempt of Congress, for refusing to disclose possible Communist Party affiliation); Dennis v. United States, 341 U.S. 494 (1951) (conviction upheld for failure to register party allegedly advocating overthrow of government by force); Korematsu v. United States, 323 U.S. 214 (1944) (conviction upheld on failure to obey statutorily-authorized military order excluding Japanese from designated areas); *Ex Parte* Quirin, 317 U.S. 1 (1942) (access to civil court only guaranteed to citizens, and alleged saboteurs could thus be tried militarily on President's order); Helvering v. Davis, 301 U.S. 619 (1937) (ignoring United States v. Butler, 297 U.S. 1 (1936), con-

security may be exaggerated in their perception or depiction, and politicians' or the CIA's *raison de groupe* may be advanced as the reason of state justification for actions taken, but the cumulative effect of crisis actions has been to aggrandize the military and related bureaucracies such as the CIA. Attempts to deal with present and future crises quickly, flexibly and effectively thus result in a massive but very *narrow* strengthening of the State. (Compared to those in European democracies, the American State remains very weak in the number and scope of welfare and economic guidance functions performed.²⁰³) Policymaking and implementation are skewed in particular directions by the exercise of a narrowly-focused, unchecked power in military and foreign policy. Many Americans are nevertheless able to retain the comforting image of living in a liberal democracy.²⁰⁴ Just as many conservatives want to trade butter for guns, so would they trade privacy and an accountability of the CIA for more security.

gressional powers unlimited in dealing with old age benefits during economic emergency); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (state mortgage moratorium law, interfering with contractual rights, upheld because of economic emergency); *Schenck v. United States*, 249 U.S. 47 (1919) (freedom of speech sacrificed to wartime hysteria); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978) (state secrets privilege absolute); *United States v. The Progressive, Inc.*, 467 F. Supp. 90 (E. D. Wis. 1979) (prior restraint on publication, based on a flimsy showing of danger to national security). *But see* *Scales v. United States*, 367 U.S. 203 (1961) (saving rights through narrow construction of legislation); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952) (President's seizure of steel mills because of strikes during Korean War not justified by emergency); *Ex Parte Milligan*, 71 U.S. 2 (1866) (after-the-fact invalidation of military tribunal proceeding during Civil War, in area where civilian courts' functioning unimpaired).

203. *See, e.g.*, H. WILENSKY, *supra* note 123, at 126 n.30 (quoted *infra* note 351); text accompanying *infra* note 219.

204. *See* G. BARRACLOUGH, AN INTRODUCTION TO CONTEMPORARY HISTORY 220 (1981); J. BERMAN AND M. HALPERIN, *supra* note 121, at 101-02; C. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 26, 76 (1977); E. LEWIS, *supra* note 123, at 146 (discussing Harold Lasswell's "garrison state" theory); *id.* at 121-23 (discussing Eisenhower's 1961 Farewell Address on the "military-industrial complex"); A. MILLER, *supra* note 16, at 149-50; G. POGGI, THE DEVELOPMENT OF THE MODERN STATE 136-37 (1978); Ransom, *supra* note 136, at 205; Walden, *supra* note 125, at 233-34; D. WISE, *supra* note 120, at 408; Brietzke, *supra* note 202; Halperin, *supra* note 125, at p. 3, col. 3 (President Reagan "talks about patriotism, about rallying around the government, when we're not even faced with a very serious foreign threat."); Turner and Thibault, *supra* note 118, at 124; Vogel, *Why Businessmen Distrust their State*, 8 BR. J. POL. SCI. 45, 53-54 (1978). Historically, the strengthening of the State has moved forward under a nationalistic fervor, political and economic crises, the modernization of warfare, and, in some countries, the scramble for colonies. Kirchheimer, *The Socialist and Bolshevik Theory of the State*, in POLITICS, LAW AND SOCIAL CHANGE 1, 7 (F. Burin and K. Shell, eds. 1969). The CIA is a facet of a modern police state, in which dispersed powers are knit together once again and used to establish a dominant policy position. *See* B. CHAPMAN, POLICE STATE 78 (1970); *infra* notes 225-26 and text accompanying.

Unfortunately, such a trade results in more intelligence rather than in more security. No tradeoff between accountability and security is apparent in America, and the fulcrum on which such a balance could be based has never been discovered.²⁰⁵ The futility of such a tradeoff was recognized by James Madison and by Alexander Hamilton,²⁰⁶ and, more pragmatically, by President Eisenhower: "Our security is the total product of our economic, intellectual, moral, and military strengths."²⁰⁷ While a country can never satisfy its craving for an absolute security, it can bankrupt itself morally and economically while attempting to do so.²⁰⁸

Some policy analysts have elaborated on Eisenhower's critique of a "military-industrial complex:" our strong State acting overseas constitutes a threat to liberal democracy under the weak State at home.²⁰⁹ While this should logically be a liberals' critique, many liberals (and moderates) have acceded to conservative demands for a strong CIA; the critique has been left to civil libertarians. (American leftists have surprisingly little to say about the CIA, perhaps because it offers pointed illustrations of the bureaucratic stultification and other horrors of the strong State that form the most potent critique of an

205. Harris, *supra* note 141, at 67.

206. See D. WISE, *supra* note 120, at 401 (quoting Madison, writing to Jefferson): It is "a universal truth that the loss of liberty at home is to be charged to provisions against danger real or pretended from abroad." See also A. MILLER, *supra* note 16, at 53 (quoting Alexander Hamilton): "[E]ven the ardent love of liberty will, after a time, give way to the dictates . . . [of] safety from external danger. . . . To be more safe, they at length become willing to run the risk of being less free."

207. Quoted in P. KOSTINEN, *supra* note 120, at 13.

208. *Id.* at 13-14.

209. See, e.g., F. DONNER, *supra* note 120, at xii (quoted *supra* note 124); *id.* at 452-53 (quoted *supra* note 201); Halperin, *supra* note 125, at 1, col. 1: The U.S. makes judgments

about whether what is going on in a foreign country constitutes such a gross violation of civil liberties that the U.S. should not provide assistance which will directly contribute to that violation. Inevitably those judgments affect perceptions within the United States, particularly . . . about what is an acceptable violation of civil liberties for the sake of national security.

[President Reagan] says that the lack of functioning newspapers in El Salvador is not a serious violation of rights because threats to the country's security justify the closing down of newspapers. . . . When the President says that it needs to be made a crime in the United States to publish the names of intelligence agents, he is making the same argument, namely that national security threats justify restrictions on freedom of the press.

See, e.g., Medow, *supra* note 135, at 826-27: There is intolerable risk in delegating our civil liberties to such foreign intelligence organizations as the Shah's SAVAK [or the Korean CIA or South Africa's BOSS].

American leftism.²¹⁰) The essence of the weak State is the fullest measure of civil liberties exercised by its citizens and, perhaps, a proselytizing for liberal democracy overseas.²¹¹ Most lawyers adopt this stance almost reflexively, on information and belief—until it comes into conflict with the real and supposed requirements of national security. When this point comes, as inevitably it does, conservatives almost uniformly prevail, favored as they are by the “us” and “them” dichotomy, by the organizational muscle of groups such as the CIA, and by legal and policy processes generally.²¹² Critics of the strong State in national security affairs are thus left in what is *perceived* as an extremist, ACLU position, with calls for extensive civil liberties exacted from a fully accountable CIA—which would be weaker because it is less secret. For example, the ACLU’s Morton Halperin argues that:

The main consequence of pursuing a policy through covert operations rather than openly is that you make it almost impossible to have the public debate the First Amendment demands on issues as grave as war and peace.

The only way to deal with the problem is to simply prohibit the conduct of covert operations.²¹³

Covert operations certainly do restrict public debate, but Halperin’s prescription is put too baldly to have much effect in the real world. If the question is whether we want to retain covert operations, at least as a policy option, all but the most adamant of civil libertarians would answer “yes.” In other words, covert operations will win out

210. See M. Kelman, Comment, The Past and Present of American Legal Scholarship, AALS Plenary Session, Cincinnati, Jan. 7, 1983. (American Leftism all but ignores the social democratic, Trotskyite, and anarchistic thinking that has sprung up elsewhere in response to these criticisms).

211. Legal liberalism is “orthodoxy . . . premised on the paired assumptions of the postwar liberal states: majority rule and minority rights; affirmative government and autonomy from government interference; the furthering of economic and technological progress and the preservation of humanist values.” G. White, *supra* note 62. These “paired assumptions” arguably have the effect of false dichotomies, in the sense that an inability to pass between them has handcuffed liberal policymaking. They can be profitably analyzed in a dialectical fashion, however: See *infra* notes 601-08 and text accompanying. A liberal-left critique, of the CIA is, of course, possible, but not all that common: See Raskin, *supra* note 120, *passim*.

212. See Brietzke, *supra* note 202; *infra* notes 556-82 and text accompanying. See also *supra* notes 27, 30, 171-73, 178-79 and text accompanying.

213. Halperin, *supra* note 125, at 2, col. 3. See 119 CONG. REC. 25,079-80 (1973) (quoted *infra* note 331). But see also H. WILENSKY, *supra* note 123, at 130 (quoted *supra* note 196); *infra* note 235.

in any struggle with an absolutist First Amendment.²¹⁴ A compromise of conflicting policies must be found: the Constitution is neither "a compact of convenience"²¹⁵ nor "a suicide pact."²¹⁶

In this and other areas of national security policy, the most that civil libertarians can hope for is a balance which is far from wholly protective of civil liberties. Aiming for much more than this, the critics wind up with much less. They lack the organizational cohesiveness to pursue unpopular remedies which, for the most part, seek to treat symptoms, i.e., civil liberties violations, rather than the disease. The disease is found in such lacunae of governmental accountability as the CIA.²¹⁷ It is unfortunate in at least some respects that the civil libertarian critique of the CIA is so weak politically and argued so unrealistically. *If* we are serious about retaining something like liberal democracy in America—and the refusal (since President Johnson's Great Society ended) to take further steps down the road to social democracy or welfare statism²¹⁸ indicates that we are serious—military

214. Compare Halperin, *supra* note 125, at 2, col. 3; *id.*, at 1, col. 1 (quoted *supra* note 209), with Turner and Thibault, *supra* note 118, at 137: The June 1982 Act making it a crime to identify covert agents represents a major step in the right direction. The media reflexively oppose any limits on what can be written or said; but this represents a parochial and unrealistic viewpoint. The new legislation can protect U.S. intelligence officers without jeopardizing the fundamental freedom of the press.

It is the perceived extremism of the civil libertarians' stance that allows ex-CIA Director Turner, in an otherwise surprisingly balanced article, to describe a "reflexive," "parochial and unrealistic" opposition by the media—adjectives used by many to characterize CIA attitudes. See also K. DAVIS, *supra* notes 146, at § 7.15 (quoted *infra* note 222); *supra* notes 129, 154-55 and text accompanying.

215. Glennon, *supra* note 148, at 40.

216. Kennedy v. Mendoza-Martinez, 371 U.S. 144, 160 (1960) (quoted in Glennon, *supra* note 148, at 40).

217. See *infra* notes 235-43 and text accompanying. See also Schwartz, *Cycles of Reform: Existential Commitment Rather than Cynicism*, 4 DET. COLL. L. REV. 1418, 1420-23 (1983): the ACLU's opposition to Sen Kennedy's Criminal Code Reform Act of 1978 (S. 1437; H.R. 6869) is a perfectionist obstacle to pragmatic law reform, an instance of the best being an enemy of the good. The Bill makes hundreds of improvements, and most of the "hysterical" ACLU objections are to the Bill's re-enactment of existing rules. *Id.* at 1421. Thus the ACLU makes common cause with the Right to defeat reform. *Id.* at 1420.

218. "Social democracy" here refers to the constitutional goals of Western states dedicated to a genuine socio-economic equalization through gradual reforms which retain as much of liberal democracy as possible. A "welfare state," on the other hand, is a cradle-to-grave caring for the public, even at the sacrifice of much individual choice. It describes the projected outcome of the search for stability by communist party-states, and the constitutional path of those Western states where liberalism was never firmly rooted or where there is a willingness to trade more of the tenets of liberalism for more of the advantages of the strong State. Of course, a particular polity may

and intelligence agencies will have to be curbed. Restrictions are needed to stop CIA officials from taking advantage "of every loophole, of every ambiguity in order to broaden the powers of the intelligence agency."²¹⁹

Absolute curbs are unattainable politically, but there is a need to direct the flow of power and other resources away from the strong State and towards the private autonomy in political (and economic) activity that is struggling to keep its place in American life. Otherwise, there will always be a thumb on the scale when the needs for guns and butter come to be balanced. Threats to national security and the organizational needs of entities such as the CIA will be exaggerated to the point where accountability appears impossible. And, if strong State policies set the tone of public law, the danger is that the executive branch will treat foreign affairs prerogatives as permanent and more extensive licenses to regulate domestic matters.²²⁰

There is precious little accountability of the CIA. I have gone into much detail about CIA practices to demonstrate that informal

reflect social democracy in some of its programs and welfare statism in others. See H. WILENSKY, *supra* note 123, at 126 n.30 (quoted in note 346, *infra*); R. WILLIAMS, KEYWORDS 281 (1976) ("welfare"); THE FONTANA DICTIONARY OF MODERN THOUGHT 579, 672-73 (A. BULLOCK AND O. STALLYBRASS, eds. 1977) ("social democracy" entry by Leopold Labedz and "welfare state" entry by Donald Watt); Brietzke, *supra* note 202; *supra* note 6 and text accompanying.

219. Uhlmann, *supra* note 135, at 11 (quoting Morton Halperin).

220. Franck and Weisband, *supra* note 154, at 401. See North, *supra* note 108, at 205; Walden, *supra* note 125, at 233-34; H. WILENSKY, *supra* note 123, at 130-31 (quoted *supra* note 196); *supra* notes 12, 123 and text accompanying.

One danger is that the National Security State will eliminate an historically-important function of liberalism: the orderly processing of change. Raskin, *supra* note 120, at 219. The CIA's low-profile, domestic policing responsibilities may create "a society programmed for fear, and a nation wracked by long-suppressed tensions." F. DONNER, *supra* note 120, at 463. Some would argue that it is "not altogether surprising" that a secret CIA, "spending billions [an estimated \$12 billion in 1975] in hidden funds, and operating outside normal constitutional and political controls, had become a corrupt force in American society." D. WISE, *supra* note 120, at 185.

Public debates in these matters are intensely ideological. They are thus open to cynical manipulation:

Dollars given to the Pentagon are dollars taken away from the poor. [We] are told to choose between the welfare state and the warfare state. It is also argued, in a similar vein, that the criterion for military spending must be economic need, that capital must be transferred from the military industries to the civilian industries if the decline in American economic power is to be reversed. . . .

"[T]he modern emphasis on the education, health, and welfare of the common man is in fundamental conflict with foreign policies based on regarding man elsewhere as a legitimate object of aggression and oppres-

controls—controls vital to the functioning of other agencies in America—are sporadically applied, confusing in operation, and open to abuse.²²¹ With regard to formal controls, conventional notions of administrative “law,” “process” and “agency” are not applied to the CIA,²²² the “mortal enemy” of the rule of law.²²³ Unlike the “lawyer’s

sion.” Of this, certainly, we may be proud; and this philosophical condition accounts in part for the difficulty faced by recent Administrations in winning popular support of double standards in their positions on human rights.

Weiseltier, *supra* note 173, at 14-15 (source of quote not identified). The terms of such public debates can be cynically manipulated by the CIA, “the ideal vehicle for a conspiracy . . .” H. WILENSKY, *supra* note 123, at 133 (quoting Allen Dulles). For example, CIA newsreel footage shows “how changes in power in countries such as Cuba and Guatemala were ominously portrayed to heighten anticommunist feelings in the United States.” Hall, *supra* note 120, at 18, col. 3. CIA Director Casey offers another, clear example (*Casey Asks Freedom from FOIA*, *supra* note 125, at 2): “Only recently have we established . . . the accuracy, the precision and the power of Soviet weapons, which we are required now to counter with budget-busting appropriations. . . .” If Soviet weapons capability has again been overestimated, as it was during the Kennedy-era “missile gap”, we will have spent money to benefit the strong State rather than ourselves. The danger is that, unless “the tell-tale signals and clues are being monitored, the whole nation may find itself caught up in a runaway, less and less controllable positive feedback situation—an arms race, a monetary crisis, inflation, depression, crime wave, trade war, revolution or the like.” North, *supra* note 108, at 199. *See id.* at 196. We would like to think that organizations like the CIA are monitoring such “signals” accurately and in good faith, but we cannot be certain that this is the case under veils of secrecy.

An even more subtle example is offered by Turner and Thibault, *supra* note 118, at 138: “Congress could minimize the risks of reopening” the longstanding debate over enacting a charter to regulate the CIA “by establishing in advance that the major issue to resolve is the degree of intrusion the public must accept.” *See FOIA Testimony Presented*, *supra* note 141, at 4 (quoted *infra* note 261). Presumably, the risks to be minimized are risks to the CIA, first and foremost. The public “must accept” intrusion because of the ways in which debates over the CIA have been cast.

221. *See Ransom*, *supra* note 136, at 210-11 (on the CIA)(“While a structure for authority exists, real control has been absent because . . . of bureaucratic pluralism and free-wheeling activity by its various units.”); *supra* note 137 and text accompanying. Informal controls include, e.g., “plausible deniability” and the “need to know.” *See supra* note 120 and text accompanying. These are also sources of administrative law, albeit weak and tenuous sources: *See K. DAVIS*, *supra* note 146, at § 4.11. For this reason, I have devoted a great deal of space to officials’ speeches.

222. K. DAVIS, *supra* note 147, at 220. *See id.* at 223; K. DAVIS, *supra* note 146, at § 7.15 (discussing national security exception to general rule that a party with a sufficient interest at stake is entitled to a trial-type hearing on issues of adjudicative fact): “our legal system is clear that when national security is jeopardized a young man may be legally compelled to expose himself to enemy fire; if life itself may give way to the national security interest, then clearly the right to a hearing may.” *See also supra* note 147 and text accompanying.

223. Raskin, *supra* note 120, at 199, 202 (citing B. SCHWARTZ, *THE POWERS OF GOVERNMENT* 26 (1963)). The rule of law entails: “1) The absence of arbitrary power; 2)

law" I surveyed in relation to contract, the CIA's regime is at most a law of social administration; it is almost totally of concern to officials who translate questions of policy and purpose directly into action. Just as the police have an almost unlimited discretion to issue tickets now and secure convictions later, so is the CIA a law unto itself. National security is nowhere defined in the statutes and executive orders ostensibly governing it. What amounts to national security is thus defined tautologically by the ways officials exercise unchecked power in the name of national security.²²⁴ The CIA's legal regime follows a particular continental model, the police state,²²⁵ which "leaves it to the official to subordinate the interests of some to those of others by iden-

The subjugation of the State and its officers to the ordinary law; and 3) the recognition of basic principles superior to the State itself." *Id.* The CIA does not feel, and is not made to feel, that it must bear these legal costs: see *infra* notes 231-34, and text accompanying. See also B. CHAPMAN, *supra* note 204, at 67: "The Gestapo drew . . . unwritten authority from the fact that it worked according to 'special principles and requirements' as opposed to the civil administration's general and regularly legalized rules."

224. K. DAVIS, *supra* note 147, at 154; G. SAWER, *LAW IN SOCIETY* 64-65, 127-30 (1965); Glennon, *supra* note 148, at 40 ("Under the best of circumstances it is no easy task to identify what is necessary to this nation's security and well-being, and to devise policies based on a balance of diverse, sometimes conflicting, national goals."); *id.* at 40-41; Raskin, *supra* note 120, at 193. See B. CHAPMAN, *supra* note 204, at 83: Police powers are exercised under an intuitive sense of values—which may not match those in the wider society. It is, of course, true in all fields that, to "a significant degree, policy turns out to be what the administrators choose to do, not what an ostensible policy decision declares." C. LINDBLOM, *supra* note 2, at 66-67. See K. DAVIS, at 154. *But see* *United States v. Robel*, 389 U.S. 258, 264 (1967) ("National defense" not an end in itself but a defense of values and ideals setting this nation apart, such as freedom of association).

225. For four decades (seven administrations) police and intelligence agencies have secretly violated laws and the Constitution—in a uniquely American police state. D. WISE, *supra* note 120, at 398. Historically, the police power was part of the uncontrollable sovereign authority of the State, an "estate" owned by the monarch. The 18th century Prussian *Polizeistaat* was a product of economic, social and military policy exercised for the common good. This included not only individual welfare but State strength too, since State welfare was thought to transcend that of individuals. Political, legislative and administrative authority is fused in a police state, where the bureaucratic values of order, form, and discipline are imposed on the public and private lives of citizens. Interference with private life is unrestricted, so that the general welfare, public security, and order can be achieved. After 1870, European jurists sought to tame the *Polizeistaat* by using, for example, French separation of powers *doctrine*. The Weimar Republic's *Reichstaat* was too weak to prevent the reversion to a *Polizeistaat* harnessed to the Nazi ideology. B. CHAPMAN, *supra* note 204, at 12-15, 17, 31, 34, 41, 44, 54. America and England have been historically willing to tolerate a greater measure of disorder, rather than risk police state incursions into liberties. American police powers are imprecise and subject to a changing Supreme Court jurisprudence. But a narrow police state has been allowed to grow up in foreign and

tifying the latter with the public interest according to policies of his own."²²⁶

Some would reject this conclusion and argue that particular CIA activities are unconstitutional or *ultra vires*, constitute crimes, or violate treaties or other aspects of international law.²²⁷ These arguments are not analyzed in detail because they miss a fundamental point, a point obvious to the CIA. Declarations of CIA illegalities may assuage the speaker's moral outrage and, perhaps, influence public opinion a bit. They will not serve to hold the CIA accountable (at least in the short run), however, unless the declarer has the capacity to visit such unpleasant consequences on miscreants as the loss of powers, jobs, budgets or the secrecy of information. Holding the CIA accountable is, in the words of then-Senator Walter Mondale, "like nailing jello to the wall."²²⁸ An impasse among factions and govern-

military policy without Court interference. *Id.* at 50. See *supra* notes 201-06, and text accompanying.

There is nothing specifically left wing or right wing about the police state. The KBG and CIA can imitate each other in attempts to create "little" police states, based on the notion that they are the only wholly reliable bastions of State interests. B. CHAPMAN, *supra* note 204, at 135. See *id.* at 114.

226. R. POUND *supra* note 37, at 15. See Emerson, *Control of the Intelligence Agencies*, 1983 DET. COLL. L. REV. 1205, 1205-06 (1983); *supra* note 225.

227. Walden *supra* note 125, at 221, 229, 233-34. The Rockefeller Commission reported to President Ford that many CIA actions are "plainly unlawful" infringements of "the rights of Americans." D. WISE, *supra* note 120, at 184-85. Similar discussions are usefully collected in J. BERMAN and M. HALPERIN, *supra* note 121, at 156-73, *passim*. Particularly noteworthy are analyses by New York Bar Association Committees (see *id.*, *passim*, quoted in part *supra* note 165) and enumerations of the (mostly 18 U.S.C.) crimes committed by the CIA:

- conspiracy to infringe upon the civil rights of citizens by violation of their First, Fourth or Fifth Amendment rights. (Section 241)
- warrantless electronic surveillance. (Section 2511)
- burglaries in violation of state and local laws.
- warrantless searches of homes. (Section 2236)
- opening of the mails and the copying of the contents. (Sections 1702 and 1708)
- obstruction of justice. (Sections 371 and 1503)
- conspiracy to violate federal law. (Section 371)
- destroying or concealing public records. (Section 2071)
- making false statements. (Section 1001)

In addition, many of the activities of the intelligence agencies, including the CIA domestic intelligence gathering and the FBI COINTELPRO, appear to go beyond the charters of the agencies.

J. BERMAN and M. HALPERIN, *supra* note 121, at 156. See *id.* at 157-70. The CIA's refusal to publish an accounting of expenditures would appear to violate the Constitution, Art. 1, Sec. ix, cl. 7. *Id.* at 170.

228. D. WISE, *supra* note 120, at 214 (quoting Mondale).

mental branches is guaranteed to result from attempts at accountability. The Constitution, "an instrument for all seasons," leaves each to his own devices on this issue.²²⁹ Neither the executive nor Congress can claim the exclusive right to settle boundaries between them, of course; and, in the quintessentially gray area of foreign affairs, the Constitution's draftsmen went beyond a separation of powers to hedge their bets under "an invitation to struggle," among the branches of government and between government and the governed.²³⁰ The CIA is immune *de facto* to both the checks and balances associated with a separation of powers and the legal-rational legitimacy described by Max Weber²³¹—and CIA officials know this. Testifying in closed session before the Church Committee, a senior CIA official with a long service record said: "It's inconceivable that a secret intelligence arm of the government has to comply with all the overt orders of the government."²³² Few are so overtly defiant in a covert CIA, and this

229. Franck and Weisband, *supra* note 154, at 428. See *supra* note 196. The "popular dimensions" of the American Constitution, those which concern the organization of parties and constitutional protections of political activities, "are more largely conditioned today by factors of culture and technology outside the constitutional frame." The coalitions that result are "continuously labile and unstable." Gilbert, *The Shaping of Public Policy*, 426 *Annals* 116, 127, 130 (1976). But overall and with regard to the CIA in particular, "culture," "technology," and "coalitions" are hostile toward an increased accountability. There are four constitutional standards for CIA practices—and that's a large part of the problem: 1) maximal authority derived from presidential powers under the U.S. Const. Art. II, supplemented by congressional authority delegated under Art. 4; 2) modified authority under more strict congressional delegations, supplemented by powers implied in U.S. Const. Art. II; 3) authority based on 1) or 2), constrained by judicial review and interpretation of the 1st, 4th, 5th, 9th, 10th and 14th Amendments; and 4) discretionary standards from 1)-3), promulgated by a president to limit encroachments on a free society. Harris, *supra* note 141, at 72.

230. T. Franck, *Constitutional Practices Since Vietnam*, Address to Congress, the President, and Foreign Policy Conference, Washington, D.C., May 10, 1984; Mathias, *Executive Privilege and Congressional Responsibility in Foreign Affairs*, in *SECRECY AND FOREIGN POLICY* 69, 86 (T. Franck & E. Weisband, eds. 1974) (quoting E. CORWIN, *THE PRESIDENT* 171 (4th rev. ed. 1957) and Madison's *Federalist*, No. 49).

231. See Miler, *supra* note 121, at 63 (quoted and discussed *supra* note 137 and text accompanying); Medow, *supra* note 135, at 837 (under case decisions—and, I would add, other legal regimes—concerning the CIA, the fit between ends and means is too loose); *infra* notes 270-71, 304, 565-68 and text accompanying. See also E. LEWIS, *supra* note 123, at 161: "The politics/administration dichotomy of Max Weber and Woodrow Wilson simply does not work. The separation of powers doctrine, so dear to the heart of American democratic ideology, is also in some difficulty. The public/private distinction has been dealt a series of blows in the political and scholarly worlds." American public administration is better at checking discretion than in confining or structuring it. K. DAVIS, *supra* note 147, at 228. It is thus unfortunate that checks upon the CIA are virtually nonexistent: "Institutional decisions at their best draw much strength from built-in systems of checks and balances." *Id.* at 143.

232. D. WISE, *supra* note 120, at 208 (quoting Angleton). See *id.* at 399 (quoting

statement was retracted in open session. The official did admit openly to the misleading of presidents, however.²³³ More representative is the Church Committee testimony of William Sullivan, who never heard "anybody raise the question: 'Is this course of action which we have agreed upon lawful, is it legal, is it ethical or moral?' [W]e were just naturally pragmatists."²³⁴ If so, it takes pragmatists (rather than, *e.g.*, civil libertarians) to curb other pragmatists.

A pragmatic accountability of the CIA has not been forthcoming under law because the policy problem has been badly put, as a false dichotomy between security and accountability. Most conservatives do not wish to erode liberal democracy to any extent which is not required for purposes of national security; it is, after all, liberal democracy that most conservatives are trying to conserve. Most civil libertarians do not want a CIA any weaker than necessary to conserve the civil liberties that are undoubtedly exposed to foreign threats too.²³⁵ Many conflicts between these rivals' positions are thus apparent rather than real (the fruits of a false dichotomy), although significant conflicts undoubtedly exist at the margins. A sensible policy would strike a balance over these marginal conflicts, after a larger consensus has been secured. My candidate for a politically-realistic consensus—a means of passing between the horns of the false dichotomy of secrecy and accountability—revolves around the policy precept of a CIA *competence*: the CIA must do effectively what we as Americans²³⁶ want it to do—and nothing more. This precept takes advantage of a consensus which already exists: the CIA has frequently proved itself incompetent, and we should focus on making it much less so in the future rather than merely excavating past misbehavior.²³⁷

Tom Charles Huston, author of the Huston Plan): "We faced an extraordinary situation requiring an extraordinary response, and you don't want a constitutional, legal mandate for that kind of thing. You don't want to institutionalize the excesses required to meet extraordinary threats." President Nixon ordered the CIA to destroy its biological weapons in 1970, and a mid-level official refused to destroy part of the stock. After his retirement, a successor assumed that remaining stocks had official sanction. G. EDWARDS, *supra* note 19, at 135.

233. D. WISE, *supra* note 120, at 207, 209.

234. *Id.* at 403 (quoting Sullivan).

235. See *supra* notes 201-14 and text accompanying; *infra* note 520 and text accompanying.

236. See Aspin, *supra* note 42, at 37. Put thus, my projected consensus may sound like a dissensus deferred, to what "Americans" want to do. I will argue that this is not the case: see *infra* notes 573-82 and text accompanying.

237. A consensus over CIA incompetence (at least in the past and with a fair degree of frequency) exists among liberals and conservatives alike. Many of the latter no longer believe that expressing such attitudes constitutes an attack on national security itself. For liberal views, see, *e.g.*, Aspin, *supra* note 42, at 32 ("The real issue

The CIA is not the monolith it may appear to be.²³⁸ It is not a take-it-or-leave-it instrument of policy, despite the way some conservatives put the issue: "Do we want a strong CIA or not?" It is clear, once the false dichotomy is discarded, that we want a *more effective* CIA for some purposes, and no CIA activity at all in other areas. A narrower CIA effectiveness and the broader protection of civil liberties should both be expanded until they come into conflict with each other, a point which would take some time to reach under even the most sensible of policies. Once greater measures of both security and accountability are attained, the remaining policy conflicts could be compromised more easily. Of course, this would be most easily achiev-

now is the quality of intelligence much more than the control of abuses"); North, *supra* note 108, at 179 (quoted in text accompanying *supra* note 199); Shattuck, *supra* note 135, at 7-8. For conservative views, see, e.g., Casey, *supra* note 182, at 3; Godson, *Introduction*, in INTELLIGENCE REQUIREMENTS for the 1980s 1, 3 (R. Godson, ed. 1979) (debate has focused on past failures rather than future intelligence needs); *id.* at 7; Halpern, *supra* note 158, at 42; *id.* at 44 ("the lack of direction or an inadequate concept of priorities . . . may have led [intelligence] collectors in Iran to avoid the time-consuming effort involved in collecting information on the dissidents."); Miler, *supra* note 121, at 49 (discussed *supra* note 135); Tovar, *supra* note 121, at 68 (CIA "clandestine efforts reflect an all too pervasive mediocrity that bodes poorly for the future."); Uhlmann, *supra* note 135, at 12; *Casey Confirmation Hearing*, *supra* note 167, at 4 (quoting CIA Director) ("it is a time to make American intelligence work better and become more effective and more competent and make the members of its establishment respected and honored.").

In a radio interview, William F. Buckley maintained that an attempted assassination of Indonesia's Sukarno had all the earmarks of a CIA operation: everyone was killed except Sukarno. (Regrettably, I have lost the citation.) If this was intended as a humorous remark, the humor lies in its plausibility. A U.S. attorney in San Diego was fired by President Reagan because he investigated a former Mexican official/CIA informer, for his involvement in a multimillion-dollar California car theft ring. Landau, *CIA, Its Allies Gain Secrecy Victories*, VIDETTE-MESSENGER (Valparaiso, In.), April 14, 1982, 4 at cols. 1-2. While the CIA adroitly halts the domestic publication of unclassified information freely available to our enemies, Britain's Geoffrey Prime has been giving away many of our real secrets, as a result of incompetence which comes close to defying description. See *infra* note 302 and text accompanying. It sometimes seems that CIA officials act out a Samuel Beckett scripting of a Dostoyevsky novel. See, e.g., a biography of two long-serving CIA officials, Angleton and Harvey: D. MARTIN, *supra* note 189. Manuevering on a "darkling plain" for decades without fear of accountability, (*id.* at xii), their careers

were mired in absurdities, not the least of which was that they habitually violated the democratic freedoms they were sworn to defend. [A]bsurdity became the only logic they knew. Immersed in duplicity and insulated by secrecy they developed survival mechanisms and behavior patterns that by any rational standard were bizarre. . . . The game attracted strange men and slowly twisted them until something snapped. There were no winners or losers in this game, only victims. *Id.* at 226.

238. See *supra* notes 174-78, and accompanying.

ed under a consensus-seeking foreign policy, a sharing of credit and blame by Congress and the President such as developed under the Monroe and Truman Doctrines.²³⁹

How can appropriate criteria of a CIA competence be devised? Surprisingly, perhaps, Antonio Gramsci offers a good beginning: "The great states have been great precisely because they were at all times prepared to enter effectively into favorable international situations, and these situations were favorable because there was the concrete possibility of effectively entering them."²⁴⁰ Note that entry must be effective, based on sound information and judgment, for, as Roger Hilsman argues:

If a . . . great power uses the techniques of subversion to bring down foreign governments . . . [others] have a right and duty to defend themselves . . . [by methods which] are *effective and appropriate and for which methods there is no effective and appropriate alternative.*

The trouble has been . . . [that, in] the past, the United States has too often used methods when they were *not* effective and appropriate or when there *were* effective and appropriate alternatives.²⁴¹

If we borrow analyses from antitrust law, Hilsman is understood to recommend that rules of reason be applied to CIA activities, rather than the "bright line" rules of a *per se* illegality that would probably be successfully ignored by the CIA anyway.²⁴²

239. See K. DAVIS, *supra* note at § 7.15 (quoted in text accompanying *supra* note 197); K. DAVIS, *supra* note 147, at 154 ("we surely can and should do far more than we have to eliminate the absolute discretion that we find to be unnecessary or unjustified."); Franck, *supra* note 230; P. WHEELWRIGHT, *supra* note 35, at 317; H. WILENSKY, *supra* note 123, at 130-31 (quoted *supra* note 196); *supra* notes 23-24; *infra* note 522 and text accompanying. During the Iranian hostage crisis, a Lou Harris poll (discussed in P. HACKES, ET AL., *supra* note 42, at 1) showed that 73% of Americans favored stepping up intelligence activities, and 19% did not. This suggests that the public equates more activity by a stronger CIA with a better, more effective CIA—which is arguably one effect of the false dichotomy on public opinion.

240. A. GRAMSCI, *The Modern Prince*, in *THE MODERN PRINCE AND OTHER WRITINGS* 135, 173 (L. Marks, transl. 1957).

241. Hilsman, *supra* note 121, at 175.

242. See *United States v. Snapp*, 444 U.S. 507, 518-19 (1980) (Stevens, J., dissenting) (discussed *infra* note 294); Medow, *supra* note 135, at 827 (under a compelling state interest challenge to restraints on publications dealing with the CIA, the argument should be that another type of restraint is less intrusive, and capable of satisfying friendly foreign intelligence agencies—rather than a "no prior restraints" argument); *supra* notes 58, 219, 232-33 and text accompanying.

No overall box score has even been kept on the CIA in this fashion, with a view toward, for example, maximizing the usefulness of a stated minimum of covert intervention or maximizing the information obtained from a stated minimum of intrusion on privacy. This, rather than a CIA which sometimes runs amok, would result in more efficient pursuit of the public interest.²⁴³ These notions can be traced back at least as far as the hostility to a then-nascent police state expressed in *Rook's Case* (1598):²⁴⁴ wide powers must be exercised reasonably, "for discretion is a science or understanding to discern between falsity and truth, between wrong and right, . . . and not to do according to their wills and private affections." This notion survives in our law (and more fully in French law), even in the face of broad statutory grants of discretion.²⁴⁵ As we shall see,²⁴⁶ there are significant but not insurmountable barriers to its application in the area of national security.

CIA officials suspect that, as censors of behavior, they will never be loved at home or abroad. They want and need to be respected, however. In 1971, the CIA Director rather grandly announced: "The nation must, to a degree, take it on faith that we, too, are honorable men devoted to her service."²⁴⁷ But many Americans were reluctant to "take it on faith" rather than on disclosure and evaluation, after the Cold War consensus that legitimated CIA activities came unraveled during an era of détente, Vietnam, and Watergate.²⁴⁸ According to Stansfield Turner: "[T]he intelligence community has to merit public support by avoiding the mistakes of the past and by providing the anticipatory and objective reporting that the nation needs."²⁴⁹ Put another way by Potter Stewart, "secrecy can be preserved only when credibility is truly maintained."²⁵⁰

CIA and other governmental officials frequently misunderstand the nature and effect of public mistrust and cynicism. Consider some of their arguments:

243. Harris, *supra* note 141, at 75; H. WILENSKY, *supra* note 123, at 64. See Harris, at 67 (citing B. WHALEY, STRATEGEM (1969)); *supra* note 186 and text accompanying.

244. 5 Co. Rep. 99b. See B. SCHWARTZ, ADMINISTRATIVE LAW, 608 (1976).

245. B. SCHWARTZ, *supra* note 244, at 610-11, citing *Barlow v. Collins*, 397 U.S. 159 (1970) (concerning broad grant to Secretary of Agriculture) and arguing that this rule may include unjustified use of discretion, as well as its abuse. See N. BROWN AND J. GARNER, FRENCH ADMINISTRATIVE LAW (1973).

246. See *infra* notes 268-303 and text accompanying.

247. Quoted in Ransom, *supra* note 136, at 217 (speech to National Press Club).

248. Colby, *supra* note 123, at 10. See *supra* notes 132-33 and text accompanying.

249. Turner and Thibault, *supra* note 118, at 136.

250. Quoted in Moorehead, *supra* note 128, at 108. See Moorehead, at 109.

[T]he loss of Afghanistan is alleged to be a serious threat to our interests. Strong support for that position among the American people is doubtful, however, and probably few believe that a free and independent Afghanistan is essential to this country's vital interests. Similarly, it is doubtful that the American public would support strong military moves to keep Pakistan free and independent. As a result of this lack of consensus, our allies and adversaries are at a loss in discerning where our vital interests lie.²⁵¹

On the contrary, all but those who are prisoners of the "us" and "them" dichotomy are able to discern a new, post-Vietnam consensus. It is no simple isolationism; it seems to combine yearnings for a more liberal democratic foreign policy with an unwillingness to take officials' assertions of a "free and independent" Pakistan, El Salvador, and so forth at face value. Many Americans realize that, trying "to make policy while ignoring the past, we become allies of a false version of 'stability' that requires us to support reactionary regimes that no American would find acceptable in this country."²⁵² It is almost as if Americans were reading John Stuart Mill: Our desires should not be imposed on others if we would regard as unjust their desires imposed on us.²⁵³ (Opinion polls concerning abortion²⁵⁴ suggest that this is indeed an important strand in the thinking of many Americans about public affairs.)

Clearly, any administration or agency whose statements and policy justifications are not consistently believed is in deep trouble in a democracy, unless it is democracy itself which is in trouble with its strong State. The rejection of expertise that "was termed the 'credibility gap' in the Johnson Administration's relations with the public is not peculiar to any one president; it is a growing problem of modern governments, as foreign policy becomes central to domestic politics and welfare, and as the blanket of secrecy is spread wide."²⁵⁵ Many a government faces such a crisis of legitimacy,²⁵⁶ a crisis for which the CIA bears part of the blame in the United States.

251. Toon, *The Soviet Threat*, 17 WILLIAMETTE L. REV. 57, 61 (1980) (speech to ABA Standing Committee on Law and National Security, by former Ambassador to Moscow). See *supra* notes 187-91, 194 and text accompanying.

252. Kaiser, *supra* note 166, at col. 4. See *id.*, col. 1 (quoted in text accompanying *supra* note 166) for a more pragmatic justification of this position.

253. See W. CONKLIN, IN DEFENSE OF FUNDAMENTAL RIGHTS 126-29 (1979) (discussing Mills's principle of "self-regarding conduct").

254. See *infra* notes 517-18 and text accompanying.

255. H. WILENSKY, *supra* note 123, at 154. See *supra* note 8 and text accompanying.

256. J. FREEDMAN, *supra* note 8, *passim*; J. HABERMAS, LEGITIMATION CRISIS (1976).

All of this may sound like a trite civics lesson. It is no less important for that or for the fact that, pursuing its short-term policies, the CIA often seems heedless of its, and government's, longer term needs for legitimacy. CIA officials are unlikely to volunteer to accept restraints on power, even those restraints plausibly designed to increase CIA effectiveness, at the cost of supervisions which would frequently annoy these officials. The "us" and "them" dichotomy is so deeply ingrained that the CIA will almost certainly continue to proceed regardless, by identifying its organizational and ideological imperatives as those of the nation.²⁵⁷ Our public interests have always been defined very abstractly, in ways convenient for manipulation by the CIA in default of our own resolute judgments.²⁵⁸ If we want to control the CIA and other manifestations of the strong State, we must decide for the first time what our national security interests really are and what, precisely, the CIA is to do and not do about them. In particular, we have to decide from time to time exactly who our "enemies" really are; better yet, we should abandon this rather

See Kristol, *On Corporate Capitalism in America*, 41 PUB. INTEREST 124, 126-27 (Fall 1975): "[Populism is] the constant fear and suspicion that power and/or authority, whether in government or out, is being used to frustrate 'the will of the people.' It is a spirit that intimidates authority and provides the popular energy to curb and resist it." The major sources of legitimacy involve discursive justification and/or canny manipulation. To the extent that legitimacy exists, fewer of the other resources used to secure compliance with decisions (*infra*) need be deployed. In the legitimation process, flows (rather than stocks) of legitimacy are augmented as well as depleted by the timely implementation of policies which the public thinks sensible. Government's claim to obedience then seems self-evident to all but marginal recalcitrants. Many of the resources used to secure compliance with decisions, such as law, public participation, coercion, charisma, ideology, and the wise exercise of an unfettered discretion, also serve as sources of legitimacy. See R. DAHRENDORF, *CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY* 200 (1959); S. FINER, *COMPARATIVE GOVERNMENT* 29-30 (1970); L. FRIEDMAN, *supra* note 24, at 112; J. HABERMAS, at xiv, 7-8; R. JACKSON AND M. STEIN, *ISSUES IN COMPARATIVE POLITICS* 206 (1971); G. LENSKI, *POWER AND PRIVILEGE* 57 (1966).

257. See Harris, *supra* note 141, at 62 ("organizations tend to equate their mission with the security of governments, not of the people whom governments represent."); *id.* at 65; *supra* notes 171-93, 251 and text accompanying.

258. The notion that a "nation is a society responding as a unit," F. NORTHROP, *THE TAMING OF THE NATIONS* 3 (1952), has been thoroughly demolished by behavioralists. No organization or nation possess a status independent of the individuals composing it; collectivities "exist and behave the way they do only insofar as the people composing them act in certain ways." H. EULAU, *THE BEHAVIORAL PERSUASION IN POLITICS* 15 (1963). See T. HUGHES, *supra* note 125, at 20 (quoting Woodrow Wilson, "I lived in the Government of the United States for many years, and I never saw the Government of the United States."); North, *supra* note 108, at 180, 184. If the public does not make intelligence policy through elected representatives, groups most interested in those policies—notably the CIA—will make policies in self-interested ways. See *supra* notes 204, 220, 224 and text accompanying.

primitive classification in favor of affirmative policies designed to win friends and influence people rather than react simplistically to the consequences of past American and Soviet policies.²⁵⁹

CIA resistance could only be overcome by altering the balance of power within government,²⁶⁰ so as to eliminate the present impasse. In a liberal democracy, it is we who should tell the CIA which civil liberties cannot be infringed in which circumstances, rather than, as in the past, leaving the determination of which infringements Americans will have to put up with to the CIA. It must be made painfully clear to the CIA that extensive civil liberties and an informed public debate are essential to our national security, rather than incompatible with it or a luxury we can afford on occasion.²⁶¹

259. Aspin, *supra* note 42, at 37; Colby, *supra* note 123, at 10 (CIA morale and effectiveness requires public debate on what we want the Agency to do); Raskin, *supra* note 120, at 193; H. WILENSKY, *supra* note 123, at 177. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587-88. (1980) (Brennan, J., concurring) (quoted in text accompanying *infra* note 575); T. HUGHES, *supra* note 125, at 4 (the need to reassert the primacy of collection, processing and evaluation of information); H. WILENSKY, *supra* note 123, at vii, 3-4; Medow, *supra* note 135, at 831 (discussed *supra* note 231).

260. The internal balance of power can be described "vertically, as between the canaries of the State Department and the cats of the Department of Defense; or horizontally, as between the foxes of the intelligence community and *les petits princes* of public planning." Franck and Weisband, *supra* note 129, at 8. The external balance of power is the familiar constitutional one; while the CIA gives the president the advantage over Congress or the Court at first glance, the CIA has frequently acted on its own, immune to presidential control. See *infra* notes 306-39 and text accompanying. The effects of the existing balance are frequently misunderstood. See, e.g., Wieseltier, *supra* note 173, at 12:

It has been suggested . . . that the internal surveillance insanity that overcame the Nixon government was a spillover from the mentality of secrecy that attends all things nuclear. This is rather forced. The persecutions of CONTELPRO originated in a political style and personality disorder that cannot be laid at the Defense Department's door.

The political culture of the United States cannot be reduced to its military culture.

The point missed here is that the struggle between "political culture" and "military culture" is an uneven one when put in these terms; the strong State apparatus in daily use can be massively misused, albeit rarely, without accountability, and until much damage is done to liberal democracy.

