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Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*

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* These notes are dedicated to the memory of Henry M. Hart, Jr.

Readers who know his and Albert M. Sacks's unpublished coursebook, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958), will recognize that many of the cases I use as examples in Part I figure prominently in that work. And while my point of view is indeed different from what I take to be the perspectives presented in *The Legal Process*, it is a point of view that has evolved from my having taught from their book.

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I. Common Law Rules

A. *An Introduction to Principles and Policies*

Lawyers are not especially concerned, in the arguments they make or the explanations they give, to distinguish principles from policies.¹ This is true of all branches of the profession, the judicial and academic, as well as the practicing bar. And it is unfortunate, for we can learn something about adjudication, perhaps more than a little, by attending to the distinction.

Consider two cases, the first deceptively simple. The beneficiary of a life insurance policy murders the insured in order to collect the insurance. He is caught, convicted of homicide, and in a separate proceeding denied payment. In the process a rule is announced by the court that a beneficiary who intentionally takes the life of the insured may not collect the insurance.²

The second case is more complex. A buyer, licensed by the secretary of agriculture, purchases a carload of cantaloupes warranted to be "U.S. grade one." The terms of his contract ("acceptance final") preclude the buyer from rejecting the produce. Yet, he rejects because the cantaloupes do not conform to the warranty. Not only is the buyer held liable for his breach, but he is also deprived of his claim against the seller. The rule, as stated by the court, is that under the Perishable Agricultural Commodities Act, a buyer who improperly rejects a shipment forfeits any cause of action for breach of warranty (growing out of the same transaction) that he might have against the seller.³

In each of these cases two types of explanations for the announced rule can be attempted. The rule in the insurance case might be explained on instrumental grounds: It is designed to deter the intentional taking of life. The instrumental, to the contrary, might be ignored and the explanation given that it is improper for the beneficiary to collect the insurance since a wrongdoer should not profit from his own wrong. There is, of course, nothing necessarily incompatible in these two explanations. Indeed, both might well be advanced by judge or commentator as joint reasons for the rule.

1. *But cf.* Dworkin, *Judicial Discretion*, 60 J. PHIL. 624 (1963); Dworkin, *Morality and the Law*, N.Y. REV. BOOKS, May 22, 1969, at 29; Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972). *See also* Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973).

2. *See, e.g.*, *Filmore v. Metropolitan Life Ins. Co.*, 82 Ohio St. 208, 92 N.E. 26 (1910).

3. *L. Gilarde Co. v. J. Martinelli & Co.*, 168 F.2d 276, *vacated on rehearing and new judgment entered*, 169 F.2d 60 (1st Cir.), *cert. denied*, 335 U.S. 885 (1948).

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The cantaloupe case might also be explained in instrumental terms. The forfeiture rule is drawn from the purpose of the Perishable Agricultural Commodities Act, which is to deter the improper rejection of perishable goods in order to reduce the economic waste resulting from rejection. A noninstrumental explanation would look to the gravity of the buyer's breach. His was a promise of such significance to the transaction that his failure to perform requires the forfeiture of his claim quite apart from the effect of the rule on subsequent transactions in perishable commodities.

If it were proffered as a justification, most students of the law would reject this second or noninstrumental explanation of the rule in the cantaloupe case. In an arm's length commercial context, promise-keeping, for its own sake, does not count enough to justify forfeiture. Most lawyers would probably accept the first, or instrumental, explanation as a justification for the forfeiture rule if they were convinced of the statute's purpose and reasonably persuaded that the rule would be an effective deterrent.

Deterrence, however, is a doubtful justification for the rule in the insurance case. While deterrence is desirable, the rule is unlikely to influence the behavior of one who is on the brink of knowingly committing the most serious of felonies. The murderer often will not be aware of the insurance rule and if he commits homicide and is caught, he will not enjoy the money, no matter what the rule is as to insurance. If he is not caught, the crime will pay and the insurance rule will not matter.