261. See, Colby, *supra* note 123, at 10; R. EYESTONE, *supra* note 6, at 166 (in democratic theory, the public interest is best served by discussion, since actions most effective in prompting governmental response are also those broadening and informing the debate); Medow, *supra* note 135, at 823 ("Information concerning public issues is the lifeblood to democracy; an uninformed citizenry is, by definition, an ineffective check on both official misconduct and misguided policy."); Turner and Thibault, *supra* note 118, at 132 (quoted in text accompanying *supra* note 149); *Congress Considers Amendments to FOIA*, *supra* note 154, at 5 (statement by a journalist, Steven Dornfield).

D. Failures in Accountability

Stansfield Turner describes "four types of controls and oversight [over the CIA]:

- * internal controls created and enforced within the intelligence agencies themselves;
- * presidential controls such as executive orders;
- * controls that come from Congress in its role as overseer of intelligence; and
- * controls that flow from public scrutiny of intelligence activities."²⁶²

This sounds impressive, but we have seen, at some length,²⁶³ that meaningful internal controls enforced by the CIA are virtually non-existent. Likewise, a meaningful public scrutiny of secret CIA matters on any regular basis is a contradiction in terms.²⁶⁴ Privacy and the First Amendment rights to know, speak and publish about intelligence activities are apparently not worth mentioning, as Turner does not bother to list the courts as CIA overseers.

In contrast to broad and longstanding judicial experience in the field of contract, courts have very little experience in the national security field and no distinctive policy goals or appropriate classifications to apply.²⁶⁵ Street "demonstrations, apocalyptic rhetoric,

See *supra* note 220 and text accompanying. But see *FOIA Testimony Presented*, *supra* note 141, at 4 (then-Deputy CIA Director Bobby Inman):

I am convinced that there is an inherent contradiction in the application of a statute [the Freedom of Information Act] designed to assure openness in government to agencies whose work is necessarily secret, and that the adverse consequences of this application have caused intelligence functions to be seriously impaired without significant counterbalancing of public benefit.

262. Turner and Thibault, *supra* note 108, at 124. See *supra* notes 229-30 and text accompanying.

263. See *supra* notes 171-78 and text accompanying.

264. See *supra* notes 145-63, 198 and text accompanying; *infra* notes 279-88 and text accompanying.

265. A. MILLER, *supra* note 16, at 116; Raskin, *supra* note 120, at 205 (courts handle "precious few" national security cases, and "courts are frightened of the Dual State, hoping that the problem will go away if no attention is paid to it.")

One important policy role for courts is characteristically American: "Judges have their own policy goals which they consciously pursue through carefully elaborated strategies, perhaps resembling those of legislative leaders and executive officials." J. SIGLER AND B. BEEDE, *supra* note 16, at 16. This is not the case in the area of national security, however:

Reference to word formulas like "direct, immediate and irreparable injury" or "clear and present danger" have proved to be only slightly useful. .

obscenity, libel, and the rest of the usual First Amendment judicial fare are poor materials from which to fashion permissions and restraints on publication of national security secrets."²⁶⁶ In circular fashion, courts are reluctant to act because they lack a national security expertise, and expertise is not forthcoming because of a reluctance to act. While contract law and policy may be an appropriate realm for judicial activism—the courts needing no control over the purse and very little over the sword to be effective—an exaggerated deference seems the courts' only feasible national security policy. The imbalance of information and expertise between executive and judicial branches is felt keenly under what are frequently perceived as crisis conditions in national security. Judicial lucidity is all but irrelevant in the face of the CIA's organizational muscle, *its* control over information, the sword, and the purse exercised with scant respect for law. If *Mapp*, *Miranda* and the school prayer decisions are regularly disobeyed when the judge's back is turned, how can the CIA be kept to the straight and narrow?²⁶⁷

. . . [T]he calculus of injury to the national security often does not permit certainty of impact or timing and is at best analogous to a mathematical projection. . . .

In fact, the courts have largely ignored the formulas. Deference to executive branch foreign policy judgments, respect for applicable congressional determinations, and a demanding and critical approach to conclusory governmental representations are all mixed in the same pot with the paramount First Amendment guarantee. . . .

Martin, *supra* note 148, at 684. (As to whether courts use a "demanding and critical approach" in fact, see *infra* notes 268-305 and text accompanying.) It would be hazardous to develop judge-made rules where much of litigation would be *in camera*, First Amendment decisions being particularly dependent on full elaborations of the facts. See A. MILLER, *supra* note 16, at 211 ("more gibberish has been written about . . . [executive] privilege based on fewer formal statements of doctrine than almost any other area of constitutional law."); Note, 74 HARV. L. REV. 976, 984 (1974) (there are "no 'manageable standards' for evaluating an international peril, and in that sense the question of whether such a peril justifies surveillance is arguably 'nonjusticiable'").

266. Schmidt, *supra* note 148, at 182. See *supra* note 265; *infra* note 271.

267. See Baum, *supra* note 54, at 46-47, 49, 56-57; Baum, *Judicial Impact as a Form of Policy Implementation*, in PUBLIC LAW AND PUBLIC POLICY 127, 128 (J. Gardiner, ed. 1977); Carter, *When Courts Should Make Policy*, in *id.* 141, at 144-46; Henig, *et al.*, *The Policy Impact of Policy Evaluation*, in *id.* 225, at 230; Note, *supra* note 265, at 983-84; *id.* at 996 (the secrecy of facts in prior cases makes of each decision a case of first instance, unless judge was personally involved in prior cases); *supra* notes 76, 117, 148. In *United States v. The Progressive, Inc.*, 467 F. Supp. 990 and 486 F. Supp. 5 (W.D. Wis 1979) (see *infra* notes 277-78 and text accompanying), "when one considers what was claimed to be at stake, the prospect of a coin toss by a nonscientist judge . . . seemed a less than adequate way to resolve this problem." Martin, *supra* note 136, at 683. The decision in *Jackalone v. Andrus*, ___ F.2d ___ (D.C. Cir. 1979) (unreported, Slip Op. 79-3140) is animated by a "sense of vulnerability:" demonstrations in front of the White House might be interpreted as officially sanctioned by Iranians holding hostages, causing them to retaliate against the hostages. Martin, at 683-84.

It was the weak State in an American liberal democracy that made judicial review both possible and necessary. There is almost no room for judicial review of behavior by our growing strong State, however. One of the ways the Supreme Court legitimates its power is by linking the exercise of this power to constitutional provisos. This task is more than usually difficult in the gray area of national security policy. A paucity of authority and policy are reflected in the dismissal of suits under case or controversy, standing, ripeness, and political question doctrines.²⁶⁸ Courts may have assumed an ombudsman's role in some areas of public law, but CIA activities plainly exceed the courts' supervisory powers and remedial ingenuity in ways that even the behavior of southern school districts does not. Even if courts were predisposed to intervene in national security, there is frequently no law to apply;²⁶⁹ given the many lacunae in the CIA's accountability,

268. See G. BARRACLOUGH, *supra* note 204, at 146; Giraud, *Judicial Review and Comparative Politics: An Explanation for the Extensiveness of American Judicial Review Offered From the Perspective of Comparative Government*, 6 HASTINGS CONST. L.O. 1137, 1138-39, 1159-63 (1979); L. Henkin, *The Supreme Court and the Interpretation of the Foreign Affairs Power*, Address to Congress, the President, and Foreign Affairs Conference, Washington, D.C., May 10, 1984; Murphy, *supra* note 24, at 129; *supra* notes 202-04 and text accompanying; *infra* note 304.

269. Although the Freedom of Information and Administrative Procedure Acts "are virtually non-applicable to the whole vast foreign policy sector" (Franck and Weisband, *supra* note 154, at 435; see *supra* note 158) the following analogies to a general administrative law seem appropriate. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 28.16 (Supp. 1982) finds that a "pernicious" idea was announced in *Standard Oil Co. of Cal. v. FTC*, 596 F.2d 1381, 1385 (9th Cir. 1979): "When no law fetters the exercise of discretion, the courts have no standard by which to measure the lawfulness of agency action, and consequently, the action is not susceptible of judicial review." This must be the way courts frequently ponder the absence of meaningful fetters on the CIA; "[i]n practice, the determination of whether there is 'law' to apply necessarily turns on pragmatic considerations as to whether an agency determination is the proper subject of judicial review." *Natural Resources Defense Council v. SEC*, 606 F.2d 1031, 1043 (D.C. Cir. 1979). See K. DAVIS, at § 28.16. See also such "subtle, elusive and unclear" (K. DAVIS, *supra* note 146, at § 28.05) constructions of the Administrative Procedure Act (5 U.S.C. § 701) as: *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971) (*dictum*). Even if relevant law clearly exists, judges sometimes refuse to apply it. The Foreign Intelligence Surveillance Act of 1978 (18 U.S.C. §§ 2511, 2518, 2519; 50 U.S.C. §§ 1801-1811) created a court "to hear applications for and grant orders approving electronic surveillance. . . ." Refusing such an application on June 11, 1981, Judge Hart held: "as a designated judge . . . , I have no authority to issue such an order. I am authorized to state that the other designated judges concur in this judgment." INTELLIGENCE REPORT, Jan. 1982, at 7. Decisions are thus left to executive branch discretion. *Id.* The "disqualification of judges on issues of military and foreign policy may be so strongly felt that judges will decline even to pass on constitutional issues." K. DAVIS, *supra* note 146, at § 28.05, citing, e.g., *United States v. Sisson*, 294 F. Supp. 511, 515 (D. Mass. 1968), dismissed on other grounds, 399 U.S. 267 (1970). This cannot be because of the complexity of a specialist subject matter, since matters are not as complex as in, e.g., patent infringement or antitrust actions. See K. DAVIS, *supra* note 146, at § 28.05. See also *infra* notes 395, 524-26 and accompanying text.

courts would have to fashion the doctrines themselves. That they will be reluctant to do so is suggested by a statement from *Nixon v. Fitzgerald*,²⁷⁰ a case establishing an absolute presidential immunity from civil damage suits:

Because the Presidency did not exist through most of the development of common law, any historical analysis . . . merges almost at its inception with the kind of "public policy" analysis appropriately undertaken by a federal court. This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers.

The only ingenuous aspect of this murky statement by Justice Powell is his placing of quotation marks around public policy. The *Fitzgerald* "separation of powers" seems to be applied heedless of checks and balances, to strengthen the State because of a most English solicitude for the executive and its "effective government" desiderata.²⁷¹

Fitzgerald and other recent cases²⁷² represent a greatly increased willingness to take executive branch claims at face value, when com-

270. 457 U.S. 731, 102 S. Ct. 2690, 2701 (1982).

271. 457 U.S. at ____, 102 S. Ct. at 2704: Before exercising separation of powers jurisdiction the Court "must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." The Court will act "to maintain their proper balance" and "to vindicate the public interest in an ongoing criminal prosecution," but will not intervene in "this merely private suit for damages. . . ." *Id. See id., passim; id.* at 2717 (White, J., dissenting); *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 408 (1979) (Blackmun, J., dissenting) ("A doctrine that denies redress for constitutional wrongs should . . . be narrowly confined to those contexts where history and public policy compel its acceptance."); K. DAVIS, *supra* note 146, at § 7.15 (quoted *supra* text accompanying note 197); *id.* at § 28.05 (quoted *supra* note 269); A. MILLER, *supra* note 16, at 16; *id.* at 223 (quoted *infra* text accompanying note 307); de Smith, *supra* note 163, at 325 ("English judges have generally manifested a keen sense of obligation to serve the interests of the State"); Martin, *supra* note 148, at 682 (the "net result" of "judicial abstention justified by the separation of powers doctrine" is that secrecy is "the responsibility either of the executive branch or the Congress" that has failed to act); *id.* at 684 (quoted *supra* note 265); *supra* note 231 and text accompanying; *infra* note 305. In general, if "constitutions or statutes failed to provide standards or rules, obedience to the constitutional ideal called on judges to fashion the generalizations themselves." J. HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 136 (1977). This has not happened in the area of national security, however.

272. See *infra* notes 275-95 and text accompanying. See also *Greer v. Spock*, 424 U.S. 828 (1976), which upholds regulations banning partisan political activity on a military base. *Greer's* significant retreat from *Flower v. United States*, 407 U.S. 197 (1972), is "troubling." Why should the "Court in a dramatic and scarcely-explained departure from traditional first amendment analysis . . . defer so obligingly to generalized and self-claimed military interests as to confer an essentially conclusive

pared to the Court's approach in the *Pentagon Papers Case*²⁷³ and in *Youngstown Sheet and Tube*.²⁷⁴ In *Snepp*,²⁷⁵ for example, the Court's eagerness to rely on CIA Director Turner's "conclusory, self-serving, . . . essentially untested" assertions is "nothing short of remarkable."²⁷⁶ In *The Progressive*,²⁷⁷ a well-meaning but naive trial judge was mortified when government's extravagant claims evaporated on a preliminary testing by the Seventh Circuit.²⁷⁸ His prior restraint on the publication of a do-it-yourself H-bomb article, an article known to have been assembled from public library materials, had meanwhile remained in effect for months.

The CIA has been so successful in winning judicial acceptance of its justifications that its claims to need a blanket exemption from the Freedom of Information Act sound hollow; the CIA has "never lost a suit . . . where it was required to disclose classified information . . . [or] the identity of a CIA source. . . ."²⁷⁹ Courts have recently held that disclosure of a fifteen-page CIA document about President Kennedy's assassination "would be likely to endanger certain national security interests,"²⁸⁰ that disclosures of past CIA activities at Syracuse

presumption of constitutional validity on the . . . restriction. . . ." Young and Herbert, *Political Association under the Burger Court*, 15 U.C.D.L. REV. 53, 72 (1981).

273. *New York Times v. United States*, 403 U.S. 713 (1971) (claim that publication would embarrass government and prolong war rejected *per curiam*, in a near-prohibition of prior restraints on publication). The central theme of the opinion is a reluctance to enjoin in an area where Congress had failed to authorize injunctions of similar publications. L. TRIBE, *supra* note 50, at 1140; Schmidt, *supra* note 148, at 181. Recent cases convey "a sense that there is a changing judicial attitude toward the kind of national security claims . . . put forward and almost summarily rejected in the *Pentagon Papers* case." Martin, *supra* note 148, at 684.

274. *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579 (1952) (presidential seizure of steel mills to avert strike during Korean War enjoined because congressional authorization obtainable). See also *Reynolds*, *infra* note 286.

275. *Snepp v. United States*, 444 U.S. 507 (1980) (*per curiam*). See *infra* notes 293-95 and text accompanying. Government's strategy in *Snepp* was dictated by the outcome of *New York Times*, *supra* note 273. Medow, *supra* note 135, at 831.

276. *Id.* at 828 n.305.

277. *Supra* Note 267. But see *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (prior restraints not permitted).

278. Personal communication from (as the CIA frequently says) a "usually reliable source." Martin, *supra* note 148, at 683, is more charitable: "It is difficult to justify rationally a judicial process . . . [to determine] whether hypothetical foreign nuclear weapons experts . . . could, through sophisticated scientific analysis, deduce the secret of the A-bomb's design from a variety of specified sources each of which allegedly revealed one or more elements of that puzzle." See *id.* (quoted *supra* note 267). This may be true but, if so, the process is no more irrational than many other judicial inquiries.

279. Landau, *supra* note 237, at col. 5. See *FOIA Testimony Presented*, *supra* note 141, at 4 (quoted *supra* note 261); *supra* notes 161, 220; *infra* note 341 and text accompanying.

280. *Allen v. CIA*, 516 F. Supp. 653, 655 (D.D.C. 1981) (held that there is no need to balance public interest in disclosure against need to protect information).

University (hardly a secret) would increase the reluctance to cooperate with the CIA,²⁸¹ that disclosure of the names of those contracting with the CIA during the Glomar Explorer project would make future contractors more reluctant,²⁸² that disclosure of CIA activities in Albania from 1945 to 1953 (activities wholly known to the Soviets through Kim Philby) would seriously strain diplomatic relations (with Albania?) and be likely to provoke retaliation,²⁸³ and that disclosures about the use of the herbicide Agent Orange in Vietnam would violate the integrity of the official Air Force history of Operation Ranchhand.²⁸⁴ The only apparent attempt at an evenhanded balancing of CIA claims is Judge Edwards's in *McGehee*,²⁸⁵ however, "his" D.C. Circuit has held the state secrets privilege to be "absolute."²⁸⁶ Judge Gesell is amazed

281. *Daily Orange Corp. v. CIA*, 532 F. Supp. 122 (N.D.N.Y., 1982).

282. *Military Audit Project v. Casey*, 656 F.2d 724 (D.C. Cir. 1981).

283. *Miller v. Casey*, ___ F. Supp. ___ (D.D.C. 1982, Slip Op. 82-1100, Dec. 22, 1982).

284. *National Veterans Task Force on Agent Orange v. ___*, ___ F.2d ___ (D.C. Cir. 1982, Slip Op. no. 81-2005, July 23, 1982).

285. *McGehee v. CIA*, ___ F.2d ___, ___ (D.C. Cir. 1983, Slip Op. 82-1096, Jan. 4, 1983):

[T]he judgment of the CIA is to be accorded considerable respect and deference. The Freedom of Information Act nevertheless imposes on the courts the responsibility to insure that agencies . . . "make . . . records promptly available to any person" who requests them, unless a refusal . . . is justified by one of the Act's specific, exclusive exemptions. Especially where, as here, an agency's responses to a request . . . have been tardy and grudging, courts should be sure they do not abdicate their own duty.

Summary judgment for the CIA was reversed and a "sample procedure" established (*see infra* note 363) because the CIA delayed for some 30 months in responding to a journalist's request for documents concerning the People's Temple massacre in Jonestown, Guyana, and then limited its search to documents on hand as of the date of the request. *Id.* *See supra* note 160.

286. *Halkin v. Helms*, 598 F. 2d 1, 7 (D.C. Cir. 1978) (adopting Defense Secretary's assertion that admitting or denying existence of NSA warrantless interceptions of international communications would reveal important military and state secrets). This must head the list of court-recognized privileges. A. MILLER, *supra* note 16, at 54-55. Congress never acquiesces in claims of absolute executive privilege, however. Mathias, *supra* note 230, at 75. *See also* *Eastland v. United States Serviceman's Fund*, 421 U.S. 491 (1975) (Senate Internal Security Subcommittee subpoena of organizations bank records held completely immune under the speech and debate clause, without inquiry into motives for investigation and despite the First Amendment violation that resulted); *United States v. Reynolds*, 345 U.S. 1 (1952) (Air Force investigative report concerning crash of plane on secret mission cannot be disclosed during Federal Tort Claims Act suit); *id.* at 10 (where "reasonable danger" exists that "military matters" will be exposed, the court should not insist "upon an examination of the evidence, even by the judge alone, in chambers."); *Chicago & Southern Airlines v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) (the "President has available intelligence sources whose reports are not and ought not to be published to the world."); *Conway v. Rimmer* [1968] A.C. 910 (doctrine of absolute Crown privilege jettisoned, but rationale unlikely to be extended to national defense or security disclosures). *But see* *ACLU v. Brown*, 619 F.2d 1170, 1172-73 (7th Cir. 1980) (remand to determine whether Army Regulations and Field Manual on domestic intelligence practices, 1966-76, should be disclosed—

"that a rational society tolerates the expense, the waste of resources, the potential injury to its own security" that Freedom of Information Act requests entail.²⁸⁷

There is a battery of statutes²⁸⁸ aimed at whistleblowers,²⁸⁹ and a trilogy of recent cases shows that the Court loveth not the whistleblower. In *Haig v. Agee*,²⁹⁰ an injunction was sought against Agee's second book about the CIA and, in the matter reaching the Supreme Court, his passport was revoked. An egregious fact situation—the methods used by former CIA employee Agee are abhorred by almost everyone, including most CIA critics—led the Court into much overbroad *dicta* which endanger freedom of speech, procedural due process, and the right to travel. For example: "Agee's disclosures, among other things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel. They are clearly not protected by the Constitution."²⁹¹ The

government's claim to privilege "sufficiently dubious"); Glennon, *supra* note 148, at 32-33 ("In some instances a court may rule . . . that a legitimate state secret is not involved, or that the need for information in litigation outweighs requirements of confidentiality.").

287. *Agee v. CIA* 517 F. Supp. 1335, 1341 (D.D.C. 1981) (upholding CIA refusal to release 8,175 of 8,699 documents pertaining to Agee himself).

288. See Medow, *supra* note 135, at 830 n.311:

In addition to 18 U.S.C. § 793(a) . . . the basic provision criminalizing speech (as opposed to pure espionage) is 18 U.S.C. § 793(d) [see *supra* notes 148-49 and text accompanying]. This law is identical in all material respects to section 793(e) except that the former applies to defendants "lawfully having possession of" the information, e.g. CIA agents, while the latter covers those having "unauthorized possession." Both sets of individuals are subject as well to several narrow prohibitions outlawing specific types of disclosures. See 18 U.S.C. § 794(b) (1976) (troop movements); *id.* § 797 (photographs of defense installations); *id.* § 798 (classified communications systems data); 42 U.S.C. § 2274 (1976) (Atomic Energy Act Restricted Data); See also Intelligence Identities Protection Act, Pub. L. No. 97-200, 96 Stat. 122 (1982) (criminalizing the disclosure of an undercover agent's name). Government employees, moreover, fall within the reach of two other narrow prohibitions. See 18 U.S.C. § 952 (1976) (diplomatic codes); 42 U.S.C. § 2277 (1976) (restricted data); *cf.* 50 U.S.C. §§ 781-783 (1976) (dealing with pure espionage activities).

289. On the strong psychological pressures that forestall much whistleblowing (and that are ignored by courts), see Thomson, *supra* note 118 (discussed *supra* note 118). An attempt to internalize whistleblowing within the executive branch has not been very successful: see Turner and Thibault, *supra* note 118, at 129 (quoted *infra* note 311).

290. 483 F. Supp. 729; 629 F.2d 80; *rev'd* 453 U.S. 280 (1981); See Hall, *supra* note 120, at p. 17, col. 1; Martin, *supra* note 148, at 684; Case Note, INTELLIGENCE REPORT, July, 1981, 1.

291. 453 U.S. at ____ (Burger, C.J.) (citing *Snepp*—see *infra* notes 293-95 and text accompanying). The Court found that: "To identify CIA personnel in a particular country, Agee . . . consults sources in local diplomatic circles whom he knows from

two dissenting Justices objected to a "whirlwind" treatment of Agee's constitutional claims; they found his speech "undoubtedly protected by the Constitution" under prior precedents.²⁹² In *Snepp*, the whistleblower's freedom of speech claims were dismissed in a footnote.²⁹³ It was no secret that *Snepp* was writing *Decent Interval* based on information made public by the CIA. Without briefing or oral argument, the Court gave the CIA more than it said was needed against an author whose apparent sin was to make the CIA look ludicrously incompetent.²⁹⁴ *Snepp* did breach his CIA contract of employment. But the Court could have refused to enforce the relevant contract covenant on grounds that public policy favors disclosure of non-secret matters of great public concern.²⁹⁵ But "public policy" leans strongly against the whistleblower, as in *Fitzgerald*.²⁹⁶ *Fitzgerald* was not allowed to recover damages after being fired for disloyalty to President Nixon: that is, testifying before a congressional committee about Defense Department cost overruns.²⁹⁷

his prior service in . . . Government. He recruits collaborators and trains them in clandestine methods and techniques designed to expose the 'cover' of CIA employees and sources." 453 U.S. at 284.

292. *Id.* at _____. See Martin, *supra* note 148, at 684.

293. 444 U.S. at 507, 509 n.3 (1980) (*per curiam*), "a watershed victory in the Agency's battle to contain the flow of information to the public." Medow, *supra* note 135, at 775.

294. See 444 U.S. 524-25 (Stevens, J., dissenting); Medow, *supra* note 135, at 775, 775 n.3, 776-77. See also D. WISE, *supra* note 120, at 197. The CIA's rather lame arguments were that publication decreased foreign confidence in CIA reliability, and that *Snepp* violated his CIA employment contract covenant not to disclose without republication censorship. As an employment restraint, this covenant should logically have been subjected to a rule of reason treatment, a determination of whether it goes further than necessary to protect legitimate CIA interests not outweighed by the public interest in disclosure. 444 U.S. at 518-19 (Stevens, J., dissenting) See Medow, at 780; *supra* notes 58, 219, 232-33, 242 and text accompanying. Instead, a breach of contract was decreed by the Court and a constructive trust impressed on the book's proceeds. 444 U.S. at 511, 511 n.6, 515 n.11; Medow, at 781. A constructive trust is an inappropriate remedy, since *Snepp* arguably owed no fiduciary (as opposed to contractual) duty to the CIA. *Snepp*, 555 F.2d at 935-37; Medow at 780-81.

Snepp casts doubt on *Marchetti* and *Knopf*. Medow at 783-87. See Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1367 (4th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975) (given citizens' right to compel Freedom of Information Act disclosure, a CIA agent should be in no worse position; and items deleted by CIA should be suppressed only if classified and classifiable); U.S. v. Marchetti, 466 F.2d 139, 1317 (4th Cir.), *cert. denied* 409 U.S. 1063 (1972) (because it exercises prior restraint, the CIA must act "promptly," within thirty days, on a republication clearance).

295. Medow, *supra* note 135, at 811-12. See 444 U.S. at 521 (Stevens, J., dissenting); *supra* note 95 and text accompanying (CIA's arguably a "polluted hand", at least in this circumstance).

296. See *supra* note 270-71 and text accompanying; *infra* note 297.

297. See also the companion case, Harlow v. Fitzgerald, 457 U.S. 967, 102 S.Ct. 2727 (1982):

Harlow modified the previously accepted method of testing defendants'

The courts are thus extremely zealous in choking off the main sources of information that would insure an informed public scrutiny of the CIA: whistleblowers and Freedom of Information Act disclosures. It may be that "truce is stranger than friction"²⁹⁸ between government and the media, but the media is powerless to exert a check on government without information and the willingness of those supplying it.²⁹⁹ Like *Rosenberg*³⁰⁰ and *Oppenheimer*³⁰¹ in an earlier era (the justice and policy wisdom of which continue to be debated today), the cases surveyed strengthen the national security State without strengthening national security itself. The minor disclosures curbed or punished, at a great cost in judicial and prosecutorial resources and to our civil liberties, are a drop in the bucket compared to the effects of unbridled CIA incompetence. While these cases were being argued and decided, Geoffrey Prime was quietly passing "real" secrets to the Soviets because of a British and CIA bureaucratic incompetence untouched by administrative laws.³⁰² Agee apparently continues his

claims that their conduct was shielded by "good faith" or "qualified" immunity. Prior thereto, defendants whose official conduct was challenged had to "objectively" and "subjectively" prove that their conduct was, indeed, in "good faith." Harlow abrogated the "subjective" aspect of the good faith analysis because the Court felt that the "social costs of such inquiries were impermissibly high."

Druckenmiller v. United States, 553 F. Supp. 917 (E.D. Pa. 1982) (*dictum*). Harlow "seems to us a small court-plaster which cannot staunch the hemorrhage of governmental efforts and resources expended in avoiding or resisting the ever increasing spiteful and unfounded torrent of Bivens claims." *Dale v. Bartels*, 552 F. Supp. 1253, 1266 n.1 (S.D.N.Y. 1982). There are now 10,000 such claims pending. Williams, *Supreme Court Decisions*, INTELLIGENCE REPORT, Nov. 1982, 1, at 6. Many of these suits are unsuccessful, however: see, e.g., *Stanley v. CIA*, 639 F.2d 1146 (5th Cir. 1981) (*Feres* doctrine bars claim, under Federal Tort Claims Act, based on L.S.D. administered without veteran's knowledge as a part of chemical warfare experiments).

298. Franck and Weisband, *supra* note 129, at 9 (quoting Maxwell Cohen). But see also Bullock, *The Office for Civil Rights and Implementation of Desegregation Policies in the Public Schools*, 2 POL. STUD. J. 597, 609 (1980): "To speculate, the role of catalyst may be most available to the media when it can focus on acts of inhumanity and do so in such a way that most policymakers and most of the public are not threatened." Otherwise, everybody gets defensive and media coverage may be counterproductive as a control. *Id.*

299. See Ignatieff, *Secrecy and Democratic Participation in the Formulation and Conduct of Canadian Foreign Policy*, in *SECRECY AND FOREIGN POLICY* 53 (T. Franck and E. Weisband, eds. 1974); *supra* notes 189, 237, 251 and text accompanying. The freer flow of information makes for a pluralism in private and public intelligence information and evaluation, giving rise to a better-informed public and government. H. WILENSKY, *supra* note 123, at 127.

300. *Rosenburg v. United States*, 346 U.S. 273 (1953).

301. See Martin, *supra* note 148; Raskin, *supra* note 170, at 214.

302. See Davies, *Communications Spy Gaoled for 38 Years*, MANCHESTER GUARDIAN WEEKLY, Nov. 21, 1982, p. 4, cols. 1-2; Davies, *Spy Trail that Led to Adropov*, MANCHESTER GUARDIAN WEEKLY, Dec. 5, 1982, p. 3, col. 5; Jackson, *U.S. Angry at Not Being Told*, MANCHESTER GUARDIAN WEEKLY, Nov. 21, 1982, p. 4, col. 3; Norton-Taylor, *Prime*

efforts through articles published abroad in *Soberania Sovereignty*.³⁰³

Much judicial labor has had little useful effect. If journalists, academics and other intelligence amateurs can detect real secrets, as the CIA claims, how much easier is this task for the many skilled Soviet agents that the CIA claims are in place undetected? Will we continue to dismantle the trappings of liberal democracy because the CIA, having frequently proved itself incompetent, claims this is a necessary response to perceived crises? The most realistic answer is found in Justice Jackson's evaluation of the strong State, in one of the *Japanese Exclusion Cases*:

Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead the people to rely on this Court for a review that seems to me wholly delusive. . . . If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraints. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.³⁰⁴

The "moral judgments of history" are fragile protectors of rights: ask a Native American. But courts place great confidence in political processes in many areas, such as an all but unfettered presidential supervision of the CIA.³⁰⁵ Is this confidence warranted? For many

. . . , in *id.* at pp. 4-5; Norton-Taylor, *The Failures of Vetting*, in *id.* at p. 4, cols. 4-5; *The Prime Case*, THE ECONOMIST, Nov. 13, 1982, p. 9; *The Treason of Geoffrey Prime*, in *id.* at 63-64; *Two Lessons from the Prime Affair*, MANCHESTER GUARDIAN WEEKLY, Nov. 21, 1982, p. 12, col. 1, at col. 2 ("The real problem is finding what peculiar combination of laxity, levity and heedlessness and doziness recruited, monitored and then promoted Prime."). See also Jones, *Letter to the Editor*, MANCHESTER GUARDIAN WEEKLY, Nov. 28, 1982, p. 2, at cols. 3-4:

Why, during the recent trial of Geoffrey Prime, was it necessary for the court to sit in camera? It appears to have been common ground that all the information in question had long since been passed to the enemy. From whom are the "secrets" being kept? I think we (and the Americans) should be told!

303. 1982: *The Year in Review*, INTELLIGENCE REPORT, Jan. 1983, 1, at 12.

304. Quoted in A. MILLER, *supra* note 16, at 138. See Martin, *supra* note 148, at 685: *The Progressive, Snepp, and Agee* represent "an erosion of the fundamental First Amendment protections that unfortunately may not be limited to the national security area." *Id.*

305. See, e.g., *Fitzgerald*, 102 S.Ct. at 2705-06 (nation's protections to be found in constant scrutiny by press and Congress, and in impeachment); *Id.* at 2711 (White, J., dissenting): (the *Fitzgerald* plurality and concurring opinions "place the President

liberals and moderates, hopes that the president could and would control the CIA in the public interest did not survive Vietnam and Watergate. For President Johnson, the management of the CIA appeared to be of little concern. President Nixon had some awareness of the need for CIA economy and efficiency, but his secretive style probably compounded the difficulty of holding the CIA accountable. Both Johnson and Nixon corrupted the CIA for partisan purposes, and applied pressure on the Agency to show military policy successes and the foreign sponsorship of domestic dissent at home. This pressure contributed to a civil liberties overkill by the CIA. Earlier, Presidents Truman, Eisenhower, and Kennedy complained of an inability to control the CIA, despite their enormous power over the CIA in theory.³⁰⁶ This power consists of the executive power vested in the President, his foreign affairs powers, and the Commander-in-Chief power. Many traditionally monarchical privileges have been implied into these powers, as "a means by which those with knowledge [such as that supplied by CIA] will remain in control of the levers of power in government. In sum, the executive is privileged when he can get away with it politically."³⁰⁷ The 1947 National Security Act was left deliberately vague to serve as a flexible instrument of shifts in presidential policy emphasis.³⁰⁸ Intelligence officers, past and present,

above the law . . . [in] a reversion to the old notion that the King can do no wrong."); *United States v. Curtiss-Wright Export Corp.*, *et al.*, 299 U.S. 304, 319 (1936) (Sutherland, J., *dictum*) ("In this vast external realm, with its important, complicated, delicate, and manifold problems, the President alone has the power to speak or listen"); Bork, in P. HACKES, *et al.*, *supra* note 42, at 2 (Bork is now a D.C. Cir. Judge, who dissented in part in *McGehee*, *supra* note 285 and text accompanying) (a balanced intelligence policy is best formulated under a self-limited presidential discretion); A. MILLER, *supra* note 16, at 138; *supra* notes 270-71, 286 and text accompanying. *But see, e.g.* Mathias, *supra* note 230, at 81 (congressional efforts at compulsion—impeachment, budget cutoffs, etc.—so crude as to be virtually unemployable); *infra* notes 573-79 and text accompanying.

306. F. DONNER, *supra* note 120, at 278; Hilsman, *supra* note 121, at 171-73; Ransom, *supra* note 136, at 208; D. WISE, *supra* note 120, at 329. *See* W. COLBY, *supra* note 184 (quoted *supra* note 184); G. EDWARDS, *supra* note 19, at 31-32; Shattuck, *supra* note 135, at 31 (President Johnson repeatedly urged the CIA to investigate antiwar activities, and information was collected on the First Amendment-protected activities of 200,000 Americans during Operation CHAOS); Wieseltier, *supra* note 173 (quoted *supra* note 173); *supra* notes 178-79 and text accompanying.

307. A. MILLER, *supra* note 16, at 223. *See* Hughes, *supra* note 148, at 13; Mathias, *supra* note 230, at 72-73; Glennon, *supra* note 148 (quoted in note 148, *supra*); Highsmith, *supra* note 125, *passim*; *supra* notes 229-30, 271, 286, 304-05 and text accompanying. Executive privilege is not a constitutional doctrine but a last resort after other evasive tactics are exhausted. A. MILLER, at 223. It is "a political maneuver, an instrument of policy. . . ." *Id.* A paramilitary CIA operates under the NSA as the president's private army, the principal staff organ for military and foreign policy. *Id.* at 139 (going a bit overboard, in my opinion).

308. J. BERMAN AND M. HALPERIN, *supra* note 125, at 168-69; Tovar, *supra* note 153, at 75; *supra* note 121.

are content to leave matters to the president (as opposed to leaving them to Congress or the courts) because intelligence is deemed an inherently presidential function. Further, the psychology of those attaining the presidency has been one of wanting to make important decisions personally, sometimes in a less-than-democratic fashion.³⁰⁹

The reality of the president's ability to control the CIA is very different from the theory. He must, in fact, work very hard to keep the CIA from running without him. While playing many roles which detract from each other from time to time, the president's interests and energies are spread very thin. Supervision of a CIA which never rests is possible only when particular CIA activities are vital to the president's political needs or represent logical extensions of some favored policy. Even then, the president is unlikely to intervene directly against so powerful an organization, and risk depleting the authority and prestige that is carefully conserved for the most important of political battles. Presidents have thus relied increasingly on national security advisors. As part of a burgeoning population of presidential special assistants, these advisors lack the consistent access to presidential power that is necessary for effectiveness. As political appointees, they are frequently as unfamiliar with the tricks of the intelligence trade as is the president.³¹⁰

The only significant structural reforms of the CIA attempted by presidents involve the time-honored device of a coordinating committee: the 52-12 or Special Group under Eisenhower, the 303 Committee under Kennedy and Johnson, the 40 Committee under Nixon, the

309. Uhlmann, *supra* note 135, at 16; Highsmith, *supra* note 125, at 343; See A. MILLER, *supra* note 16, at 122 (quoting T. Cronin, who quotes an anonymous aide to President Kennedy): "Everyone believes in democracy until he gets to the White House and then you begin to believe in dictatorship, because it's so hard to get things done."

310. See R. EYESTONE, *supra* note 6, at 92; *id.* at 98 (CIA activities may be important to Congress and the Court, but president may think them a minor issue, and the CIA frequently disregards all of these institutions); E. LEWIS, *supra* note 123, at 169 ("the scarcity of attention and the serial nature of problem or issue consideration . . . tend to favor the 'prolonged attention subsystems' of professionalized bureaucrats."); C. LINDBLOM, *supra* note 3, at 66 (Roosevelt, Truman, and Kennedy complained bitterly that their policies were ignored or only feebly implemented in many areas); R. LINEBERRY, AMERICAN PUBLIC POLICY 56-57 (1978); McConnell, *The Steel Price Controversy, 1962* in PUBLIC POLICIES AND THEIR POLITICS 127, 138 (R. Ripley, ed. 1966) ("Power is not solely a grant of authority under a constitutional provision"—it "is also a capacity for action which rests upon intangibles of previous history, public confidence, and prestige."); J. SIGLER AND B. BEEDE, *supra* note 16, at 16 (citing Ted Sorenson); Gilbert, *supra* note 229, at 143-44; Sullivan, *The Role of the Presidency in Shaping Lower Level Policy-Making Processes* 3 POLITY 201 (1970). Assistant Secretary of Defense Froehle told a congressional committee in 1970 that: "There wasn't one [inventory] in the Intelligence Community when I took over. . . ." Ransom, *supra* note 136, at 207-08. How could a president control that which had not even been inventoried?

Interagency Classification Review Committee created by Nixon, a Foreign Intelligence Advisory Board in and out of action, the Intelligence Oversight Board in use since Ford created it, and so forth. Committee members are frequently distinguished but usually True Believers in the "mission" of intelligence agencies. About as forceful as polite alumni visiting committees, these groups have focused on ameliorating intelligence flops and flaps after the fact rather than serving in a preventative, watchdog role.³¹¹

Executive orders have been widely used by the last three presidents to create new norms of control over the CIA and, under Reagan, to revert to the old norms. President Ford's Executive Order of February 1976³¹² sought to limit CIA incursions into Americans' civil liberties, require intelligence agencies to issue regulations, and create clearer job descriptions, lines of authority, and operational guidelines. Then-Attorney General Levi devoted considerable effort to seeing that the Executive Order and his own guidelines on electronic surveillance and FBI intelligence operations were followed.³¹³ Carter's E.O. 12036 of January 1978³¹⁴ made minor changes in Ford's, and added that sensitive CIA collection activities had to be authorized in advance by the National Security Agency. The Attorney General, who has no operational control over intelligence agencies, was also required to approve all of their regulations in advance. A modified

311. Moorehead, *supra* note 128, at 113; Ransom, *supra* note 136, at 211-13. See Sullivan, *supra* note 310. *But see also*, Turner and Thibault, *supra* note 118, at 129: [T]he Intelligence Oversight Board (IOB) . . . is a three-person panel that reports directly to the president. Ford and Carter empowered it to review intelligence activities that "raise questions of legality or propriety." Anyone, including Agency employees, could use this unique channel to report known or suspected wrongdoing. Reagan has considerably weakened the IOB, limiting it to advising the president on matters of legality but not matters of propriety.

312. E.O. 11905, 41 Fed. Reg. 7703 (1976). See Shenefield, *supra* note 128, at 5; Smith, *supra* note 128, at 2; Turner and Thibault, *supra* note 107, at 123; *id.* at 129 (quoted *supra* note 311).

313. Shenefield, *supra* note 128, at 5. Levi's domestic security guidelines have been made much less restrictive. See *FBI Intelligence Guidelines Now Being Revised*, INTELLIGENCE REPORT, Aug., 1982, p. 1; *Senate Hearings Continue on Domestic Security Guidelines*, INTELLIGENCE REPORT, Sept. 1982, p. 1 (quoting FBI Director Webster) ("with the benefit of hindsight, I feel that the balance struck [by Attorney General Levi] has unduly restricted the flow of vital intelligence to the Secret Service"). (This has proved a popular argument for decreasing intelligence curbs, after the Reagan assassination attempt.)

314. 43 FED. REG. 3674 (1978) (replacing E.O. 11905, *supra* note 312). See Martin, *supra* note 148, at 680; *supra* note 312. Thirty "discrete sets of procedures and guidelines required approval by the attorney general—and scores of interagency directives and regulations were created." Smith, *supra* note 128, at 2.

version of E.O. 12036 was introduced in the 95th Congress as the "Intelligence Charter,"³¹⁵ but it failed to pass.

Much or all of this was undone by President Reagan, who pledged, during the 1980 election campaign, to strike the fetters from the CIA. The CIA is one of the few government organizations currently hiring large numbers of people, under increased budgets and for greatly expanded covert operations.³¹⁶ The tone of Reagan's intelligence policies is set by the affirmative quality of the preamble to his E.O. 12333:³¹⁷ "all reasonable and lawful means must be used to ensure that the United States will receive the best intelligence possible." Under Reagan, "the intelligence agencies are authorized to conduct specified activities but within certain limitations; this contrasts with . . . the previous order [12036], which generally prohibited such activities outside certain limitations and left the authority for non-prohibited activities to be implied."³¹⁸ Under Reagan's order, the Agency Director "shall insure implementation of special activities," and Director Casey has appointed himself head of the "international affairs"—covert operations—division.³¹⁹ Physical surveillance of Americans abroad is now permitted, as are domestic covert operations not "intended" to influence public opinion. The requirements that the National Security Council review sensitive intelligence operations and conduct annual reviews, requirements which forced the CIA to do its homework, are eliminated.³²⁰ Under Reagan's E.O.

315. S. 2525, 95th Cong., ____ (197). See P. HACKES *et al.*, *supra* note 42; *passim*; Uhlmann, *supra* note 135, at 11, 13; *infra* notes 333-35 and text accompanying. (Carter's Justice Dept. did initiate many national security prosecutions which endangered civil liberties, however.)

316. See Halperin, *supra* note 125, at p. 1, col. 1, p. 3, cols. 2-3 (quoted in part *supra* notes 125, 160, 167, 209); Jackson, *Opportunities Galore with a Booming CIA*, MANCHESTER GUARDIAN WEEKLY, Feb. 20, 1983, at 8; Southerland, *supra* note 135, at pp. 1, 12; Turner & Thibault, *supra* note 118, at 124; *id.* at 132 (quoted *supra* text accompanying note 149). *But see* 1982: *The Year in Review*, *supra* note 303, at 2 (quoting Daniel Silver, former CIA general counsel): Under Reagan's executive orders, it "appears . . . that more radical changes . . . may have been forestalled by a number of cosmetic changes and modifications of tone whose significance is less real than apparent. [Their] most important aspect . . . is the . . . continuity they present. . . ." See *id.* at 9 (quoted *supra* text accompanying note 318).

317. 46 FED. REG. 59941 (1981). Along with E.O. 12334, which continues the Intelligence Oversight Board (*supra* note 311), E.O. 12333 replaces E.O. 12036, *supra* note 314.

318. 1982: *The Year in Review*, *supra* note 303, at 9 (quoting Daniel Silver). See *id.* at 2 (quoted *supra* note 316).

319. Jackson, *supra* note 315, at col. 4 (quoting E.O. 12333 § 1.5(D)).

320. Turner and Thibault, *supra* note 118, at 126-28. See *id.* at 129 (quoted *supra* note 311); 1982: *The Year in Review*, *supra* note 303, at 9 (quoting Silver): E.O. 12333 "abolished the rigid National Security Council committee structure embodied in the

12356,³²¹ doubts are now resolved in favor of classification rather than the declassification of information. President Reagan also pardoned two ex-FBI agents, convicted of "black bag operations" against the Weathermen. Reagan argued that: "America was generous to those who refused to serve . . . in the Vietnam War. We can be no less generous to two men who acted on high principle to bring an end to the terrorism that was threatening our Nation."³²²

The courts are right: supervision of the CIA (actually the lack thereof) is a political football. A President's ideological predispositions and his current relations with Congress, the bureaucracy, and the public are the prime determinants of policy, rather than the requirements of a sensible, longer-term national security. The President does have the right and duty to speak on military and foreign policy, but his message gets distorted or blocked by Congress, interest groups, the media, and other nations—and his administration frequently speaks with (and in) many tongues.³²³ The CIA only listens to those it wishes to hear, and the results³²⁴ are frequently anomalous.

Congress has been even less effective than the president when seeking to compel the CIA to listen. This is but one aspect of a familiar lament in twentieth century America and the European democracies—the decline of legislatures as formulators and monitors of law and

previous order and replaced it with a provision permitting the NSC to establish such committees as may be necessary. The order also abolished the National Foreign Intelligence Board and the National Intelligence Tasking Center . . . " See also Southerland, *supra* note 135, at p. 12, col. 5 (quoting CIA Director Casey):

The criticism of the executive order [E.O. 12333] was much overblown. It's not true that we wanted the order so that we could spy on Americans. We wanted it to simplify the work of our operations officers. Before, they had 130 pages of operational guidance and restrictions to follow and interpret. It's down to 25 percent of what it was.

321. 47 FED. REG. 14874, 15557 (1982). See *House Committee Critical of Classification Order*, *supra* note 151, at 5; *supra* notes 149-52 and text accompanying.

322. *Pardons for W. Mark Felt and Edward S. Miller*, INTELLIGENCE REPORT, May 1981, 1 (quoting Reagan). They were fined \$5,000. and \$3,500 respectively, where the maximum penalty was 10 years and \$10,000. *Felt-Miller Conviction*, INTELLIGENCE REPORT, Jan. 1981, 3. See *id.* at 4:

It now appears that such operations were legal and constitutional if a particular entry is approved in advance by either the President or the Attorney General. The defendants did not seek the specific approval of either . . . because such had never been thought necessary in the past and, at the time they acted, there was nothing to suggest that personal approval was required.

323. Hughes *supra* note 148, at 13; A. MILLER, *supra* note 16, at 66. See Miler, *supra* note 121, at 55 (president must eliminate intelligence oversight functions of those in his administration who contribute to confusion about intelligence needs); *supra* note 304-05 and text accompanying.

324. See, e.g., *supra* notes 157-58, 163, 178-79, 224, 234-36.

policy, a decline paralleling the growth of the strong State. Intelligence matters show Congress at its worst disadvantage in the face of the *relative* unity, decisiveness, speed, and secrecy displayed by the CIA and by the executive branch generally. Congress can inquire into disasters after the fact, but cannot deal with uncertain contingencies prospectively. Until the mid-1970s, a Congress uncertain of its powers over the CIA delegated these powers to the executive branch under standards so loose as to amount to confessions of an absolute congressional ignorance.³²⁵ Congressional debates on intelligence matters were ritualized responses to perceived "them" versus "us" crises. They were occasionally followed up with minor policy changes negotiated with the executive branch. By the end of 1972, some 132 bills providing for congressional oversight of intelligence activities had been introduced; only two were reported out of committee, to be defeated roundly.³²⁶ An "abdication of influence by the legislators, aggressive pursuit of influence by the executive, and the heightened pace, complexity, and hazard of international affairs"³²⁷ added up to a congressional inattention.

By the mid 1970s, however, many in Congress had grown to mistrust the CIA. The Church Committee's revelations, and a larger distrust of executive branch expertise and the motives of presidents embroiled in Vietnam and Watergate led to attempts to curb threats to civil liberties and to extend newly-rediscovered congressional prerogatives. In a rejection of the tradition of a perfunctory oversight by two or three congressional leaders, Senate and House Select

325. See R. EYESTONE, *supra* note 6, at 35 (political supervision is often difficult "because the aggregate is hidden, its growth is incremental, and no single addition is greatly controversial in itself."); Mathias, *supra* note 230, at 71 (discussing FEDERALIST No. 70); Franck, *supra* note 230; Gilbert, *supra* note 229, at 140; *supra* notes 121, 137, and text accompanying.

Since 1937, courts have almost always sustained the constitutionality of delegations of congressional power. The formal standard is that Congress has legislated as far as is "reasonably practicable." *Butterfield v. Stranahan*, 192 U.S. 470, 496 (1904). But in practice the only criterion for delegation is that the relevant wisdom is not to be found in Congress. K. DAVIS, *supra* note 146, at § 2.03, 29; J. FREEDMAN, *supra* note 8, at 78-79. Courts have deemed this to be the case in the area of foreign and military policy—see, e.g., *supra* note 305—and Congress has been unable or unwilling to provide the procedural protections of individual rights that are found in most administrative laws. See K. DAVIS, at § 2.03, 30.

A. MILLER, *supra* note 16, at 128, argues that: "The target of interest groups, with little self-generative power, it [Congress] is the prime example of a nineteenth century institution that will not reform itself. . . . Congress staggers along, full of unrequited self-importance and dashed expectations, with some members participating in the 'sub-governments' of Washington."

326. R. EYESTONE, *supra* note 6, at 158; Ransom, *supra* note 136, at 212; Walden, *supra* note 125, at 230.

327. Glennon, *supra* note 148, at 270.

Committees on Intelligence were created in 1976 and 1977. The possibility of a public committee rebuke has had some influence on the behavior of CIA officials, and Senate confirmation hearings for CIA directors have served as general policy reviews.³²⁸ In 1981, for example, nominee Casey assured the Committee that he "could not now conceive of any circumstances" under which he would not cooperate with its oversight activities.³²⁹ (The Committee later found Casey to be "not unqualified.") There is some doubt whether a rigorous, consistent oversight is in fact achieved, however. Many of the committees' members seemingly have a "need not to know" the ungentlemanly details of intelligence, and the CIA has withheld information from the committees on occasion. This is known because some of the information disclosed by the CIA as a consequence of Freedom of Information Act lawsuits had not been previously given to Congress.³³⁰

Congress tried to put some teeth into demands to be informed about intelligence operations during the 1970s. But it soon became apparent that, as interpreted by presidents, the War Powers Resolution of 1973 (WPR)³³¹ has a paramilitary loophole; CIA covert operations would proceed without prior presidential consultation with Con-

328. S. Res. 400, 94th Cong., 2d Sess., 122 CONG. REC. 14,673 (1976); J. FREEDMAN, *supra* note 8, at 66; Ransom, *supra* note 136, at 213; Turner and Thibault, *supra* note 118, at 129. See *supra* notes 8, 18 and text accompanying. There was a strong feeling in Congress that it could have retarded the Vietnam escalation if the extent of disagreement among executive branch policy experts had not been kept secret. Hughes, *supra* note 125, at 37-38. Senator Church was cautious, fearing that Americans were not ready to have their idols shattered and that he would be seen to be furthering presidential ambitions. His Committee nevertheless dug deeper than ever before (D. WISE, *supra* note 120, at 203) or since.

329. Casey Confirmation Hearing, *supra* note 167, at 4.

330. FOIA Testimony Presented, *supra* note 141, at 3. The CIA was essentially exempt from the FOIA until 1975, *id.*, which may be amended to create a blanket exemption in the future. See Aspin, *Forward*, in P. KOSTINEN, *supra* note 120 at vii; Ransom, *supra* note 136, at 213-14; D. WISE, *supra* note 120, at 404 (quoting Sen. Stennis); *id.* at 409 (House committee intelligence report costing \$500,000 was suppressed, and leaking of document to Daniel Schorr investigated instead); Hall, *supra* note 120 (quoted *supra* note 120); Raskin, *supra* note 120, at 206.

331. 50 U.S.C. §§ 1541-48 (1976). See Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984); Hardy, *supra* note 129; Highsmith, *supra* note 112, at 328, 368-69. The WPR's opponents claim that clause 11 of the Constitution "confers upon Congress only a narrow piece of the war power." Carter, at 101. The WPR is triggered by "hostilities," actual or imminent, and the Reagan Administration finds this to mean an exchange of fire by actively engaged American forces. Hardy, at 269. The constitutionality of terminating U.S. involvement by Congress's failure to pass a concurrent resolution within 60 days (under § 4(a)(1)) is cast into doubt by *I.N.S. v. Chadha*, 103 S. Ct. 2764, 77 L. Ed. 2d 317, 51 U.S.L.W. 4907 (1983). *Chadha* is probably distinguishable, however. Hardy, at 272. Public interest in the WPR has been rekindled by the recent deployment of Marines in Lebanon, Reagan Administra-

gress under the WPR. The Hughes-Ryan Amendment of 1974³³² thus sought to prohibit the expenditure of funds for covert CIA operations where the president has not reported "in a timely fashion, a description of the nature and scope of such operation to the [eight] appropriate committees of Congress." A broad intelligence charter³³³ was not enacted in its entirety, but Title V became law as the 1980 Amendment to the National Security Act of 1947.³³⁴ Under Title V, only the Senate and House Select Committees need be consulted, but consultations must broadly cover the "significant" (not just covert) intelligence

tion policies with regard to Central America (Hardy, at 268), especially the mining of Nicaragua's harbors—and the invasion of Grenada.

The Iranian hostage rescue attempt would probably not have triggered the WPR if CIA personnel had been used. Highsmith, at 370-71. Presidents have circumvented the WPR by using the CIA or by contending that hostilities are not "anticipated" or that a "humanitarian mission" was undertaken. *Id.* at 382. *See id.*, at 378. For an argument that the WPR covers covert operations and certain economic and diplomatic measures taken by the U.S., *see* Sen. Eagleton, 119 *Cong. Rec.* 25,079-80 (1973): "Wars do not always begin with the dispatch of troops. They begin with more subtle investments . . . of dollars and advisors and civilian personnel. [T]he end result is the same: Americans are exposed to the risk of war. And as they are exposed to the risk of war, the country then makes a commitment to war." *See supra* note 213 and text accompanying J. BERMAN AND M. HALPERIN, *supra* note 121, at 102 (quoting Jerrold Walden) add that: "At no place in the legislative history of the CIA is it apparent that Congress intended the Agency to engage in subliminal warfare."

332. 22 U.S.C. § 2422(a) (1976). Hughes-Ryan does not apply where war has been declared or the War Powers Resolution complied with, *Id.* at § 2422(b). It serves to qualify 50 U.S.C. § 403 (1976) (quoted *supra* note 121). *See* J. BERMAN AND M. HALPERIN, *supra* note 121, at 102-03; Highsmith, *supra* note 125, at 354-55. The War Powers Resolution and Hughes-Ryan both "represent a compromise between the theory of congressional authorization and the practical realities of presidential decision-making in a . . . fast-moving world." *Id.* at 378. Uhlmann, *supra* note 135, at 11-12, argues that covert CIA help during the Aldo Moro kidnapping was impossible since the legally-required finding that Italy's Red Brigade is an "international terrorist organization" could not be made. This argument should be taken with a grain of salt: statutes like Hughes-Ryan can become handy rationalizations for incompetence by the CIA and others.

333. S. 2284, 96th Congress, 2d Sess. (1980). *See* Uhlmann, *supra* note 135 at 13; Highsmith *supra* note 112, at 355-58; *supra* notes 314-15 and text accompanying. There were many intelligence disputes between Congress and President Carter, who supported the continuation of a Hughes-Ryan type of oversight (*supra* note 332 and text accompanying) and opposed S. 2284 because it would give the CIA Charter (much of which replicated Carter's E.O. 12036—*see supra* notes 314 and text accompanying) the force of law. Highsmith *supra* note 125, at 357, 360. S. 2284 seemingly failed to pass because of a paradox: a perceived CIA incompetence during the fall of the Shah and the invasion of Afghanistan was used to justify strengthening the president's hand in intelligence matters. *Id.* at 355. Raymond Waldman, testifying before the Senate Select Committee about S. 2284, argued against "the direct involvement of Congress in the management of executive agencies. Congress should concern itself with authorizations, restrictions and procedures. The writing of detailed rules . . . is more appropriate for an administrative agency for its own operations." *Standing Committee, 1980, INTELLIGENCE REPORT*, Jan. 1981, 1 at 5.

334. Pub. L. No. 96-450, 94 Stat. 1975 (1980), 50 U.S.C. §§ 501-05 (1980).

activities of any agency (not just the CIA). Prior notification of the Committees is also required, for the first time.³³⁵ Secrecy makes it impossible for Congress to know how effective these consultation procedures are in practice. Some experts praise the procedures highly,³³⁶ while others³³⁷ complain bitterly about partisanship in oversight and leaks of "sensitive" information by committee members and their staff. These complaints are used to justify, tacitly and sometimes not so tacitly, withholding from Congress some of the vital pieces of the intelligence jigsaw puzzle.

335. See Highsmith, *supra* note 125, at 330-31, 356-58. "Significant" activities, those which must be reported in advance, are those with "policy implications;" the "day-to-day implementation" of previously adopted policies is excluded. 50 U.S.C. § 501(a)(1). The Committees' approval is not a condition precedent, however. *Id.* at § 501(a)(1)(A). The Foreign Intelligence Surveillance Act of 1978 also seeks to curb CIA activities, but its key provision has been negated by at least some of its designated judges: see *supra* note 269.

336. Turner and Thibault, *supra* note 108, at 129-31:

[A]lthough the committee members . . . have a good record of preserving secrecy, the requirement of disclosing information to Congress inhibits intelligence officers.

[T]he widespread impression that congressional oversight has hobbled intelligence can be attributed to the 1980 battle over modifying the Hughes-Ryan amendment. . . .

. . . While in the past some subordinates may have sought to hold back information from the . . . [CIA Director], today they know they may be called to testify before Congress where they would face the choice of disclosure or perjury.

Finally, all intelligence officials who testify . . . benefit from the exchange.

See S. Rep. No. 730, 96th Cong., 2d Sess. 12 (1980): "The executive branch and the intelligence oversight committees have developed over the last four years a practical relationship based on comity and mutual understanding without confrontation." Title V attempts to continue this relationship, in an area where constitutional doctrine is lacking. *Id.*; Highsmith, *supra* note 125, at 363. See also Casey, *supra* note 123, at 3 (quoted *infra* note 337); Colby, *supra* note 123, at 6: The 1980 Amendment—see *supra* notes 334-35 and text accompanying—is a reasonable sharing of information and power with committees able to keep secrets.

337. See, e.g., Pforzheimer, *supra* note 142, at 4 (paraphrasing CIA Deputy Director Inman's October 1982 speech) (emphasis supplied):

[A]t present there are staff leaks from the Senate Intelligence Committee . . . ; the Admiral said he could furnish names to those empowered to be informed. He then criticized the House Intelligence Committee staff report on intelligence community performance in Central America, leaked a few days before it was officially released. [I]t had been released on a straight party-line vote . . . [which is] so serious a breakdown in bipartisanship that the Admiral . . . resign[ed] his post as a consultant to the committee.

See also Bork, *supra* note 42, at 6 (congressional leaks make covert activities impossible); Godson, *supra* note 237, at 6 (Hughes-Ryan requirements of presidential approval and reports to eight congressional committees "effectively ruled out major covert action as an option."); Landau, *supra* note 237, at col. 3 (discussing CIA Directors', Turner's and Casey's, complaints of congressional leaks). But see also, Casey, *supra* note 123,

It is nearly impossible for Congress to engage in a longer-term policy planning, in the field of intelligence and elsewhere, because of biennial election cycles and an annual budgeting. It is totally impossible for Congress to exercise budgetary controls over the CIA in any event. Many details of CIA budgets are kept secret by hiding them under innocuous headings for other agencies. This practice is probably unconstitutional in theory,³³⁸ and it eliminates oversight of the CIA by the appropriations committees that frequently staunch the growth of other agencies and that are less likely to be impressed by Agency blandishments. After the Church Committee was disbanded, it became difficult to maintain a zeal for and a sustained attention to the details of intelligence oversight. Intelligence committee members receive few personal gains from their service, neither the national exposure nor the kind of constituent "casework" that are perceived to improve re-election chances. A rigorous oversight might, in today's political climate, expose the overseers to charges of endangering national security.³³⁹ That Congress may be more receptive to Agency blandishments is suggested by the enactment of such statutes as the Classified Information Procedures ("Greymail") Act of 1980³⁴⁰ and the Intelligence Identities Protection Act of 1982.³⁴¹

at 3: "Today our relations with the two permanent congressional intelligence committees are excellent. We are responsive to their concerns, as we should be. In turn, their attitude is one of 'what can we do to help you accomplish your mission?'" (This attitude may have changed after the mining of Nicaragua's harbors.)

338. See U.S. Const., Art. I, sec. 9, cl. 7: "No money shall be drawn from the Treasury but in consequence of appropriations made by laws; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time." See also K. DAVIS, *supra* note 146, at § 4.08, 108-09; J. FREEDMAN, *supra* note 8, at 66-67; Mathias, *supra* note 230, at 81 (congressional compulsion—impeachment, budget cutoffs, etc.—is so crude as to be virtually unemployable); *supra* notes 18-19, 26, 148, 227-28 and text accompanying.

339. G. EDWARDS, *supra* note 19, at 157. See E. LEWIS, *supra* note 103, at 169; Ransom, *supra* note 136, at 209 (intelligence "overkill" results from congressional inability to control CIA's budget); *id.* at 211 (Office of Management and the Budget controls over the CIA seem ineffective, although it is impossible to be certain of this); J. SIGLER AND B. BEEDE, *supra* note 16, at 20; Carron, *supra* note 7, at 292-93; *id.* at 293 ("Spontaneity and laissez-faire are still deeply ingrained" in Congress).

340. See 18 U.S.C. Appendix (1980), Pub. L. 96-456, Oct. 15, 1980, 94 Stat. 2025 (Title 18 App.). "Greymail" encompasses attempts to win a civil suit or defend a criminal suit by threatening to obtain classified information through discovery, or to threaten to introduce such information into evidence. See *Litigating National Security Issues*, INTELLIGENCE REPORT, June 1982, 1. (The statute covers criminal prosecutions only.)

341. 50 U.S.C. §§ 421-26 (1982), Pub. L. 97-200. Signing the Bill after a three year battle in both houses, President Reagan said that it would send a "signal to the world that while we in this democratic nation remain tolerant and flexible, we also retain our good sense and our resolve to protect our own security and that of the brave men and women who serve us. . . ." *Act Signed into Law by President*, INTELLIGENCE REPORT, July 1982, 1.

For extended arguments for and against the constitutionality of the Act, see Bork, *Professor Bork on Intelligence Identities Protection Act*, INTELLIGENCE REPORT, Produced by The Berkeley Electronic Press, 1984

E. Future CIA Accountability: A Proposal

While there is a fairly clear line of future development in contract law and policy,³⁴² no such line exists for the CIA. We may be in for fuller reversions to the untrammelled discretion enjoyed by the CIA prior to the mid-1970's, but such a trend is unlikely to outlast present and future disclosures of CIA misdeeds and incompetence. Despite the apparent cycles of congressional trust and mistrust of the CIA, Congress is the CIA's most promising overseer in the long run. Congress is, after all, the locus of American liberal democracy, the institution whose prerogatives are most at risk from the strong State and its intelligence activities. If a politically effective pluralism concerning intelligence policies (a fruitful questioning of diverse sources of information and a willingness to dissent from official views) is to be found at a particular time, it will be found in Congress. The falsity of the "us" and "them" dichotomy, and the futility of trading CIA accountability for more national security, will not always (perhaps not usually) be apparent to a majority in Congress. Nevertheless, Congress is the only governmental body capable of achieving a consensus over intelligence which differs significantly from the CIA's views.³⁴³

Congress possesses both the strongest motives for curbing the CIA and the least effective institutional means to this end. Congress did try to reform itself to sustain a policy competition with the executive branch during the 1970s, over intelligence policy and many other matters. New advisory boards were created,³⁴⁴ but these are largely irrelevant to a CIA oversight. In any event, it would be futile for Congress itself to try to create an intelligence expertise in miniature. A fair amount of decentralization in congressional power also occurred during the 1970s, a decentralization which gave added

Sept. 1980, 2; *House Hearings on Intelligence Identities Protection Act*, INTELLIGENCE REPORT, May 1981, 2, at 3. Halperin, *supra* note 125, at 3, cols. 1-2 argues that the Act is "part of a much more disturbing trend," the "development by the government of the concept of . . . 'dangerous information' . . ." Government asserts the right to control such information, whether it "is in the hands of government employees or private individuals." *Id.*

342. See *supra* notes 111-18 and text accompanying.

343. P. KOSTINEN, *supra* note 120, at 17; H. WILENSKY, *supra* note 123, at 127, 162; Turner and Thibault, *supra* note 118, at 137. See C. LINDBLOM, *supra* note 3, at 21; A. MILLER, *supra* note 16, at 129; *supra* notes 186-93, 202-03, 209-13, 218, 325-41 and text accompanying. See also Hughes, *supra* note 125, at 39: "Congress and the intelligence community have a similar stake in institutionalized skepticism and in assuring that the products of an expensive and elaborate process are not ignored."

344. E.g., the Office of Technology Assessment, Congressional Research Service, expanded Government Accounting Office functions (auditing assistance for Congress), and the Congressional Budget Office and other mechanisms created by the Budget and Impoundment Control Act of 1974, Pub. L. 93-344, 88 Stat. 297, 93rd Cong. 2d Sess. (1974). See Beckman, *supra* note 6, *passim*; Thurber, *supra* note 19, *passim*.

authority to those who chair committees and subcommittees. One effect of this was more autonomy for intelligence oversight by committees, but decentralization has also meant a fragmentation of congressional power and a weakening of its leadership. This fragmentation makes Congress an even poorer match for powerful agencies like the CIA, which present a united policy front to Congress and fall back on misinformation, endless delays, and claims of executive privilege when the going gets rough.³⁴⁵

The CIA will not curb itself, the checks exercised by courts are flimsy and likely to remain so, and, periodically, presidents have a unity of purpose with the CIA in strengthening the National Security State. If Congress is to alter this impasse, which leaves the CIA more or less unaccountable, new means of supervision will have to be institutionalized. An altering of the balance of power in intelligence would not create separation of powers problems. CIA functions and lines of authority stem from the customs and statutes that can be changed by statute, rather than from constitutional doctrines.³⁴⁶ My candidate for an effective new institution would be an intelligence ombudsman,³⁴⁷ selected by and responsible to Congress. The need for

345. Hughes, *supra* note 148, at 39; Mathias, *supra* note 230, at 75, 79; Moss, *supra* note 132, at 123. See J. FOX, *ARMING AMERICA* 136-37 (1974) (five successful "games" used by the Pentagon to secure congressional funding for endangered programs); E. LEWIS, *supra* note 123, at 125-26; Beckman, *supra* note 6, at 242-43; Carron, *supra* note 7, at 292; Davidson, *supra* note 18, at 300-04, 311, 322; *id.* at 300 (information and power fragmented by "byzantine jurisdictional politics" of congressional committee/subcommittee system); Frye, *supra* note 18, at 270-72; Jones, *Why Congress Can't Do Policy Analysis*, in 1 *POL. STUD. REV. AN.* 234, 235 (S. Nagel, ed. 1977); *supra* notes 19, 333-34 and text accompanying. (The tactics discussed in the text were used against Congress by some Environmental Protection Agency officials during early 1983.)

Congress functions collectively in some areas and fragmentarily in others, with varying degrees of success. It "probably cannot devise an energy policy, but it can take the initiative in environmental regulation; it probably cannot function independently in global, fiscal or monetary management, but it can write tax legislation in detail." Gilbert, *supra* note 229, at 140.

346. See J. FREEDMAN, *supra* note 8, at 261; Medow, *supra* note 135, at 812; *supra* notes 229-31, 257, 271, 305, 325 and text accompanying; *infra* note 347. Harris, *supra* note 141, at 72, argues that the Constitution, Art. IV, sec. 4 (the "guarantee clause") and *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) confer broad intelligence oversight powers on Congress, but this argument seems rather farfetched.

347. See *infra* note 351 and text accompanying. There are no legal barriers to a congressional delegation of power to one agency (the CIA) to be exercised in accordance with standards and procedures prescribed by a second agency (the ombudsman), particularly as the latter would be closely linked to Congress in its exercise of power. See National Water Commission Act, 42 U.S.C. § 1962a-2; K. DAVIS, *supra* note 146, at § 2.03, 46. An ombudsman could perform many of the functions performed ineffectively by the Intelligence Oversight Board, performing them for Congress rather than for the president. See Tovar, *supra* note 121, at 78 (a single congressional "committee, giving the subject full-time attention and working closely with

such an institution has only become apparent recently. The lawyers' and political scientists' answer to Juvenal's question, "Quis custodiet ipso custodes?" (roughly, "Who controls the controllers?"), used to be rather uniformly optimistic: democratic processes, aided by the press and the direct democracy of petitions and public meetings, with judicial remedies in the background.³⁴⁸ Our courts still think this the full and effective answer to the CIA's power,³⁴⁹ but the growth of the strong State since World War II (some would say since the Depression) has been cause and effect of these traditional controls becoming much less effective. This was, for example, the thrust of the Goldwater conservatives' attack on the march of "collectivism" in an American "welfare state."³⁵⁰

There is now enough experience on which to base an intelligence ombudsman's functions, the experience of a generation of trial and error that has exhausted the ingenuity of would-be overseers who tried to adapt traditional devices. The complexities of modern bureaucracies must be matched by complex controls, and this has led other countries,³⁵¹ and states such as Nebraska

Executive leadership, could profit from the mistakes of the past and perform its watchdog role effectively."); *supra* note 311 and text accompanying.

348. G. SAWER, *supra* note 2, at 1.

349. See *supra* notes 272-73, 304-05 and text accompanying.

350. G. SAWER, *supra* note 2, at 1-3. See W. GELLHORN, *OMBUDSMEN AND OTHERS* 2 (1966).

351. See J. FREEDMAN, *supra* note 8, at 111-12 (discussing problems faced by the Equal Employment Opportunities Commission); I. AL-WAHAB, *THE SWEDISH INSTITUTION OF OMBUDSMAN* 13-14 (1979); H. WILENSKY, *supra* note 123, at 126:

[P]rocedural safeguards and outside checks . . . which involve a search for information as well as justice [are needed]. Consider the Ombudsman. . . . While this institution originated in Sweden, apparently analogous institutions have been or can be developed in common-law countries that have inherited the British parliamentary system (United Kingdom, Canada, New Zealand), in countries with federal forms that separate legislative and executive powers (the United States, the Philippines), and even in countries with a well-developed system of administrative courts providing easy access to judicial review (France, West Germany).

See *also id.* at 126 n.30:

[I]n the reluctant welfare state of America, a more aggressive matching of agency to clientele than that afforded by a greivance commissioner may be necessary. Doctrines of economic individualism reinforce structural barriers to the humane administration of health, education, and welfare services. An unusual accent on minimum government, private property, and the free market reinforces our decentralized federalism and our separation of powers, thereby making it difficult to finance public services and making it necessary to channel services obliquely through a labyrinth of local units, each more reluctant than its neighbor to yield a fraction of its autonomy.

See *supra* note 218 and text accompanying. It is precisely "a more aggressive matching"

and Hawaii,³⁵² to experiment with ombudsmen. To be successful, an ombudsman must search out information and identify appropriate reforms in law and policy, as well as rectify injustice. A skeptical expertise is needed, of course, as is a strong power base insulated fairly effectively from both the producers and consumers of the government service in question. An ombudsman who needs to neither create nor use intelligence could attain a neutrality and objectivity in the evaluation of intelligence operations, while resisting the temptation of a detailed supervision of these operations. At the most general level, such an ombudsman would pragmatically promote a CIA responsiveness to the fundamental principles of liberal democracy and a distinctly American intelligence policy. The mere existence of such an ombudsman, who offers an accountability where other control devices are unavailable, inadequate, slow or expensive, would create significant incentives for the CIA to correct maladministration and to avoid needless civil liberties violations.³⁵³

Like a court but unlike Congress, an ombudsman could risk a

of the CIA with its clientele that is needed. This matching can be termed an ombudsman institution without doing violence to the term. "Procurator" might be a better term, were it not for its Kafkaesque connotations. The federalism and separation of powers problems mentioned by Wilensky deserve serious consideration, but they are irrelevant to strong State institutions such as the CIA.

352. See A. WYNER, *THE NEBRASKA PUBLIC COUNSEL* (1976); *The Ombudsman in Hawaii: The Basic Premises*, 7 HAW. B.J. 17 (Apr. 1970). The "general idea" of an ombudsman "is one that we Americans ought to explore." K. DAVIS, *supra* note 146, § 4.10, at 115. Careful adaptations of foreign models will be required, however: *see supra* note 351.

353. K. DAVIS, *supra* note 146, § 4.10, at 115; K. DAVIS, *supra* note 147, at 150; J. FREEDMAN, *supra* note 8, at 261; W. GELLHORN, *supra* note 350, at 1, 3-4; H. WILENSKY, *supra* note 123, at 176. See K. DAVIS, *supra* note 146, § 4.02, at 92; K. DAVIS, *supra* note 147, at 150 (ombudsman cannot be a substitute for competent administration); A. MELTSNER, *supra* note 11, at 4-6; G. SAWER, *supra* note 2, at 49 ("A good ombudsman will reduce the complacency, verging towards arrogance, which is the characteristic vice of bureaucracies, and he will also remove many of the chips on shoulders which citizens tend to display in their dealings with government."); H. WILENSKY, *supra* note 123, at 130-31 (quoted *supra* note 196); Franck and Weisband, *supra* note 154, at 401 (foreign affairs prerogatives should not become licenses to replace legislation in the regulation of internal affairs); *id.* (adequate if not always immediate public information must be assured); Highsmith, *supra* note 125, at 378 (compromise required between theory of congressional authorization and the practical realities of presidential decisionmaking); Turner and Thibault, *supra* note 118, at 130 (danger that Congress will try to manage rather than oversee CIA activities, a distinction easily blurred in many circumstances); STANDING COMMITTEE, 1980, *supra* note 333 (quoted *supra* note 333); *supra* notes 140, 259 and text accompanying. See also Turner and Thibault, *supra* note 118, at 136: "Since the Attorney General's office is not a principal user of foreign intelligence, it has an institutional inclination to tighten controls and to curtail intelligence activity rather than to let the CIA take risks." This is certainly true in theory, but memories of a John Mitchell seemingly responsible only to Nixon make Congress a more logical

certain number of politically-unpopular decisions, thereby insulating Congress from some of the political consequences of a rigorous intelligence oversight. Congress excels at accumulating desirable policies, but finds it difficult to balance and establish priorities among them. For example, Congress would no doubt approve of an all-powerful CIA which is fully accountable and protective of civil liberties. But when the inevitable tradeoffs between these policies come to be made, Congress runs aground. An ombudsman could make these tradeoffs for Congress, subject always to its disapproval. (S)he would also introduce an inquisitorial element into the adversarial debates concerning intelligence, within Congress and between Congress and the executive branch. Disputes could be narrowed and tensions reduced by the ombudsman's careful investigations into the "facts" being debated. While some see American courts as ombudsmen, dealing with "a cafeteria of questions"³⁵⁴ in some areas, courts are unwilling and unable to do this in the area of intelligence—as we have seen.³⁵⁵ Unlike French or German administrative courts, or the ombudsmen who work by their side, American courts lack the intimate relations with parliament, ministers, and the bureaucracy necessary to a technically informed assessment of administrative activity. American courts can judge the legality of an administrative activity, but not its propriety. Activities cannot be supervised by our courts in any detail, and programs to deter maladministration cannot be developed in any elaborate way. Our courts examine the symptoms, civil liberties violations, in a cursory fashion rather than attacking the cause: a CIA unaccountability which is addressed most inadequately by existing rules, doctrines, and remedies. These would be best created anew rather than merely reformulated. An ombudsman can do this as well as anyone, borrowing the (admittedly limited) congressional flexibility and control over the sword and purse that the courts lack.³⁵⁶

354. Goodwin, *Comment*, 12 SW. U.L. REV. 358, 360 (1980-81). See J. SIGLER AND B. BEEDE, *supra* note 16, at 7; Lowi, *Distribution, Regulation, Redistribution: The Functions of Government*, in PUBLIC POLICIES AND THEIR POLITICS 27, 40 (R. Ripley, ed. 1966); Baum, *supra* note 106, at 42-43.

355. See *supra* notes 265-97, 303 and text accompanying.

356. See F. MARX, THE ADMINISTRATIVE STATE 141-43 (1957) (the impact of French administrative law on administration there); G. SAWER, *supra* note 2, at 4-5, 17; *id.* at 10 (ombudsman as alternative to powerful administrative court, a useful alternative where problems are too complex to be solved by ingenious adaptations of private law remedies or prerogative writs); *id.* at 186 (quoted *supra* note 2); K. WHEARE, MALADMINISTRATION AND ITS REMEDIES 31, 39-42 (1973); H. WILENSKY, *supra* note 123, at 126 (quoted *supra* note 351.) At one extreme, Anglo-American judicial review of administrative action prevents a real review because of a refusal to probe the foundations of facts presented. At the other extreme (all but absent from the national security area), uninformed judicial preferences are imposed on administration. F. MARX, at 141. The "resulting string of court decisions has left the administrative process tattered

An ombudsman could bridge the false dichotomy between CIA secrecy and accountability with greater ease than could any existing governmental institution. While courts dislike *in camera* proceedings, and Congress and the executive branch are prone to leaks on occasion, an ombudsman could keep investigations secret while giving the widest publicity to the fruits of investigation—whether these serve partisan purposes or not. Demonstrably able to keep the “real” secrets, an ombudsman could legitimately insist on a fuller and deeper investigation, a subsequent public disclosure of matters not properly classified, and a reprimanding of the overclassifiers. Disclosure by the ombudsman would frequently be delayed, however, particularly to allow secret negotiations and attempts to form policy coalitions to go forward. The secret sources of information would be deleted and replaced by the ombudsman’s judgment about the reliability of the information. Ombudsmen are used in several countries, notably in Britain and New Zealand, to filter secrets in this way. Such a system would decrease the tendency to partisan leaks and counter-leaks, expose the divisions and dissensions within the administration (after attempts at policy coalitions have failed), and encourage officials to identify and line up behind the “best” policy.³⁵⁷ An ombudsman could, in fact, institutionalize the whistleblowers’ role along lines attempted (unsuccessfully) by Ford’s and Carter’s Intelligence Oversight Board.³⁵⁸

Were it better informed about foreign and military policies, the public would have a significant incentive to take greater interest in them, and in the CIA activities purporting to further them. The mere fact that justified complaints by Americans *and* by foreigners or their governments would obtain redress from an ombudsman, *and* that groundless complaints would stand revealed as such, would greatly

and torn without any suggestion of better alternatives for serving the general interest.”
Id.

357. Colby, *supra* note 123, at 25; Franck and Weisband, *supra* note 154, at 430; Ignatieff, *supra* note 299, at 6; A. MELTSNER, *supra* note 11, at 280. See K. DAVIS, *supra* note 146, § 4.06, at 104 (quoted *supra* note 146); I. AL-WAHAB, *supra* note 351, at 52 (“no document is so secret that it may be kept . . . from an Ombudsman and no official has the right or the privilege to refuse answering the questions of an Ombudsman or to decline to give him assistance whether during inspections or investigations.”); Martin, *supra* note 148, at 684; *supra* note 118 and text accompanying (ombudsman could be both knowledgeable and free to talk); *supra* notes 151-58, 162-63, 337 and text accompanying. There have been attempts to create ombudsman-like filters for secrets: see e.g., Muskie Bill, S. 2965, 92d Cong., 1st Sess., Dec. 7, 1971 (7-member Disclosure Board, appointed by president with Senate’s advice and consent); Horton-Moorehead Bill, H.R. 4960, 93rd Cong., 1st Sess., Feb. 28, 1973 (Freedom of Information Commission to downgrade or declassify information); Franck and Weisband, *supra* note 154, at 430.

358. See Turner and Thibault, *supra* note 118, at 129 (quoted *supra* note 311); *supra* notes 288-97 and text accompanying.

increase the credibility of a CIA forced to be more careful.³⁵⁹ For example, Cuba's Castro claims to have evidence of recent CIA assassination attempts against him. If an ombudsman were to find Castro's case proved, draconian action could (and should) be taken by Congress. If his evidence proved insubstantial, Castro would be revealed to the openminded as an international libeller of the CIA—and many such libellers would take care in the future not to endanger their credibility further. If Castro refused to submit his evidence, it would be heavily discounted by the openminded. Over time, the effect of an ombudsman believed to pursue investigations actively and objectively would be to swell the ranks of those who are openminded about the CIA.

Congressional and media evaluations of the CIA are oriented toward past failures rather than a future efficacy and efficiency. An ombudsman's oversight, on the other hand, could be forward looking, attending to a past misadventure only when it points to unresolved problems.³⁶⁰ At present, the few rules of a "per se" illegality applied to CIA activities are unenforceable because controversies arising from violations of these rules are non-justiciable. CIA conduct thus winds up being legal per se, while an ombudsman could effectively apply much needed rules of reason³⁶¹ to this conduct. While a fair amount of discretion is essential to a competent CIA, much less is needed than presently exists. Some intelligence processes are not readily cabined by rules, and dealing creatively with the peculiarities of circumstance requires innovation rather than a mechanical bureaucratic response. Insisting on a strict bureaucratic legality amounts to settling for a merely tolerable administration, while ombudsmen try to improve administration by evaluating the motive for and effect of particular exercises in discretion. Evaluations would not be based on the CIA's extravagant claims for needed powers, but on criteria devised (sometimes after the fact) by the ombudsman acting on his expert judgment. How closely did a particular operation adhere to the most restrictive means—those least violative of domestic and foreign rights—available to perform a legitimate task competently? Over time, a sliding scale of rules would evolve to cover particular circumstances, rules about what is desired (although not required) or allowed (but not necessarily desired). These rules, like those of the common law and of a good faith performance of duties in particular, would remain rather vague until they coalesce in the face of the clearest violations.³⁶²

359. See *supra* notes 255-56, 260-61 and text accompanying.

360. See Godson, *supra* note 237, at 3; *supra* notes 238-39 and text accompanying.

361. See *supra* notes 240-44 and text accompanying.

362. See *Snepp*, 444 U.S. at 518-19 (Stevens, J., dissenting) (discussed *supra* note 294); K. DAVIS, *supra* note 146, § 4.02, at 92; *id.*, § 4.10 at 115; K. DAVIS, *supra* note 147,

To make the rules more concrete, sample procedures³⁶³ could be drafted, and the ombudsman could require the CIA to draft its own specific guidelines.³⁶⁴

The purposes of this exercise would be pragmatic: the rewarding of CIA competence with recommendations for promotion, etc.; the keeping of inevitable deviations within reasonable bounds by recommending the suspension or dismissal of the clearest violators; and recommending changes in intelligence processes in areas where violations become too numerous. An ombudsman would have to attend to organizational reforms of the CIA, particularly those breaking down rigid hierarchies and rituals, coordinating intelligence activities (without creating artificial divisions of labor or marriages of informational and covert activities), and forcing superiors to monitor their subordinates' performance. Congressional committees would presumably be willing to question closely any official who received an adverse report from the ombudsman concerning the official's, or his subordinates', performance. A patient reeducation of CIA officials would also be in order, away from the "us" and "them" dichotomy that leads to policy being its own cause, and toward efficiency, a respect for Americans' and foreigners' rights, and an ability to think creatively about radical changes in small countries with weak governments.³⁶⁵

In sum, I propose many tasks for a powerful ombudsman, who would need a small staff to deal with the more minor matters. To control this controller, Swedish-style arrangements should be adopted:

at 215-19; B. GROSS, *THE MANAGING OF ORGANIZATIONS* 721 (1964); F. MARX, *supra* note 356, at 142; B. SCHWARTZ, *supra* note 244, at 611 (the rule in *Rook's Case*, quoted *supra* text accompanying note 244, may extend beyond abuse of discretion to the unjustified use of discretion); I. AL-WAHAB, *supra* note 351 at 60, 66; K. WHEARE, *supra* note 356, at 153 (the British Parliamentary Commissioner for Administration's 1970 Report criticized three decisions simply on the ground that they were wrong); *supra* notes 102, 186, 188, 199, 204, 218 and text accompanying. *But see also* the present position, that national security activities are legal per se: e.g., Greer, *supra* note 273; Halkin, *supra* note 286 and text accompanying; Young and Herbert, *supra* note 272.

363. In *McGehee*, *supra* note 285, Edwards, J., "offered" a "sample procedure" for processing documents originating in other agencies and demanded from the CIA under the Freedom of Information Act.

364. See Note, *supra* note 265, at 1000. The attempt to fashion such guidelines might itself provoke a re-thinking of policy. *Id.*

365. See B. GROSS, *supra* note 362, at 719, 727; J. SIGLER AND B. BEEDE, *supra* note 16, at 19 (quoting Kenneth Davis); Uhlmann, *supra* note 135, at 14; I. AL-WAHAB, *supra* note 351, at 58 (Swedish ombudsman's prosecutions rare and designed to secure "discipline"); H. WILENSKY, *supra* note 123, at 46-48, 58, 62, 175-78; *Secret Operations Can Go Awry*, CHRISTIAN SCIENCE MONITOR, Dec. 3, 1982, p. 10, col. 1 (quoting Pezzulo, former U.S. Ambassador to Nicaragua); *supra* notes 23-6, 137-8, 174, 176, 186-87, 194-95, 234, 259 and text accompanying.

the election by Congress of an ombudsman, nominated by the Senate Intelligence Committee, to a maximum of two six-year terms. This ombudsmen could be dismissed at any time by a vote of no confidence passed by both Houses of Congress. An annual report would be required of the ombudsman, summarizing actions taken and proposing law reforms.³⁶⁶

An intelligence ombudsman would obviously get off to a slow start; the hope is that competent ombudsmen would, over time, build up the expertise and the prestige necessary to an effectiveness. The ombudsman's expertise, probity, and neutrality are demanding qualifications, but people like Edward Levi, Stansfield Turner, and Vernon Walters³⁶⁷ would meet them nicely. An appeal from the ombudsman's decision should lie in the courts, which would presumably welcome a requirement that the ombudsman's remedies be exhausted where constitutional rights are not at stake. It would certainly do no harm to transfer Freedom of Information Act requests concerning national security matters to the ombudsman (whose staff would then have to be much larger). If the ombudsman ordered disclosure of the requested information, it could then be introduced in an ordinary lawsuit. Otherwise, much of the courts' drastically self-limited jurisdiction over national security matters would remain; the ombudsman's primary objective would be to improve CIA competence, and the vindication of rights (which is, presumably, the courts' central concern) would be a secondary objective designed to encourage the filing of meritorious complaints. It nevertheless seems likely that more rights would be vindicated more fully by an ombudsman than by courts applying contemporary doctrines.³⁶⁸ Congress could, for example, set up a compensation fund administered by the ombudsman and deducted later from appropriate CIA budget headings.

While some conservatives would agree with at least some of my policy prescriptions, many would feel that these restraints on the strong State would also weaken national security. But a "balanced" intelligence policy requires a liberal-by-design ombudsman, to counter the CIA's conservative influence on foreign and military policies.³⁶⁹

366. See I. AL-WAHAB, *supra* note 351, at 43-47, 89. In Sweden, parliamentary controls over the ombudsman are exercised in a bipartisan spirit (*id.* at 43), a tradition that Congress could usefully adopt.

367. (Levi is a former Attorney General, and Turner and Walters are former CIA Directors.)

368. See E. GELLHORN, *supra* note 350, at 438 (ombudsman device amounts to a government of men and not laws); I. AL-WAHAB, *supra* note 351, at 71-72, 76; Baum, *supra* note 54 at 48-49; Martin, *supra* note 148, at 685; *supra* notes 304-06 and text accompanying. See also J. SHKLAR, *supra* note 24, at 114-15.

369. See *supra* note 201 and text accompanying.

To round out this section, we should note an important intelligence policy reform advocated by conservatives: the need for competitive analysis of intelligence data to reduce the likelihood of policy mishaps.³⁷⁰ This would not be the classic, Holmesian free market in ideas, but a somewhat freer flow designed to expand the range of intelligence policy alternatives. Since individual and bureaucratic rivalries will exist anyway, why not restructure the CIA to put rivalry to good use in competitive analysis? Spying on each other would have to be prohibited, of course, and intelligence personnel given "not only a license to report the truth but also the full confidence that their licenses will be respected and protected."³⁷¹ This competition could be usefully expanded to include advisory committees, semi-autonomous research institutes, individuals doing research under contract, and even the mass media. This would increase CIA contacts with other fields and value judgments, providing breaths of fresh air for intelligence.³⁷²

IV. ABORTION: *SPREADING THE HORNS OF THE FALSE DICTOTOMY*

The abortion controversy could also do with some fresh air. Abortion will be treated more briefly than was the CIA, since the outlines of abortion law and policy are all too painfully familiar for most of us. Readers who have persevered can probably guess what my arguments will be: the activities of pressure groups³⁷³ have created a false, pro-choice versus right to life, dichotomy. This dichotomy leaves sensible policies lurking in the gray areas between the ever-spreading horns of an abortion dichotomy. From this standpoint, *Roe*

370. See, e.g., Casey, *supra* note 182, at 3; Jackson, *supra* note 315, at col. 4 (Reagan's stress on 'analytical competition' is "not easily achieved by the lightning idiocy that computers bring to human studies."); Graham, *supra* note 172, at 25-27; 1982: *The Year in Review*, *supra* note 303, at 9 (quoting Silver) (Reagan's E.O. 12333, *supra* notes 317-19 and text accompanying, "contains a strong emphasis on competitive analysis" to be guaranteed by the CIA Director).

371. North, *supra* note 108, at 187. See H. WILENSKY, *supra* note 123, at 174-75; Murray, *supra* note 35, at 856-57; Turner and Thibault, *supra* note 118, at 126, 128; *supra* notes 30-31 and text accompanying.

372. Harris, *supra* note 141, at 75; E. LEWIS, *supra* note 123, at 169; H. WILENSKY, *supra* note 123, at 162-describes what may be called a congressional model of intelligence—"the ultimate assurance that experts will be questioned fruitfully lies in a pattern of political pluralism: a diversity of strong, independent interest groups representing a significant division of values and engaged in open conflict and competition." The two "radical contrasts" to this pattern are the FBI and CIA, given their attempted monopoly over information. *Id.* at 163. Also, there are distinct limitations to this process of "pluralism:" see *infra* notes 580-82 and text accompanying.

373. To minimize controversy, I will call each group what it most frequently calls itself; each has unflattering names for the other, of course. See Vinovskis, *Abortion and the Presidential Election of 1976*, 77 MICH. L. REV. 1750, 1750 n.1(1979); *infra* notes 424-31 and text accompanying.

*v. Wade*³⁷⁴ becomes a good faith attempt at an initial approximation of sensible, gray-area policies, an early attempt prematurely frozen into our law by judges who feel compelled to defend it from the particularly virulent attacks of well-organized groups.³⁷⁵ This is not to say that *Roe v. Wade* creates anything like elegant constitutional doctrines,³⁷⁶ but then few of the True Believers on abortion matters would have been swayed by doctrinal elegance. The Court seems to have done about as well as can be expected under the circumstances: activities and policies deemed to be good must "conflict by their very nature; and . . . there can be no incontestable scheme for harmonizing them"³⁷⁷ and no absolutes pleasing to everyone.

Important bundles of rights and interests, concerning women, fetuses, doctors, special interest groups, various branches and levels of government, and, perhaps, society itself, emerged in response to rapid changes in medical technology and in the mores of some groups.

374. 410 U.S. 113 (1973) [hereinafter cited as *Roe*]. See *infra* notes 381-91, 394, 408, 417 and text accompanying.

375. See *L. Wardle, supra* note 55, at 303-07; *infra* notes 496-513 and text accompanying.

376. See, e.g., A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 114 (1976) ("neither historian, layman nor lawyer will be persuaded that all the details prescribed in *Roe v. Wade* are part of either natural law or the Constitution"); Dellapenna, *The History of Abortion*, 40 U. OF PITT. L. REV. 359, 424 (1979) (abortion decisions based on inaccurate and inconclusive history and unhelpful moral premises, with no constitutional text to point to); Ely, *The Wages of Crying Wolf*, 82 YALE L.J. 920 (1973); *id.* at 947 (*Roe* "is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be"); Epstein, *Substantive Due Process by Any Other Name*, 1973 SUP CT. REV. 159; *id.* at 184 (*Roe* "symptomatic of the analytical poverty possible in constitutional litigation"); Newman, *supra* note 76, at 553 (decisions became established legal doctrine only when decisional advances and social approval in approximate balance).