The insurance rule nevertheless is law and, most lawyers would say, good law. A wrongdoer should not profit from his own wrong—at least in this case he should not—even though the rule has no discernible effect on the incidence of homicide. That a wrongdoer should not profit from his own wrong here counts enough to serve as a justification for the rule. I shall call such a justification a principle. In contrast is the justification for the rule in the cantaloupe case, which I shall call a policy.⁴

2.

The distinction advanced thus far between principle and policy—the latter is an instrumental justification for a rule, while the

4. The distinction has at least some relationship to the distinction between deontological and teleological theories. In the next portion of these notes, however, I may be understood by some to be denying the validity of the distinction. See pp. 223-25 *infra*. Cf. R.M. HARE, *THE LANGUAGE OF MORALS* 56-58 (1952), and R.M. HARE, *FREEDOM AND REASON* 123-24 (1963).

former is not—may seem fragile. That a wrongdoer should not profit from his own wrong is itself a decisional standard which can be justified instrumentally. The justification is not that the application of the standard directly deters homicide, but that a judicial decision based on it shows that the law takes the standard seriously; this, in turn, makes the standard more important in the community. And if it is more important, it is more likely to affect conduct. The effect, to be sure, is long-run and general. In the long run the insurance rule will assist in the socialization of future generations and society will be that much better.

The trouble with collapsing the distinction between principle and policy in this manner is that it impedes rather than facilitates one's understanding of adjudication. If the social sciences were sophisticated enough to trace all the effects on behavior of the rule in the insurance case⁵ and were to demonstrate that these effects were nil (an admittedly counter-intuitive demonstration), the rule would not be seriously undermined. The principle that a wrongdoer should not profit from his wrong counts as a justification for the insurance rule, even though the rule has no discernible effect on behavior, because of the principle's relationship to conventional morality: a relationship that I will subsequently attempt to explain.⁶

Some effects of the insurance rule, however, might undermine its continued acceptance as law. For example, if it were found in a substantial number of cases that an effect of the rule was to deprive the beneficiary's innocent children of adequate financial support, we might question whether the rule was a good one.⁷ Observe, however, that this is a side effect different from the deterrence of homicide or the socialization of the next generation; desirable side effects might count as independent justifications for the insurance rule. My argument is simply that deterrence is doubtful and that socialization is a secondary justification because the rule would be accepted in the face of evidence disproving it. An undesirable side effect cannot, of course, be advanced to justify a rule. It may, however, weaken it, for there must be a relationship between the persuasiveness, or weight, of a principle used to justify a rule and the consequences of the rule's application.

5. That is to say: (1) the *direct* effects of the particular rule on behavior; (2) the *supportive* effects (the extent to which that rule reinforces other similar rules), and (3) the *undermining* effects (the extent to which a contrary rule would undermine other similar rules).

6. See pp. 243-54 *infra*.

7. Even if the rule were to have this side effect, it would still vindicate the principle that a wrongdoer should not profit from his wrong, and thus there might be ground for retaining the rule.

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Principles are contextual—the right to privacy, for instance, counts very differently in different cultures as justification for a rule—and part of context is the known or assumed side effects of the rule. Where the side effects are desirable they strengthen the principle, but clarity requires that these effects also be seen as potentially independent justifications for the rule. In the terminology I am suggesting, one would say—if he believed it to be the case—that the rule was justified not only by the principle that a wrongdoer should not profit from his wrong, but also by the policy of deterrence or of socialization.

If, on the other hand, the side effects of a rule are undesirable, the persuasiveness of the principle, as a justification for the rule, is weakened, and indeed the rule may not survive as law. Whether it survives depends upon the force of competing principles and policies available to a court as decisional standards.

3.