377. Williams, *Introduction*, in I. BERLIN, *CONCEPTS AND CATEGORIES* xi, xvi (H. Hardy, ed. 1981) (stating Berlin's theme in this collection of his writings). (One "good" may be adjudged better than another, of course.) See, e.g., F. FROHOCK, *supra* note 30, at 255 ("though most civil and legal authorities recognize the difficulty of settling a dispute" like abortion "with such a long and conflicting history, most statutory and legal interpretations must favor one view or another"); Jones, *Abortion and the Consideration of Fundamental Irreconcilable Interests*, 33 SYRACUSE L. REV. 565, 612 (1982) ("The abortion issue does involve irreconcilable differences between the rights of a pregnant woman and the fetus," and pretending "these rights can be reconciled does not make them so."); ABORTION 12 (L.Sass, ed. 1978) (quoting WALL STREET J. of Jan. 26, 1973) ("on the whole we think the court struck a reasonable balance on an exceedingly difficult question") [hereinafter cited as *Sass*]; *id.* at 7 (quoting CHRISTIAN SCIENCE MONITOR of Jan. 29, 1973) (criticised both for going too far and not far enough, *Roe* recognized "the sanctity of life, both adult and unborn"); *infra* note 557 and text accompanying. But see, e.g., Morgan, *Roe v. Wade and the Lesson of the pre-Roe Case Law*, 77 MICH. L. REV. 1724, 1725 (1979) (the court shouldn't have decided *Roe*, given the politically unsettled and judicially confused state of the law); *supra* note 376; *infra* notes 420-23 and text accompanying.

These bundles grew into conflict with each other so quickly that the legal system was caught unprepared to deal with the variety of issues pressed.³⁷⁸ The Court could have awaited a "Missouri Compromise" over abortion, with little hope that politicians³⁷⁹ would hammer it out in anything but the long run, or that all of the rights and interests at stake would be recognized. Rather than tolerate the emerging chaos of approaches to abortion, a more difficult path was chosen: a minimal recognition and an inevitably messy balancing of rights and interests, as these had evolved by 1973 in the eyes of nine Justices.

As in the question of supervising the CIA,³⁸⁰ the Court lacked experience in, and appropriate classifications for, new abortion policies—as did other branches and levels of government pondering mores and medical technologies. In contrast to their CIA decisions, the Justices rushed in to intervene because they had distinctive policy goals to pursue regardless of the judgments of their political counterparts. The Court presumably underestimated the degree of political muscle organizations would exert against its decisions, and the detailed supervision that would be required to defend abortion policy. Such miscalculations would be fatal in any dealings with the CIA, and opponents of the Court's abortion policies may yet seize the means, perhaps the Constitution itself, to overrule and possibly overturn the Court, by sapping its legitimacy.

A. *Roe v. Wade as the Policy of the Second-Best*

An irresistible force met its immovable object in 1973. A "fundamental" right³⁸¹ was found, limited by a "compelling state

378. This is not a common situation; see, e.g., G. SAWER, *supra* note 224, at 183: One might expect that legal response to social stimulus would often be slow, because the need for change does not quickly become apparent, because men will put up with inconvenience and even painful tensions between practice and precepts or all kinds—religious and moral as well as legal—and because the structure of the legal process, judiciary, and legislature usually operates to put a brake on legal changes, especially on changes in lawyer's law.

What happened to abortion, according to Dellapenna, *supra* note 376, at 421, is that "[s]hifts occurred in the areas of sexual mores, role expectations for women, concern about overpopulation, pressures created by poverty and rising illegitimacy, reactions against the influence of certain religious groups, and the gradual rise of a quality of life ethic over the traditional 'sanctity of life' ethic."

379. See R. EYESTONE, *supra* note 19, at 106, 109, 113; Sass, *supra* note 377, at 28 (quoting CHICAGO DAILY NEWS of Feb. 5, 1976); Vinovskis, *The Politics of Abortion in the House of Representatives in 1976*, 77 MICH. L. REV. 1790, 1817-18 (1979). (Politicians mostly try to duck abortion issues.)

380. See *supra* notes 265-69, 304-05, 356 and text accompanying.

381. *City of Akron v. Akron Center for Reproductive Health*, 103 S. Ct. 2481,

interest"³⁸² nonetheless, and initially-radical changes in policy have remained more or less static ever since. A woman can choose to have an abortion, during the first trimester of pregnancy, if she is not too poor or immature and if her choice coincides with the professional judgment of her doctor.³⁸³ This woman's right is thus exercised jointly with a doctor. It is, of course, subject to the latter's "fiduciary" duty to find the facts courts use to operate the scheme set up by *Roe*. The right is one of privacy and grounded in the fourteenth amendment,³⁸⁴ a right dramatically extended but not clarified by *Roe*. Clearly, however, this right is "not unqualified," and the Court has shown little interest in whether the right can be exercised effectively.³⁸⁶

Terming this woman's right fundamental³⁸⁷ causes much confusion, particularly as the Court has previously preferred to analyse

2491 (1983); *Roe*, 410 U.S. at 154. See Jones, *supra* note 377, at 600; Parness and Pritchard *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CINN. L. REV. 257, 259 (1982); Brietzke, Book Review, 16 VAL. U. L. REV. 409 (1982).

382. See L. TRIBE, *supra* note 50, at 602, 892-93, 914, 963, 965, 975-76.

383. *Roe*, 410 U.S. at 164-66. See Doe v. Bolton, 410 U.S. 179, 192 (1973) (doctor's judgment to be exercised "in the light of all factors—physical, emotional, psychological, and the woman's age") [hereinafter cited as *Doe*]; Jones, *supra* note 377, at 579-80. "Her" doctor is also the state's, to the extent doctors' abortion rights are fettered by the *Roe* scheme; many abortions are carried out in abortion clinics, however, where it may be reasonably inferred that professional judgment inclines in favor of abortion.

384. *Harris v. McRae*, 100 S. Ct. 2671, 2686 (1980) ("Due Process Clause of the Fourteenth Amendment" as the "constitutional underpinning" of *Roe*); D. O'BRIEN, *PRIVACY, LAW AND PUBLIC POLICY* 187-89 (1979); L. WARDLE, *supra* note 55, at 84. According to Asaro, *supra* note 61, at 135, A. WESTIN, *PRIVACY & FREEDOM* (1967) is the most "thoughtful and comprehensive study" among "dogmatic and often crusading works. . . ." Westin finds in privacy the "personal autonomy" necessary to a "sacred individuality" and the preservation of "ultimate secrets." A. WESTIN, at 33-34; Asaro, at 135. Privacy is also necessary for "emotional release," for planning and self-evaluation, for companionship, and for the achievement of group aims. A. WESTIN, at 35-40, 42-51; Asaro, at 136.

385. *Maher v. Roe*, 432 U.S. 464, 473 (1977) (discussing *Roe*); Jones, *supra* note 377, at 596.

386. See *Akron*, 103 S. Ct. at 2491-92; *Maher*, 432 U.S. at 458-59 (Marshall, J., dissenting); *id.* at 459 (woman unable to afford abortion loses all "chance to control the direction of her own life"); *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 94 (1976) (White, J., concurring in part and dissenting in part); *F. Frohock*, *supra* note 30, at 251; Jones, *supra* note 377 at 577, 584, 600; Parness and Pritchard, *supra* note 381, at 259; Annot., 20 A.L.R. 4th 1166 (1983) (citing *Harris v. McRae*, 448 U.S. 297 (1980)) ("although the due process clause affords protection against governmental interference with freedom of choice, it does not entitle citizens to such funds as may be necessary to fully realize the advantages of that freedom.").

387. W. CONKLIN, *supra* note 253, at 1-3 (fundamental right termed essential, formative, irreducible.) See *Twining v. New Jersey*, 211 U.S. 78, 106-07 (1908): A fundamental right is such "that there would be no due process without it." (*Twining* winds up a case about "incorporation," however.)

rights occupying a "preferred position" or simply "incorporated" into the fourteenth amendment.³⁸⁸ In its fundamental-ness, privacy seems to have been collapsed into the individual's liberty (really libertarian) interest of autonomy in the act of choice.³⁸⁹ The "only legitimate limit to the scope of [such] a fundamental right is the existence and exercise of another fundamental right."³⁹⁰ According to the *Roe* Court, this limit must be a State right, suddenly springing up when State interests become "compelling." This is rather awkward: under "classic liberalism's philosophy of individual liberty," the apparent basis for privacy rights, "the only purpose for which power can be rightfully exercised over any member of a civilized community against his [or her] will is to prevent harm to others."³⁹¹ As we saw in discussions of the CIA,³⁹² the State can seldom resist the temptation of self-aggrandizing claims to represent inchoate "others," and thus of infringing the individual autonomy that is at the core of liberalism, unless a court or other independent decisionmaker holds the balance. For much of "classic liberalism's" history, the State has not prevented harm coming to blacks, women, etc. in many of their activities. However, some protections were accorded the health of pregnant women and the potential represented by the fetus. Fetal protection seems to have been accomplished under a legal indirection, however; the state of medical technology and social mores made it unnecessary to raise and judge fetal interests explicitly, even as the law tried to see pregnancies carried to term.

Can we now evaluate State claims to represent and protect the fetus? Evaluations are complicated by the fact that such claims are rarely explicit, even today. For example, recently proposed constitutional amendments have as their ostensible purpose the truncating of the Court's jurisdiction over abortion (and certain other) matters, or the returning of abortion and other policies to the states under a federal system of comity.³⁹³ Inquiries are also complicated by the

388. L. TRIBE, *supra* note 50, at 552n., 564-601, 813, 819, 924n., 1147n.

389. See D. O'BRIEN, *supra* note 384, at 190; Sidorsky, *Contemporary Reinterpretations of the Concept of Human Rights*, in *ESSAYS ON HUMAN RIGHTS* 88, 93 (D. Sidorsky, ed. 1979). A "zealous individualism" should, in theory, guarantee the sanctity of the private sphere in America. Asaro, *supra* note 61, at 134. Privacy "is a special kind of independence. . . . The free man is the private man, the one who still keeps some of his thoughts and judgments entirely to himself. . . ." *Id.* at 137 (quoting Clinton Rossiter).

390. W. CONKLIN, *supra* note 253, at 230.

391. B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 154 (1980). See Wellman, *A New Conception of Human Rights*, in *HUMAN RIGHTS* 48, 56 (E. Kamenka and A. Tay, eds. 1978) (ethical relations between individuals must be very different from those with the State, a special organization with a distinctive role in human affairs).

392. See *supra* notes 154, 167, 177, 183, 201-05, 219, 251 and text accompanying.

393. See *Senate Judiciary Committee, Human Rights Federalism Amendment*,

holding, in *Roe*,³⁹⁴ that fetuses are not "persons" whose rights can be protected under the fourteenth amendment. This seems the only possible holding, so long as the jurisprudence of fetal interests and rights (a *lex imperfecta*,³⁹⁵ fetuses having no duties correlative to "their" rights) remains in its undeveloped state. Questions like "Who are persons?" and "Can fetuses be persons outside of the fourteenth amendment?" have gone unanswered, while fetuses occupy an ambiguous position under tort, criminal, inheritance, and trust laws.³⁹⁶ Here, in contrast to its analysis of woman's privacy right, the *Roe* Court takes refuge in a lack of authority, authority to base a compelling state interest on so widely disputed a premise as life beginning at conception. But all of this apparently changes after the fetus becomes "viable," potentially capable of surviving outside the womb albeit with artificial aid. This stage was marked, in 1973, by the beginning of the third trimester of pregnancy. Then, logic and biology are said to dictate that, if not alive, the fetus is at least almost alive. This premise is not as widely disputed as life beginning at conception, and it can thus form the basis for a compelling State interest (in the "potentiality" of life) which overrides woman's privacy.³⁹⁷

The fragility³⁹⁸ of this argument is probably the reason why the indisputable policy of protecting the pregnant woman's health became the touchstone for many of the abortion restrictions the Court

S. Rep. No. 465, 95th Cong. 2d Sess. 53-60, 62-64 (1982) [hereinafter cited as S. Rep. No. 465].

394. 410 U.S. at 157-62.

395. See *Institutes of Justinian*, I (i) § 3 in, e.g., *MANUAL OF CIVIL LAW* 31-32 (2d ed., P. Cumin, ed. 1865): "*Vivere honeste* involves many duties, as charity, temperance, and c., to which Law attaches no obligation. Such mere moral duties are styled *imperfect*, to distinguish them from *perfect* duties, which raise a legal obligation, and are enforced by law." "Person" is then defined as "any being capable of having rights and owing duties." (*Id.* at III, p. 36) Persons are to be distinguished from "*res*—things in which persons had rights." *Id.* See also *supra* notes 115, 269, *infra* notes 524-26, and text accompanying.

396. *Roe*, 410 U.S. at 159; Moore, *Abortion and Public Policy: What are the Issues?*, 17 N.Y.L. FORUM 411, 434 (1971) (Appendix C); Parness and Pritchard, *supra* note 381, at 257-58. See Annot., 64 A.L.R. FED. 886 (1983) (Fetus as "person" under 42 U.S.C.S. § 1983); *supra* note 269 and text accompanying.

397. *Roe*, 410 U.S. at 163. See *id.* at 150, 160, 163-65; Morgan, *supra* note 377, at 1745-47 ("speculative reading" of *Roe*, based on *Abele v. Markle*, 342 F. Supp. 800 (D. Conn. 1972), vacated and remanded, 410 U.S. 951 (1973)); Parness and Pritchard, *supra* note 381, at 260; *infra* notes 410, 417 and text accompanying.

398. I.e., the non-viable fetus may not be a "person" in the whole sense, but it is certainly not nothing either. Ely, *supra* note 376, at 931; Morgan, *supra* note 377, at 1740. The potential for life is no less potential in the first than in the third trimester. *Akron*, 103 S. Ct. at ____ (O'Connor, J., dissenting). The fetus *qua* fetus is always in the process of becoming a person, unless stopped by natural or artificial means. If corporations are "persons" under the 14th amendment, why not the fetuses

tolerates. Here, the State's interest is said to become compelling at approximately the end of the first trimester. Even if compelling, this State interest is not particularly powerful: health risks from abortion have decreased markedly in modern times and will presumably continue to do so, and the Court will test governmental restrictions under the kind of cost-benefit analysis that policy experts recommend in other areas.³⁹⁹ The Court is thus prepared to second-guess a legislature whose purported concern for maternal health is felt to be a stalking-horse for a premature concern about the fetus, or a catering to interest group pressures unrelated to maternal health. Such second-guessing hardly began with *Roe*, since it accounts for some of the brightest stars in the Warren Court's (liberal, result-oriented) firmament. As in earlier school desegregation and death penalty cases, for example, the *Roe* Court is trying to make policies for what it thinks a future society can and ought to become.⁴⁰⁰

This is not the stuff of which "neutral principles" of constitutional law are made, as Justice O'Connor's *Akron* dissent⁴⁰¹ makes clear. But a neutral principle (usually a pallid lowest common denominator acceptable to all sides in the controversy) is not going to result from any attempt to implement policy, unless the policy is nothing more than the generating of neutral principles. Such principles would be

that grow into the species *homo economicus*? It is presumably these counter-arguments which led Kurt Baier to observe:

That the life of a human being begins at conception appears to be a necessary truth. . . . But from this it does not follow, though it may be true, that an individual's right to life begins at conception, for the question of when his life begins is essentially a retrospective one.

Baier, *When Does the Right to Life Begin?*, in *NOMOS XXIII: HUMAN RIGHTS 201* (J. Pennock and J. Chapman, eds. 1981). The fetus may have a moral right to life, although this is hotly debated, but it does not necessarily follow that it has a legal right to life. See *supra* note 64 and text accompanying; *infra* notes 408-16 and text accompanying.

399. *Akron*, 103 S. Ct. at 2492-93; *Roe* 410 U.S. at 149, 162-65. See *id.* at 162-63; *id.* at 164 (restriction must be "reasonably" or "legitimately" related to woman's health); Dellapenna, *supra* note 376, at 364; *supra* note 19, *infra* notes 417, 459, 500 and text accompanying; *infra* text following note 457. An alternate standard is proposed in *Akron*, 103 S. Ct. at 2492-93: abortion regulation is permitted where justified by important state health objectives having "no significant impact" on the exercise of women's rights. Note that fetal interests are omitted from this cost-benefit analysis.

400. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1963) (discovery therein of the "privacy" right that laid the foundation for *Roe*). An epitome of the Warren Court's approach is found in the Chief Justice's reliance, in *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (quoted in *Furman v. Georgia*, 408 U.S. 238, 327 (1972) (Marshall, J., concurring)) on "the evolving standards of decency that mark the progress of a maturing society." What these "standards" are and should be is still widely disputed, however: See *infra* notes 584-85 and text accompanying. But see also G. SAWER, *supra* note 224, at 183 (quoted *supra* note 388); *supra* text accompanying note 304.

401. 103 S. Ct. at 2504. See Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

canons of paralysis. They are disobeyed by conservative and liberal judges (however defined) every day, and usually without controversy, whenever policies with a favored substantive tone or content get implemented.⁴⁰² The real danger, seen by Justice Goldberg⁴⁰³ among others, is that judges will favor policies on personal and private grounds rather than those of our traditions and "collective conscience." This, it is frequently alleged,⁴⁰⁴ is what happened when the *Roe* Court reverted to techniques of a substantive due process. Some of these arguments deserve to be taken seriously,⁴⁰⁵ but most of them (complaints about a "Lochnerizing" or "activist" Court) are little more than expressions of a strong dislike of the *Roe* result encoded in doctrinal analyses of constitutional law. Perceived as such, they become the academic equivalent of crying wolf when repeated often enough, an unfortunate tendency if a substantive due process Court is again rewriting separation of powers doctrines into a judicial supremacy. This has not happened as a result of *Roe*, however. *Roe* may be a "victory" for the Court over other branches and levels of government,

402. See LORD RADCLIFFE, *supra* note 31, at 3, 6-7 (discussed in part *infra* text accompanying note 428); *supra* notes 116-17, *infra* notes 404-06, 571-74, 583, and text accompanying.

403. *Griswold v. Connecticut*, 381 U.S. 479, 493 (1963)(Goldberg, J., concurring). See Lackland, *Toward Creating a Philosophy of Fundamental Human Rights*, 6 COL. HU. RIGHTS L. REV. 473 (1974-75).

404. See *e.g.*, *Akron* 103 S. Ct. at 2505 (O'Connor, J., dissenting) (on abortion, etc., judges are not 'Platonic Guardians' of our social policy, 'wisdom' or 'common sense'); Sass, *supra* note 377, at 3 (quoting OMAHA WORLD-HERALD of Jan. 28, 1983) (like the Warren Court, the *Roe* Court is "falling back on the judge's personal feelings and sociological considerations in the name of the Constitution.") See also *Vermont Yankee Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 547, 557 (1978): courts should not "run riot," be "Kafkaesque" or engage in "Monday morning quarterbacking." *But see also, e.g.*, Bishop, *Robed Rivalry*, NEW REPUBLIC, June 27, 1981, at 36: "Every argument for, say, the abortion cases is also an argument for the other cases and even for the opinion of Chief Justice Roger Taney, . . . in *Dred Scott v. Sandford*." (Taney and two other Justices invoked substantive due process as one basis for *Dred Scott*; whether Bishop's analogy is apt is for the reader to judge: see *supra* notes 48-49 and text accompanying.)

405. See *e.g.*, Ely, *supra* note 376, at 926 (Court simply should not second-guess legislatures and their statutes); Epstein, *supra* note 376. Even in the most judicious of hands, this is a slippery argument. *E.g.*, Justice Black was frequently accused of using a substantive due process while, at the same time, being one of its staunchest critics. See *e.g.*, *Griswold*, 381 U.S. at 519 (Black, J., dissenting from majority's "natural law due process" theory, a judge's own appraisal of the law's wisdom and necessity); *Rochin v. California*, 342 U.S. 165, 176 (1952) (Black, J., concurring but decrying the Court's "shock the conscience" test as a "nebulous" standard legitimating an "unlimited power"). *But see* *Harris v. McRae*, 448 U.S. 297, 322 (1980) (while upholding congressional refusal to pay for abortions for the poor under the Hyde Amendment, held that fifth amendment due process is not the source of substantive rights and liberties but, rather, of the right to be free from invidious discrimination).

but losses in the Court's legitimacy have been high.⁴⁰⁶ Further, the Court loses or abstains in enough other areas (such as in supervising the CIA⁴⁰⁷) for the separation of powers to continue tottering along, forever in flux.

Presumably the Court thought it was pointing the way to neutral principles when it refused to base a decision in *Roe* on religio-philosophical⁴⁰⁸ grounds which do not command a consensus. Since most people want the law to embody their aspirations, convictions and philosophies, and to be something more stable and fundamental,⁴⁰⁹ persons whose views were rejected in *Roe* got angry. It nevertheless remains that, with varying degrees of ingenuity and perhaps disingenuousness, life has been found to begin in: prehistory, the sperm and egg kept separate, their mingling (conception), the firm implantation after conception, the embryo taking on a human

406. See *United States v. Carolene Products*, 304 U.S. 144 (1938); *J. Ely, supra* note 44, at 18 ("Familiarity breeds inattention, and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms" similar to "green pastel redness."); L. FRIEDMAN, *HISTORY OF AMERICAN LAW* 300-02 (1973); J. HURST, *supra* note 271, at 90; M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 264-66, 288-89 (1967). See also B. SIEGAN, *supra* note 391, *passim* (dubious argument that there is *too little* substantive due process in our contemporary constitutional law). The *Roe* Court, 410 U.S. at 117, attempted to rebut in advance the notion that it was Lochnerizing:

We bear in mind, . . . Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York*, 198 U.S. 45, 76 (1905): "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

407. See *supra* notes 229-30 and accompanying text.

408. See *Roe*, 410 U.S. at 159-60; *Roe v. Norton*, 408 F. Supp. 660, 663 n.3 (D. Conn. 1975) (interpreting *Roe v. Wade*, the issue is to be "stripped of the sensitive moral arguments surrounding the abortion controversy"); *Coe v. Hooker*, 406 F. Supp. 1072, 1083 (D. N.H. 1976) (interpreting *Roe v. Wade*, "[m]oral judgments are not 'reasonable standards' under the law"); Galebach, *A Human Life Statute*, *HUM. LIFE REV.*, Winter, 1981, at 5 (judiciary has no suitable evidentiary standard to determine an answer over abortion); Morgan, *supra* note 372, at 1745-47 (discussed *supra* text accompanying note 397). But see also A. ETZIONI, *supra* note 2, at 154 (most policy problems touch on both values and perceived self-interest and thus "have deep emotional resonance"); *infra* notes 428, 430-31 and text accompanying.

"Religio-philosophical" is an awkward term chosen for the sake of accuracy. After a careful review of the literature, I (and many others) am unable to distinguish the philosophical from the religious arguments—those concerning matters of faith and immune to a rational demonstration or refutation. In abortion matters, religion, emotion, and deep personal conviction account for much of the argument. It is thus not surprising that the Court seemed chary of the First Amendment Establishment Clause in *Roe*, thereby exposing itself to the charge of implementing, e.g. "secular humanism."

409. LORD RADCLIFFE, *supra* note 31, at 10.

appearance, movement by the fetus (quickening), a potential for survival outside the womb (viability), and birth.⁴¹⁰ As one index to the nature of public debate, the *Atlanta Constitution* terms these findings "irreconcilable. They are all based on faith—the willing suspension of disbelief—and have no place in civil law—which must be pragmatic."⁴¹¹ When "abortion is separated from religion and morality," according to the *Louisville Times*, "it becomes no different from a vasectomy, a tubal ligation or a circumcision. It should not be the policy of government to encourage or discourage abortions any more than it is to promote the Latin mass or endorse baptism by immersion. . . ."⁴¹² These arguments may prove too much. As the *Washington Post* observes, "the public arena may be the best place . . . in a democracy" to resolve "an issue in which religion and emotion and deep personal conviction count for more than a literal and arbitrary reading of the law."⁴¹³

It is, of course, true that much of law is and should be based on morality. But morality is not all of one piece, and its relation to law is not direct. Law's artificial reason is kept separate from those of religion and philosophy, where different methods are used to justify and to improve choices. Law "is social, objective and coercive; morals are individual, subjective, and voluntary."⁴¹⁴ When morality becomes law, its advocates benefit from having successfully invoked a government's near-monopoly of the legitimate means of coercion. Such benefits are indeed guaranteed by the law of our liberal democracy, but only up to the point where this morality comes into conflict with other rights and morals which have similarly obtained a legal recognition. If it were otherwise, if the morality of one group or law were allowed to override all others, a philosophical absolutism would become a political authoritarianism under law. The morality of our law is pragmatic, most theories of natural law having fallen on hard times. Social values have become more secular and relativistic, in part

410. *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 63-65 (1976) (statute defining "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems" does not circumvent or violate *Roe* limitations on state regulations); Emerson, *The Power of Congress to Change Constitutional Decisions of the Supreme Court*, 77 NW. U. L. REV. 129, 131 (1982); Margolis and Neary, *Pressure Politics Revisited: The Anti-Abortion Campaign*, 8 POL. STUD. J. 698, 700 (1980); Moore, *supra* note 396, at 424 (Appendix C).

411. Sass, *supra* note 377, at 189, quoting ATLANTA CONSTITUTION of June 6, 1972, on differences of opinion on abortion.

412. *Id.* at 194, quoting LOUISVILLE TIMES of Aug. 14, 1978.

413. *Id.* at 91, quoting WASHINGTON POST of June 24, 1977. See *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting). But see also *infra* notes 418, 430-31, 575-80 and text accompanying.

414. J. SHKLAR, *supra* note 24, at 44. See *supra* note 35 and text accompanying.

because of the proliferation of divergent religious and philosophical values. Change, which will eventually debunk any fixed ideal of perfection, has become the driving force of society and of law.⁴¹⁵ The *Roe* Court thus seems justified in resisting rival religio-philosophical blandishments. The beliefs that life begins at conception or at birth can be, and are, the foundation of comprehensive moral schemes. Under a pragmatic morality, these beliefs are not violated by *Roe*; each group keeps religio-philosophical beliefs to itself and does not restrict freedom by imposing its beliefs on others.⁴¹⁶

415. *Roe*, 410 U.S. at 117 (quoted in note 406, *supra*); G. JACOBSOHN, *supra* note 76, *passim* (discussing the influence of John Dewey and William James on American law and the Court); Pennock, *Rights, Natural Rights, Human Rights*, in NOMOS XXIII: HUMAN RIGHTS, 1, 3 (J. Pennock and J. Chapman, eds. 1981); Hartshorne, *supra* note 38, at 326 (quoted *supra* note 64); Sidorsky *supra* note 389, at 96-97; *supra* notes 235, 411 and text accompanying; *infra* note 423 and text accompanying. See Lackland, *supra* note 403, 398, at 487: Perhaps we should be grateful to the *Roe* court for not burdening us with a philosophical theory. Such "theories are, after all, much like religions; each is most comfortable with our own view and resents others needlessly imposing theirs on us." *Id.* See also Samuels, *The Economy as a System of Power*, 27 U. MIAMI L. REV. 261 (1973): According to Robert Lee Hale, notions of a "voluntary" freedom—choosing among freely-chosen alternatives—are nearly irrelevant; "volitional" freedom, choice constrained by the choices of others, is the relevant concern. Philosophical arguments:

descend from on high but stop some twenty feet above the ground. It is the peculiar task of law to complete this structure of ideals and values . . . so that it is seated firmly and concretely and shelters real human beings against the storms of passion and conflict. . . . The lofty philosophical edifice does not determine what the last twenty feet are. . . .

Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 57 (1981). G. LENSKI, *supra* note 256, at 30 adds that:

Pragmatic morality is the basis of all popular moral codes, and is based on the recognition that men need each other, and therefore condemns many kinds of harmful actions, especially those which threaten to undermine the social order. Ideal morality, by contrast, has never been accepted as the basis of any popular moral code, since it not only condemns harmful actions but requires that men love others as they love themselves and without regard to possible rewards.

Roe does not require everyone to love the fetus as much as themselves. Some kinds of actions harmful to the fetus are prohibited or restricted, and other actions are sheltered "against the storms of passion and conflict" raised by others. *Roe* also does not complete a "structure of ideals and values . . . so that it is seated firmly. . . ." On the other hand, a statute does not violate the Establishment Clause merely because it 'happens to coincide or harmonize with the tenets of some or all religions.' Harris v. MacRae, 448 U.S. 297, 319 (1980), quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961).

416. See Knowles, *Public Policy on Abortion*, SOCIETY, July, 1974, at 15, 16 ("A pluralistic society need not encourage or discourage abortions but would seek to make sure that those who need and want abortions can get them and that all abortions will be performed as early as possible."); Sass, *supra* note 377, at 9 (quoting NEW YORK TIMES of Jan. 24, 1973).

Having avoided this trap, the Court immediately fell into another by relying so heavily on medical practice and opinion. Presumably, the Court was trying to lower the temperature of debate over abortion and, once again, trying to generate neutral principles, by applying a supposedly value-free science. The Court's hope seemed to be that abortion would go the way of contraception, that safe, cheap and effective methods would lessen the need of, and the desire for, legal restrictions. Unlike controversies such as the one surrounding school prayer, the need for abortion and, perhaps, the beginning of life could seemingly be treated as empirical questions. These could then be answered by a medical profession which had shown little interest in religio-philosophical questions. But it turns out that there are seldom any purely medical reasons for an abortion, and none at all for life's beginnings or its value. Doctors are nevertheless given much discretion in the detailed implementation of *Roe*, and the state of their art in 1973 is reflected in the Court's trimesters. As much for convenience as for anything else, doctors frequently identified viability (in 1973, the beginning of the third trimester) as the beginning of life. The Court made the third trimester into the hallmark for state protection of the "potentiality" in fetal life. Under then-extant technologies, woman's health was at a significantly higher risk from second-trimester abortions than from those in the first trimester. This difference is reflected by the state's interest in woman's health becoming compelling during the second *Roe* trimester.⁴¹⁷

417. J. ELY, *supra* note 44, at 53 (disputes about cruelty to animals and abortion "are over the appropriate breadth of the moral universe and not over any factual claim."); F. FROHOCK, *supra* note 30, at 255; L. WARDLE, *supra* note 55, at 84; Carter, *supra* note 267, at 152; Dellapenna, *supra* note 376, at 417; Jones, *supra* note 377, at 593 (citing Colautti v. Franklin, 439 U.S. 379, 387 (1979) (reiterating "that, up to the point where a compelling state interest justifies intervention, the abortion decision is inherently and primarily a medical decision and that a physician must be given adequate discretion")); Knowles, *supra* note 411; Margolis and Moore, *supra* note 410, at 700. The *Roe* Court, 410 U.S. at 116, expressed its hopes in the following way:

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and predilection. We seek earnestly to do this, and because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries.

See id. at 163 ("present medical knowledge" criterion, discussed in *Akron*, 103 S. Ct. at 2496); *id.* at 130-47 (a sociomedical history of abortion, the accuracy of which continues to be hotly debated); S. Rep. No. 465, *supra* note 393, at 3; Sass, *supra* note 377, at 9 (quoting MILWAUKEE J. of Jan. 24, 1973) (in *Roe*, Court "skillfully steered away" from religio-philosophical entanglements by basing guidelines on "established medical facts."); *supra* notes 13, 16, 31, 383-84, 397-99, 408 and text accompanying.

It can be argued that much of medical practice amounts to rules of thumb, rather than rules of reason. Even so, the Court adopted a definition of viability about which physicians disagree. *See Roe*, 410 U.S. at 160, 163; Buckley, *Note: Current Technology Affecting Supreme Court Abortion Jurisprudence*, 27 N.Y.L. SCH. L. REV. 1221, 1222,

Medical technologies continue to improve, however, and the *Roe* trimesters now appear to be caught in a technology crunch: the abortion patients' "window of vulnerability" gets smaller and smaller as safe abortions are performed later and later, while the fetal "window of opportunity" gets larger and larger as fetuses survive earlier and earlier.⁴¹⁸ Can anything good be said for an unwieldy *Roe*? Yes, if we leave medical technology alone—as the Court should. So much judicial movement back and forth—oscillations within and between a "fundamental" but "not unqualified" right and subjecting a "compelling" state interest to "strict scrutiny," for example—has precisely the same purpose as the to and fro of contract law: attempting to recognize and balance conflicting rights and interests, while retaining a measure of such cardinal legal values as certainty, stability and generality, if not simplicity.⁴¹⁹ While trimesters are not encrusted with the centuries of precedent that bolster the contract/no-contact dichotomy, the Court behaves as if they are. With so much balancing going on, the Court seems to have gotten rather lazy about devising and reviewing abortion classifications.

The Court could have chosen not to get involved in abortion in the first place, but not to decide is to decide to uphold policies of

(1982). Conceding that it was in no position to determine when life begins (410 U.S. at 159), the Court nevertheless determines when "meaningful life" begins. *Id.* at 163; Buckley, at 1227. While *Danforth*, 428 U.S. at 64, made much of *Roe*'s "flexibility" over when viability occurs, the next major case, *Colautti*, 439 U.S. 379 (1979), arguably returned to a rigid definition. Buckley, at 1232.

418. See *Akron*, 103 S. Ct. at 2496; *id.* at 2507 (O'Connor, J., dissenting); Buckley, *supra* note 417, at 1232, 1238-42, 1245-57; *supra* note 30 and text accompanying. Advances in the treatment of prematurely-born fetuses (neonatology) and in gestation outside the womb or in a "surrogate mother" (ectogenesis) raise the following legal issues:

- (i) the effects on the viability time scale set forth in *Roe*, *Danforth* and *Colautti* caused by increasingly early capability of fetal survival; (ii) the issue of whether abortion implies a right to terminate a fetus or merely a right to terminate a pregnancy; and (iii) the problem of a physician's duty with respect to a fetus which technically meets the case law definition of viability, but is nevertheless abortable. The conflicts arising from inadequate law involve (i) the physician's dilemma with respect to his patient; (ii) the *Commonwealth v. Edelin* type dilemma or the problem of the physician's duty with respect to fetuses aborted alive.

Buckley, at 1238. The fetus is no longer a mere organ of the mother, particularly as an artificial womb may soon be developed to accomplish gestation in its entirety. *Id.* at 1241-42. The compelling State interest could possibly be protected by limiting abortion to an ectogenetic method; the aborted fetus could then reach maturity in a surrogate mother or in an *in vitro* device. *Id.* at 1239, 1246. Buckley concludes that it would have been wiser for the *Roe* Court to have defined viability as the potential for life outside the mother's womb *without* artificial aid. *Id.* at 1257. Such a definition gives rise to other problems, of course.

419. See *supra* note 109 and text accompanying.

the status quo where the Court clearly has the power to change them. The status quo was rather unsavory: many abortions were performed, even though illegal, and they were riskier and more expensive for women because abortionists ran risks similar to those faced by drug pushers and porno merchants. To continue to tolerate this would have been an abdication of judicial responsibility *once* a fundamental right was seen to be at stake. Fundamental rights cannot depend on what a legislature of the moment chooses to think of them, and these rights render a judicial deference inappropriate. To intervene, then, the Court had either to strike a balance among such rights as it could identify or to work out exhaustively the jurisprudence of privacy, of "persons" (or quasi-persons) and their beginnings, and of how, *precisely*, the State can come to represent and itself balance these competing rights. Even then, the interests involved would remain unreconciled if the terms of policy debate and analysis are not similarly changed. Such changes in jurisprudence and policy perceptions would have been preferable but are too far-reaching to be accomplished in any single case of our case-by-case constitutional law. (*Brown v. Board of Education*⁴²⁰ was, after all, to be implemented with "all deliberate speed.") Nine justices of finite wisdom, which changes from time to time, had to respond to complex pressures by using linguistic tools of limited precision and specificity.⁴²¹ While the judicial "techology" they used, balancing, finds few admirers,⁴²² it can nevertheless be approved under an economics-

420. 349 U.S. 294 (1955).

421. See W. CONKLIN, *supra* note 253, at 67-81; M. FREEMAN, *supra* note 27, at 52; F. FROHOCK, *supra* note 30, at 255-56 (although "most civil and legal authorities recognize the difficulty of settling a dispute [abortion] with such a long and conflicting history, most statutes and legal interpretations must favor one view or another."); Danet, *Language in the Legal Process* 14 L. AND SOC. REV. 445 (1980); Knowles, *supra* note 416, at 15 ("Dr. Christopher Tietze has estimated that in the first two years of a liberalized abortion law in New York City, legal abortions to residents replaced some 100,000 *previously* illegal abortions."); Margolis and Moore, *supra* note 410, at 712; Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981); *supra* notes 10, 37, 58-59, 217 and text accompanying; *infra* notes 422-23 and text accompanying. A particularly revealing exchange took place during the oral arguments in *Akron* (103 S. Ct. 2481 (1983)), 51 U.S.L.W. 3433, 3435 (1982):

[Solicitor General Lee:] Under *Roe* . . . there must be a balancing of the woman's interest and the state's interest. Balancing is synonymous with policy determination. Legislatures do that better.

Justice Blackmun: Are you asking that *Roe v. Wade* be overruled?

Lee: No I am not.

Justice Blackmun: It seems to me that you are asking that or you are asking that we overrule *Marbury v. Madison*.

422. See W. CONKLIN, *supra* note 253, at 236-57; B. SIEGAN, *supra* note 391, at 126, 219, 221, 305, 311; Christie, Book Review, 70 MICH. L. REV. 947, 960-63 (1981); *Comment*, 15 HARV. C.R.-C.L. L. REV. 713, 726-45 (1980). In fourteenth amendment cases, the Court has traditionally balanced competing interests; see Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963).

style theory of the second-best⁴²³ for abortion policy. More elegant, abstract and/or absolutist constitutional theories would have been unworkable.

B. *Roe's Unwanted Progeny*

For a majority of the Senate Judiciary Committee in 1982, the "subsequent development of the abortional right . . . in *Roe v. Wade* [an "all-or-nothing legalization of abortion-on-demand"] has largely been one of expansion of the right to its fullest possible limits through the gradual elimination of virtually all possible impediments to its exercise."⁴²⁴ The other, polar view is of a backsliding since *Roe*: "Today for the poor and the young, the right is virtually meaningless and for those who are not poor and young the right is greatly restricted."⁴²⁵ These statements typify the consensus *de minimus* that *Roe's* progeny are disagreeable, while illustrating the tendency to distort in opposite directions the contemporary realities of abortion policy. *Roe* has certainly grown more complex, wily and formalistic, acquiring a life of its own in response to the many pitfalls laid against it.⁴²⁶ But

423. I.e., public policy need not approximate the ideal results attainable under a favored theory, where theoretical assumptions do not accurately describe the real world. The best e.g. of a theory of the second-best is the economics concept of workable competition. See J. BAIN, *INDUSTRIAL ORGANIZATION* 13-15, 464-67 (2d ed. 1968); J. KOCH, *INDUSTRIAL ORGANIZATION AND PRICES* 53, 314, 322, 347 (1974); R. MILLER, *INTERMEDIATE MICROECONOMICS* 445-46 (1978); F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 22-25 (1970); Schwartz, *supra* note 217 (discussed *supra* note 217). See also Sidorsky, *supra* note 389, at 97 (on Bentham's notion that inalienable rights are inevitably alienated) (emphasis supplied): "Accordingly, for utilitarians and pragmatists, freedom in any society depends upon the ways in which the rights of different parties in conflict are respected, weighed, and balanced, and upon the processes by which the consent of different persons and groups are negotiated. . . ." *Roe* can be faulted on the latter ground, if consent over abortion is open to genuine negotiations. But see also *infra* notes 521-28 and text accompanying.

424. S. Rep. No. 465, *supra* note 393, at 5, 10. See *id.* at 19 (subsequent cases "essentially" a "reaffirmation and extension" of the *Roe* right and "protection of it from virtually all possible competing interests, private or public."); Rice, *The Dred Scott Case of the Twentieth Century*, 10 *HOUS. L. REV.* 1059, 1062 (1973) (*Roe* "a practical license for elective abortion at any stage, right up to the last minute before normal delivery."); *infra* note 431.

425. Jones, *supra* note 377, at 612. See Copelan, *Reproductive and Sexual Freedom in the 1980's*, 2 *ANTIOCH L. REV.* 47 (1982); *infra* note 431.

426. See S. Rep. No. 465, *supra* note 393, at 47: "The court's reading of this radical policy into the Constitution has prompted an equally radical reaction and frozen our legal system into a position which allows for none of the negotiation and accommodation characteristic of a democratic system of government."; L. WARDLE, *supra* note 55, at xv; *supra* notes 66-69, *infra* notes 434-35, and text accompanying. See also Justice Dept.'s argument in *Akron* (103 S. Ct. 2481 (1983)), 51 *U.S.L.W.* 3389 (1982): *Roe* left many questions unanswered, and subsequent cases forced the Court to fill in more detail, "resulting in a set of rules that has become increasingly intricate and

Roe policies have remained more or less on a dead-center because, I will argue, the Court feels that stonewalling (or, if you prefer, a strict *stare decisis*) is the safest defense of its power and policy against those laying the traps. The Court has emulated both the pragmatism and the true believership of *Roe's* opponents. This is another example of policy as its own cause.⁴²⁷ The story of how and why the pitfalls came to be laid in abortion policy makes an interesting case study of policy politics in its most extreme form.

Like school prayer and busing decisions, *Roe* has created a great deal of divisiveness. Fortunately for our legal system, such divisiveness is rare. Americans have by and large taken their law easily in the twentieth century, out of a tolerance, inertia, and apathy. But *Roe* touches a nerve rubbed raw by altruism, perceived self-interest, and, for some, frustration in the sexual, family, religious, and career activities through which we try to express ourselves. A wrenching and polarizing case sent partisans from both sides into the streets, convinced of their right and rectitude. They have fought hard, each side feeling that it can win or lose everything at the turn of a case or statute. The battle has given rise to more dubious euphemisms and extremist tactics than any other controversy since at least Vietnam, and a "responsible" political leadership has been more than usually absent.⁴²⁸

A careful examination of writings about abortion proves out the conclusion that the "intellectual underpinnings . . . are, to put it mildly, precarious. [I]nconsistency is likely to play dumb and hypocrisy to speak out with extra vehemence. There has been a lot of what can only be called disingenuous pretending about, for example, what a fetus is."⁴²⁹ The gibberish common to other policy discussions⁴³⁰ reaches

substantially more complicated." Continuing down this path will take "the court further away from what courts do best and more into the realm of what legislatures do best." *Id.*

427. See *supra* notes 8, 28-30, 66-67, 108, 164-93 and text accompanying.

428. S. Rep. No. 465, *supra* note 393, at 2; R. EYESTONE, *supra* note 6, at 113-14; A. ETZIONI, *supra* note 2, at 154-55; F. FROHOCK, *supra* note 30, at 251; A. MELTSNER, *supra* note 11, at 281; LORD RADCLIFFE, *supra* note 31, at 3, 6, 24; *id.* at 7 (austere vigor with which earlier societies maintained their purpose has been abandoned); G. SAWER, *supra* note 224, at 183 (quoted *supra* note 378); Sass, *supra* note 377, at 28 (quoting CHICAGO DAILY NEWS of Feb. 5, 1976) ("On this issue . . . there may be no 'moderate' position"); *id.* at 120 (quoting PHILADELPHIA INQUIRER of June 16, 1978, which quotes Rep. William Clay, Dem. of Mo.) ("It's the holy wars all over again," and the "heathen must be conquered or converted."); *id.* at 187; *id.* at 190 (quoting WASHINGTON STAR of Mar. 21, 1978); Barkun, *Law and Social Revolution*, 6 L. AND SOC. REV. 113, 116-17 (1971); Knowles, *supra* note 411, at 15; Roberts, *Power Balance in Favor of Abortion*, NEW YORK TIMES, Sept. 20, 1982, at 12, col. 3.

429. Sass, *supra* note 377, at 16 (quoting WASHINGTON STAR of July 10, 1976).

430. See *supra* notes 73-74, 120, 183-85 and text accompanying.

new heights over abortion. Arguments largely consist of emotive words used inaccurately, logical fallacies, false or imperfect analogies, tasteless oversimplifications, cynical manipulations of narrow values so that they override and restructure other values into a life centering on abortion issues, and/or reflexive attacks on rival arguments (any which fail fully to fit cherished preconceptions).⁴³¹ Social scientists have had very little to say *ex officio* on abortion matters that interests decision makers, pressure groups, or the public. Social scientists are not scientific or otherwise rigorous enough to deal persuasively with values brought into conflict over abortion. Little wonder, then,

431. See Barker, *supra* note 60, at 103; S. ENGEL, *supra* note 59, at 79, 81, 87-89; Williams, *supra* note 377, at xvi; Dellapenna, *supra* note 376, at 359 n.6 (citing Aubert, *Competition and Dissensus*, 7 J. CONFLICT RESOLU. 26 (1963) and Gusfield, *Moral Passage*, 12 SOC. PROB. 175 (1967)); Lackland, *supra* note 403, at 487; Tribe, *supra* note 10, at 95-96; *supra* notes 58-67, 72-74, 128-34, 138-40, 183-94, and text accompanying.

It is all too easy to easy to "parade the horrors" in this area, but the citing of a few examples seems appropriate. Granting

a man the power to force someone to carry and care for his child . . . would raise the specter of the legally enforced physical and psychological domination of one group in society by another. A woman . . . is entitled to believe that more than a play on words has come to link her forced labor with the concept of involuntary servitude.

Tribe, *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 40 (1973). This equating of childbearing with slavery was extended by others after the abortion funding decisions (see *infra* notes 488-89 and text accompanying); impoverished women serve as baby farms for the rich-but-childless who want to adopt. More generally, "[s]uppression of the people to live independent lives is not among the legitimate powers of government." Steinem, *The Ultimate Invasion of Privacy*, Ms., Feb. 1981, at 43. The change in power relations inherent in the right to abortion disturbs a male identity reacting to the feminist struggle and a greater equality in sexual relations. L. GORDON, WOMAN'S BODY 415 (1976); Hayles, *Abortion*, 5 SIGNS 307, 322 (1979). Pregnancy is not 'natural' or necessary, but is ideologically imposed as a result of masculine control over the "public sphere." Copelan, *supra* note 425, at 48, 51. *Roe* is part of a broader struggle for freedom, "in particular for lesbians and gay men, poor women and women of color." *Id.* at 51.

Opponents of this view see in it the patterns found "in the treatment of those convicted of crimes, in the waging of war, and in the purveying of sex and crime and drugs and violence." Sass, *supra* note 377, at 189 (quoting ST. LOUIS REV. of May 21, 1972, on the "birth control mentality."). Abortion "rights groups . . . have used the public trough to encourage cavalier behavior among women." *Id.* at 92 (quoting ARIZONA REPUBLIC of June 27, 1977). Wives will now have abortions in "fits of domestic pique" (*id.* at 17, quoting ARIZONA REPUBLIC of July 9, 1976), and "parents can't be parents." *Id.* at 17 (quoting MEMPHIS COMMERCIAL APPEAL of July 3, 1976). The "unborn child is just as human as grandma," and there is "no question" but that abortion will lead to the killing of old people and defective children." *Id.* at 195 (quoting MANCHESTER UNION LEADER of Apr. 6, 1977, which quotes Dr. Willke, Right to Life Society Vice President). Interestingly, each side regularly portrays its opposite number as some species of fascist, which seems a good reason for allowing neither side to dominate a supposedly-pluralistic policy. The parties have invested abortion with an emotional and ideological freight heavier than any single legal policy can bear. See *supra* notes 19, 66, 424-25, *infra* notes 535-38, and text accompanying.

that the Court pays scant attention to their voluminous literature on abortion.

As fragile and overdrawn as abortion policy arguments may seem to the uncommitted bulk of the population, they have proved to have considerable organizing power⁴³² for small minorities. Without the bureaucratization of, for example, the CIA, right to life and pro-choice groups have each managed to create a Groupthink cut loose from rival facts and value judgments. Uniform and complex yet flexible responses to the vicissitudes of policy battles follow along, despite the absence of a readily identifiable leadership in either camp. Each group will automatically push a favorable policy judgment to extremes regardless of rationality. Any rent which appears in the thinly-stretched policy fabric of abortion is ruthlessly manipulated for advantage. The world is seen as one of "us" versus "them," and actions by "us" cause "them" to act more and more like our enemies; as in Soviet-American struggles, a policy *politics* becomes its own cause. Even under the best of circumstances, there is no free competition in a law and policy characterized as elitist by many American political scientists and as oligopolistic by some economists. However, an even more restricted "duopoly" over abortion gives rise to a perfect indeterminacy, given the rivals' inability to agree on a direction for policy.⁴³³ Having first found succor in the Court under *Roe*, pro-choice groups continue to go there and to portray themselves as the kind of civil rights/civil liberties organizations that the Court should want to help. Pending new appointments to the Court, right-to-life groups have all but given up on it. They seek legislative and executive help by portraying themselves as holders of the high moral ground and as single-issue constituencies capable of determining election results.

The success of right-to-life groups, measured in terms of the number and range of pitfalls laid for the Court, has been impressive. Space limitations permit only brief discussions of some pitfalls, most of which have been avoided by the Court in what has become a policy

432. See *supra* notes 64-65 and text accompanying.

433. See, e.g. Sass, *supra* note 377, at 103 (quoting Burlington, Vt. FREE PRESS of June 27, 1977) (While the few "have drawn up their battle lines, the majority of Americans stand on the middle ground watching the swirling controversy."); Barkun, *supra* note 428, at 126; Uslander and Weber, *Public Support for Pro-Choice Abortion Policies in the Nation and States*, 77 MICH. L. REV. 1772, 1786-88 (1979); *supra* notes 18-19, 31, 34, 59, 65, 176, 184-86, 192 and text accompanying. The basis for a uniform but loosely-organized response is suggested by Ms. Laswick of the (Pennsylvania) People Concerned for the Unborn Child (quoted by Margolis and Neary, *supra* note 410, at 707): "As individuals we all have our personal opinions about welfare and conception, but as an organization we must not spread ourselves too thin. First we must be successful in banning abortions."

standoff.⁴³⁴ A complete list of attempted abortion restrictions taking effect before the fetus becomes viable would look something like this: prescribing standards for abortion facilities and methods, relieving from liability those individuals and institutions refusing to perform abortions, banning abortion clinics through zoning measures, requiring all abortions to be reported to an administrative agency, requiring that abortions be performed by a licensed physician (perhaps with a second physician attending to the fetus), imposing criminal liability on doctors performing abortions under certain circumstances, requiring that women be informed of the consequences of and alternatives to abortion, requiring a waiting period between consultation and abortion, requiring a husband's consent to abortion or parental notification or consent for the unmarried minor patient, restricting the use of public funds for abortion, and prohibiting abortion advertising or the advertising of and access to contraceptives. After viability of the fetus, abortions other than those saving the woman's life or health have been prohibited, consultations with other doctors have been required, and aborted children born alive have been made into public wards. Some of the whackier legislative attempts concerning abortion have failed to become law.⁴³⁵

The Court's techniques for defending abortion policies are quite similar to those used to defend antitrust policies,⁴³⁶ in another area

434. S. Rep. No. 465, *supra* note 393, at 4; Johnson and Bond, *Coercive and Noncoercive Abortion Deterrence Policies*, 2 L. & POLICY Q. 106, 121 (1980). As Justice Powell wryly observes, legislative responses to *Roe* have required the limits on state authority to be spelled out on several occasions. *Akron*, 103 S. Ct. at 2487. The nature of this process is frequently misunderstood. *See, e.g.*, Johnson and Bond, at 112: "state governments are seeking to deter behaviour that the Supreme Court has in effect legitimated by restricting state authority to prohibit it." (The mere fact that certain exercises in state authority are made illegitimate does not render legitimate the behaviour addressed by that authority.)

435. *See, e.g.*, Sass, *supra* note 377, at 129 (quoting *NEWSDAY* of Mar. 10, 1978): only after protracted debate did the Oklahoma House turn down an antiabortion amendment that would have required any man intending to have intercourse with a woman to get her written consent in advance [to obviate an abortion on the ground of rape]. He would also have had to tell her that she might become pregnant as a result, and that childbirth could cause serious health problems.

436. *Compare* *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977); *United States v. Container Corp. of America*, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting); *United States v. Northern Pacific Ry.*, 356 U.S. 1, 5 (1958); *United States v. Socony-Vacuum Oil*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) (quoted *infra* note 547); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil of N.J. v. United States*, 221 U.S. 1, 58-60 (1911); *United States v. Addyston Pipe and Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); *with infra* notes 438-41, 453-67, 503-04 and text accompanying.

of the law full of messy strikings of balance. There are few, if any,⁴³⁷ situations in which a statute regulating abortion—touching on woman's fundamental right—is constitutional per se. The basis or starting point for the Court's analysis is thus a rule of reason: a restraint on abortion is constitutional if its purposes and effects are reasonably related to a legitimate state objective.⁴³⁸ More precisely, the restraint on abortion must be merely ancillary to such an objective and necessary to its protection; restraint cannot be its own objective or found to be ancillary to an objective impermissible under *Roe*. Additionally, a restraint must go no further than necessary to secure a legitimate

437. One exception may be the requirement that abortions be performed by licensed physicians. See *Connecticut v. Merrillo*, 423 U.S. 9, 9-10 (1975) (*per curiam*, citing *Roe*, 410 U.S. at 163, 165); Jones, *supra* note 377, at 581-82. Other restrictions are broadly tolerated but subjected to minimal supervision nonetheless. E.g., record-keeping requirements have been found to be reasonably related to protection of the woman's life or health, but confidentiality must be carefully safeguarded. See *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 79-81 (1976); Jones, *supra* note 377, at 584.

438. See *Roe*, 410 U.S. at 157 n.54: "Neither in Texas nor in other States are all abortions prohibited. Despite broad proscriptions, an exception always exists." An injunction against enforcement of an abortion consent statute will thus be vacated where the injunction is so broadly drawn as to include valid informed consent provisos. *Guste v. Jackson*, 429 U.S. 399 (1977). See what might be called the blue pencil test in *Menillo*, 423 U.S. at 9-10. The requirement that abortions be performed in a facility accredited by the Joint Commission on Accreditation of Hospitals is invalid because it is not "reasonably related" to permissible objectives. *Doe v. Boulton*, 410 U.S. 179, 194-95 (1973) (companion case to *Roe*) [hereinafter cited as *Doe*]. But a criminal statute prohibiting second-trimester abortions conducted outside of licensed "hospitals" (interpreted by Powell, J., to include clinics) is "not an unreasonable" means of protecting the compelling state interest in women's health. *Simopoulos v. Virginia*, 103 S. Ct. 2532, 2540 (1983). Recordkeeping on abortion is "reasonably related" to protection of women's health or life. *Danforth*, 428 U.S. at 81. The requirement of a pathological examination of "aspirated" tissue (including the fetus but excluding tonsils, adenoids, hernial sacs and prepuces) is reasonably related to medical practices and a compelling state interest in women's health. *Planned Parenthood of Kansas City, Mo. v. Ashcroft*, 103 S. Ct. 2517, 2522-24 (1983) [hereinafter cited as *Ashcroft*]. As state action to encourage childbirth is "rationally" related to the legitimate State objective of protecting the potentiality of life, the State need not structure legislation to encourage or facilitate abortion. Parental notification (as distinct from consent) requirements, and certain broad restrictions on the public funding of abortions, are thus valid. *H.L. v. Matheson*, 450 U.S. 398, 413 (1981) [hereinafter cited as *Matheson*]; *Harris v. MacRae*, 448 U.S. 297, 324-26 (1980); *Poelker v. Doe*, 432 U.S. 519, 521 (1977); *Maher v. Roe*, 432 U.S. 464, 478-79 (1977); *Beal v. Doe*, 432 U.S. 438, 445 (1977). Thus, one court found a requirement that insurers offer a lower-priced health policy containing only limited coverage for abortion services to be "rationally related" to State policies favoring childbirth. *American College of Obstetricians v. Thornburgh*, 51 U.S.L.W. 2374, 2375 (E.D. Pa. 1983) (citing *Maher*). See *infra* note 439.

A closely related criterion is the one under which the Court should determine whether a restriction "unduly burdens" the woman's right. See *Akron*, 103 S. Ct. at 2509-12 (O'Connor, J., dissenting); *Beal*, 432 U.S. at 446; *Bellotti v. Baird*, 428 U.S. 132 (1976) [hereinafter cited as *Bellotti I*]; *infra* notes 507-08 and text accompanying.

state objective.⁴³⁹ Abortion statutes must be rather narrowly drawn, under canons of construction similar to those applied in criminal law and first amendment analyses: vagueness, ambiguity, the requirement of *scienter* in a criminal statute, and, perhaps, overbreadth and the "chilling effect" a statute may have on the exercise of doctors' discretion and women's rights.⁴⁴⁰ The process of statutory interpretation

439. *Akron*, 103 S. Ct. at 2497 (State regulation need not correspond perfectly in all cases to asserted State interest, but the lines drawn must be reasonable and must not impose heavy and unnecessary burdens on access to abortion); *Matheson*, 450 U.S. at 413 (Utah statute, as applied to minors, "plainly serves important state interests, is narrowly drawn to protect only those interests, and does not violate any guarantees of the constitution.") See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil of N.J. v. United States* 221 U.S. 1, 58-60 (1911); *United States v. Addyston Pipe and Steel Co.* 85 F. 271 (6th Cir. 1898); *aff'd* 175 U.S. 211 (1899); L. SULLIVAN, ANTITRUST 173, 175, 187, 194 (1977); *supra* note 438. The Court attempts roughly to gauge the purpose and effect of abortion statutes in: *Ashcroft*, 103 S. Ct. at 2517, 2522-24 (discussed *supra* note 438); *Akron*, 103 S. Ct. at 2500 (much of information provided under informed consent ordinance—life begins at conception, speculations concerning fetal characteristics, and a "parade of horrors" about abortion complications—has as its purpose "not to inform the woman's consent but rather to persuade her to withhold it altogether."); *id.* at 2493 (prohibition on increasing the cost of, and decreasing access to, abortion, in the absence of correspondingly important health benefits—a prohibition based on *Danforth*, 428 U.S. at 77-78); *Beal*, 432 U.S. at 448 (remand to determine whether a certificate of medical necessity executed by two other physicians—a means of obtaining public funding of an abortion—interferes with attending physicians's medical judgment); *Danforth*, 428 U.S. at 70, 74 (attempts to delegate to spouse or parent a veto on abortion are invalid because the State itself lacks this veto power); *id.* at 83 (purpose and effect of whole statute is to inhibit women from seeking abortions during first twelve weeks of pregnancy).

440. See *Simopoulos*, 103 S. Ct. at 2540-41 (Stevens, J., dissenting) (majority's interpretation of statute too charitable an attempt to cure its vagueness); *Ashcroft*, 103 S. Ct. at 2504 (requirement of "humane and sanitary" disposal of aborted fetus too vague a basis for imposing criminal liability); *Matheson*, 450 U.S. at 406 (overbreadth arguments not reached because minor lacked standing, having failed to allege that she was mature or emancipated); *id.* at 413 (discussed *supra* note 439); *Bellotti v. Baird*, 443 U.S. 622, 643-44, 646-48 (1979) (as construed by Mass. Supreme Court, statute too broadly requires parental consent for competent and mature minors) [hereinafter cited as *Bellotti II*]; *Colautti v. Franklin*, 439 U.S. 379, 390-94, 394-97, 399 (1979) (statute similar to that in *Danforth*, *infra*, which imposes on doctor a standard of fetal care if there is "sufficient reason to believe that fetus may be viable"—capable of living "outside the mother's albeit with artificial aid"—is void for vagueness, ambiguous as to whose opinion must be consulted, and defective because it lacks a *scienter* requirement); *id.* at 400-01 ("greater precision" required before a physician can be subjected to criminal liability); *Danforth*, 428 U.S. at 65, 67, 82-83 (criminal statute requiring that same duty of care be applied to aborted fetus and to fetus intended to be born alive is invalid, for failure to limit its applicability to post-viability abortions); *Doe*, 410 U.S. at 192-93 (criminal statute upheld against vagueness challenge, since requirement that physician find abortion "necessary" gives sufficient latitude to consider all factors relating to woman's health); *Planned Parenthood of Central and Northern Arizona v. Arizona*, 52 U.S.L.W. 2267, 2268 (9th Cir. 1983) (discussed *supra* note 490 and text accompanying); *City of St. Louis v. Klockner*, 50 U.S.L.W. 2748 (Mo. Ct. App., 1982) (defense, to criminal trespass prosecution for blocking access to abortion clinic, based

under an abortion rule of reason is best illustrated by a line of cases⁴⁴¹ dealing with attempts to require parental consent (as distinct from parental notification) for minors' abortions. In this and other areas, the Court seeks to defend its *Roe* policies against new restraints, of a number and scope limited only by the imagination of legislative drafters and pressure groups.

on statute justifying conduct preventing "imminent public or private injury," is rejected; "no sensible construction would permit the statutory terminology to include legally protected human activity . . . which causes no injury in the legal sense."); R. ELY, *supra* note 44, at 105 (in first amendment jurisprudence, "overbreadth," "less restrictive alternative," and doctrine that "administrative convenience" is an invalid justification all amount "to much the same thing."); L. TRIBE, *supra* note 50 at 712, 718-19; Jones, *supra* note 377, at 582-83, 594; *supra* note 439. *But see infra* note 446 and text accompanying.

441. In a succession of cases, e.g., *Danforth*, 428 U.S. at 74, the Court has fleshed out the requirements for parental consent statutes. States may reasonably require the approval of some third person before a minor receives an abortion. The minor is thus more restricted in the exercise of an abortion right than is an adult woman. Jones, *supra* note 377 at 586. The matter was dealt with exhaustively in *Bellotti II*, 443 U.S. 622. A statute cannot give parents an absolute and possibly arbitrary veto. A minor must have an opportunity to go to a court (or something like it), without consulting her parents first, and to show either that she is well-informed and mature or that abortion will be in her best interests. *Id.* at 643-50. The abortion right is to be "exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties. . . ." *Id.* at 655, quoted in *Ashcroft*, 103 S. Ct. at 2531 (Blackmun, J., dissenting in part and disputing Court's validation of parental consent statute).

The consent-by-court process must create opportunities for case-by-case evaluations. *Akron*, 103 S. Ct. at 2497-99, but how this can be best achieved is still open to dispute. *See Ashcroft*, 103 S. Ct. at 2530-31 (Blackmun, J., dissenting in part). The requirement of parental notification (as opposed to consent) does not violate the rights of immature and dependent minors (*Matheson*, 450 U.S. at 406-07), even though the "chilling effect" on minors' exercise of rights may be as great as from a parental consent statute. *See*, L. TRIBE, *supra* note 50, at 1077-79, 1079 n.9; *infra* note 477 and text accompanying.

Further, no means exists for the detailed supervision of judges who are to grant consent in appropriate circumstances. For example, Randall Hekman, a Juvenile Court Judge in Grand Rapids, Michigan, refused permission for a thirteen-year-old's abortion, and refused to assign the case to another judge. Hekman defended his actions as follows:

[D]o we want our judges always to behave like mindless bureaucrats . . . ?
 [Can judges] escape moral culpability either by obeying the law and saying that they were "just following orders" or by disqualifying themselves so that other judges without their scruples can issue the unjust decrees? . . .
 . . .

Ten short years ago, a judge in Michigan would be guilty of a felony crime if he . . . ordered that a pregnant girl obtain an abortion. [The Supreme Court, ignoring the "sentiment of the majority," changed this, but] we juvenile court judges, whose statutory responsibility is the protection of children from abuse, must perform the "hatchet job" of assigning unborn children to a cruel and merciless death. . . .

2 (1) Status Call, Fall, 1982, at 7-8 (Milwaukee, Catholic League for Religious and Civil

Some of these restraints have succeeded, however. One explanation of these successes is offered by Justice Brandeis, in another and much earlier context: "To stay experimentation in things social and economic [and, I would add, moral] is a grave responsibility. It is one of the happy incidents of the federal system that a single courageous State may serve as a laboratory; and try novel . . . experiments without risk to the rest of the country."⁴⁴² The fundamental nature of woman's abortion right has not prompted the Court to "stay experimentation" altogether. Experiments are, rather, constrained; the State must maximize its interests more creatively because interferences with woman's privacy and autonomy must be minimized under a rule of reason. Such a federalism in policymaking, over abortion and other matters, has always resulted in a sharing of functions rather than their compartmentation. Like other policy issues, abortion seeks its own level of government from time to time. A chaos of localized approaches created pressures for minimum standards at the national level. Promulgated by the Court in *Roe*, these standards prompted new local efforts which attempt to clarify, circumvent, or alter these standards. Where successful, these new efforts are often adopted by other states and localities, as the Court continues to keep the inevitable policy divergences within reasonable bounds.⁴⁴³ During this process, states are not prevented from establishing protections of the right to abortion which exceed federal minima.⁴⁴⁴ Since the merits of a policy experiment do not turn on the level of government

Rights) (quoting Hekman's letter to the GRAND RAPIDS PRESS). While our society rightly cherishes the principle that each is treated as an individual rather than a statistic, tailoring all determinations to the individual case encourages arbitrary actions such as Hekman's. See *L. Tribe, supra* note 50, at 1078. See also *Jaffree v. Board of Comm'rs. of Mobile County*, 51 *U.S.L.W.* 2426 (D. Ct. S.D. Ala. 1983) (quickly vacated by the Supreme Court): Justice Black was wrong in *Adamson v. California*, 332 U.S. 46 (1947); public school prayer is constitutional because the first amendment Establishment Clause does not apply to the states.

442. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion).

443. See *Harris*, 448 U.S. at 325-26; *Doe* 410 U.S. at 222 (White, J., dissenting); R. EYESTONE, *supra* note 6, at 128; A. WILDAVSKY, *supra* note 5, at 143; Gilbert, *supra* note 229, at 121-22. Indeed, one reason why woman's right is declared fundamental (see *supra* notes 287-90 and text accompanying) may be to eliminate any excuse for applying the presumption of constitutionality. See *United States v. Carolene Products*, 304 U.S. 144 (1938).

444. *E.g.*, the denial of public funding for abortion has been held to violate state constitutions in: *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 352 (1981) (under privacy and equal protection provisos broader than those in the U.S. Constitution; *Harris*, 448 U.S. 297 thus distinguishable); *Moe v. Sec'y. of Admin. and Finance*, 417 N.E.2d 387 (Mass., 1981) (on privacy and due process grounds, health care for pregnant women must be publicly funded with a genuine indifference); *Right to Choose, etc. v. Byrne*, 169 N.J. Super. 543 (1979) (proposed guidelines violate prohibitions of unreasonable and discriminatory restrictions, because the State's interest in the potentiality of fetal life does not become compelling until the third trimester).

commissioning it, the Court does not evaluate an experiment differently because it originates in Akron, St. Louis, the Connecticut Welfare Department, or Congress, rather than in a state legislature.⁴⁴⁵ The Court will, however, defer in a limited way to a state's interpretation of its own statute.⁴⁴⁶

Roe gave rise to a procedural innovation, a presumption: interferences with woman's abortion right are unconstitutional.⁴⁴⁷ A state must thus try to rebut this presumption by proving the reasonableness of its restraint on abortion. The standard of proof required to rebut the *Roe* presumption remains unclear,⁴⁴⁸ perhaps intentionally so, but speculation or religio-philosophical argumentation taken alone will not suffice. The procedural function of the trimester system created by

445. See *Akron*, 103 S. Ct. 2481 (an evaluation of a city ordinance, which then becomes the basis for evaluating state statutes, etc); *Harris*, 448 U.S. at 312, 314-15 (*Maher*, 432 U.S. 464, *infra*, answers due process arguments raised in opposition to Hyde Amendment passed by Congress; see *infra* notes 479-86 and text accompanying); *Williams v. Zbaraz*, 100 S. Ct. at 2644 (1980) (*Harris*, *supra*, validates Illinois's statutory denial of public funds for non-therapeutic abortions); *Poelker*, 432 U.S. 519 (*Maher*, *infra*, validates refusal by St. Louis to provide publicly financed hospital services for non-therapeutic abortions); *Maher*, 432 U.S. 464 (Conn. Welfare Dept. regulation receives the same treatment as the Pa. statute in *Beal*, 432 U.S. 438). But see *Am. Academy of Pediatrics v. Heckler*, 51 U.S.L.W. 2628 (D.D.C. 1983): Health and Human Services regulations concerning treatment of handicapped newborns in federally-funded hospitals are arbitrary, capricious, and promulgated in violation of Administrative Procedure Act requirements). But see also *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

446. See, e.g. *Simopoulos*, 103 S. Ct. at 2532; *Ashcroft*, 103 S. Ct. 2517; *Bellotti I*, 428 U.S. 132. But see *Bellotti II*, 443 U.S. at 643-44, 646-48. It is difficult for the Court to come up with its own saving construction, however: see *Simopoulos*, 103 S. Ct. at 2540-41 (Stevens, J., dissenting); L. TRIBE, *supra* note 50, at 717.

447. See L. WARDLE, *supra* note 33; *supra* notes 387-90 and text accompanying.

448. See *Scheinberg v. Smith*, 51 U.S.L.W. 2316 (S.D. Fla. 1983) ("preponderance of the evidence"). See also *Simopoulos*, 103 S. Ct. at 2532, 2540 (ordinary criminal burden of proof applies to prosecution of physician, and burden of going forward on defense of necessity rests on defendant); *Scheinberg* (on the kinds of empirical evidence which establishes risk of harm or death from abortion); *supra* note 432. But see also *Thornburgh*, 51 U.S.L.W. 2375: The parties having stipulated that the effects of a statute on health insurance costs could not be precisely identified, the court found "no evidence" proving that the statutory requirement of a cheaper policy excluding non-therapeutic abortions was arbitrary, unrelated to real costs, etc. This result was reached even though it "departs from" another Pennsylvania statute "mandating actuarial soundness." *Id.*

The standards of proof used in *Scheinberg* and *Thornburgh* seem rather undemanding, as recognitions of woman's fundamental right. I would argue that a more elevated, "clear and convincing" standard should be used where the individual's interest at stake is more precious than a property right, more substantial than a mere loss of money. See *Santosky v. Kramer*, 455 U.S. 745 (1982) (parental rights termination); *Addington v. Texas*, 441 U.S. 418, 425-33 (1979) (involuntary commitment to mental institution). This argument is rather shaky, however: *Santosky* and *Addington* are procedural due process cases, and the Court may be reluctant to apply them in the "substantive" area of abortion.

Roe is to help spell out what it is that a State must prove: the reasonableness of protecting the pregnant woman's health by a restriction taking effect during the second and third trimesters of pregnancy, or of protecting the potentiality of the fetus by a restriction on third-trimester abortions.⁴⁴⁹ This scheme offered no basis for rebutting the presumption in aid of abortion restrictions, no matter how reasonable, taking effect during the first trimester. Another burden of proof was thus created by the Court in 1976 or 1977.⁴⁵⁰ This burden is still evolving; the most recent formulation is Justice Powell's, in *Akron*.⁴⁵¹ The Court's caveats do

not mean that a State *never* may enact a regulation touching on the woman's abortion right during the first weeks of pregnancy. Certain regulations that have *no significant impact* on the woman's exercise of her right *may be permissible where justified by important state health objectives* But even those *minor* regulations . . . may not interfere with physician-patient consultation or with the woman's choice. . . .

This newer burden of proof should be interpreted as a prophylactic rule of reason, carefully qualified but nevertheless available to rebut

449. See *Ashcroft*, 103 S. Ct. at 2521-22 (under *Roe*, 410 U.S. at 164-65, compelling State interest in a viable fetus validates Mo. statute requiring the presence of a second physician after viability to protect fetal interests); *id.* at 2529 (Blackmun, J., dissenting in part) (emergency may make second doctor unavailable, and method of choice in post-viability, third-trimester, abortions—the one which best preserves woman's life and health—entails no chance of fetal survival); *Colautti*, 439 U.S. at 387 (a higher degree of interference in the physician's exercise of medical judgment is permitted after the fetus reaches viability); *Beal*, 432 U.S. at 446 (discussed *infra* note 450); *Friendship Medical Center v. Chicago Bd. of Health*, 505 F.2d 1141, 1153 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975) (regulation of abortion clinic during first trimester can be no more expansive than regulations of other medical procedures of like risk and complexity) [hereinafter cited as *Friendship*]; L. WARDLE, *supra* note 55, at 41, 43.

More generally, the State's interest in the pregnant women's health, which becomes compelling in the second and third trimesters, does to validate the requirements that an abortion be performed in a full-service hospital, that other doctors approve the abortion, or that a safer abortion method which is not widely available be used. *Danforth*, 428 U.S. at 75-79; *Doe*, 410 U.S. at 194-200; *Roe*, 410 U.S. at 163; L. TRIBE, *supra*, note 50, at 925.

450. See *Akron*, 103 S. Ct. at 2492-93 (quoted *infra* in text accompanying note 443, and giving as an *e.g.*, *Danforth*, 428 U.S. at 77-78 (1976)); *Beal*, 432 U.S. at 438, 446 (1977) (State's interest in childbirth "significant" throughout pregnancy but insufficiently compelling to justify unduly burdensome restrictions on abortion right until third trimester); *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting, and finding "the Court's sweeping invalidation of any restrictions on abortion during the first trimester . . . impossible to justify.")

451. *Akron*, 103 S. Ct. at 2492-93 (emphasis supplied).

the presumption of unconstitutionality regardless of classifications by the trimester.⁴⁵² While the State's burden of proof is eased under these criteria, the Court can still predetermine the outcome of attempts to rebut the presumption by adjusting the strictness of scrutiny, the rigor with which canons of construction are applied, and the degree of willingness to second-guess the legislature.

The subsequent history of *Roe*, until 1977 at least, has been one of a growing rigidity. The rule of reason has been hedged about by a code of judge-made rules as detailed, and as discouraging of alternative analysis, as any legislative code. Rather than reform or abolish trimester classifications, the Court has reinforced them by repeatedly pigeonholding untidy or inconvenient factors in one trimester or another, or, more recently, in all three trimesters. Trimesters grow richer in implication because they offer apparent security against an unfriendly tinkering with abortion policies. The Court has also grown accustomed to hypothesizing the same kinds of purposes and effects for similar statutes enacted by different states. Hearing incomplete and often misleading information and analysis, introduced by the parties to attack or defend abortion restrictions which have been repeatedly found wanting, the Court sees no need for complicated and prolonged inquiries into reasonableness.⁴⁵³ Judicial effort (and creativity) is thus conserved at the expense of only a slight arbitrariness, and, as *Akron*⁴⁵⁴ suggests, the Court's patience is wearing thin over abortion. The *Roe* presumption of unconstitutionality has never been declared conclusive. But it has become difficult to imagine how, in certain areas,⁴⁵⁵ the presumption can be rebutted or a statute can be drafted to survive an especially strict scrutiny.

In these areas, where State policy clearly interferes with woman's right or policy experimentation has given way to close variations on impermissible themes, abortion rules of reason are beginning to harden into rules of an unconstitutionality per se. These rules find parallels in the field of antitrust.⁴⁵⁶ State motives and achievements would have to be of a Doric simplicity and purity of line to survive a very strict scrutiny, and this is rarely the case. For example, all statutes which

452. See *Beal*, 432 U.S. at 438, 446 (discussed *supra* note 450); *supra* notes 387-90, *infra* notes 503-04, and text accompanying.

453. See Freund, *Storms Over the Supreme Court*, 69 A.B.A. J. 1474, 1480 (1983); *supra* notes 37-59, 418 and text accompanying. See also *United States v. Container Corp. of America*, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting); *United States v. Northern Pacific Ry.*, 356 U.S. 1, 5 (1958); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) (quoted *infra* note 547); L. SULLIVAN, *supra* note 439, at 187, 193-97.

454. 103 S. Ct. 2481 (1983).

455. See *infra* notes 457-65 and text accompanying.

456. See cases cited *supra* note 453.

regulate the advertising of abortions, and the advertising of and access to contraceptives, have been struck down on First Amendment grounds when they reach the courts.⁴⁵⁷ It is of course possible for states to regulate false and misleading advertising in these areas by exercising conventional police powers rather than compelling state interests concerning abortion. However, any such regulation is extremely suspect as trenching on a fundamental right, and it certainly could not serve to implement right-to-life desiderata. Attempts by states to name the kinds of "hospitals" where abortions must be performed are almost invariably⁴⁵⁸ struck down. The Court has characterized the effect, and probably the purpose, of such restrictions as increasing the costs of, and decreasing access to, abortion. Such an effect or purpose is invalid *per se*, although the state is free in theory to raise the "defense" of correspondingly important health benefits flowing to the woman as a result of the restriction.⁴⁵⁹ Such benefits can, however, be obtained under ordinary exercises of the police power.⁴⁶⁰ Once again, such police power regulations are the suspect hedges on a fundamental right that are unlikely to further right-to-life aims.

During the time before the fetus becomes viable, the State must take great care not to intrude upon the physician's and the woman's exercise of discretion over abortion. This policy is reflected in the *per se* exceptions built into *Akron's* prophylactic rule of reason⁴⁶¹ and governing restraints on the "physician-patient consultation" and "woman's choice." A 24-hour waiting period between consultation and

457. See *Carey v. Population Services Int.*, 431 U.S. 678, 688 (1977) (access to contraceptives guaranteed by the Constitution as essential to right to choose and use them, and State interest limited to protecting user's health and controlling quality of contraceptives); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (advertising of abortion fully protected, its commercial character notwithstanding, under first amendment); *id.* at 822 (State cannot, through its police powers, supervise internal affairs of another State by banning information about an activity, abortion, lawful in that State); L. WARDLE, *supra* note 55, at 286.

458. See *Akron*, 103 S. Ct. at 2487, 2490 (requirement that all second-trimester abortions be performed in full service, acute care hospitals stricken on cost and access grounds, grounds which would hamper most regulatory efforts over abortion); *Doe*, 410 U.S. at 194-95 (discussed *supra* note 438); *Friendship*, 505 F.2d 997. *But see also Simopoulos*, 103 S. Ct. at 2532 (Powell, J., interpreting "licensed hospitals" to include abortion clinics and upholding statute under rule of reason); *id.* at 2540-41 (Stevens, J., dissenting) (majority's interpretation too charitable, and court should remand for interpretation by the Va. Supreme Court).

459. See *Akron*, 103 S. Ct. at 2492-93; *supra* note 399 and text accompanying. *But see also Ashcroft*, 103 S. Ct. at 2522-24 (discussed *supra* note 438).

460. See *Akron*, 103 S. Ct. at 2493.

461. See *Akron*, 103 S. Ct. at 2492-93 (discussed *supra* text following note 451); *id.* at 2491 (physician's role one of assisting in woman's decisionmaking and implementing it if she chooses abortion); *Colautti*, 439 U.S. at 387, 399-401 (discussed *infra* note 463). *But see also Doe*, 410 U.S. at 192-93.

abortion has been struck down as "inflexible,"⁴⁶² and it is difficult to imagine how a flexible statute could be drafted here to advance any of the State interests under discussion. Restraints on the method of abortion used by the doctor have also been stricken.⁴⁶³ Impositions of a standard of fetal care on the physician, and requirements that the abortion be approved by other, "independent" physicians, have been invalidated where the abortion occurs prior to viability.⁴⁶⁴ The requirement that a husband consent to his wife's abortion was held unconstitutional per se in *Danforth*:⁴⁶⁵ the regulation endangers marital stability where the child is not the husband's, it denies Equal Protection to unwed fathers, and it gives the husband veto power over his wife's fundamental right of autonomy and choice. In any event, the State cannot delegate to husbands a power which the State itself cannot validly exercise under *Roe*. This holding offers a broad basis for declaring other delegations of State power over abortion (and much else) unconstitutional per se, but the Court has not returned to this theme since *Danforth* in 1976.

From 1973 to 1976, a great deal of balancing under an abortion rule of reason led to an imbalance, through the emerging rules of unconstitutionality per se that had the effect of favoring the aims of pro-choice groups. That this was not the Court's steadfast purpose is shown by its subsequent recognition of the legitimacy of State interests which had earlier been ignored or glossed over in abortion cases: preferring childbirth to abortion, and safeguarding the family unit and parental authority.⁴⁶⁶ Throwing into the hopper these new interests which (like almost all State interests concerning abortion) are congruent with right-to-life aims, the Court struck new balances which operate to favor right-to-life groups. Another corrective was

462. *Akron*, 103 S. Ct. at 2503.

463. See *Akron*, 103 S. Ct. at 2493; *Colautti*, 439 U.S. at 387 (criminal statute mandating abortion method giving fetus best chance for survival, so long as another method not "necessary" for woman's life or health, an unconstitutional infringement of physician's discretion in a medical decision made prior to viability); *id.* at 399-401 ("necessary" having been interpreted to mean "indispensable", statute doesn't state that woman's health and life always takes precedence over fetus's; and, anyway, "greater precision" required before a physician can be subjected to criminal liability); *Danforth*, 428 U.S. at 77-78; *id.* at 76, 79 (statutory prohibition of abortion by saline amniocentesis after twelfth week held unconstitutional, the Court finding a great danger in banning a technology and thus substituting its judgment for the legislature's finding that technique "deleterious to maternal health"); *supra* notes 383, 417 and text accompanying.

464. See *Ashcroft*, 103 S. Ct. at 2521-22, 2529 (discussed *supra* note 449); *Colautti*, 439 U.S. at 390-94 (discussed *supra* note 440); *Danforth*, 428 U.S. at 82-83 (discussed *supra* note 440); *Doe*, 410 U.S. at 199 (requirement that all abortions be concurred in by two other, independent physicians stricken).

465. 428 U.S. at 69-71, 74.

466. See *infra* notes 468-86 and text accompanying.

thus applied in 1983, in an attempt to move abortion policy back to a dead-center.⁴⁶⁷

C. Mothers Young and Poor

Abortion is more complex than most parent-child-State issues, involving as it does a near-adult's assertion of an individual's privacy against both the State and her parents. In *Danforth*⁴⁶⁸ and *Matheson*,⁴⁶⁹ the Court struggled to place her right among certain older, privacy and privacy-related, liberties. These reinforce the autonomy of the family and the authority and religio-philosophical values of its dominant members.⁴⁷⁰ Family autonomy is a canon of State non-interference, however; the State must go no further than to provide incidental supports for parental authority. Where these efforts concern abortion they have been evaluated by the Court under a less strict scrutiny⁴⁷¹ since *Danforth* in 1976. There,⁴⁷² the Court found the State to have a "somewhat broader authority to regulate" minors' abortions. Unlike that of an adult, the privacy right of a competent, mature minor gets balanced against an additional State interest: safeguarding the family unit and parental authority.

The balance weights even more heavily against the privacy of immature, dependent minor women. This was clarified in 1981 by *Matheson*:⁴⁷³ their rights are not violated by the "mere requirement" of parental notice (as opposed to parental consent) prior to an abortion. The State's interests that win out here, interests in minors' rights, "family integrity and protecting adolescents," are collapsed into

467. *Akron*, 103 S. Ct. 2476 (1983). See *infra* notes 495-504 and text accompanying. 468. 428 U.S. 52 (1976).

469. *H.L. v. Matheson*, 450 U.S. 398, 101 S. Ct. 1164 (1981).

470. See, e.g. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Soc. of Sisters*, 268 U.S. 510 (1925); *Buchanan*, at 554; *infra* note 471.

471. See *L. TRIBE*, *supra* note 50, at 986, 1079 n.9, 1080-81. There is a "private realm of family life which the state cannot enter" without compelling justification. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). This realm is limited, however, *Id.* See *Runyon v. McCrary*, 427 U.S. 160, 172, 172 n.10, 178, 178 n.14 (1976); no privacy interest was violated when Congress acted under the 13th amendment to outlaw segregated private schools. Schools appeal to public constituencies, and parents are still free to inculcate whatever values and standards they deem appropriate. *Id.*

472. 428 U.S. at 74-75. See also *Bellotti II*, 443 U.S. 622, 634-9 (1979): the State's *parens patriae* interests are those of protecting children unable to protect themselves, of insuring that they develop into productive adults.

473. 450 U.S. 398 (1981). The trial judge ruled that the statute did not apply to emancipated minors, and that it would be unconstitutional if it were so applied. This issue was not appealed to the Supreme Court. *Id.* at 406. The Court also declined to reach the issue of overbreadth: the minor failed to allege that she was emancipated, and she thus lacked standing to raise overbreadth. *Id.*

the traditional parents' right 'to authority in their own household to direct the rearing of their children.'⁴⁷⁴ The *Matheson* plurality refused to decide if and when an alternative to parental notification is required, but concurring Justices Stewart and Powell would have required such an alternative.⁴⁷⁵ The plurality went on to admit that parental notification deters some minors from seeking an abortion, and tried to rationalize this on rather flimsy grounds.⁴⁷⁶ The deterrent or chilling effect of parental notification appears to be substantial.⁴⁷⁷ Clearly, the requirement of parental notification goes impermissibly further than necessary under a rule of reason analysis based on *Roe's* compelling State interest in women's health; notification is, however, merely ancillary to a rediscovered State interest in giving parents of the unemancipated opportunities to exercise authority over abortion.⁴⁷⁸

A 1977 trilogy of decisions⁴⁷⁹ about the public funding of abortion provided other bases for the holding in *Matheson*: legislation need

474. *Id.* at 406, 410 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)) (plurality opinion). This parents' right (rather than duty) includes providing medical information to their daughter's doctor, and giving "mature advice and emotional support" to the daughter making a grave decision under emotional stress. *Matheson*, 450 U.S. at 410-11.

475. *Id.* at 420. Marshall, Brennan, and Blackmun dissented and would hold the statute unconstitutional. *Id.* at 425-54. *Matheson* does, however, reiterate the holding, in *Bellotti II*, 443 U.S. 622, 625 (1979) (plurality opinion), that a blanket, unreviewable parental consent is unconstitutional.

476. See *Matheson*, 450 U.S. at 413.

477. Nine states have parental consent laws and eleven states have abortion notification laws. Planned Parenthood found Minnesota's requirement that a parent or judge be notified to have decreased abortions by one-third. Isaacson, *Holding Firm on Abortion*, NEWSWEEK, Euro. ed., June 26, 1983, 28.

478. But see also, Jones, *supra* note 377, at 591:

Familial privacy is entitled to great protection against state interference. Nevertheless, the state is, through the notice requirement, in fact interfering with familial privacy. [T]he state does not foster familial integrity by forcing the parties to confront each other over an issue which at least one member of the family does not want to share with the . . . [others].

This echoes Justice Marshall's dissent in *Matheson*, 450 U.S. at 443. Additionally, there is no reasonable relation between notice and the minors' health and welfare. Jones, at 590.

479. *Beal v. Doe*, 432 U.S. 438 (1977) (no federally-imposed obligation on states—Pennsylvania here—to fund abortions not certified by doctors as "medically necessary" under Title XIX of the Social Security Act (Medicaid), 42 U.S.C. § 1396 et seq. (1970 ed. and Supp. V)); *Maher v. Roe*, 432 U.S. 464 (1977) (Connecticut Welfare Dept. regulation mandating funding for childbirth, but not for non-therapeutic abortion, similar to statute in *Beal*, is no denial of Equal Protection under the Fourteenth Amendment); *Poelker v. Doe*, 432 U.S. 519 (1977) (refusal, by St. Louis, to provide publicly-financed hospital services for non-therapeutic abortions is governed by *Maher*). See *Harris v. MacRae*, 448 U.S. 297 (1980) (annual refusal since 1976, under Hyde Amendment, by Congress to fund Medicaid abortions not involving rape, incest or saving the woman's

not be structured to encourage or facilitate abortion,⁴⁶⁰ and a state may thus pursue its "significant" interest in promoting childbirth. It remains true that, as under *Roe*,⁴⁶¹ the State interest in fetuses does not become "compelling" until approximately the third trimester. But no such compelling interest need be shown for a state's policy choice of favoring childbirth⁴⁶² by, for example, making it more financially attractive than abortion.⁴⁶³ It has also become "not unreasonable" for the State to require a showing of medical necessity for an abortion performed at public expense.⁴⁶⁴ Such a showing imposes no restriction on a woman's right which is not already there, and her "not unqualified" right implies no limits on states' value judgments concerning the allocation of public funds.⁴⁶⁵ State funding for childbirth but not for most abortions is said to violate neither Equal Protection nor the Establishment Clause of the First Amendment.⁴⁶⁶

It is difficult to explain this seemingly new tack in the Court's thinking as anything other than a limited recognition of the legitimacy of political demands for protecting the fetus before its third trimester. The legal logic of a *Roe* trimesterism is circumvented in the public funding cases, where childbirth rather than woman's health becomes the touchstone of compelling State interest and where certificates of

life is governed by *Maher*; *Thornburgh*, 51 U.S.L.W. 2374, 2375 (citing *Maher*, statute requiring "insurers to offer a lower-priced policy containing only limited coverage for abortion services is rationally related to the state policy favoring childbirth."); Hyde Amendment for 1981, Pub. L. No. 96-123, § 109; 93 Stat. 926; H.J. Res. 610 (F.Y. 1981); Bauman Amendment, H.J. Res. 610 (F.Y. 1981) (permits states to choose to eliminate Medicaid abortions where public funds remain available); *supra* notes 442-46 and text accompanying. *But see also Akron*, 103 S. Ct. at 2493.

460. *Matheson*, 450 U.S. at 413.

461. *Roe v. Wade*, 410 U.S. at 194-95. In *Maher*, 432 U.S. at 473-74, the Court denied that the public funding cases signalled a retreat from *Roe*. There is a relevant distinction between direct state interference with constitutionally-protected activity and state encouragement of alternatives: *See id.* at 475. *But see also infra* notes 487-90 and text accompanying.

462. *Matheson*, 450 U.S. at 413; *Harris*, 448 U.S. at 324-26; *Poelker*, 432 U.S. at 521; *Maher*, 432 U.S. at 578-79; *Beal*, 432 U.S. at 445.

463. *Harris*, 448 U.S. at 324-25.

464. *Maher*, 432 U.S. at 478, 480. But there was a remand to determine if such certification interferes with the doctor-patient relation. *Id.* at 478.

465. *Maher*, 432 U.S. at 474, 477. *See Harris*, 448 U.S. at 316-17: woman's free choice does not entail a constitutional entitlement to financial resources for taking advantage of the full range of constitutionally-protected choices.

466. *Harris*, 448 U.S. at 319 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)) (the Establishment Clause is not violated when a policy choice having a clearly defined secular purpose 'happens to coincide or harmonize with the tenets of some or all religions.'). *Poelker*, 432 U.S. 519; *Maher*, 432 U.S. at 471 (financial need has never been held a suspect class for Equal Protection purposes). *See id.* at 469-71; *Frieman v. Walsh*, 481 F. Supp. 137 (W.D. Mo. 1979). A different result may obtain under interpretations of state constitutions, however: *see supra* note 444.

medical necessity can be interposed between doctor and patient.⁴⁸⁷ Where the Court validates the State purpose of promoting childbirth, its effects on women and their rights recede into the background of analysis. In what may seem a departure from the abortion rule of reason, the Court displays little or no concern with whether restrictions on abortion funding go further than necessary to promote childbirth. This issue is not reached because the Court does not see the abortion right as affected by funding decisions. Abortions could, for example, be funded at the same time as childbirth is made relatively more attractive, but this forms no part of the Court's policy agenda. If contemporary studies are to be believed, the deterrent effect of denying public funds for abortion is substantial. Due to an inability to pay, the abstract right to an abortion is not exercised effectively about 35% of the time.⁴⁸⁸ Not surprisingly, currently productive women exercise their autonomy more freely than the economically unproductive. Those who wish to become productive and autonomous in the future may be unable to do so because of an unwanted pregnancy.⁴⁸⁹ This seems inconsistent with the Court's clear holding in other types of cases "that government may not restrict the exercise of constitutionally protected rights, even when that restriction takes the form of withholding a benefit, rather than applying a penalty, for that exercise."⁴⁹⁰ The neutrality of Court-sanctioned policies is more doubtful here than over other abortion issues; conferring the benefit of funding for childbirth but not for most abortions minimizes neither public

487. See Jones, *supra* note 377, at 602, 604; *supra* notes 383, 399, 484 and text accompanying.

488. See S. Rep. No. 465, *supra* note 383, at 38 (citing and discussing studies). The inhibiting effect appears similar to that associated with parental notification statutes: see *supra* note 477. As an abortion costs \$850-900 in a hospital and \$350-400 in a clinic, Akron, 103 S. Ct. at 2495, several different conclusions can be drawn from the studies: They are unreliable, they indicate the extreme poverty of some women who become pregnant, and they show that right-to-lifers are correct in asserting that some abortion decisions are "frivolous." Some abortions may reflect "marginal" decisions, affected by increasing the costs and holding the benefits of abortions constant, but what should the State's role be where *Roe* assumes autonomous women are exercising rational choice?

489. This is the main subject of Justice Marshall's impassioned dissent to the public funding cases: see *Beal*, 432 U.S. at 458-59. He concludes that, for a poor woman, "[a]ll chance to control the direction of her own life will have been lost." *Id.* at 459.

490. *Planned Parenthood of Central and Northern Arizona v. Arizona*, 52 U.S.L.W. 2267, 2268 (9th Cir. 1983). While the theory is that government need not fund the exercise of fundamental rights, such funding is required in, e.g., *Douglas v. California*, 372 U.S. 353 (1963) and *Griffin v. Illinois*, 351 U.S. 12 (1956). In *Central and Northern*, 52 U.S.L.W. at 2268, Judge Choy glosses over such inconsistencies on the basis of the distinction drawn in *Maher* (discussed *supra* note 481), but later exposes the inconsistencies indirectly. See *Central and Northern*, 52 U.S.L.W. at 2268 (emphasis supplied):

Clearly, Arizona may not *unreasonably* interfere with the right of Planned

expenditure (some of the children will become public charges) nor institutional and religio-philosophical entanglement.⁴⁹¹

The public funding decisions are strong evidence that the abortion right is so firmly anchored in an individualistic liberty interest that there is no need or desire to hold this interest in dynamic tension with our other significant constitutional value: equality. This libertarianism winds up a rejection of one paternalism, of public payment for abortion, for another paternalism of promoting childbirth. It is hard to see how the Court could have it any other way. Most issues in abortion policy are feasible realms for judicial activism because effective policymaking requires little judicial control over the sword and none over the purse. But effectively mandating a public funding for abortion would require a degree of control over the public purse which the courts lack. While the Equal Protection of those seeking abortion could be attained by striking down public funds for childbirth,⁴⁹² this evenhandedness benefitting none would be an absurd policy for the Court to pursue. A paucity of power and policy are the probable reasons why, when compared to other types of abortion cases, the Court is much more willing to defer to legislative judgments in the public funding cases.⁴⁹³ The Court also seems to *agree* with these legislative judgments. Abortion funding is treated as a species of "welfare," which has long been a pungent issue for the Court as well as for the electorate. The notion of welfare "as something for nothing" was easily manipulated in the course of the abortion debate into an image of female free riders unwilling to take the individual responsibility that the abortion right assumes. The funding

Parenthood to engage in abortion or abortion-related speech activities, but the state need not support, monetarily or otherwise, those activities.

... Arizona's *main* concern was to ensure that state funds not be used in a manner contrary to state policy and not to deter the organization from engaging in constitutionally protected activities.

However, it is not *clear* that the statute was drawn as narrowly as possible to permit the state to control use of its funds while infringing *minimally* on the exercise of constitutional rights.

The Court's public funding opinions have put lower court judges in a difficult position, and Judge Choy seems to have done as well a possible by adopting the to and fro that is typical of policy dilemmas.

491. L. TRIBE, *supra* note 50, at 933 n.77. See *Beal*, 432 U.S. at 448 (Brennan, J., dissenting): Pregnancy is a condition requiring medical services; abortion and childbirth are alternative means for dealing with it. If a woman and her doctor choose abortion, it becomes medically necessary and must be funded under Medicaid. *Id.* See also *supra* notes 401, 408-16 and text accompanying.

492. *But see also* Harris, 448 U.S. at 316-17: women retain the same freedom as if Congress had chosen to subsidize no health care costs.

493. *Compare* Harris, 448 U.S. at 325-26, which seems to echo Justice White's dissent in *Doe*, 410 U.S. 179, at 222, with *supra* note 399 and text accompanying.

of childbirth also creates free riders, yet the Court's reaction to statutes denying public funds for abortion is similar to President Carter's: "the world is unfair" and we lack the authority to change it.⁴⁹⁴

The 1983 *Akron* trilogy⁴⁹⁵ serves to wall off the Court's decisions concerning public funding and minors' abortion rights from the mainstream of abortion doctrine.⁴⁹⁶ *Trimesters*,⁴⁹⁷ requiring the State to meet its burden of proving a compelling interest,⁴⁹⁸ and the policy foci of safeguarding woman's health and the doctor-patient relation⁴⁹⁹ are all reinstated by this trilogy in more or less the form they took ten years earlier in *Roe*. The kind of cost-benefit analysis called for in the 1976 *Danforth* decision, and ignored in the public funding and minors' abortion rights cases, is made a basis for condemning the statute in *Akron*.⁵⁰⁰ Suggestions, made in the minors' rights and public funding cases,⁵⁰¹ that a state need not "fine-tune" its abortion statutes are set off against the canon of avoiding statutory vagueness.⁵⁰² Justice Powell elaborates on this theme in *Akron*:

It is true that a state abortion regulation is not unconstitutional simply because it does not correspond perfectly in all cases to the asserted state interest. But the lines drawn . . . must be reasonable, and . . . [must not impose] a heavy, and unnecessary, burden on women's access to a relatively

494. Anderson, *supra* note 17, at 718 (quoting President Carter). President Carter also stated (Sass, *supra* note 377, at 139, quoting the PORTLAND OREGON J. of July 18, 1977): "There are many things in life that wealthy people can afford and poor people can't. I don't think the federal government should make these things equal when there is a moral issue involved." See F. FROHOCK, *supra* note 30, at 193-94; Sass, *supra* note 377, at 101 (quoting the SAN JOSE NEWS of June 22, 1977) ("like the Supreme Court—many persons see a sharp distinction between recognizing a woman's right to seek an abortion and the public's obligation to pay for her exercise of that right."); A. WILDAVSKY, *supra* note 5, at 302; *infra* note 520 and text accompanying.

495. *Akron*, 103 S. Ct. 2481; *Ashcroft*, 103 S. Ct. 2517; *Simopoulos* 103 S. Ct. 2532.

496. See *Ashcroft*, 103 S. Ct. at 2525-26 (citing *Akron*, 103 S. Ct. at 2497-99).

497. See *Simopoulos*, 103 S. Ct. at 2536-40; *Ashcroft*, 103 S. Ct. at 2519-20; *Akron*, 103 S. Ct. at 2494-95; *supra* notes 397, 447-53 and text accompanying.

498. See *Ashcroft*, 103 S. Ct. at 2520-22; *Akron*, 103 S. Ct. at 2492, 2494-95; *id.* at 2503 ("legitimate" state interest); *supra* notes 382, 391-92 399-400 and text accompanying.

499. See *Simopoulos*, 103 S. Ct. at 2536-40; *Ashcroft*, 103 S. Ct. at 2523-24; *id.* at 2527, 2529-30 (Blackmun, J., and three others, dissenting in part); *Akron* 103 S. Ct. at 2492-93; *supra* notes 384, 389, 394 and text accompanying.

500. See *Akron*, 103 S. Ct. at 2493 (citing *Danforth*, 428 U.S. at 77-78). The basis for cost-benefit analyses of denials of public funds for abortions can be found in *supra* notes 399, 459, 488-89, 491 and text accompanying.

501. *Matheson*, 450 U.S. at 413; *Harris*, 448 U.S. at 325; *Maher*, 432 U.S. at 473-74. Dissenting in *Akron*, 103 S. Ct. at 2512, Justice O'Connor would apply this criterion to the mainstream of abortion policy.

502. *Simopoulos*, 103 S. Ct. 2540, 2541 (Stevens, J., dissenting).

inexpensive, and otherwise accessible and safe abortion procedure.⁵⁰³

This, along with the Justice's prophylactic *Akron* standard (discussed earlier),⁵⁰⁴ is an attempt to restate a rule of reason which was battered during the minors' rights and public funding cases—and by critics of abortion policymaking by the trimesters.

D. Changing the Terms of the Abortion Debate

Justice O'Connor has become the foremost critic of this vein in constitutional doctrine. Dissenting from the *Akron* trilogy, she laments the striking down of a number of procedural restrictions on abortion.⁵⁰⁵ These strikes amount to a reinvigoration of the approach that leaves some abortion restrictions unconstitutional *per se*.⁵⁰⁶ Justice O'Connor would replace all of this with a simple rule of reason which ignores the trimesters, makes State interests compelling throughout pregnancy, and is thus more deferential to State claims that do not "unduly burden" woman's right.⁵⁰⁷ This is clearly a minority view at present. *Roe* would have to be gutted to reach Justice O'Connor's result, and this is unlikely; "especially compelling reasons" for treating *Roe* to a strict *stare decisis* were recently advanced by the *Akron* majority.⁵⁰⁸

503. *Akron*, 103 S. Ct. at 2497.

504. *Id.* at 2492-93 (discussed *supra* notes 451-52 and text accompanying).

505. See *Supreme Court Review and Constitutional Symposium*, 52 U.S.L.W. 2228, 2233 (1983) (Lawrence Tribe)—

[In the *Akron* trilogy,] the Court struck down, 6-3, requirements that: (1) forced second trimester abortions out of clinics; (2) authorized the "hassling" of women who seek abortions by, e.g., requiring physicians to describe in detail the abortion process, its effects on the fetus, etc.; (3) required women to return within 24 hours following the decision to have an abortion to reconfirm that decision; and (4) provided vague requirements for the disposal of fetal remains.

506. See *Ashcroft*, 103 S. Ct. at 2521-22, 2529; *Akron*, 103 S. Ct. at 2487, 2490-93, 2503; *supra* notes 456-65, 505 and text accompanying. But see also *Simopoulos*, 103 S. Ct. at 2532; *Ashcroft*, 103 S. Ct. at 2522-24.

507. See *Simopoulos*, 103 S. Ct. at 2540 (O'Connor, J., dissenting in part); *Akron*, 103 S. Ct. at 2509-12 (O'Connor, J., dissenting); *id.* at 2505, 2510, 2515, (citing *Bellotti I*, 428 U.S. at 147 and *Griswold*, 381 U.S. at 485). See also *supra* note 453 and text accompanying.

508. 103 S. Ct. at 2487 n.1. The "doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *Id.* at 2487. This is especially so for *Roe*, a 7-2 decision which "was considered with special care" after argument, reargument, and extensive briefing. *Id.* at 2487 n.1. Yet Justice O'Connor "rejects the basic premise of *Roe* and *its progeny*" and only "stops short of arguing flatly that *Roe* should be overruled." *Id.* (emphasis supplied). All of this flies in the face of the fact that, for the Court, *stare decisis* does not even have the status of a customary norm; each Justice

The policy politics of this, the Court's astonishing fidelity to *Roe* over time, was described earlier as a stonewalling: new policy is made chiefly to defend old policy, lest hard-won principles and classifications be undermined by abortion pressure groups.⁵⁰⁹ Piece by piece, abortion presumptions, rules of reason, excursions into per se analysis, etc., have been assembled into efforts to hold the initial, *Roe* balance of interests wherever possible.

While it fails to please connoisseurs of a doctrinal architecture, the stone wall of abortion grows ever more rigid as one hole after another gets plugged.⁵¹⁰ Brainstorming new solutions becomes more difficult at a time when established patterns of doctrine and pressure group politics are growing larger and larger. Trimesters have, for example, become far too rigid to adjust to technological change⁵¹¹ or to Justice O'Connor's well-taken criticisms: no matter what *Roe* says, the State has an interest in making first-trimester abortions as safe as possible, and potential fetal life is no less potential in the first and second trimesters than in the third.⁵¹² Under a strict *stare decisis*,

decides policy consistency for himself/herself. G. SCHUBERT, JUDICIAL POLICY MAKING 33-34 (rev. ed. 1974). What O'Connor, J., does (*Akron* at 2508) is to quote from *Smith v. Allwright*, 321 U.S. 649, 665 (1944): "Although we must be mindful of the 'desirability of continuity . . . when convinced of former error, this Court has never felt constrained to follow precedent.'" See L. WARDLE, *supra* note 55, at xv (*stare decisis* in abortion cases gives rise to "a regressive formalism" which is "mechanical (and typically evasive)"); *id.* at 303; Isaacson, *supra* note 477 (in the *Akron* trilogy, "filled with forceful phrases that seemed as much addressed to the controversy in the country as in the courts, a clear majority of the Justices roundly reaffirmed the landmark 1973 [*Roe*] decision as the law of the land.")

509. *Supra* notes 427, 433-35 and text accompanying. See *supra* notes 9, 28-29, 54, 57-59, 66, 73, 108, 219, 235 and text accompanying.

510. *Hearings Scheduled*, 51 U.S.L.W. 3387, 3389 (1982) (quoting from Justice Department arguments in the *Akron* trilogy): In the years since *Roe*, "the Court has been asked to fill in more detail, 'resulting in a set of rules that has become increasingly intricate. . .'" Unless this is clarified, and more deference is accorded legislative judgments, the Court will be taken "further away from what courts do best and more into the realm of what legislatures do best. [T]he adversaries will be back again and again. . . [T]hat is an unfair and improper burden to impose upon any Constitution." *Id.* L. Wardle, *supra* note 55, at xv; *id.* at 311 (quoted *infra* note 513); *id.* at 310-11:

To one devoted to teaching that legal analysis is of overriding importance in the judicial system, the record of the federal court abortion cases is an awkward deviation. . . The abortion doctrine has sprawled and evolved in an unprincipled, unpredictable and sorely dogmatic manner.

Wardle must realize that there are many such "awkward" deviations, deviations which cast doubt on the relevance of the kind of "legal analysis" claiming her devotion.

511. See *supra* note 418 and text accompanying.

512. *Akron*, 103 S. Ct. at 2509 ("inherent fallacies" in *Roe*). See Buchanan, *supra* note 470, at 557: fetal life is always present, prior to viability as well as after, as a moral issue which appears to influence the Court subtly. But see also Jones, *supra* note 327, at 613: "The interest of the woman is also in the potentiality of life."

the Court has imposed its authority in ways discouraging to the feedback and the new information from lower courts and uncommitted outsiders that frequently lead to doctrinal innovations in other areas. The jurisprudence of privacy and of persons (or quasi-persons), the particular province of courts, cannot develop spontaneously, and the Court seems incapable of developing it further while locked into the current analytical scheme.⁵¹³ The costs of a policy standoff over abortion are immense, measured in terms of the time devoted to this issue by judges, legislators, bureaucrats, pressure groups, and the media. Their time is a scarce resource which would have been better spent on investigating solutions for other policy problems. There are other costs, too, but they are more difficult to measure. The Court has lost at least some of its legitimacy, a scarce and valuable resource, because of an inability to win political acceptance of abortion decisions over time. Congress and state legislatures may have lost legitimacy as well, and the abortion debate has certainly contributed to the growth of single-issue constituencies which have, temporarily perhaps, changed the rules of electoral and logrolling games.⁵¹⁴

There are thus many things wrong with abortion policies; they are only the best we could have expected under the circumstances.⁵¹⁵ Can these second-best policies be improved by changing the terms

513. E. DE BONO, *LATERAL THINKING* (1977); L. WARDLE, *supra* note 55, at 303-07; *Note, supra* note 267, at 983. *See* L. WARDLE, at 311: "While the doctrine of abortion privacy may not be beyond repair, . . . it stands no hope of being repaired until the federal judiciary summons the self-discipline necessary to neutrally apply the doctrine . . . as a doctrine of law, not merely as a crystallized, controversial social policy." *See also supra* notes 5, 8 and text accompanying.

514. *See, e.g.*, R. EYESTONE, *supra* note 6, at 111; Sass, *supra* note 377, at 28 (quoting *CHICAGO DAILY NEWS* of Feb. 5, 1976) ("for abortion to become the decisive issue in the election would turn voting into a travesty."); *id.* at 116 (quoting *Louisville COURIER JOURNAL* of Feb. 10, 1977) (during Hyde Amendment proceedings, "religious lobbyists played a role that many Americans might regard as dangerously close to domination of governmental decisions by a particular religious group."); *id.* at 119 (quoting *DETROIT FREE PRESS* of Feb. 15, 1978) ("The politics of abortion . . . now threatens to paralyze Congress and chip away at other constitutional guarantees, as well as restrict the rights of women."); D. WISE, *supra* note 120, at 406 (abortion "wasted" more than one month of the Senate's time before and during September 1982); Moore, *supra* note 396, at 411; Isaacson, *supra* note 477, at 29; Roberts, *supra* note 428, at cols. 3-5; *id.* at col. 4 (quoting Senate aide) ("It's hard to say to our constituents, we let interest rates go up while we debated abortion."); *id.* ("Even so, [and n]o matter what the polls showed, many lawmakers believed that opponents of abortion would cast votes and give money based on that issue alone."); Vinovskis, *supra* note 373 at 1767-68; Vinovskis, *supra* note 379, at 1817-18; *supra* notes 256, 325 and text accompanying. Attempts to describe the causes and effects of the Supreme Court's legitimacy have been inconclusive and otherwise unsatisfactory. *See* the studies collected in: *AMERICAN COURT SYSTEMS* (S. Goldman and A. Sarat, eds. 1978); *THE IMPACT OF SUPREME COURT DECISIONS* (T. Becker, ed. 1969).

515. *See supra* notes 419-23 and text accompanying.

of the debate, in much the same way as I propose doing for the CIA?⁵¹⁶ The time may be ripe for a new consensus *de minimus* over abortion policy, if the temperature of debate can be lowered somehow. While the relevant statistics are hardly free from doubt, 66% to 81% of Americans apparently see abortion as a personal matter to be left to the woman and her doctor,⁵¹⁷ as an unfit subject for legislative intervention. At the very least, it can be said that only small minorities would either permit or ban all abortions. The wider public is confused and confusingly in between, having grown weary of the abortion wars. Yet the public seems prepared to follow the Supreme Court so far as to preserve the liberal democratic tenets of, for example, John Stuart Mill.⁵¹⁸ This amounts to a rejection of the paternalistic or strong State that would tell "us" what to do⁵¹⁹ about abortion. Public support for the Court's public funding decisions suggests that all aspects of abortion should be strictly off-limits for the State.⁵²⁰ After ten years, the less extremist members of pro-choice and right-to-life groups must be coming to realize that all of their desiderata cannot be achieved. One legal loophole after another has been closed, and lobbying and psychodrama — "consciousness-raising" demonstrations, occupations of abortion clinics, etc. — have failed.

516. See *supra* notes 235-39 and text accompanying.

517. As S. Rep. No. 465, *supra* note 393 at 48 observes, polls concerning abortion "have not always given reliable or consistent information because of differences in sampling, in the phraseology of questions, and in the respondents' level of knowledge of the issues. Such problems are, of course, are common in public opinion polls taken on any complex issue." *Id.* See Moore, *supra* note 396, at 419 (quoting Rep. R.D. Lamm). This may be one reason why social science data about abortion are held in such low regard. Be that as it may, 74% of those polled in 1981 approved of abortion in all or most circumstances. WASHINGTON POST, June 8, 1981, at A1, cols. 1-3. The same percentage of those asked in a 1977 CBS-New York Times poll, favored leaving the abortion decision entirely to the woman and her doctor. Sass, *supra* note 377, at 220 (69% of Catholics and 76% of Protestants). 81% agreed this result in a 1976 Knight-Ridder Newspapers survey, and 66% in a 1976 nationwide survey. *Impact* 80, 1 ABORTION L. REP. § 2.1 (May 1980) (National Abortion Rights Action League). See Arney and Trescher, *Trends in Attitudes Toward Abortion*, 8 FAM. PLAN. PERSP. 117 (My-June 1976); Jones *supra* note 377, at 608-09. Surveys cited in S. Rep. No. 465, at 49-50, 49 n., 50-52, and in Vinvoskis, *supra* note 373, at 1753-54, tell a different story: 11-22% of the population are "hard-core" opponents of abortion, and 23-27% would never prohibit abortion. The majority in the middle agreed that abortions should be permitted, but only under certain circumstances.

518. *Supra* notes 252-53 and text accompanying. See L. WARDLE, *supra* note 55, at 107 (a "protective" abortion right, "a shield against application of the awesome, coercive, penal powers of government"); *supra* notes 209-11, 213, 218 and text accompanying.

519. See *supra* notes 202-06, 212, 220, 225-26 and text accompanying.

520. In one poll, 40% of those questioned favored federal funding for abortion while 54% opposed it. WASHINGTON POST, *supra* note 517, at A4, col. 1. See *supra* notes 492-94 and text accompanying.

Pro-choice groups are not pro-abortion, except to the extent that the unavailability of abortion restricts choice. Likewise, most right-to-life groups and their members are not anti-choice, except where the choice is to abort.⁵²¹ Belaboring the obvious, the broadest basis for consensus would have us working toward fewer abortions and more autonomy and choice simultaneously.⁵²² Those refusing to move to this position and away from their absolutist, demonstrably-unworkable extremes could logically—and fairly—be accused of preferring principles to fetuses. Unfortunately, this position cannot be reached under present laws and policies. The “not unqualified” right to abortion misses the salient policy issue by treating one symptom rather than the cause: man’s and woman’s inability to manage sex and other aspects of intimate relations sensibly. A host of traditional social ills and side effects of rapid social change are part of the abortion policy problem: forced marriages, unwanted children, domestic violence, the health risks of numerous pregnancies in rapid succession, delinquency. Neither the right-to-life nor the pro-choice principle deal more than superficially with the many scientific, moral, socio-economic, and emotional issues arising. Under past responses to judicial policy, less is done than is necessary to protect woman’s right without doing as much as possible to safeguard fetal rights.⁵²³

A principle of equity⁵²⁴ could be used to reduce the extremity of result from focusing on either women’s or fetal rights. To rectify the *lex imperfecta* of these rights, rights tied to each other in biology if not under present laws and ideologies, a correlative duty should be imposed on the exercise of a right that serves to terminate the fetus.⁵²⁵ As in my analysis of policy problems concerning the CIA,⁵²⁶

521. See *supra* notes 201-14, 235 and text accompanying.

522. See Knowles, *supra* note 416, at 18; *supra* note 239 and text accompanying.

523. See L. FRANKE, *THE AMBIVALENCE OF ABORTION* (1978); Sass, *supra* note 377, at 7 (quoting WASHINGTON EVENING STAR of Jan. 27, 1973); Gordon, *The Predicament*, NEW YORK REVIEW OF BOOKS, July 20, 1978, at pp. 37-39; Margolis and Neary, *supra* note 410, at 703, 712; Moore, *supra* note 396, at 431; *supra* notes 197, 217 and text accompanying. See also Margolis and Neary, at 713 (quoting Blockner): if the anti-abortion movement does not begin to address the impact of social problems and values on abortion, it will go the way of the Anti-Saloon League. The League ignored “the fact that planned social change can succeed only when it rests upon a consensus of values, no matter how pluralistic the society. . . .”*Id.*

524. See Sass, *supra* note 377, at 98 (quoting MILWAUKEE J. of July 29, 1977); *supra* note 115, *infra* note 546, and text accompanying.

525. See *supra* notes 115, 269, 395, *infra* notes 546, and text accompanying. One basis for this duty, where rights conflict, is the “indispensible nexus” between a right and “the moral-political norm of self-respect.” See W. CONKLIN, *supra* note 253, at 2, 5, extrapolating from the ideas of Thurgood Marshall, and from *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

526. See *supra* notes 236-45 and text accompanying.

the task is one of holding "persons" who are decisionmakers accountable under this duty, while reinforcing their legitimate scope of discretion and choice. Like the right, this correlative duty should extend to women, their doctors, and, less directly, to all of us: demonstrating respect for life, both adult and unborn, as an end rather than a means to some other policy goal. The abortion debate has twisted the symbol "life" into either a mere physical existence or participation in a free-wheeling, middle-class dream.⁵²⁷ Life means both these things simultaneously in America, plus, for some, the effects of poverty, racism, and the desperate search for someone to love.

On close examination, there turns out to be very little respect for life in America. The sprawling media vulgate of a commercialized "lifestyle" and many of our public policies reflect this sorry fact. For example, even those legislators ostensibly dedicated to a right to life are reluctant to put their money where their mouths are, into such viable alternatives to abortion as sex education and contraceptives, adoption information and support, and better medical care, nutrition, tax benefits, and educational and occupational assistance for mothers who wish to keep their children.⁵²⁸ Forced to choose, most of these legislators prefer policies associated with a traditional morality, a fiscal responsibility, and keeping the Welfare State at bay (while, perhaps, increasing military budgets and tax breaks for corporations). Legislators may thus deserve the rebuffs regularly administered by the Court; any society capable of desegregating southern schools and putting a man on the moon can, if it wishes, markedly decrease the number of abortions performed. If this is indeed the main legislative policy goal, setting it alongside a judicial policy that will not budge—guaranteeing a moderate degree of access to abortion facilities—would require moderate public expenditures and a careful policy planning and coordination. In this way, new options could emerge from policy experimentation and competitions between legislatures and courts.

527. See *supra* note 395 and text accompanying.

528. See K. MOORE AND M. BURT, *TEENAGE CHILDBEARING AND WELFARE: POLICY PERSPECTIVES ON SEXUAL ACTIVITY, PREGNANCY, AND PUBLIC DEPENDENCY* (1981) (reviewed in *THE WILSON QUARTERLY*, Spring 1982, pp. 45-46); Johnson and Bond, *supra* note 434, at 122; Sass, *supra* note 377, at 151 (quoting *CHICAGO TRIBUNE* of Dec. 1, 1977, which quotes chairman of an HEW panel) (the current alternatives to abortion are "suicide, motherhood, and some would add, madness."); *supra* note 26 and text accompanying. See also Auletta, *Review*, *NEW REPUBLIC*, Feb. 7, 1983, p. 32, at p. 34:

Preaching chastity may make out-of-wedlock births less socially acceptable, but it won't prevent a teenage girl from having a baby in order to escape an unhappy home or to have someone to love. The Reagan Administration's policies have cruelly cut the benefits and training and job opportunities of some "truly needy" Americans. On the other hand, Reagan's efforts to drive the working poor off welfare . . . has [sic] been more successful than is generally conceded.

Coercive legislative restrictions on abortion have proved unconstitutional, conferred a protective economic tariff on those who sell abortions in the manner of pornography and illicit drugs, and created more misery than necessary without reducing abortions as much as possible. In our democracy, it is choice-expanding "carrots" rather than such "sticks" that are likely to prove both constitutional and more effective in reducing the numbers of abortions.⁵²⁹ Carrots can more efficiently and effectively influence the longer-term parameters of women's own cost-benefit analyses concerning sex and childbirth, so as to reduce the number of abortions that prove necessary. For example, effective childbirth subsidies would do no harm, and they may do much good by, among other things, making tangible our respect for life, *if* abortion is a meaningful alternative. This may seem a paradox but, so long as nothing is done to curb medical and child-rearing costs and the feminizing of poverty, the right of autonomy and choice that must be part of a fully-elaborated respect for life will be illusory for increasing numbers of women. Doing something constructive about these problems would yield many social benefits, in addition to refuting Barney Frank's taunt that the right to life begins at conception and ends at birth.⁵³⁰

529. See M. FREEMAN, *supra* note 27, at 52; Sass, *supra* note 377, at 141, 146 (quoting ROANOKE TIMES AND WORLD-NEWS of July 8, 1977, MINNEAPOLIS TRIBUNE of June 6, 1977, and BOSTON GLOBE of July 12, 1977); *id.* at 153 (quoting BOSTON GLOBE of May 6, 1978) (over time, increasing "spending dramatically to provide the full array of service . . . may well prove the most 'economic' as well as the most socially beneficial approach" to abortion problems); Johnson and Bond, *supra* note 434, at 108-10, 122-25; *id.* at 125 ("most Americans would probably be shocked by a proposal to pay people to have children."); Knowles, *supra* note 416, at 16.

530. I regret having lost the source of the Frank quote. See Sass, *supra* note 377, at 98 (quoting MILWAUKEE J. of June 29, 1977); *id.* at 140 (quoting ROANOKE TIMES AND WORLD-NEWS of July 8, 1977) (adoption subsidies carry a "risk of the kind attributed to Fagin in Dickens' *Oliver Twist*"); *id.* at 153 (quoted *supra* note 514); Moore, *supra* note 396, at 431 ("Under restrictive laws, poor women suffer most, as reflected in their disproportionate mortality and underrepresentation in the few hospital abortions performed under restrictive laws.") See also Sass, at 146 (quoting MINNEAPOLIS TRIBUNE of June 16, 1977): "Would the government be using financial penalties and incentives to make poor women serve as baby factories for the childless affluent? Some poor women are likely to think so—and with some justification."

The feminization of poverty is described by Sen. Moynihan, *One-Third of a Nation*, THE NEW REPUBLIC, June 9, 1982, p. 18, at 21:

The welfare population today is associated . . . with abandoned female-headed families, or those that never had a father at home in the first place, and these have in turn become the most salient aspect of poverty in America. In 1980, white female-headed families had a median income of \$11,908, compared to \$23,501 for white husband-wife families. Black female-headed families had a median income of \$7,425, compared to \$18,593 for black husband-wife families.

The impact of race on poverty may help to explain why: "Abortion and out-of-wedlock births are more common among black teens; marriage and adoption are chosen more

Difficult issues concerning childbirth subsidies need be reached only as a last resort. An ounce of prevention being worth a pound of cure, many studies have shown that the best chance for reducing the number of abortions lies in expanding the availability of sex education and contraceptives.⁵³¹ While it might seem that such programs violate the privacy-related rights of parental authority in much the same way as abortion does, the courts have not so held. The State's interest in childbirth is one of seeing pregnancies carried to term, an interest which does not extend so far as to insure that the pregnancies occur in the first place. Promoting health and welfare by stemming the tide of teenage pregnancy is an additional and important interest to balance against the State interest in bolstering parental authority. Familial privacy is thus left with fewer of the incidental State supports that would enable dominant family members to oppose contraception effectively.⁵³² Unfortunately, there are barriers to

frequently by whites. Eighty-three percent of black and 29 percent of white teenage mothers in 1978 were unmarried." K. MOORE AND M. BURT *supra* note 528 (reviewed in THE WILSON QUARTERLY, *supra* note 528, at 46).

531. See Sass, *supra* note 377, at 146 (quoting BOSTON GLOBE of July 12, 1977); Knowles, *supra* note 416, at 17 (the "widest possible dissemination" of family planning information and services is "a major, positive, immediate step to minimize the need for abortion. . . , for both moral and economic reasons."); Moore, *supra* note 396, at 436, 429.

Family planning expenditures per capita have the statistically most significant impact on decreasing the number of abortions, followed by tax benefits for having children and state day-care programs and adoption efforts, with coercive policies running far behind. Johnson and Bond, *supra* note 434, at 122-24. K. MOORE AND M. BURT, *supra* note 528 (reviewed in THE WILSON QUARTERLY, *supra* note 528, at 46) summarize several studies concerning contraception:

In 1979, 63 percent of "never-using" teen girls became pregnant, compared to 14 percent of "always-users" and 30 percent of "irregular users." Awareness of contraceptives is nearly universal. Even so, a quarter of sexually experienced teenagers have never used any method of birth control. The reasons: ignorance, embarrassment, cost, and medical, moral, and social objections.

Two-thirds of the teenagers surveyed in 1976 sought sex education in high school. In another poll of college students, a majority felt that they had too little sex education. Sass, *supra* note 377, at 164 (quoting MIAMI HERALD of Feb. 5, 1977). The "value of sex education can be seen in a Lake County School District program for pregnant girls. Prior to it, 95 percent of these girls became pregnant a second time before turning 18, but since the classes started only 6 percent have repeated." *Id.* at 153 (quoting Orlando, Fla. SENTINEL STAR of June 21, 1978).

532. Compare *Carey v. Population Services International*, 97 S. Ct. 2010 (1977); *Danforth*, 428 U.S. at 412-13; *L. TRIBE*, *supra* note 50, at 1087; *Buchanan*, *supra* note 470, at 608, 610; *Jones*, *supra* note 377, at 588, 591; *supra* note 457 and text accompanying, with *supra* notes 466-94 and text accompanying. In *Eisenstadt v. Baird*, 405 U.S. 438, 448-49 (1972) the Court remarked that it would reflect a strange scheme of values, "be plainly unreasonable," and only serve as a marginally-effective deterrent, for the law to prescribe "pregnancy and the birth of an unwanted child as punishment for fornication." For Justice Stevens (concurring in *Carey*, at 2032), the denial

sex education. The public generally supports sex education in schools,⁵³³ and Congress and some state legislatures appropriate small sums for this purpose. But a local control over education frequently leads to ignoring sex education altogether or reducing it to anatomy lessons calculated to offend as few parents as possible. Ideally, sex education would be treated as part of a civic education, as descriptions of the things responsible citizens do to demonstrate society's respect for life. Local communities are, of course, free to give such education a moral content that does not infringe the First Amendment. The reticence of many school districts here offers abundant scope for initiatives from private, voluntary organizations. That these are poorly funded is an illustration of, once again, our public and private lack of respect for life.

Minimizing the need for abortion, through sex education, contraception, childbirth subsidies, and ameliorating the effects of poverty and discrimination, is the best way forward to reducing abortions under the pragmatic morality described earlier.⁵³⁴ Searching for policies that would work, by expanding the range of choice and minimizing religio-philosophical entanglements, the Court made a good beginning in *Roe* but got bogged down in its own classifications. There is and can be no substantive constitutional doctrine governing intimate relations, and our attitudes on this subject change rapidly while retaining a contradictory character. We now seem to want it both ways,⁵³⁵ asserting demands for self-fulfillment and commercialized sexual titilla-

of contraceptives to unmarried teenagers would be like forbidding the use of safety helmets to dramatize state disapproval of motorcycles: an utterly perverse means of control and propaganda. In *Michael M. v. Superior Court*, 450 U.S. 464, 470-74 (1980) (plurality opinion by Rehnquist, J.), a gender-neutral "statutory rape" law—applicable to women as well as men—was seen to frustrate the State's interest in effective enforcement and its "strong" interest in preventing illegitimate teenage pregnancies.

533. See e.g., Sass, *supra* note 377, at 154 (quoting Rochester, N.Y. DEMOCRAT CHRONICLE of July 1, 1978): a recent Gallup poll shows that 77% of Americans favor sex education in schools, and 69% would include information about contraceptives.

534. See Sass, *supra* note 377, at 159 (quoting TULSA WORLD of June 11, 1977); *supra* notes 415-16 and text accompanying.

535. See Sass, *supra* note 377, at 98 (quoting MILWAUKEE J. of June 29, 1977); *id.* at 160 (quoting Houston Post of June 5, 1977); *id.* at 140 (quoting Lincoln NEB. J. of Oct. 12, 1977) (prolonged discussion of sex made HEW Secretary Califano "quite uncomfortable"); *id.* at 166 (quoting DETROIT NEWS of March 26, 1977) ("We are not so far from the Victoria era, . . . but we may not be so far, either, from a neo-Victorianism when the current moral laxity has run its course"); Harrison, *Book Review*, THE NEW REPUBLIC, Feb. 24, 1982, p. 27. Harrison (*id.* at 30) expects that

we will continue to muddle along with two contradictory ideas . . . nicely expressed by Paul Robinson, who, in his *Modernization of Sex* has written: As moderns, we remain permanently divided between a Romantic past, whose repressions we would gladly rid ourselves of, and a deromanticized future, whose emotional emptiness we fear even while we anticipate its greater freedom.

tion while, at the same time, recognizing these demands to be frequently tawdry, doomed to frustration, and inconsistent with the Victorian, Puritanical heritage that is itself deeply contradictory. Our muddle bears down most cruelly on the many teenagers who are becoming sexually active earlier, to face a more protracted struggle of love, desire, and acquiring the financial and social means sensibly to give effect to these emotions. Many who would help the muddled, and who pursue right-to-life aims at the same time, confuse sexual enlightenment with permissiveness, hoping that the denial of information and "easy" alternatives will deter sexual activity. Numerous studies show these policy prescriptions to be wrongheaded: the availability of contraceptives has little effect on teenage sexual activity, abortion is a traumatic rather than an easy alternative for nearly all women, and an expanded access to abortion would not make us an aborting rather than a contracepting nation.⁵³⁶

The policy prescriptions outlined in the last few paragraphs are widely deemed effective, yet they have failed significantly to influence the course of abortion policy. Their implementation has been blocked by the pro-choice and/or pro-life groups that, like pressure groups concerned with national security matters,⁵³⁷ will not voluntarily abandon

536. See L. FRANKE, *supra* note 523; K. MOORE AND M. BURT, *supra* note 528 (reviewed in THE WILSON QUARTERLY, *supra* note 528, at 46, *id.* at 45-46 ("Among unmarried 19-year-olds in 1979, 65 percent of white females (about one and one-half times the 1971 rate), 89 percent of black females, 77 percent of white males, and 80 percent of black males had had sexual intercourse."); SASS, *supra* note 377, at 140 (quoting Wilmington, Del. NEWS J. of July 16, 1977) *id.* at 153 (quoting the Orlando, Fla. SENTINEL STAR of June 2, 1978) ("the anti-sex-education alarmists have scared just about everyone else from the arena and something must be done to stem the tide."); *id.* at 156 (quoting WASHINGTON POST of Dec. 11, 1976) (of industrialized countries, only New Zealand, East Germany, and Bulgaria have higher rates of teenage fertility than ours—with the implication that American teenagers are sexually active); *id.* at 161-62 (quoting Portland OREGON J. of June 26, 1978, and CASPER STAR-TRIBUNE of July 24, 1977, which discuss research by Sylvia Hacker); *id.* at 167 (quoting Charlotte, N.C. OBSERVER of June 20, 1977, which discusses several studies); Gordon, *supra* note 523; Margolis and Neary, *supra* note 410, at 712; *id.* at 714 (quoted *infra* note 538); Moore, *supra* note 396, at 425. See also Knowles, *supra* note 416, at 18:

The fear has sometimes been expressed that easier access to abortion will make women careless . . . and that we may become an aborting rather than a contracepting nation—something like the countries of Eastern Europe. Nothing in the experience of contracepting nations, such as England and Scandinavia, which have liberal abortion laws, would add credence to this concern. In our own country, as in New York and Hawaii, there has been no apparent relaxation in contraceptive vigilance. . . .

But see also S. Rep. No. 465, *supra* note 393, at 43: "[A]bortion weakens the marital structure' by denying procreative responsibility and creating fundamental conflicts between spouses with different value systems. Abortion can also isolate adolescents from their parents by encouraging resort to a 'quick and easy' solution which evades problems instead of resolving them through family consultation."

537. See *supra* notes 257, 345 and text accompanying.

their more extremist policies. Abortion has been invested with world-views as expansive as those fueling the "Better dead than Red" versus "Better Red than dead" dichotomy: striking off all socio-economic fetters on women and severing totally the link between sex and procreation, versus the evils of pre-marital sex and departing from idealized traditional family roles. Reality cannot break through when a single policy problem is burdened with more symbolism and ideology than it can bear.⁵³⁸ Policy collapses under the weight, and the bases for a consensus over coping with reality either leak away or get appropriated for partisan purposes by one or both of the abortion policy rivals.

If abortion policy is to move forward, old classifications will have to be abandoned, the excess baggage of symbolism and ideology discarded, and more flexible rules of reason adopted to guide behavior by stipulating what is desired but not required and allowed but not desired.⁵³⁹ Real (substantive) choice should be expanded and legal (formal) choice constrained, in a compromise enhancing the value of choice and life alike. This would not require the repression of abortion extremists; it assumes that creative policymakers can develop the political courage to ignore extremists while acting as entrepreneurs (statesmen) for a new policy consensus. Extremists should be moved gently but firmly to the margins of the policy arena, where their concerns would be balanced as fairly as possible under an overall consensus. The number of abortions that prove necessary could then be markedly reduced by decreasing the costs of, and increasing the benefits from, preferred alternatives: abstinence, contraception, and having and caring for the child.⁵⁴⁰ To remedy the *lex imperfecta* discussed earlier,⁵⁴¹ the right to control one's body should have as a correlative duty the choice of one of these preferred alternatives to abortion. Privacy requires that there be no prior restraint on this choice, but

538. See F. FROHOCK, *supra* note 30, at 251; Jones, *supra* note 377, at 573 (and sources cited therein); Knowles, *supra* note 416, at 15; *supra* notes 62-63 and text accompanying. See also Margolis and Neary, *supra* note 410, at 714:

Many who supported the [Anti-Saloon] League hoped that closing the saloons not only would curb alcoholism but also would reduce problems of poverty, crime, infidelity, and even . . . industrial absenteeism. In the absence of widespread acceptance of the moral values of prohibition, however, the main effects of Prohibition were corruption of public officials and widespread defiance of the law.

Similarly, . . . [m]any feel that closing the abortion clinics not only will stop . . . the killing of innocents, but also will reinforce their conception of Judaic-Christian "family life" values of obedience to parents, chastity before marriage, and fidelity afterwards.

539. See *supra* notes 362-64, 438-39 and text accompanying.

540. See Johnson & Bond, *supra* note 434, at 114-15; *supra* notes 235-37, 239 and text accompanying.

541. See *supra* notes 115, 269, 395, 524-26 and text accompanying.

the reasons for choosing abortion could be the subject of an after-the-fact evaluation. If a genuinely free choice is found to result in an abortion, a sanction demonstrating society's respect for life could be imposed for breaches of the correlative duty. This sanction would fall on women who elect abortions "voluntarily," without rape, incest, unforeseeable dangers to health, or mental incapacity, and despite full access to an expanded range of choice: to sex education, contraception, and the means for childrearing. Under an ideal morality, this sanction would also fall on men *in pari materia*. Pragmatically, the difficulties of identifying the man and the possibility of false identifications would mean that the duty follows the right in falling primarily on the woman. The burden would be less than at present, however, because of an expanded range of meaningful choice.

How could sanctions on abortion be defined and imposed? Community service orders could be designed to compensate a society which has lost valued fetuses.⁵⁴² A range of choice in community service could be allowed the woman, in line with her interests and experience. In particular, the woman could choose to work with children but would not be required to do so. A full due process would be required before such a sanction could be imposed, a judicial determination that the pregnancy was fully voluntary for this particular woman. Due process is expensive, but any attempt to integrate women's and fetal rights—to make the most of two, interrelated and partly-contradictory sets of rights—is bound to prove expensive. The notion of a community service order imposed after an abortion may seem repugnant to us, as a modern-day version of Hester Prynne's *Scarlet Letter*: "A" for Abortion rather than Adultery. If so, we may be reflecting the concern for women's privacy and *feelings* that the Court sought to implement in *Roe v. Wade*. If cost, moral considerations, and competing policies continue to block a more comprehensive approach to abortion policy, such as the one I outline, this is perhaps the final proof that the *Roe* scheme is the best we deserve and can expect.

V. CONCLUSIONS AND PROPOSALS FOR REFORM

We permit vague, unimaginative, unsupported, and unsupportable public policies to set an unsavory tone for society and the legal system. We allow wooly-minded decisionmakers to duck the relevant issues

542. See Johnson and Bond, *supra* note 434 at 114: "No state . . . requires a woman who has an abortion to work in a child care service, to be a foster parent, or to stay away from her job for a period equal to that which she would have missed had the pregnancy been taken to full term." These are the kinds of measures which would decrease the benefits from abortion (*id.*) but which are too extreme to attract a public consensus as appropriate sanctions. Sanctions would have to be designed careful-

while they treat symptoms rather than disease.⁵⁴³ Poorly understood policies then become their own cause in the frequently sterile policy politics that provokes a public distrust.

In sum, my suggestions for reform are simple but not, I hope, simplistic; they revolve around what is basically an Aristotelian argument.⁵⁴⁴ A sensible policy process—for contracts, abortion, the CIA, and other policy problems—would have us seek out and implement one after another of Aristotle's mean between extremes. If this does not happen, extremes will continue to plague us as false dichotomies of apparent policy alternatives: contract versus no-contract, the CIA's effectiveness versus its accountability, women's right of autonomy and choice versus the right to life. The exercise of discretion by a decisionmaker, whether a person in business, a national security bureaucrat, or a pregnant woman, has its Aristotelian mean in law: between doing injustice (to a consumer, "terrorist," fetus) and suffering injustice yourself, between having more than your share and having less.⁵⁴⁵ CIA bureaucrats do not display an Aristotelian virtue, given as they are to the vice of excess—just as civil libertarians are given to the vice of deficiency—in defining and protecting national security interests. Their claims, like those of right-to-life and pro-choice groups, should be evaluated by independent decision-makers who have the political and the intellectual power to resist self-interested blandishments.

My analyses of *Skirball*, the national security cases, and *Roe v. Wade* suggest that an Aristotelian mean cannot be fixed with mathematical precision by operating a juridical slot machine. Aristotle's mean is found, rather, through the flexible application of such gray-area principles as equity,⁵⁴⁶ rules of reason,⁵⁴⁷ and the duty to

ly, to deter those abortions which can be deterred without prompting a laxity in enforcement or recourse to illegal abortions.

543. See R. EYESTONE, *supra* note 6, at 158 (policy decisions frequently consist of "almost ritualized debate . . . followed by negotiated incremental changes"); *supra* notes 19, 24-26, 170, 217, 356, 522 and text accompanying.

544. See *infra* note 545.

545. My analyses are based on ARISTOTLE, NICHOMACHEAN ETHICS, Bk.2, Chs. 6-7, 9 (pp. 40-50 in the M. Oswald translation (1962)). See D. ALLAN, THE PHILOSOPHY OF ARISTOTLE 132, 136 (1970); M. HAMBURGER, MORALS AND LAW: THE GROWTH OF ARISTOTLE'S LEGAL THEORY 152 (new ed. 1971); W. HARDIE, ARISTOTLE'S ETHICAL THEORY 202 (2d ed. 1980) (quoting Gauthier-Jolif); Kelsen, Aristotle's Doctrine of Justice, in ARISTOTLE'S ETHICS 102, 116, 135 (J. Walsh and H. Shapiro, eds. 1967); J. RANDALL, JR. ARISTOTLE 268 (1968). See also F. FROHOCK, *supra* note 30, at 259: "Though the Aristotelian fusion of ethics and politics is a long way off (some would say thankfully), the ideas of justice and morality are vital instruments to comprehend public affairs."

546. See Tribe, *supra* note 10, at 102; notes 115, 269, 395, 524-26, and text accompanying.

547. See *United States v. Trenton Potteries*, 273 U.S. 392, 397 (1927) (the

pursue interests in good faith.⁵⁴⁸ These principles are designed to reduce the extremity of result from black and white applications of, for example, liberty or equality, private or public interests, and dogma or skepticism.⁵⁴⁹ In Aristotle's example about "giving and taking money, the mean is generosity, the excess and deficiency are extravagance and stinginess."⁵⁵⁰ The problem is, as Aristotle adds, that generosity looks like extravagance to the stingy,⁵⁵¹ as in recent policies concerning welfare for the poor. Unable to decide what we want as a society, our generosity is designed to cost as little as possible. We attempt to have it both ways.

In the absence of a compelling alternative, we try to live as we wish and escape the consequences of our decisions by throwing the burden on others. We seek personal autonomy while preserving fetuses. We seek complete freedom of action while binding others contractually. We demand a broad civil liberties at home but demand as well the decisive effectiveness in foreign policy thought to result from a strong State acting abroad. Analyses based on Aristotle's mean

meaning of reasonableness "necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines."; Medow, *supra* note 135, at 827 (discussed *supra* note 242); *supra* notes 243-46, 361-65, 438-46, 451-52, 469-94, 503, 539 and text accompanying.

548. See *supra* note 102 and text accompanying.

549. See Berlin, *The Purpose of Philosophy*, in CONCEPTS AND CATEGORIES 1, 2-3 (H. Hardy, ed. 1981) (at least one intermediate "basket" is to be found between false dichotomy classifications of empiricism and formalism); E. LEWIS, *supra* note 123, at 161 ("The public/private distinction has been dealt a series of blows in the political and scholarly world"—as in *infra* notes 559, 563); *id.* (quoted *infra* note 556); J. SHKLAR, *supra* note 24, at 118 (the policy of justice may, "in many . . . areas, lead to far worse social consequences than a policy of semi-justice, in which several incompatible goals are allowed to live in compromise"); Spadaro, *supra* note 22, at 12; K. WHEARE, *supra* note 356, at 20 (administration must satisfy citizens of its reasonable regard for a balance between private and public interests); A. WILDAVSKY, *supra* note 5, at 19, 109, 210; Anderson, *supra* note 17, at 719 ("In liberal argument, equality locates the burden of proof in making cases about justice, as freedom does in relation to the problem of authority."); *supra* notes 23-24 and text accompanying. Gray-area principles can be used to cut through much ideological argumentation:

The power and intensity of their [early Americans'] belief in liberty was balanced by the sheer variety of interpretations of the term. . . They believed in something called equality . . . with almost as much intensity. But . . . there was a great diffusion of definitions, some of them contradictory. When it came to balancing the value of liberty against the value of equality, there was still more confusion. What came out of it all was a kind of fuzzy American ideology.

Weisberger, *An Interview with James MacGregor Burns*, AM. HERITAGE, Dec., 1981, 106, at 107 (quoting Burns).

550. ARISTOTLE, *supra* note 545, at Bk. 2, ch. 7, p. 45.

551. *Id.* at Bk. 2, ch. 9, p. 48. See *infra* notes 598-99 and text accompanying.

demonstrate that we can't have it both ways, can't simultaneously attain incompatible extremes such as liberty and equality. Further, our attempts to do so can paralyze policy in what becomes a ritualized avoidance of tough policy questions and of the messy tradeoffs that answering them involves. We frequently seem unable to translate our limited understanding of and sympathy for others into action. Our limited freedom of choice is then not translated into a correlatively limited duty to exercise it responsibly in the public interest. Under a *lex imperfecta*, we also fail (over abortion and the CIA but not contracts) to delegate effective authority to decisionmakers to determine which rights are whose in what circumstances.⁵⁵²

I chose to analyze contract polices because they point up a process, far from perfect, for dealing with relevant questions and messy tradeoffs. Courts can, on occasion at least, move in the correct Aristotelian direction of, for example, Charles Knapp's "contract to

552. See J. ELY, *supra* note 44, at 153 (prejudice distorts reality and keeps a nation of minorities from perceiving the overlapping interests that bind a majority together on an issue); Sass, *supra* note 377, at 98 (quoting MILWAUKEE J. of June 29, 1977); A. WILDAVSKY, *supra* note 5, at 116 (quoting Jung) ("If a man is capable of leading a responsible life himself, then he is also conscious of his duties to the community."); *id.* at 403 ("To rule oneself . . . is not only to affirm but also to subdue the self, because reciprocity as well as autonomy is required for self-government."); Anderson, *supra* note 17, at 718 (emphasis supplied) ("It is easy enough to demonstrate that there is no definition of the public interest to which all reasonable persons would necessarily repair [, but it] . . . is equally easy to show that any rational policy evaluation must give reasons for regarding a policy proposal as, *in some sense*, in the public interest.") Asaro, *supra* note 61, at 121-22 (discussing R. UNGER, *supra* note 67, at 27, 45, 61) (the dichotomy between what is private—the realm of desire—and what is public—the realm of reason—is false from the perspective of the psychology of an integrated personality); Asaro, at 123 (quoting R. UNGER, at 215-16) ("contrary to the liberal myth of individualism, we live in danger of succumbing to conformity; to the extent that we eschew common bonds and beliefs, we lack the means to express the individuality we so jealously guard."); Asaro, at 126, 128 (discussed *infra* note 563); Jones, *supra* note 377 at 605-07; *supra* notes 24, 54, 64-65, 259-60, 269 and text accompanying.

According to Tribe, *supra* note 10 at 99:

[T]he whole point of personal or social choice . . . is not to implement a given set of values in the light of perceived facts, but rather to define, and sometimes deliberately to reshape, the values—and hence the identity—of the individual or community. . . The decision-maker, in short, often chooses not merely how to achieve ends, but what they are and who he is to become.

But see also Lord Radcliffe, *supra* note 31, at 24:

Understanding and sympathy reach further [today] . . . and are more widely diffused. In all these ways society is much stronger. But whether it is at the same time stronger in the general process of aspirations and beliefs which are capable of elevating the purposes which animate it and so of sustaining its members in the darker hours . . . is rather a different question to which there are no ready answers.

bargain.”⁵⁵³ This is largely because contract is an “easy” field of public policy compared to abortion and the CIA. Contracts give rise to more clearly-defined problems which do not change rapidly. The authority of decisionmakers is clearly recognized by other branches and levels of governments, so that this “lawyer’s law” provokes little public disagreement. Neither the organizational, procedural, and personnel problems that make it difficult to hold the CIA accountable nor the kinds of religio-philosophical dilemmas associated with abortion play a significant role in contract.

Contract policy problems are almost entirely conceptual, and many of these are coming to be solved after centuries of experimentation. Pigeonholing is a barely-workable method for dealing with certain recurring fact patterns in contract. Outmoded categories can sometimes be made to correspond with essences. Judges can occasionally untie their predecessors’ verbal knots with a sense of the future direction for policy. This seems less likely in matters of abortion and the CIA, where new policy is more frequently made to defend old policies. Ever since freedom of contract lost its place at center-stage, contract policies have been burdened with little of the symbolic and ideological baggage that makes matters of abortion and CIA policy so contentious. Unlike attitudes toward abortion, contracts seldom express the deepest of feelings; they are means to some other end. Contractual ethics are nearly always situational; the same person may seek enforcement in some circumstances and non-enforcement in others. Judges can thus pursue their second-best policies, plus some idiosyncratic judgments, in a purposive, pragmatic fashion which provokes little controversy.⁵⁵⁴

As applied today, the contract/no-contract dichotomy does not appear consistently to favor one group over another. There is no reason to organize the kinds of pressure groups operating with regard to abortion and the CIA. Contractual interests are restricted to imposing the consequences of one party’s desires on the other party to a particular contract and lawsuit, and, perhaps, to contracting around disagreeable precedents. The thinly-stretched fabric of policy does not get manipulated as ruthlessly as in matters of abortion and the CIA. With the consumer protection movement in abeyance, there are few calls for legislative or executive intervention. Contract is not much of a political issue.

Judges retain a broad discretion within a distinctive contracts

553. See *supra* notes 75, 88, 114 and text accompanying.

554. See T. HUGHES, *supra* note 125, at 24; D. LLOYD, *supra* note 3, at 3; J. SHKLAR, *supra* note 24, at 33; *supra* notes 20, 31, 36, 40, 67, 73, 76, 109, 116, 186, 342, 356, 380, 427, 509, 538 and text accompanying.

decisionmaking role seen to cause no separation of powers problems. Their discretion is exercised as an essential part of conventional dispute resolution in a weak, "nightwatchman" State. This discretion appears narrowly constrained by the facts of the case, and by the need for logical applications of pre-existing rules and categories. An institutional capacity to formulate and implement policy effectively makes contract a feasible realm for a rather decentralized policy activism. The adversary system seems to generate all (or nearly all) of the information necessary to a policy decision. There is some of the gibberish but little of the secrecy and "disinformation" attending decisions by and about the CIA. Secrecy and disinformation are dealt with fairly effectively under contract (and tort) doctrines of burdens of proof, misrepresentation, the modern parol evidence rule, etc. Little importance is attached to policy planning for contract law or, indeed, to a consistency among decisions or among jurisdictions in the same type of decision. Specialized theory can be used to more or less resolve the specialized problems of contract *ad hoc*. It is not necessary to generalize theories of political philosophy, like those called for in decisionmaking involving abortion or the CIA. It is this philosophizing which causes us to flounder.⁵⁵⁵

A. *Weak State, Strong State*

It comes as no surprise that overtly political processes generate many of the problems of, and some of the solutions to, our more difficult issues in public policy. As we have seen, decisionmaking in the areas of abortion and the CIA give rise to conceptual false dichotomies much like those found in contract law. Abortion and the CIA also pose another false dichotomy general enough to plague many policy areas: pluralism versus absolutism (true believership in an all-encompassing policy solution). Described structurally, the dichotomy is between a libertarian, weak State and a paternalistic, strong State. The dichotomy can also be described conceptually: an eighteenth-century constitutionalism, with all the checks and balances of a separation of powers, versus the Germanic legal-rational legitimacy, organized in a hierarchy of disciplined, concentrated powers, proposed by Max Weber and Hans Kelsen.

The Weber/Kelsen model is very attractive to those who try to implement the fragmented policies of fragmented institutions operating

555. See D. LLOYD, *supra* note 3, at 2; Hurst, *supra* note 6, at 406 (in the 1950s, at least, "professionals found no basic concern over the legitimacy or competency of the common-law style of policymaking."); Reiter, *Good Faith in Contract*, 17 VAL. U.L. REV. 705, 728-29 (1983); *supra* notes 41, 64, 83, 87, 117, 125, 265-68, 305 and text accompanying. *But see also* M. Kelman, *supra* note 210: "The failures of legal scholarship are really no different in kind than the failures of our political imagination. . . ."

under short time horizons. Such policy technocrats will never dominate the overall process, however. Many a policy issue is cast in a form which requires that two questions be answered: how do we solve it, and will the solution interfere with our liberties? The blind eye of our inattention may be turned to particular areas of policy for long periods, up to about 1970 for abortion and the CIA alike, and technocrats such as doctors performing abortions and national security bureaucrats would retain a substantial discretion under most foreseeable policy schemes. Yet we stand firm in wanting no Platonic Guardians, those who would hold the polity together by defining the public interest for "us" free of interference. We find "them," these "neutral" experts who are outsiders under our constitutionalism and ideal of popular sovereignty, to be frequently incompetent. They are captured by their charges and caught maximizing budgets, power and personal security rather than the public interest. What we try for is an Aristotelian process, with a distinctly American accent, instead. Individualized policy choices are tinged with a populism reacting to the expertise displayed in policies about energy, Vietnam, the Great Society, and the like.⁵⁵⁶ What we *do* expect from our bureaucrats is the effective implementation of our ill-defined, dichotomous, contradictory policies.

These unrealistic expectations are in large part the fruits of our inability to come to terms with the limits of an irrevocably "mixed"

556. See *Akron*, 103 S. Ct. at 2505 (O'Connor, J., dissenting) (courts are not our Platonic Guardians, and they encounter disapproval when they act as such over abortion); J. ELY, *supra* note 41, at 117 (quoting Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 585 (1972)) ("An argument for letting the experts decide when the people's representatives are uncertain or cannot reach agreement is an argument for paternalism and against democracy."); R. EYESTONE, *supra* note 6, at 31; T. Franck, *supra* note 230 (we believe foreign policy too important to be left to anything other than a populist politics); J. FRIEDMAN, *supra* note 8, at 48 (our resentment of experts echoes Hofstadter's ANTI-INTELLECTUALISM IN AMERICAN LIFE and our experiences with Vietnam, the "expert's war"); F. FROHOCK, *supra* note 30, at 179; E. LEWIS, *supra* note 123, at 161 ("the politics/administration dichotomy of Max Weber and Woodrow Wilson simply does not work" and the "separation of powers doctrine, so dear to the heart of American democratic ideology, is also in some difficulty."); *id.* (quoted *supra* note 549); C. LINDBLOM, *supra* note 3, at 11 (on our recent cynicism, a distrust of, e.g., a public utility's analysis of the need for nuclear power, and our anti-rationalism, a feeling that much is missed in statistics and bloodless categories); F. MARX, *supra* note 356, at 55; A. WILDAVSKY, *supra* note 5, at 109 (elitist policy model of an intellectually-guided society versus a non-elitist policy model echoing Mills's *On Liberty*—"every one well knows himself to be fallible"); G. WILLS, EXPLAINING AMERICA: THE FEDERALIST 163 (1981) (our's an Aristotelian blend of mild regimes, a *medium mediocrum*, a compound Republic); *id.* at 209 (conflicts between parties, Federalists v. Jeffersonians, Jacksonians v. Republicans, Lincolnians v. Whigs, New Deal Democrats v. business Republicans, etc., were attempts to achieve "a mean of means, a blend of previously tempered and moderate types."); Carron, *supra* note 7 at 293; Frye, *supra* note 18, at 226-27; de

economy and polity. Under so uneven a mix, "all good things do not cohere and . . . many good things (such as political pluralism) have perverse effects (such as the unceasing battle of parties and pressure groups)."⁵⁵⁷ A tragic flaw can be detected in what Barry Karl describes as our Uneasy State: the evident need for consistent, effective national policies overlaying and sometimes overwhelming our commitment to autonomous individuals as the foundation of democracy.⁵⁵⁸ The inconsistency of result obtaining in the private and the public spheres that coexist in our Uneasy State is demonstrated by the false dichotomies I have analyzed. Liberal democracy is alive in such policies as freedom of contract, an insistence that the CIA respect civil liberties at home (and perhaps abroad), and woman's privacy and freedom to choose an abortion—so long as the State doesn't have to pay for it. The paternalistic or strong State can be found in judicial and legislative interventions in the parties' bargains, in the CIA defining national security requirements for us, and in some groups purporting to decide choice and right to life issues for others. In many such areas, we flit between weak and strong State policy extremes because we cannot reach an Aristotelian mean appropriate to our mixed polity.⁵⁵⁹

This unease resulting from confusions of power and policy is inevitably echoed in our political philosophies. Liberal democracy would

Long, *supra* note 31, at 886-87; Kristol, *supra* note 256 (quoted *supra* note 256); Thurber, *supra* note 19, at 416-17; *supra* notes 18-19, 57, 67, 73, 145, 150, 188, 255-56, 404.

557. Hoffman, *Raymond Aron (1905-1983)*, N.Y. REV. OF BOOKS, Dec. 8, 1983, 6, at 8. See *supra* note 377 and text accompanying.

558. B. KARL, *THE UNEASY STATE* (1983). See Raskin, *supra* note 120, at 205, *passim* (analyses of our Dual State).

559. See P. ATIYAH, *LAW AND MODERN SOCIETY* 86 (1983) (in a mixed economy and pluralistic society with a succession of governments, many laws will serve conflicting goals and values); Lowi, *Introduction*, in *PRIVATE LIFE AND PUBLIC ORDER* vii (T. Lowi, ed. 1968) (book title represents two ways of looking at the same thing, society providing and surviving—activities in which the inseparable private and public spheres will always be at odds); D. O'BRIEN, *supra* note 34, at 231 (American way of life includes the "right to be let alone," individualism, and the rule of law); A. WILDAVSKY, *supra* note 5, at 109; Asaro, *supra* note 61, at 127, 138 (mainstream American political thought, from Madison to Nozick, has stressed the primacy of the private sphere and of protecting it from intrusion; this renders impossible the on-going decisionmaking and participation that Unger would introduce into the workplace); Wieseltier, *supra* note 173, at 8 ("The struggle between democracy and totalitarianism"—or, I would add, paternalism—"did not end in 1945, because it is a struggle between different answers to some of the most fundamental questions of human life"—questions reflected in nuclear arms and abortion policies); *supra* notes 29, 202-04, 209-13, 218-20, 253, 302, 325 and text accompanying; *infra* note 563. See also G. SAWER, *supra* note 2, at 21-22: "The real difficulty is that the United Kingdom, and Australia, have improvised a Welfare State which cannot work without vesting large powers in government, but have been unable to admit and face the consequences. We have all, Micawber-like, been waiting for something to turn up" (*id.*) or, I would add, been seeking to visit the "consequences" on others.

have all of us registering relative preferences to remain in force for the time being; strong State officials seek to bind the future under overarching universals, and to then convince dissidents that this is for the good of all. The means to these ends oscillate back and forth between an expedient opportunism and such elaborate idealisms⁵⁶⁰ as the law and economics of the Chicago School and the constitutional jurisprudence of Herbert Weschler and Alexander Bickel.⁵⁶¹ These oscillations are illustrated by the tactics of pressure groups over abortion and the CIA, and by decisionmakers' responses to these tactics. Despite the distinctive contributions of an American pragmatism to philosophy, particularly in the application of a situational yet purposive morality to public affairs, little is found to lie between an American Machiavellism (or positivism) and its Confucian (or Idealist) opposite:

Americans are great at general, pious formulations. We're also great at practicalities: "How do we do this tomorrow?" But the linkage between the two is often weak, so that when people are in power, there is no strategy—there are no norms by which to set up a hierarchy among certain kinds of freedom.⁵⁶²

It is precisely the weakness, and the absence, of these philosophical, institutional, and legal links that is responsible for the false

560. See C. LINDBLOM, *supra* note 3, at 66; E. MEEHAN, *supra* note 5, at 21-24; Lackland, *supra* note 403, at 487 (quoted *supra* note 415); Schwartz, *supra* note 217 (quoted *supra* note 217).

561. See e.g., Berlin, *supra* note 549 (discussed *supra* note 549); A BICKEL, THE LEAST DANGEROUS BRANCH (1962); R. POSNER, *supra* note 93; Posner *supra* note 24; Weschler, *supra* note 401. See also G. JACOBSON, *supra* note 76, at 164-68.

562. Weisberger, *supra* note 549, at 107 (quoting James MacGregor Burns). See G. JACOBSON, *supra* note 76, at 169 (the need to develop the means for reconciling principle and expediency in a principled fashion, through, e.g., the "passive virtues" of judicial deference); G. LENSKI, *supra* note 256, at 30 (discussed *supra* note 415); Ransom, *supra* note 136, at 206; F. MARX, *supra* note 356, at 55; J. SHKLAR, *supra* note 24, at 15 (fear of the arbitrary and the expedient gives legalism its political uses); J. STONE, LAW AND THE SOCIAL SCIENCES 14 (1966) (Australian jurist's assertion that to move in the correct direction is to follow John Dewey's pragmatism and instrumentalism, Veblen's institutionalism, Holmes's realism, Charles Beard's economic determinism, and perceptions of history as a means for understanding the present and guiding the future); Lackland, *supra* note 398, at 487 (discussed *supra* note 415); *supra* notes 28, 41, 73, 100, 234, 427, 534, 27, 38, 63, 90, 226, 421, 519 and text accompanying; *infra* note 599 and text accompanying.

According to A. WILDAVSKY, *supra* note 5, at 57 (quoting Charles Hersh), reform-minded liberals see troubled individuals and blame this on the environment; conservatives see a troubled environment and blame this on individuals. Liberals despair because too little has been accomplished, and conservatives despair because too much has been attempted. *Id.* at 87. Their despair frequently causes conservatives to adopt liberal strategies, and vice versa. *Id.* at 57. Policy implementation is confused:

The pragmatic liberal, acting within a "consensus" he seeks both to foster

dichotomies of policy, the inability to reach an Aristotelian mean by tinkering.

Weak and nonexistent policy linkages mean that governmental structures frequently do not correspond with their contemporary policy functions. Important functions thus spawn incoherent new structures, such as the CIA and the Office of Economic Opportunity created to coordinate Great Society programs. Being incoherent, these structures necessarily spawn incoherent policies.

My analyses of abortion show how little more than a standoff can result from policies made in several different ways, for different purposes and effects, by the various branches and levels of government. This is a recurring consequence of our having repudiated the British style of cabinet government in Parliament; intricate and arduous lawmaking processes were designed to keep the American State weak. Constitutional separations and diffusions of power were invitations to compete in what we might now call the jealous maintenance of one's "turf" in policy formulation. Checks and balances are used to frustrate the formation of some of the policy links that would empower rival policymakers to coordinate activities. This eighteenth-century system encourages a weak-State inertia over policy, and abdications of responsibility for it. Where these tendencies become sufficiently formalized and permanent, uncertainties of policy and power in the face of a perceived crisis lead one or more branches of government to delegate their powers in the form of a blank check. This is how narrow, strong State exceptions get carved out of liberal democratic processes.⁵⁶³ The CIA, for example, came to power under

and to manipulate, frees himself from political values, only to find that he has bound himself to react pragmatically to events as they occur, able to judge only their urgency and not their importance.

Fairlie; *A Radical and a Patriot*, THE NEW REPUBLIC, Feb. 28, 1983, 25, at 28. We have a phrase describing this kind of policymaking: "crisis management." *Id.*

563. See G. WILLS, *supra* note 556, at xvi (pluralists, led by Harold Laski, see ours as the least possible government, a fail-safe that will abort any organized political program); Asaro, *supra* note 61, at 126, 128 (discussing THE FEDERALIST No. 49 and ideas of Unger) (public constraints on private actions are seen as necessary evils, under the separation of the public and the private institutionalized by the Federalist political system); *id.* at 127, 138 (discussed *supra* note 559); Brietzke, *supra* note 202; *supra* notes 26, 31, 141, 158, 167, 174, 218, 229-31, 514, 537, *infra* note 581, and text accompanying. Each policy technique "can be studied through the filters of congressional politics, electoral politics, group politics, bureaucratic politics, judicial politics, and the politics of federalism." Ripley, *Introduction*, in PUBLIC POLICY AND THEIR POLITICS vii, xiv (R. Ripley, ed. 1966). These "filters" are responsible for differences in the rigor of enforcement, in the degree of continuing involvement by interest groups, in partisan debate, in the likelihood of exemptions and loopholes, and in the degree to which original purposes can be subverted. *Id.* at xv. R. EYESTONE, *supra* note 6, at 123-24, offers the case study of public housing, where a long series of incremental

the judicial deference of the political question doctrine and a congressional deference to executive branch claims about national security needs for the Cold War.⁵⁶⁴

These kinds of institutional pressures toward strong State exceptions are reinforced by politically-influential demands for the national security, economic growth, and corporate and individual welfare programs that cannot be delivered under the privatism and proceduralism of our eighteenth-century Constitution. These programs always seem urgent, and there is always the danger that they cannot be immunized from vetoes by dissident groups or governmental agencies. Immunity is thus sought under the European-style laws of social administration that operate with regard to the CIA.⁵⁶⁵

Beginning with *Carolene Products*⁵⁶⁶ in 1938, the Supreme Court sought to homologize these laws with the older law of liberal democracy. The "fit" of these two bodies of law has not improved much over time, as is illustrated by recent court decisions over national security and, less clearly, by some abortion decisions.⁵⁶⁷ There

changes decreased policy effectiveness while increasing its complexity. Congress more or less gave up and deferred to the housing bureaucracy. These bureaucrats tried to make use of the private developers active in the housing field. These speculators made a few repairs to get FHA mortgages; when mortgage payments were not made and the houses fell apart, the FHA was left holding them. *Id.*

R. UNGER, *supra* note 67, at 175-76 (quoted in Asaro, *supra* note 61, at 125) explains the emergence of strong State exceptions as the outcome of attempts by the "welfare-corporate" State to displace the liberal social order:

Private institutions assume more and more of the responsibilities previously committed to government, or, without undertaking its responsibilities, they begin to resemble its organization and to imitate its power . . . [in a] universalization of bureaucracy. . . . At the same time, a wealth of public bodies come into being that are only perilously connected with one another and that are as close, in interest, outlook, or . . . organization, to "private" institutions as they are to the traditional agencies of government.

Similarly, H. ARENDT, *THE HUMAN CONDITION* 60-61 (1959) argues that, under modern capitalism, the public realm has been made to serve the private realm. Everyday affairs of peoples and communities come to be cared for by "a kind of 'collective housekeeping'; the collective of families economically organized into the facsimile of one super-human family is what we call 'society,' and its political form of organization is called 'nation.'" *Id.* at 28. *But see also* Asaro, at 144-45, *passim* (distinguishing Arendt's from Unger's approaches).

564. *See supra* notes 265-315, 325-26 and text accompanying.

565. *Supra* notes 223-26 and text accompanying. *See* G. SAWER, *supra* note 2, at 21-22 (quoted *supra* note 559). *See supra* notes 148, 227-33 and text accompanying.

566. *United States v. Carolene Products*, 304 U.S. 144 (1938). *Carolene* abandoned *Lochner v. N.Y.*, 198 U.S. 45 (1905), in a nearly complete judicial abdication to legislative socio-economic judgments which do not fall within specific constitutional prohibitions; political processes can be relied upon for the repeal of undesirable legislation.

567. *See supra* notes 151, 223-25, 275-97, 479-91, 559, 563 and text accompanying.

is little in our jurisprudence and governmental structures to guarantee the integrity of the laws of social administration cut loose from liberal democratic processes. Rarely, in other words, do these laws attain the ideals described by Kelsen and Weber, ideals sought by many policy theorists.

Under the theorists' model, policy moves logically down a central hierarchy and toward the increasingly specific and concrete applications of rules held consistent with each other. In contrast to their desires, the American reality is one of numerous discrete hierarchies, each with many gaps and weak points. As in CIA and abortion policymaking, the requirements of constitutions, statutes, regulations, and court decisions are frequently ignored, consciously or unconsciously. Key rules in a policymaking hierarchy are often missing, part of the *lex imperfecta* of rights without duties, or too unclear to establish what is an adequately authorized act. Administration inevitably acquires an intensely political character, through the exercise of discretion and choice without a meaningful accountability or the feedback channels that cause problems encountered downstream in policy processes to spur reforms upstream.⁵⁶⁸ The CIA illustrates all of these tendencies. It pursues its own or the president's personal interests, and no amount of executive branch coordinating committees or guidelines seems to change this.⁵⁶⁹ Neither a separation nor a concentration of powers seems a plausible description of the discontinuous, unintegrated concentrations that serve as our policy process.⁵⁷⁰

See also *supra* notes 265-68, 468-78 and text accompanying.

Americans found in law the prime means for increasing collective capacities while, at the same time, protecting prized individual wills against public encroachment. J. HURST, *supra* note 271, at 44. The introduction of laws of a social administration, beginning in the 1930s, disrupted this ideal relation, which has yet to be firmly restored. Discussing the contractual terms the CIA imposed on Snepp (*see supra* notes 293-95 and text accompanying), Medow, *supra* note 135, at 811, concludes that the CIA could impose only those conditions that its bargaining power justified and that current political mores tolerated. [But] neither the Constitution nor any other legal doctrine would play any role in the checking process. The distribution of benefits would be deemed the dispersal of "privileges", a process over which the state possessed plenary legal power.

568. These themes are developed in greater detail in Brietzke, *Administrative Law and Development: The American 'Model' Evaluated*, 26 HOW. L.J. 645, 654-57, 661-68 (1983). See e.g., E. LEWIS, *supra* note 123, at 161 (quoted *supra* note 231); C. LINDBLOM, *supra* note 3, 66-67 (quoted *supra* note 224); *supra* notes 68, 231 and text accompanying.

569. See *supra* notes 306-24 and text accompanying. In domestic policy, the president must work very hard to keep government from running without him. R. LINEBERRY, *supra* note 310, at 56-57; J. SIGLER AND B. BEEDE, *supra* note 16, at 16, (citing Ted Sorenson).

570. See E. LEWIS, *supra* note 123, at 172; *id.* ("Balance wheel notions of federalism and separation of powers are less applicable today than ever before."); P. NONET AND P. SELZNICK, *supra* note 33, at 103 (quoted *infra* note 581).

B. Clearing the Policy Streams

Our Uneasy State has an unevenly mixed legal system, the reform of which requires more than a bit of tinkering here and there. A patient clearing of the policy streams is in order to improve the workings of both the liberal democratic and the strong State aspects of government. The competition inevitable in politics can be turned to good use by reducing the restraints on competition over policy. Freer "markets" in policy information and ideas, and in the entrepreneurship (statesmanship) necessary to form a consensus around the best ideas, can be attained without creating a standoff by opening up the public and private channels of communication.⁵⁷¹ A great deal of conceptual underbrush must be cleared away, as I have tried to do⁵⁷² in three, fairly narrow areas. Policymaking must be reworked into closer approximations of the liberal democratic processes presupposed by the Constitution but rarely attained in practice—the *Baker v. Carr*⁵⁷³ writ large among levels and branches

571. See, Tribe, *supra* note 10, at 104 (no reason to assume that the Invisible Hand will leave all important values accounted for, in a multitude of tunnel-visioned analyses for a multitude of clients); *supra* notes 338-39 and text accompanying. See also J. FREEDMAN, *supra* note 8, at 58 (quoting J. CLARK, SOCIAL CONTROL OF BUSINESS, 1926): 'One disquieting symptom is the frequency with which, when a new reform is suggested, ways are sought to 'keep it out of politics.' Politics is the democratic way of governing; it is becoming necessary, then, to keep government itself out of politics.'

My approach shares some common elements with John Hart Ely's "representation-reinforcing theory of judicial review." J. ELY, *supra* note 44, at 181. E.g., constitutional adjudication should take on an antitrust rather than a regulatory orientation. *Id.* at 101 (citing Alfred Kahn). But with policy as my focus, my reform proposals go further (are more "activist") to involve all branches and levels of government. Compare *id.* at 73-179 with *infra* notes 572-612 and text accompanying. It is certainly true that "unblocking stoppage in the democratic process is what judicial review ought preeminently to be about. . . ." J. ELY, at 117. Ely's goal is also a major purpose of mine: extension of a meaningful franchise (a dominant constitutional theme since the 14th amendment was enacted) to achieve "a political process open to all on an equal basis and a consequent enforcement of the representative's duty of equal concern and respect to minorities alike." *Id.* at 99; see *infra* notes 584-85 and text accompanying. Under such a scheme, "everyone's interests will be actually or virtually represented at the point of substantive decision, and . . . the processes of individual application will not be manipulated to reintroduce in practice the sort of discrimination that is impermissible in theory." J. ELY, at 101. See *id.* at 153 (quoted *supra* note 552).

572. See, e.g. *supra* notes 28, 34, 54, 57-59, 67, 64, 73, 75, 88, 186-90 and text accompanying.

573. 369 U.S. 186 (1962) (Equal Protection violated by a state legislative districting which caused the votes of more populous districts to be "debased" relative to votes in less populous districts). In deciding the case, the Court announced guidelines useful to other reform-minded branches and levels of government. These concern the limits on effective intervention posed by constitutions and an institutional incompetence, the ability efficiently to pursue policy through a division of labor among the branches and levels of government, the existence of manageable legal standards, the need for

of government that I will describe. Decisions about the best means to implement freshly-conceived, democratically-chosen policies would guide the reform of governmental institutions from time to time, within the broad parameters of the constitutional document rather than the narrower constraints imposed by conventional techniques of governance. It would then become clear that many conflicts between weak State and strong State are more apparent than real. Their better fit and a broader public consensus over policy would have the effect of moving many conflicts to the margin, where they can be adjusted more easily.⁵⁷⁴

In a republican democracy, policymaking is a determination of what, precisely, our interests really are, who implements these interests, and which means promise a creative implementation under constraints imposed by the pursuit of our other interests. It becomes much more difficult to hide a policy incompetence when means, ends, and the fit between them are defined in public. Justice Brennan puts it thus:

[T]he First Amendment . . . has a *structural* role to play in securing and fostering our republican system of self-government. . . . Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open" . . . but the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but for the indispensable conditions of meaningful communication.⁵⁷⁵

But there is little "communication" that is not at cross-purposes concerning the policy extremes of contract, the CIA, abortion, and many other policy areas. There has been little effort "to do what Publius

uniform and consistent policies in the area under discussion, and the striking of a balance between the "unusual need" to question a political decision and the need to respect other branches of government. *See id.* at 217; G. WILLS, *supra* note 556, at 175; *infra* note 575 and text accompanying. This is a rather "unstable" formulation from the doctrinal standpoint—*see* L. TRIBE, *supra* note 50, at 71-72 n.1 and sources cited therein—but this is another way of saying that it is flexible enough to meet changing circumstances and needs.

574. *See* Lowi, *supra* note 559, at vii (ideal relation between public and private spheres in America always shifting); Gilbert, *supra* note 229, at 127; *supra* notes 167, 175, 229, 235, 521-27 and text accompanying.

575. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring).

said *must* be done: consult "the genius of the people" about placing "the common above the private good."⁵⁷⁶

Public attention will vary from policy to policy, but consultation is always necessary because those steps bringing about the most effective government action are also those which broaden and inform the debates through which consensus is discovered. It does not do to rejoice, along with some political scientists, when apathy keeps away from policy those who are thought least capable of making wise choices. A public without responsibilities cannot be expected to behave responsibly, particularly when the passion for unaccountable power through a governmental secrecy discourages public attention and responsibility. A badly-informed public sends inconsistent messages to the politicians and bureaucrats who, in any event, tend toward inertia, vacillation, or attempts to satisfy pressure group desiderata. Different kinds of policies get made in areas of informed public involvement, primarily because public knowledge differs from that of the experts' over, for example, nuclear power and arms control.⁵⁷⁷ Such rejections of a policymaking competence, the "credibility gap" I examined in relation to the CIA,⁵⁷⁸ come about as citizens balance rationally the sometimes irrationally-perceived gains and losses flowing from contacts with government as a whole, and from experiences with particular programs. Government is frequently found seriously wanting, and unless "society finds a blend of leadership styles, new policies and institutional reforms that build public confidence, one can expect to see increasing erosion of the support on which effective democratic government ultimately rests."⁵⁷⁹

Informed public evaluations of public policy are the most difficult—accurate information the hardest to obtain—in the many

576. G. WILLS, *supra* note 556, at 216. (Publius is probably James Madison, in THE FEDERALIST). See *id.* at 225 (discussing Madison's Federalist No. 10) (in a republic, as opposed to a democracy, the public view is refined and enlarged; it is not sacrificed to temporary or partial considerations); *supra* notes 6-7, 197, 236-39, 243, 259 and text accompanying. See also Anderson, *supra* note 17, at 717, 719 (quoted *infra* note 613); *id.* (citing Franz Neuman): "The logic of public policymaking requires that the burden of proof rests always with the state. . . . It is hard to imagine how the presumption can be reversed [while retaining] . . . any meaningful sense of political discourse." *Id.*

577. See A. CARNESALE, et al., LIVING WITH NUCLEAR WEAPONS 10, 200 (1983); G. EDWARDS, *supra* note 19, at 162; R. EYESTONE, *supra* note 6, at 166-67; A. WILDASKY, *supra* note 5, at 116 (quoted *supra* note 552); *id.* at 275-76; H. WILENSKY, *supra* note 123, at 130-33 (quoted in part *supra* note 196); Kristol, *supra* note 256 (quoted *supra* note 256); Medow, *supra* note 135, at 823 (quoted *supra* note 261); *supra* note 357, 359, 413, 559, 563, *infra* note 582, and text accompanying.

578. See *supra* notes 255-56 and text accompanying. See also *supra* notes 6-8, 18-19 and text accompanying.

579. P. KOSTINEN, *supra* note 120, at 19n (quoting Alan Westin's analysis of a 1978 Lou Harris poll).

areas where a broad, Aristotelian balancing of interests seems necessary. My analyses of abortion and CIA policies emphasize a major reason for this: the manipulation of information and influence that pressure groups, seeking to tilt the policy balance, practice on decisionmakers and the public. Whether a tilt, toward the CIA for example, or a standoff, in abortion policy for example, is the result, the tendency is to foreclose the kind of policy alternatives that could command a consensus if they are, in fact, allowed to compete.⁵⁸⁰ A recent study by Magaziner and Reich concludes that

it will be difficult for the U.S. to achieve the sort of consensus upon which industrial policy must rest. Such a consensus is necessary to ensure that the sacrifices . . . are willingly endured . . . [and] that no group is forced to bear a disproportionate share of the burden. . . . But consensus-forming institutions . . . have deteriorated over the last two decades. Political parties, civic organizations, religious organizations, charities, and other broad groups have been replaced . . . by special interest organizations that seek narrow legislative goals. . . .

. . .

[C]oalitions are fleeting. Attention spans are short. Issues rise and fall with a rapidity and specificity that render comprehensive policymaking all but impossible. [I]ssues must be at or near a point of crisis, and already distilled into relatively clear choices, before a large enough coalition can be mustered to get action.⁵⁸¹

Despite the firm repudiation that was one reason for the Civil War, John C. Calhoun's notion of governance through concurrent majorities—the "vice of faction" James Madison tried to circumvent—continues to reappear in various guises. Groups try to monopolize a narrow policy in order to exercise a veto in particular areas regardless of any broader consensus. A careful handicapping of the interest group horse race would force a group's influence to more closely approximate its real stake in the public interest. A few mistakes and many

580. See Polsby, *Policy Analysis and Congress*, 18 PUBLIC POLICY 61, 70 (1969); *supra* notes 31, 34, 54-57, 66, 73, 197, 217, 304, 427, 433-35 and text accompanying.

581. I. MAGAZINER AND R. REICH, MINDING AMERICA'S BUSINESS 377-78 (1982). See P. NOENT AND R. SELZNICK, *supra* note 33, at 103:

There is the spectre of a multitude of narrow-ended, self-regulating institutions, working at cross-purposes and bound to special interests; of a system impervious to direction and leadership, incapable of setting priorities; of a fragmented and impotent polity in which the very idea of public interest is emptied of meaning.

complaints would result from decisions taken by independent handicappers under due process standards. But this would be preferable to what currently obtains: each group defines its own stake under conditions of a political market failure. The broad consensus groups mentioned by Magaziner and Reich would have to be revitalized.

Overrepresented interest groups should be reined in. Their contributions to political candidates and other not-so-subtle corruptions should be strictly regulated, and their "iron triangles" broken down. Otherwise, these coalitions of a pressure group with its captive administrative agency and coopted legislators will continue to coordinate power in extra-constitutional ways which injure the public interest. Achieving a balance may, in some areas, mean stimulating the organization of groups otherwise underrepresented in politics and the economy, groups whose members otherwise tend to become victims rather than clients of policy programs. Policies should be designed as less susceptible to group veto through a reliance on the kinds of carrots (rather than the sticks whose force can usually be deflected) I described in relation to abortion. Procedural rules should consistently strike a balance between the need to avoid delay and inflexibility, and the need to insure the consideration of all relevant factors and a representation of the underrepresented. Explicit procedures are needed across that board, to keep decisionmakers, driven by pressure groups, from collapsing process into results and results into a policy jumble.⁵⁸²

582. See J. ELY, *supra* note 44, at 135 (even in an "open process," some will obtain advantages at the expense of others—which makes "a travesty of the equality principle" despite the existence of one person, one vote); *id.* at 153; *id.* at 99, 101, 117, 181 (quoted *supra* note 571); A. ETZIONI, *supra* note 2, at 121 ("democratization" in the management of health care); F. FROHOCK, *supra* note 30, at 65-66; W. GELLHORN, *supra* note 350, at 421; E. LEWIS, *supra* note 123, at 109-10; C. LINDBLOM, *supra* note 2, at 94-96 (the permitting of veto powers reflects a concern for liberty rather than popular control over policy, but this has a high and rising price in an era of collective rather than distributional problems); A. MELONE, *supra* note 10, at 16-17 (quoting Harmon Zeigler, who cites studies by David Reisman and associates); P. NONET AND P. SELZNICK, *supra* note 33, at 103 (quoted *supra* note 581); Ripley, *supra* note 563 (discussed *supra* note 563); J. SIGLER AND B. BEEDE, *supra* note 16, at 13 (Federal Advisory Committee Act of 1973 attempts to avoid the dominance of congressional committees by an agency, but its requirement of public access is evaded; many influential events occur by 'phone or personal contact); Stedman, *supra* note 10, at 150-51; G. WILLS, *supra* note 556, at 101 (conflicting interests will mobilize themselves, without waiting to be sorted out in constitutional functions, under such systems as Calhoun's "concurrent majorities" or Robert Dahl's "polyarchy"); *id.* at 190 (quoting David Hume) (the check of honor on behavior is largely removed when people act in a group); *id.* at 193 (quoting Hume) ("Factions subvert government, render law impotent, and beget the fiercest animosities among men . . . who ought to give mutual assistance and protection . . ."); Beer, *Federalism, Nationalism, and Democracy in America*, 72 AM. POL. SCI. REV. 9, 17-18 (1978); Beer, *supra* note 5, at 25 (Daniel Webster was the main opponent of John C. Calhoun's challenge to nationalism—"the very idea of an American people, as constituting a single community, is a mere chimera.");

C. *Securing a Policy Competence*

The kind of attention Felix Frankfurter asked us to pay to (policy) procedures is certainly necessary, but it is not sufficient to the making

id., *passim*; Bullock, *supra* note 298, *passim*; Hurst, *supra* note 6, at 440-41; Majone, *supra* note 3, at 62 (typically, we know the policy chosen but not the decision rules; if these exist, they are frequently ambiguous or rationalized after the fact.); Tribe, *supra* note 10, at 84-86; *supra* notes 64, 229, 415, 427, 433-35, 537 and text accompanying.

Any economic policy that failed to attract attempts at a veto by the National Association of Manufacturers, the AFL-CIO, the National Farm Organization and/or the NAACP would have to be pretty weird or have its true purpose hidden. The hiding of purpose sometimes succeeds in Congress, and was a technique frequently used by President Johnson. G. EDWARDS, *supra* note 19, at 38; R. EYESTONE, *supra* note 6, at 35.

Political Action Committees (PACs) have achieved an undue influence by certain interest groups and, perhaps, corruption. The availability of campaign money is closely related to the ability to defeat incumbents. PACs donated 19% of such funds in 1980, chiefly to Republican non-incumbents. Organized under the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-456 (1976 and Supp. V 1981), PACs were initially allowed to contribute no more than \$1,000 to a candidate in each election (*id.* at § 441a). This spending limit was invalidated in *Buckley v. Valeo*, 424 U.S. 1 (1976), with the result that PAC's proliferated to upset the balance between local constituent representation and national responsibilities in Congress. Wary of unlimited political expenditures by unaccountable groups, Congress has discussed legal reforms. Reform efforts are limited by *Buckley*, however. Adamany, *Political Action Committees and Democratic Politics*, 1983 DETROIT COLL. OF L. REV. 1013, 1015-20, 1023, 1026 (1983); Ferris and Ballard, *Independent Political Action Groups: New Life for the Fairness Doctrine*, 36 VANDERBILT L. REV. 929, 930-31 (1983). See *id. passim*. The Court clearly needs to rethink *Buckley*, and may do so after the 1984 elections; the rule should be that "institutional PACs . . . are not citizens for purposes of the franchise and related activities." Adamany, at 1027-28.

In constitutional terms, pressure group politics suggest either that *The Federalist* No. 10 was wrong, making No. 51 necessary, or that No. 10 was right, making No. 51 superfluous and destructive of what No. 10 accomplished. See G. WILLS, at xvii (quoting James MacGregor Burns). An inability to think through reforms can in no small measure be blamed on our political scientists' dominant ideology, their deadlock formulation of an interest group pluralism. Contra this ideology, the Invisible Hand does not advance the public interest as if my magic. Due to serious political market failures, the power to make public policy cannot safely be parcelled out to private groups. A little here, a little there for overrepresented groups never solves anything, and it is the antithesis of a rational ordering of priorities. See T. DYE, *supra* note 1, at 23 ("ideological myopia" of commitment to the elements of pluralism, which are important to the theory rather than to policy); J. ELY, *supra* note 44, at 135, 242 n.4 (discussing the powerful attack on pluralism found in P. BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM* 83-92 (1962), W. GAMSON, *THE STRATEGY OF SOCIAL PROTEST* (1975), T. LOWI, *THE POLITICS OF DISORDER* (1971), and E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE* (1960)); T. LOWI, *THE END OF LIBERALISM* xiii, 71 (1969) (quoted in Auerbach, *supra* note 8, at 1336); A. MILLER, *supra* note 16, at 129; Stedman, *supra* note 10, at 151-52; A. WILDAVSKY, *supra* note 5, at 254; *id.* 275-76 (pluralism an irrefutable and therefore empty theory, so broad as to include any group—e.g., Soviet dissidents—from any society); G. WILLS, at 204; deLong, *supra* note 31, at 887 (quoting Richard Stewart) (our public administration undermined by "the corrosive seduction of welfare economics and pluralist political analysis"); Moore, *supra* note 396, at 431 (quoted *supra* note 530); Tribe, at 104 (discussed *supra* note 571).

of important decisions in sufficient quantity and with sufficient quality. A more activist setting of individual and organizational powers according to the limits of their competent exercise is also required. Indeed, evaluation of a demonstrated level of competence in policy formulation and implementation usefully sets the limits on activism in three different ways. First, competence offers a means of attending to the integrity and credibility of government which can be easily understood by decisionmakers and the public alike. Second, competence judgments take advantage of the division of labor inherent in our separation of powers (the sharing rather than compartmentation of functions that has marked our constitutional history) by requiring each institution to do what it can do best. Third, competence judgments offer incentives to line up behind the best policies and to compete, in the healthy way of seeking to increase your competence so as to have more opportunities for power-through-activism. Those who practice the policy vices described earlier would lose their power over policy, which that would then fall to a more competent individual or organization. These vices include inability to gather relevant information and interpret it free of a Groupthink, relentless tinkering to no good effect, mindless pigeonholing, and making new policy merely to defend the old. It is surprising that this competence theme has played so small a role in legal analyses of policy processes.⁵⁸³

For the CIA, a demonstrable incompetence has been allowed to serve as the justification for increased powers, there being no institution competent in holding the CIA accountable. This illustrates, in extreme fashion, a familiar state of affairs throughout government. The lessons offered by abortion policy are subtler and more interesting. Judicial competence over abortion policy is modest: much higher than over national security questions but much lower than over contract policies. State legislatures would appear to be more competent organs of abortion policy, unless Tribe is correct:

[W]hen the question before a legislature is whether it should permanently and completely relinquish its role in an area

583. See G. WILLS, *supra* note 556, at 175; Howard, *supra* note 46, at 11 (Burger Court sensitive to Frankfurter's concern about limits of judges' competence, especially when second-guessing the legislature); White, *supra* note 62, at 296-97; *supra* notes 27, 30-31, 125, 140, 146-47, 155, 236-45, 357, 361-64, 443, 509, 523-42 and text accompanying. Competence judgments make it possible to answer such old chestnuts as: Does the slow pace of school desegregation illustrate a defect in the policy process or a sensitivity to democratic public opinion?; Did Hiroshima and the Cuban missile crisis reflect scandalous policy flaws or a admirable decisiveness?; and Did policy processes work well over Watergate, or was the result determined by a series of accidents? See C. LINDBLOM, *supra* note 2, at 5-6.

that has for a time been part of its jurisdiction. . .the answer comes from a source that cannot act disinterestedly. . . .⁵⁸⁴

Even if . . . religious involvement [the challenged legislation having been "shaped in the cauldron of heated religious controversy"] should be regarded as irrelevant on the ultimate merits of the constitutional dispute, one cannot realistically treat it as immaterial to an assessment of how accurately the political process would reflect, and how sensitively it would accommodate, the range and intensity of views and values implicated in the abortion question.⁵⁸⁵

On this view, the Court went activist and took policy away from legislatures adjudged incompetent over abortion. What followed was a second-best abortion policy, the result of the Court's seeming inability to clear the policy streams, *Baker v. Carr*-fashion, so that legislatures could then "accurately" and "sensitively" incorporate "the range and intensity" of abortion views.

Such competence judgments are, in turn, subject to competitive judgments of their competence—the pitfalls laid for the Court over abortion, the subsequent dangers to its capacity to act effectively, and the numerous media and academic discussions of whether the peculiarly judicial notions of privacy and "personhood" make for better policies. These judgments are more politically potent, and more useful in evaluating the right to perform a policy task in competition with others, than diffuse complaints about a judicial activism. Much ink has been spent on this twentieth century term of art, but it still amounts to little more than the dislike of particular policies and the crochet pattern of legalisms surrounding this dislike. Analyses of an activism are usually applied to courts, but all policymaking institutions go through cycles of activism and quietism. These are really cycles of optimism and pessimism based on shifting expectations about competence in dealing with the variety of problems that always seem to press. Congress tried to reform itself because of crises of competence over Vietnam and the events surrounding Watergate, but an overall twentieth-century decline in legislative responsibility and responsiveness in shaping policy is still evident. As analyses of CIA

584. Tribe, *supra* note 431, at 30-31. See *supra* notes 236-37, 304, 377, 380, 418-23, 427, 513-15 and text accompanying.

585. L. TRIBE, *supra* note 50, at 929-30. See J. ELY, *supra* note 44, at 99 (quoted *supra* note 571); Sass, *supra* note 377, at 116, 119 (quoted *supra* note 514); Buckley, *supra* note 417, at 1260: "The Court, at least institutionally, can deal objectively with these [abortion] matters. Congress cannot. [I]t is too influenced by pressure groups. . . ." But see also *supra* text accompanying note 413.

policies demonstrate, tighter delegations of congressional authority are needed if further tilts in the balance of power among the branches of government are to be avoided. There will otherwise be a tilting away from the liberal democracy that is the *raison d'être* of Congress, along with paying attention to policy alternatives and the fit between means and ends. Congress needs more efficient procedures which are less cyclical (less tied to annual budgets and biennial elections) and which place less of an emphasis on the quick fix.⁵⁸⁶

The incompetence of Congress over a policy planning is almost total, but the same can be said about other governmental agencies. This is a particularly prominent failing in our policy processes. Analyses of the CIA show how a lack of planning results in *ad hoc* responses to situations which have gotten out of control, despite the fact that many of these situations are of the agency's making. In a democracy, planning involves an anticipation of demands rather than their suppression, and expanding the realm of meaningful choice to meet these demands along the lines I suggested for abortion policy. Being free to choose (a phrase arguably trivialized by the Friedmans) is the essence of our policy. Denial of that freedom is a denial of responsibility in a *laissez-faire* world where everything simply happens. Consistently applied, all but the worst policies will yield better results than the constant tinkering that usually involves dismantling predecessors' policies as a precondition to implementing your own, "better" policies.⁵⁸⁷

586. See Baum, *supra* note 54, at 47-49; J. ELY, *supra* note 44, at 104 (quoting Alexander Bickel) (the challenge for the Court is to act out Judge Hand's 'sense of common venture', without lowering "the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility."); R. EYESTONE, *supra* note 6, at 30, 97; C. LINDBLOM, *supra* note 3, at 66; F. RODELL, NINE MEN 271 (1955) (quoting Walton Hamilton's characterization of Frankfurter); G. SCHUBERT, *supra* note 508, at 212 ("when a majority of the Court is activist, dissenters will argue . . . the virtues of judicial restraint, just as a majority will preach restraint to activist dissenters."); J. SIGLER AND B. BEEDE, *supra* note 16, at 18-19 (quoting Kenneth Davis); J. STONE, *supra* note 36, at 668, (judicial restraint notions "set up some kind of 'keep off' notice against those very activities of policy choice-making which [are] . . . inseparable from appellate judicial functions."); G. WHITE, EARL WARREN: A PUBLIC LIFE 189, 351 (1982); A. WILDAVSKY, *supra* note 5, at 110; H. WILENSKY, *supra* note 123, at 162 (quoted *supra* note 372); Beckman, *supra* note 6, at 237-38; Carron, *supra* note 7, at 292-96; Davidson, *supra* note 18, at 307-08; Frye, *supra* note 18, at 276; Jones, *supra* note 345, at 226-27, 235; Polsby, *supra* note 580, at 61, 68, 72; Schick, *supra* note 6, at 259-60; Thurber, *supra* note 19, at 405-06, 416-17; *supra* notes 117, 267, 325-41, 343-45, 380, 406-07 and text accompanying.

587. See M. AND R. FRIEDMAN, FREE TO CHOOSE (1981); F. FROHOCK, *supra* note 30, at 279; E. SCHUMACHER, SMALL IS BEAUTIFUL 191-93 (1974); A. WILDAVSKY, *supra* note 5, at 125, 128; Brietzke, *supra* note 568, *passim*; Carron, *supra* note 7, at 292-93; Schwartz, *supra* note 217 (discussed *supra* note 217); *supra* notes 168, 181, 186, 192-93, 338-41, 516-42 and text accompanying.

There is a strong need for planning agencies in the executive branch, particularly for industrial policies, and a need to take advantage of the president's extra-legal "jawboning" powers to coordinate programs. Jawboning may ultimately prove the only way to bring the bureaucracy under control. From this perspective, *Nixon v. Fitzgerald*⁵⁸⁸ is wrongly decided because it fails to condemn a presidential jawboning exercised for reasons antithetical to a policy planning and coordination. With a policy planning at the core of the effort, it becomes possible⁵⁸⁹ to design administrative law rules so as to align bureaucrats' interest with the public interest, and to thus improve the "fit" between liberal democratic laws and those of social administration. A poor fit could well become a ground for judicial condemnation of particular rules. Judges would have to develop the administrative expertise of their European colleagues, and the D.C. Circuit may be in the process of so doing.⁵⁹⁰

Such a judicial "activism" in clearing the policy streams, fostering competence through coherence, would be no vice. Otherwise, policy will remain its own cause under "the law of unintended consequences. . . : a past set of problems is perceived; factions interpret the effectiveness of each solution according to their own self-interest; and few pay much attention to the cumulative effects of all of the changes."⁵⁹¹ Like the English but unlike the French, "Americans seem content to abide a fair degree of contradiction and of ad hoc evolution in their law."⁵⁹² We may believe this, and the incoherent policies resulting, to be the price paid for living with a federated separation of powers. But it need not be so, and courts are the logical agencies for applying competence judgments here. While they lack the liberal democratic advantages of Congress, courts are capable of a more

588. *Supra* notes 270-73 and text accompanying.

589. *See* Brietzke, *supra* note 568, at 674-93.

590. *See supra* note 568 and text accompanying. *See also, e.g.*, *Farmers Union Cent. Exch. v. Federal Energy Regulatory Comm'n*, 52 *U.S.L.W.* 2549 (D.C. Cir., No. 82-2412, 1984); *Assn. of National Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir., 1979), *cert. denied*, 447 U.S. 921 (1980). Prior to the proceeding in *Advertisers*, Chairman Pertschuk had sent letters and given speeches to the effect that childrens' advertising was indeed unfair under the FTC Act. Holding that he did not have to be disqualified, the court argued that quasi-judicial proceedings could not be grafted onto an agency's essentially legislative mandate; policymaking administrators cannot act like neutral adjudicators because they must shape political support and the agency's agenda. Disqualification should be had only on a "clear and convincing showing" of "an unalterably closed mind." *Id.* at 1170. *But see also supra* note 356 and text accompanying.

591. *Reforming the Reforms*, THE NEW REPUBLIC, Feb. 17, 1982, 8 (applying this "law" to reforms in Democratic Party Convention procedures).

592. Howard, *supra* note 46, at 28. *See* B. MOORE, JR., REFLECTIONS ON THE CAUSES OF HUMAN MISERY xii (1972) (quoted *infra* text accompanying notes 616-17).

penetrating scrutiny. A finer judicial focus and more precise procedures emphasize the rights that frequently get lost in the shuffle elsewhere in government, and that provide a measure of representation to the underrepresented. Analyses of abortion and CIA policies illustrate most of the difficulties involved in attaining these ideals. A paucity of both policy and power over the CIA led me to recommend an ombudsman responsible to Congress.⁵⁹³

Ombudsmen would prove extremely adept at filling the policy lacunae in government, a needed bolster for congressional power in areas where accountability cannot be secured in any other way. The exceedingly pragmatic ombudsman institution can simultaneously vindicate rights without fostering new veto groups, curb maladministration, force superiors to monitor subordinates, break down rigidities while coordinating policies, and plan future reforms.

Two other institutions with potentially significant policy roles but lacking a formal status in the process should be attended to: political parties and the media. The traditional party functions of electoral accountability for an aggregate of policy options, of organizing government and opposition to it, and of mobilizing public opinion, have all been substantially eroded in recent years. The media can play a catalytic role in policy evaluation and reform, and, of course, in informing the public generally.⁵⁹⁴ It is therefore unfortunate that the whistleblower trilogy and the FOIA cases⁵⁹⁵ deprive the media of some of the most valuable sources of policy information which do not endanger national security.

Institutional reforms are most urgently needed in state and local government. Federalism only comes alive when a lower-level agency kicks, and the New Federalisms of Nixon, Reagan, and the Burger Court have clearly failed to realign policy functions in a more finan-

593. See R. DAHRENDORF, *THE NEW LIBERTY* 87 (1975); J. ELY, *supra* note 44, at 104 (quoted *supra* note 586); A. ETZIONI, *supra* note 2, at 158-59; F. MARX, *supra* note 356, at 55; E. MEEHAN, *supra* note 5, at 20; B. MOORE, JR., *supra* note 592, at 27; P. NONET AND P. SELZNICK, *supra* note 33, at 103; G. SCHUBERT, *supra* note 508, at x-xi, 6; A. WILDAVSKY, *supra* note 5, at 7, 124-25; Baum, *supra* note 54, at 48-49 (quoting Donald Horowitz); *supra* notes 343-68 and text accompanying.

594. See A. MELTSNER, *supra* note 11, at 281; J. SIGLER AND B. BEEDE, *supra* note 16, at 7; Bullock, *supra* note 218, *passim*; Gilbert, *supra* note 229, at 127; Stedman, *supra* note 10, at 163-64 (declining importance of parties matched by increased importance of party politics, a factionalism based on the personality politics that is an inadequate substitute for policy formulation); *id.* at 167 (quoting Lowi) (unlike European parties, America's have a negligible effect on policy; they largely exist to keep leadership and constitutional structure separate from the settlement of issues); *supra* notes 118, 229, 234, 357, 365, 371, 442 and text accompanying; *infra* note 611 and text accompanying.

595. *Supra* notes 118, 270-303 and text accompanying.

cially and administratively rational way. Centralization is inevitable whenever a firm policy must be thoroughly implemented. This is true of national security programs, of abortion (as I would argue), and of the corporate welfare policies enacted under the Interstate Commerce Clause. There seems little reason for treating individuals' welfare programs differently.⁵⁹⁶ George Stigler has long proposed assigning a policy task to the lowest level of government capable of doing a competent job. This seems a useful precept, although here, as elsewhere, the competence theme would have to be elaborated carefully. The means of doing this for CIA and abortion policies were outlined earlier.⁵⁹⁷

D. *The Dialectics of Law and Policy*

Once the streams are cleared and policies are pursued more competently, the bases for concealing or spreading the horns of the false dichotomies of policy will begin to disappear. A series of Aristotelian means can then be reached by an almost dialectical process: on the rebound, first from one policy extreme and then another, in ways which moderate the policy swings over time. Picking up on the example from Aristotle discussed earlier,⁵⁹⁸ Great Society failures, which were largely the result of a policy incompetence, led to a consensus over doing less for the poor. But skepticism over Great Society dogmas too quickly gave rise to the new dogmas that are now inducing a new skepticism, as a substitute for clear thinking once again. Policy has gone too far, in a governmental stinginess to the poor which ran to the benefit of corporate and military welfare programs.

These programs are beginning to look like an extravagance—even to the extravagant. Fewer guns and more butter thus seem to be in the offing, in reaction to a policy incompetence and the greed of pressure groups. There will be more guns and less butter than under the Great Society (Vietnam aside), however. Such policy syntheses are sneered at by True Believers, including those accustomed to an austere analytical elegance. But this is the politics of policy; a process now messier than need be (and needlessly cruel to the poor), it would remain rather messy under even the best of circumstances. We can aspire to little more than to find “a mean of means, a blend

596. See E. MEEHAN, *supra* note 5, at 137; A. WILDAVSKY, *supra* note 5, at 142; Gilbert, *supra* note 229, at 148.

597. See *supra* notes 236-45, 361-64, 523-42 and text accompanying; *infra* note 598 and text accompanying.

598. *Supra* text accompanying notes 550-51. See North, *supra* note 108, at 199 (quoted *supra* note 220); Weiseltier, *supra* note 173, at 14-15 (quoted *supra* note 220).

of previously tempered and moderate types."⁵⁹⁹ No law, policy, institution or individual can be all good or all bad, and decisionmakers must therefore try to advance the good and suppress the bad over time. This involves, for example, doing more to protect woman's right/national security while, at the same time, advancing fetal rights/the accountability of our national security agencies. The process is a pragmatic one in which, as Holmes, Pound, and Cardozo taught us, truth is made rather than found, "continually redefining itself as it unravels."⁶⁰⁰

The dialectics of law and policy reward careful study. A dialectical tension among policies, rules, and institutions is responsible for much of the interest law holds as an academic subject, and for the vitality law needs to deal with policy problems. Things are always changing, and from "the seedbed of implementation new policy problems grow and are plucked for the agenda."⁶⁰¹ We move forward because, consciously or unconsciously, we each maintain images of what is and what ought to be, and act to decrease the gap between these images. Whether the "is" gets aligned with the "ought" depends upon

599. G. WILLS, *supra* note 556, at 209. A. WILDAVSKY, *supra* note 5, at 125 (without a balance between skepticism and dogma, policy amounts to force without foresight or mind without mater); G. WILLS, at 209 (discussed *supra* note 556); Conyers, *Social Reform and Law Reform*, 4 DET. COLL. L. REV. 1121 (1983); Mahaffey, *Privatization vs. the Constitutional Commitment to the Promotion of the General Welfare*, 4 DET. COLL. L. REV. 1339 (1983); Weiseltier, *supra* note 173, at 14-15 (quoted *supra* note 220); *supra* note 562 and text accompanying. In 1980, the "vote may have been more of a Carter disaster than a Reagan triumph. Liberalism was indisputably a failure, in the 1960s at least, but the evidence that Americans have repudiated its fundamental assumptions about the nation's purposes remains unclear and insufficient." Yardley, *Review*, MANCHESTER GUARDIAN WEEKLY, Feb. 12, 1984, 17 (excerpted from the WASHINGTON POST).

600. G. JACOBSON, *supra* note 76, at 46. See Berlin, *supra* note 76, at 124-25 (rules for segregating rational or purposive from irrational factors can only be "distillations of a generalized sagacity—of practical judgment founded on observation, intelligence, imagination, on empirical insight, . . . something that resembles a skill or gift more than it does factual knowledge but is not identical with either"); *supra* notes 41, 73, 148, 188, 194-98, 521-23 and text accompanying. Advancing the good and suppressing the bad is, of course, one of the major canons of statutory interpretation: See Heydon's Case (1584), 3 Co. Rep. 7a, 76 Eng. Rep. 637.

601. C. LINDBLOM, *supra* note 3, at 4. See Fatouros, *supra* note 61; W. Goldsmith, *Separation of Powers and the Intent of the Founding Fathers*, Address to Congress, the President, and Foreign Policy Conference, Washington, D.C., May 10, 1984; *infra* note 605. See also Hartshorne, *supra* note 36, at 320:

Being a mathematician, used . . . to careful reasoning about continuity, and living . . . in an age in which discontinuity had been introduced into physics, Whitehead arrived at the old insight of Hinayana Buddhism: becoming is not continuous change in a single actuality, but a series of unitary actualities each of which is somehow produced or created out of its predecessors.

what governments "can" do, on a policy leadership widely regarded as legitimate and competent.⁶⁰²

Several Europeans, closer to a Hegelian/Marxist tradition of dialectical analysis, have conducted studies that can be translated quite easily into useful analyses of American law and policy. Ralf Dahrendorf, for example, spells out policy implications of the "dialectics of stability and change, integration and conflict, function and motive force, consensus and coercion."⁶⁰³ The late Raymond Aron spent his life developing

a philosophy emphasizing tensions and disparities; between intentions and results; between absolute commitments and dubious courses of action; . . .between prospective choices (made in uncertainty) and retrospective interpretations (which lean toward determinism); . . .between the diversity of culture, values, and interpretations and the "Idea of Reason"—the dream of a single universal destiny and destination [*pace* Flaubert]; between politics as modest reformism and politics as salvation. . . ;[and] between the moral imperative of peace and the realities of the "state of war" among nations.⁶⁰⁴

This is the stuff of policy issues carefully posed in light of circumstances in our mixed society and Uneasy State.

If Dahrendorf's or Aron's frames of reference sound peculiar or even radical, this may be because the dialectics of American law and policy have never been described in any thoroughgoing way. But important components of such an analysis can be found in the many legal "antimonies" discussed earlier.⁶⁰⁵ If the streams are clear, the

602. North, *supra* note 108, at 198. See P. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE 228-29 (1972) ("Whatever else the court does, it must still reconcile the legal 'ought' with the social 'is' through a dialectical process of interpretations hammered out for specific fact situations."); Spadaro, *supra* note 22, at 12; Anderson, *supra* note 17, at 717; *supra* notes 68-70 and text accompanying; *infra* notes 609-14 and text accompanying.

603. R. DAHRENDORF, *supra* note 256, at 163. See *id.*, *passim*. See also J. HABERMAS, *supra* note 256, *passim*; J. HURST, *supra* note 271, at 245 (history of antitrust policy reveals consensus and conflict in all their variety).

604. Hoffman, *supra* note 557, at 6 (describing Aron's philosophy). See E. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 14-16 (1966) (quoted *infra* note 612); *supra* notes 41, 73, 150, 188 and text accompanying.

605. See, e.g., *supra* note 61. Many of these antimonies receive additional discussion elsewhere: see, e.g., *supra* note 24 and text accompanying (efficiency v. rights—a theme essayed extensively in relation to, e.g., contracts law); *supra* notes 404-05, 582 and text accompanying (procedure v. substance); *supra* note 562 and text accompanying

dichotomies of a policy can become thesis and antithesis—amenable to a synthesis reached by a zig-zag path and soon to change again. Legal processes exist to conserve more than they change, yet social changes constantly upset the few priorities we set for ourselves under law and the other criteria we use to evaluate policies. Policy usually gets made incrementally, through the partisan mutual adjustment that seeks to avoid direct confrontation between values in conflict. Actions calculated to relieve distress at one point create it at another point. Rooted classifications get manipulated, and policy grows more complex, less efficient, and less effective. Classifications and their concepts overlap to create contradictions. In the compromises that follow, the constellation of different classifications and concepts is redefined. Freedom of contract has, for example, been redefined *de facto*, even as it remains the basis for the traditional contract/no-contract dichotomy. An ever-widening judicial search for fairness and justice in the particular case goes on within this dichotomy and has spilled over into other concepts which are expanding to overlap.⁶⁰⁶ For ex-

(idealism v. positivism); *supra* note 592 and text accompanying (contradictory nature of American law in general).

Much of the analysis of law and policy about abortion and the CIA concerns the extent to which *apparent* majorities (the streams remaining uncleared) can override minority rights, and the extent to which these rights can be used as effective stumbling blocks to the rapid formulation and implementation of policy. *See also* J. MERQUIOR, ROUSSEAU AND WEBER 1, 6 (1980) ("the problem of legitimacy," tensions between Rousseau's power theory of legitimacy and Weber's belief theory of legitimacy—*Glaube*); A. WILDAVSKY, *supra* note 5, at 125 (discussed *supra* note 599); *id.* at 210 ("The tension between skepticism and dogma is built into the rival needs for organizational change and organizational stability"); Brietzke, *supra* note 202 (the dialectic between effectiveness and validity in constitutional law, somewhat analogous to Merquior's analyses and to my analyses of the CIA); Samuels, *The Economy as a System of Power: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 286, 350 (1973) (Hale's analyses of the compound of freedom and necessity that flows from inequalities in the exercise of conflicting liberties); White, *supra* note 62, at 296 (quoted *supra* note 62).

606. *See* J. ELY, *supra* note 44, at 88 (the few attempts by the Constitution's framers to freeze substantive values were repealed, either officially or by interpretive pretense); R. EYESTONE, *supra* note 6, at 25 (citing Charles Lindblom); *id.* at 123-24 (discussed *supra* note 30); G. JACOBSON, *supra* note 76, *passim* (major defect in American pragmatism is a failure to offer unchanging criteria for the evaluation of changing laws and policies); E. MEEHAN, *supra* note 5, at 195-97; North, *supra* note 108, at 196 (quoted *supra* note 170); G. SAWER, *supra* note 224, at 183 (quoted *supra* note 378); Goodrich, *The Antimonies of Legal Theory*, 3 L. STUD. 1, 2 (1983); Knowles, *supra* note 416, at 18 ("A wise public policy" for abortion "would seek to avoid direct confrontations between the two values in tension in . . . communities—the beliefs of the institutions versus the constitutional rights of the consumer to the services she needs and wants."); Tribe, *supra* note 10, at 69 (in contrast to the rules of ethics, policy choices seen as marginal tradeoffs or exchanges among desired outcomes); *supra* notes 27, 92-117, 239, 522 and text accompanying. *See also* Hartshorne, *supra* note 39, at 320 (quoted *supra* note 581).

ample: "Traditionally nontraditional, promissory estoppel has steadily expanded from its modest beginnings. . . . [It] is now employed with increasing frequency in what are essentially commercial, 'bargaining' situations . . . [even] where a bargain was under negotiation but no final agreement had been reached."⁶⁰⁷

The effects of promissory estoppel on contract law may, indeed, come to resemble those described in Thomas Kuhn's *Structure of Scientific Revolutions*:

When a sufficient number of contradictions accumulate within a paradigm of knowledge [the contract/no-contract dichotomy], the paradigm is abandoned in favor of a new one [promissory estoppel]. Although there may be resistance to this transformation . . . the power of scientific anomalies is by and large inexorable in persuading or converting the next generation of scientists [first-year law students(?) to a novel paradigm. "Crisis simultaneously loosens the stereotypes and provides the data necessary for a fundamental paradigm shift", to which is added: "Scientific revolutions are inaugurated by a growing sense . . . that the existing paradigm has ceased to function adequately in the exploration of an aspect of nature to which that paradigm itself had previously led the way."⁶⁰⁸

Law is not science, of course. Kuhn's theory does not explain the drift in CIA policy, where there is no paradigm and where anomalies and crises are numerous yet kept hidden by and large. If the policy streams were cleared, however, the power of CIA anomalies would almost certainly prove "inexorable" and lead to the creation of a paradigm.

Kuhn's approach offers an explanation of *Roe v. Wade* as a "scientific" revolution that failed. The Court and many others saw a number

607. Knapp, *supra* note 89, at 687. See *supra* notes 106-07 and text accompanying.

608. Goodrich, *supra* note 606, at 1-2, discussing T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1973), and quoting *id.* at 89, 92. Goodrich concludes, at 2, that Kuhn's theory is not applicable to legal antinomies. With respect, I disagree. Many changes in logical or metaphysical principles

come about as the result of philosophical reflection based on the discovery of hitherto hidden inconsistencies, on the fear of future inconsistencies or on various kinds of intellectual discomfort. . . . Reflection and argument may appeal to particular philosophical methods, such as the method of doubt, the transcendental, the phenomenological[,] the "linguistic," the "scientific" method, all of which claim (wrongly, I think) that one, and only one metaphysical system, is valid.

Korner, *supra* note 39, at 355.

of serious anomalies, almost a crisis in the pre-*Roe* abortion law and policy. But resistance to the truly novel *Roe* paradigm ensued, as did a near-total judicial incompetence at "converting the next generation" to it. The *Roe*, trimesterian paradigm is intellectually unsatisfying and incapable of accounting for further social and technological change. Unable either to develop further or to fall of its own weight, the *Roe* paradigm was manipulated to cover, however thinly, situations that appeared to contradict it. Failures in abortion policy leadership led to a policy complexity, inefficiency, and ineffectiveness.

E. Policy Leadership

The dialectics of American law and policy are moved, not by a blind, Hegelian determinism but by particular policymakers trying to cope with particular issues. Abortion and CIA policies failed to move much during the last decade because of an absence of policy entrepreneurship, a compelling vision of the public interest pursued in a competent enough way to forge a consensus over the heads of would-be veto groups. In advance of vision and competence comes the ability to think clearly (a casting aside of false dichotomies, for example), the "first step towards political regeneration"⁶⁰⁹ which is always in short supply. Translating clear thought into vision and then into action requires an understanding of history and people, courage, and the humane commitment that evokes affection and faith. It is sometimes more important to be rhetorically right than statistically correct, right rhetoric being very different from empty rhetoric. Admittedly, some policy leaders have lacked these qualities, possessed by both Roosevelts and by Earl Warren. J. Edgar Hoover and Admiral Rickover, for example, successfully brokered their expertise to advance narrow goals that left the policy streams as fouled as before. Their influence remained deep but narrow and by the back staircase, because of our distrust of Platonic guardianship coming from the strong State. In a democracy and with partial exceptions for the Supreme Court, a broad policy leadership must be won by democratic means from a public too clever (or so the hope of the Republic goes) for the demagogue.⁶¹⁰

609. Orwell, *supra* note 73, at 353. See Berlin, *supra* note 76, at 124-25 (quoted *supra* note 600); G. JACOBSON, *supra* note 76, at 15; Weisburger, *supra* note 549, at 107 (quoting Burns) ("the great leaders of history have been intellectual leaders—though they were other things at the same time."); *supra* note 428 and text accompanying.

610. See J. ALSOP, FDR: 1882-1945 (1982) (the adroitness, confidence, tenacity, guts, optimism, and gallant front of the ever-pragmatic and anti-ideological Roosevelt); R. EYESTONE, *supra* note 6, at 30 ("Knowledge is the only essential . . . that cannot be replaced by public leadership, but even here some kind of response can occasionally proceed on the basis of ignorance, good intentions, and the blithe assumption that the job can be done one way or another"); Lewis, *A Man Born to Act, Not to Muse*, in THE SUPREME COURT UNDER EARL WARREN 151, 152 (L. Levy, ed. 1972) (Warren's

This kind of leadership seems to have gotten harder rather than easier to find. The president is the most logical of policy leaders; indeed, the Constitution assumes it so. But presidents are seldom masters of their own souls these days, or at least they are not widely seen to be in control. Political mercenaries take control while packaging candidates and officials so as to offend as few as possible and to appeal to as many pressure groups as possible. Voters are left to grope in the dark by media treating electoral and other politics like a sporting event, and leaders are left chasing rather than making a consensus. A calculatedly bland personality is a poor substitute for policy, which may be one reason for Reagan's success as a candidate. One of the few qualities all genuine leaders share is that, by really standing for some things and against others, they inspire intense dislike among some groups. As Hamilton recognized long ago, leadership is much more than achieving a balance among groups, where the views of one group are deemed as good as another's. The temptation to duck a tough decision and go for maximum hype and minimal results from the media is understandable, but it can be avoided. Creative reforms are urgently needed: it makes little sense to return to the smoke-filled rooms ("peer evaluation"). In the meantime, some in Congress are able entrepreneurs of particular policies and, in default of leadership from elsewhere, there are always the experts coordinating policy in bureaucratic interstices and the Supreme Court. But a growing dissensus on the Burger Court, and its mastery of the fine line that distinguishes Warren Court precedents without creating new ones, do not inspire much confidence.⁶¹¹

"statesmanship"—"a sense of history, an understanding of people, force, courage."); E. LEWIS, *supra* note 123, at 168; G. WHITE, *supra* note 586, at 326 (Warren "became the Personification of his Court"; he "seemed to be the last major American public servant" who believed that "the future would be better than the past, that public morality and private morality were the same, and that . . . justice will eventually prevail" in America); Beer, *supra* note 4 (*inter alia*, discussing the leadership qualities of Hamilton, Webster, Lincoln, T.R., and F.D.R.; *id.* at 29 (quoted *supra* note 4); Clark, *America Needs Heroes to Pull the Country Together*, U.S. NEWS AND WORLD REP., June, 1982, 68 (heroes, persons "with sufficient leadership qualities," needed to strive against "fragmentation and pluralism" and to help small groups by serving as volunteers); Douglas, *The Mind of Perry Miller*, THE NEW REPUBLIC, Feb. 3, 1982, 26, at 30 (Miller's credo that "invigoration" comes "from contending against society for the welfare of society."); Kennedy, *Review*, THE NEW REPUBLIC, Jan. 31, 1983, 34, 36 (Thomas Dewey as the "Model of Mugwumpery", America's greatest administrator at a time when "the public hungered for redder meat"); *id.* (quoting Dorothy Thompson) (Dewey lacked the "imponderables by which great leadership weathers storms, compounded of sympathy with human feelings, humor, compassion, friendship, loyalty—qualities which evoke affection and faith, which is different from confidence."); Moynihan, *supra* note 530, at 18; Weisburger, *supra* note 549, at 106 (quoting Burns's description of the American "sunburst of leadership," 1787-1860); *supra* notes 404, 556, 576-79 and text accompanying.

611. See D. CHAGALL, *THE NEW KINGMAKERS* (1981); R. EYESTONE, *supra* note 6, at 38; J. FREEDMAN, *supra* note 8, at 60 (quoting Joseph B. Eastman) (effective
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Partial, makeshift solutions seldom work because an overarching leadership is needed to establish a consensus over policy and to coordinate attempts at its implementation. There must be a prudent mediation among demands for stability and for change, demands voiced by individuals and governmental and private organizations. We all resist changes perceived as threatening, and the key to successful mediation is to determine who or what is resisting which change, and why. Much resistance will turn out to be a rational response to poor policies, poorly implemented. These must be fixed before consensus can be secured, as in abortion. Other resistance, such as to the desegregation of southern schools, will prove irrational and amenable, perhaps, to the influence of brilliant policies brilliantly justified, and to the symbolism of law. If resistance persists, compliance will have to be secured through a coercion used as creatively as possible to foster consensus.⁶¹²

administrators are "masters of their own souls, and known to be such"); J. GREENFIELD, *THE REAL CAMPAIGN: HOW THE MEDIA MISSED THE STORY OF THE 1980 CAMPAIGN* (1982); McConnell, *supra* note 310 (quoted *supra* note 307); Steadman, *supra* note 10, at 164; Anderson, *supra* note 17, at 717 (quoted *supra* note 576); *id.* at 719 (quoted *infra* note 613); Beer, *supra* note 4, at 24; Bundy, *The Quick-Trigger Mentality*, *MANCHESTER GUARDIAN WEEKLY*, Apr. 10, 1983, p. 17, col. 3, at col. 3-4; Fairlie, *supra* note 545, at 28 (quoting Randolph Borne) ("unless you start with the vividest kind of poetic vision, your instrumentalism is likely to land you with the younger intelligentsia" engaged in administering, World War I); Greenfield, *The Myth of the Media's Political Power*, *CHANNELS OF COMMUNICATIONS*, June/July 1981, 18; Matthews, *Citizen Reagan*, *THE NEW REPUBLIC*, Jan. 24, 1983, 43; Sherrill, *Review*, *N.Y. TIMES BK. REV.*, Dec. 27, 1981, 3; *supra* notes 306, 311, and text accompanying. See also Ashmore, *supra* note 156, at 2 (quoting Peter Lisagor, 1970); Presidential statements are "rich lodes of insight and uncertainty, truisms and ambiguities, recognition and discovery. They say a little something to everybody and they drive up the wall the rational analyst who would search for the succinct passage that explains the Presidents's purpose and direction." This is not very different from some criticisms of the Burger Court. See, e.g., Howard's analysis, *supra* note 46, at 16, of that Court as "master of the fine line": It usually "prefers to limit or distinguish a precedent, including even those Warren Court decisions found somewhat distasteful. Often the Burger Court will leave the precedent as it is but refuse to carry its inherent logic to the next step." *Id.*

612. See Anderson, *supra* note 3, at 11 (in America, most people conform to law and policy "because of prior conditioning (in a non-Pavlovian sense) and force of habit."); *id.* at 111-12 (quoting Robert Merton) ("The very existence of the law operates to create a climate of opinion conducive to compliance"); E. HAWLEY, *supra* note 604 (FDR's economics "confused" but, politically, he did a "fairly respectable job of satisfying conflicting demands"); G. JACOBSON, *supra* note 76, at 17, 47; W. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* (1963) (details of FDR's democratic responsiveness to traumatic socio-economic crises); Muir, *Under What Circumstances Can Law Bring About Attitude Change*, in *LAW AND CHANGE IN MODERN AMERICA* 48 (J. and M. Grossman, eds. 1971) (school prayer decisions); P. NONET AND P. SELZNICK, *supra* note 33, at 113 ("Responsive law presupposes a society that has the political capacity to face its priorities, make the necessary commitments."); LORD RADCLIFFE, *supra* note 31, at 24 (quoted *supra* note 552); Zinn, *Introduction*, in *NEW DEAL THOUGHT* xv, xviii (H. Zinn, ed. 1966) (Thurmond Arnold's pragmatism, in *THE SYMBOLS OF GOVERNMENT*

We must decide what to do about the private transactions, the bureaucratic power, and the dilemmas of human existence examined in this article. The purposes of government can be elevated by anchoring such decisions to concepts having a powerful legal symbolism: achieving rights, justice, the public interest or, as Lasswell and McDougal put it, dignity in a free and abundant society where people are usually treated as ends rather than means.⁶¹³ To work ef-

and THE FOLKLORE OF CAPITALISM, the theoretical equivalent of FDR's opportunistic virtuosity in practical politics); Brietzke, *supra* note 568, at 682-84; Roche and Gordon, *Can Morality be Legislated?*, in LAW AND CHANGE IN MODERN AMERICA 245 (an overly-optimistic study of desegregation); Barkun, *supra* note 428, at 126 ("Indoctrination, symbol-manipulation, and the provision of material rewards instill and maintain supportive legal attitudes, yet they do so only within limits."); Brietzke, *supra* note 568, at 655-57; Tribe *supra* note 10, at 99 (quoted *supra* note 552).

613. *Trop v. Dulles* (quoted *supra* note 400); *supra* notes 172, 378 and text accompanying. A. ETZIONI, *supra* note 2, at 39-41 (a humanist psychology sees the "need for secure survival. . . affection (or love), recognition (or dignity), and self-actualization"—in the U.S. and the U.S.S.R. alike); King, *Letter from Birmingham Jail*, THE NORTON READER 470 (5th short. ed., A. Eastman, et al, eds 1980) (reprinted from *Why We Can't Wait* (1963)); H. LASWELL, A PRE-VIEW OF THE POLICY SCIENCES 42-43 (1971) (the Universal Declaration of Human Rights outlines some of the implications of dignity); J. SHKLAR, *supra* note 24, at 92-93 (McDougal's dignity concept a goal for all to strive for, and thus a standard for evaluating laws and institutions); A. MILLER, *supra* note 16, at 150 (need to remedy failings of pluralism, such as "structural" unemployment, problems of the leisure society, and the disappearance of the concept of the dignity of man); Lasswell and McDougal, *supra* note 34, at 501; Schick, *supra* note 6, at 261. See Cardozo, *supra* note 2 (quoted *supra* note 2); F. FROHOCK, *supra* note 30, at 203 (what we do with welfare policies depends on what we want as a society); *id* at 209 (freedom and security are excellent candidates for a mass public interest, yet they frequently conflict); E. HAWLEY, *supra* note 604, at 14 ("The dilemma of the New Deal . . . lay in the political necessity of . . . creating organizations and controls that could check deflationary forces and provide a measure of order and security while at the same time preserving democratic values, providing the necessary incentives, and making the proper concessions to competitive symbols."); Horowitz, *Economic Equality as a Social Goal*, in 5 POL. STUD. REV. AN. 256, 261 (I. Horowitz, ed. 1981) (quoting Herbert Gans) (what is needed is more concern for the quality of life and more power to control one's destiny); G. JACOBSON, *supra* note 76, at 19 (public interest discernible through careful analysis and the application of constitutional principles to the social realities reflected in the signs of the times); B. MOORE, JR., *supra* note 592, at 3 (the questions that arouse human passions have to do with the forms of authority and justice, the ways in which people are treated as means and as ends); J. ROBINSON, *supra* note 70, at 120 (social engineering differs from space engineering in that the objective is not given, but is precisely what must be determined); G. SAWER, *supra* note 224, at 15 ("constitutional law depends on some theory of relations between government and governed, family law on some theory of domestic relations, even so abstract a legal concept as property derives much of its content . . . from . . . social values"); A. WILDAVSKY, *supra* note 5, at 87, 90 (the social welfare revolution we're waiting for is already here, because of a consensus over doing more for peace and less for war); *id.* at 215, 277 (chief obstacles to effective policy evaluations are an absence of clearly defined ends and a tendency to treat people as means rather than ends); Zinn, *supra* note 612 (quoted *supra* note 612); Dellapenna, *supra* note 376, at 423 (danger, through abortion, etc.

fectively, this process needs persuasive justifications of policies as contributing to these goals. The justifications must later be borne out in fact. After years of relatively parochial interpretations, these goals must be clarified. In particular, it must be made clear, and palatable, that governments' creative pursuit of the public interest cannot be sustained by our low tax levels.⁶¹⁴ We can't have it both ways here, a fact that Western European electorates have accepted.

* * * * *

Much progress has been made in certain substantive policies over the last thirty years. But our statecraft—nationbuilding and, increasingly, a national reconstruction—has lagged behind. Our poor performance can largely be attributed to the remediable faults of a lack of presidential, congressional, and judicial time, interest, and understanding of the tools and tasks at hand. Attention to policy content has been at the expense of clearing policy streams and forging new coordinating links, by channelling politically—and constitutionally—inevitable competitions in directions useful for policy. Good policy can and should focus on all of these aims simultaneously, to create from better policies those which are better still, by a dialectical process and setting aside empty objections to an activism and empty theories of an interest group pluralism. Only in this way can we reduce a chaos of inappropriate policies, without signing over our democratic policy rights to the strong State experts who would be our Platonic Guardians. Levels of a policy chaos having been reduced overall, areas where a chaos remains will call attention to themselves as anomalies fit for a policy dialectic. Where policy is no longer its own cause, chaos will serve as a signal to reduce chaos. A policy mean of means will be discovered more easily because a dialectic operating within a coherent process will moderate the swings between policy extremes. If we have achieved a democratic control over policy means

policies, of becoming "inured to seeing ourselves purely as means."); Fairlie, *supra* note 562 (quoted *supra* note 562); Gutman, *Academic Determinism*, 53 S. CAL. L. REV. 295, 319 (1981) (quoting Coward) (Contracts and Torts should be taught together as Obligations, under "the principle of reasonably decent conduct expected in civilized society."); Symmons, *supra* note 2, at 190 (public policy is the general equivalent of public interest); *supra* notes 54, 65, 525 and text accompanying. See also Anderson, *supra* note 17, at 719: "In liberal argument, equality locates the burden of proof in making cases about justice, as freedom does in relation to the problem of authority. All individuals are to be regarded as in the same position with regard to policy unless good reasons can be given for treating them differently."

614. See G. EDWARDS, *supra* note 6, at 162; Parsons, *supra* note 60, at 70 (canons of rationality are oriented toward clear and unambiguous goals or internally consistent values, and toward means adapted to a goal according to best available knowledge); H. WILENSKY, *supra* note 123, at 126 n.30 (quoted *supra* note 351); Anderson, *supra* note 17, at 718 (quoted *supra* note 552).

and ends through Congress, experts can do no harm and may do much good while implementing policies under canons of competence. A democratic policy leadership is vital to effective implementation. Achieving a policy coordination requires that a consensus be created among citizens and within government, and that matters then be regularized under law. Such a consensus does not develop spontaneously, and even Roosevelt's rather charismatic leadership was not wholly sufficient to the task of coordinating policy across interest groups and the many gaps and weak points within and among agencies.⁶¹⁵

At great length, I have attempted a synthesis of the "rather varied intellectual precipitate"⁶¹⁶ of law and policy. Such a synthesis is all the more necessary in "an age of unavoidable specialization and scarcely less avoidable rancor."⁶¹⁷ All we can do, and that indeed is considerable, is to make "medium-term thinking relevant for short-term action"⁶¹⁸ by improving "in every possible way the factual and theoretical bases for unavoidable decisions."⁶¹⁹ Policy decisions are unavoidable in the sense that not to decide is to decide in favor of the status quo. A denial of responsibility by simply letting things happen is no longer an option under our mixed economy and Uneasy State. The "price of improvement is dedication to purpose, precision in usage, acceptance of stringent rules of evidence and methods of argument, and changes in the machinery used to make policy, monitor

615. See G. EDWARDS, *supra* note 19, at 3, 157; E. LEWIS, *supra* note 123, at 123 (quoting Eisenhower) ("It is the task of statemanship to mold, to balance and to integrate 'the military-industrial complex' and other forces . . . within the principles of our democratic system"); F. RODELL, *supra* note 586, at 18-19; H. WILENSKY, *supra* note 123, at 50 (rather than insulate himself from squabbles, Roosevelt fostered competition within public channels of information and balanced them against private, unorthodox sources); J. SIGLER AND B. BEEDE, *supra* note 16, at 16; Beer, *supra* note 5, at 29 (quoted *supra* note 5); *id.* (allocating functions among governmental branches a job for practical men, but "the imagery of the national idea can prepare" their "minds . . . to recognize in the facts of our time the call for renewed effort to consolidate the union."); Burns and Beschloss, *The Forgotten FDR*, THE NEW REPUBLIC, Apr. 7, 1982, 19, at 22; Fairlie, *The Voice of Hope*, THE NEW REPUBLIC, Jan. 27, 1982, 16, at 18 (It took Roosevelt's supreme confidence and skill "to let loose so many oddballs at so many desks to do so many things, and still manage to weave them into that tapestry" of agencies old and new); Goodman, *Review*, N.Y. TIMES BK. REV., June 30, 1982, 10 (Roosevelt's "gifted tinker's knack for taking institutional arrangements apart and putting them back together in 'rational' ways."); Light, *supra* note 18, at 74; *supra* notes 159, 310-11 and text accompanying.

616. B. MOORE, JR. *supra* note 592, at xii.

617. *Id.*

618. R. DAHRENDORF, *supra* note 593, at 87.

619. B. MOORE, JR., *supra* note 592, at 27. See E. MEEHAN, *supra* note 5, at x, on the need to improve the quality of intellectual consumerism, and to demonstrate the desirability of linking inquiry to purpose, knowledge to action. Of course, law has a significant role to play in this process.

consequences, and adjust performance to improve results.”⁶²⁰ The centenary of Franklin Delano Roosevelt’s birth having just passed, the notion of a New Deal in laws and policies relevant to the 1980s, of a new logic of public life that dispenses with many of the old false dichotomies, sounds appealing.

620. *Id.* at 180. See G. EDWARDS, *supra* note 19, at 165 (public policy will always be with us, and ignoring or simply excoriating it will not improve it); J. STONE, *supra* note 562, at 14 (engaging in analyses like those described in the text, social scientists “have nothing to lose but their deductive chains.”); A. WILDAVSKY, *supra* note 5, at 22-23 (A self-conscious society has no choice but to think, and we owe it to ourselves to learn from failures and to make our dilemmas more expressive of our moral selves).