Few American lawyers are likely to disagree with one implicit premise of the position I am urging. The profession generally recognizes that it is an obligation of the courts to justify the rules they announce and to keep the rules and their justifications up-to-date. This does not mean that a rule which cannot be justified is not recognized as law. It does mean, however, that such a rule is unstable, and that one is entitled to criticize its continued application. Nor does it mean that the principles and policies that underpin the doctrine of *stare decisis* cannot count as a justification for a rule's survival in situations where the original justification is no longer tenable. It means only that a court should stop relying upon the original justification.⁸

American lawyers—schooled as they are to see law as predominantly instrumental—are apt to have little difficulty in accepting the argument that a policy may serve as the justification for a rule. Assuming, of course, that the rule accomplishes what it is supposed to accomplish, the only question that a lawyer is likely to raise is whether a particular policy is one which a court may legitimately employ in adjudication. Given its pedigree, the policy in the cantaloupe case is unquestionably legitimate: It was declared by Congress in a valid

8. I use the word doctrine merely to mean a collection of rules. In this sense, *stare decisis* is a doctrine made up of rules that relate to an individual's reliance on prior law—rules justified by principles and policies (*see* discussion of "surprise" pp. 233-35; 242-43; 254-61 *infra*)—and rules that relate to the efficiency of judicial administration—rules justified by a policy.

statute which controlled the case before the court.⁹ Many policies, however, would not be accepted as legitimate if they were advanced by a court to justify a common law rule. For example, if the common law of a state imposes strict liability upon manufacturers for personal injury resulting from defective products, a court could not justify a rule which granted an exemption from such liability to manufacturers of a newly developed product on the ground that the protection of infant industries is in the state's economic best interest. Such a policy may be widely regarded as socially desirable, but the structure and theory of American government would seem not to lodge authority for granting a subsidy to infant industries at the expense of other groups—injured plaintiffs and established industries producing relatively substitutable products—in the courts. Authority to create a special class and redistribute income to it resides in the legislature. The sense that it is improper for a court to justify a common law rule with such a policy is so deeply ingrained that a statute granting a subsidy is not apt to serve as a source of decisional law in cases not controlled by it. Thus, for example, if a legislature were to grant tax relief to an infant industry, the legislative policy of subsidizing infant industries by tax relief would not count as even a partial justification for a judge-made rule exempting such industries from strict liability.

If a policy is to be employed in common law adjudication, it must not work in so partisan a fashion. A common law policy must be more neutral than that.¹⁰ To recur to the insurance case, both deterrence

9. The statute is the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. §§ 499a *et seq.* 1970. Its constitutionality today seems clear. *But see* *Abe Rafelson Co. v. Tugwell*, 79 F.2d 653 (7th Cir. 1935).

10. The legitimacy of common law policies is dealt with in more detail at pp. 236-43 *infra*.

There is, of course, another way to put the neutrality constraint; namely, that it is required by that aspect of morality we call justice. Professor H.L.A. Hart is suggestive. Indeed, one may infer from his statement that the role for common law policies ought to be less than I suggest. He says,

An important juncture point between ideas of justice and social good or welfare should be noticed. Very few social changes or laws are agreeable to or advance the welfare of all individuals alike. Only laws which provide for the most elementary needs, such as police protection or roads, come near to this. In most cases the law provides benefits for one class of the population only at the cost of depriving others of what they prefer. Provision for the poor can be made only out of the goods of others; compulsory school education for all may mean not only loss of liberty for those who wish to educate their children privately, but may be financed only at the cost of reducing or sacrificing capital investment in industry or old-age pensions or free medical services. When a choice has been made between such competing alternatives it may be defended as proper on the ground that it was for the "public good" or the "common good." It is not clear what these phrases mean, since there seems to be no scale by which contributions of the various alternatives to the common good can be measured and the greater identified. It is, however, clear that a choice, made without prior consideration of the interests of all sections of the community, would be open to criticism as merely partisan and unjust.

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and socialization would seem to be examples of legitimate policies. They are widely regarded as socially desirable and are neutral in the suggested sense. As I have argued, however, deterrence is doubtful as a justification for the insurance rule because the rule does not deter; and socialization is no more than a secondary justification. While most of us have faith in the proposition that law is a moral teacher, we know little about the dynamics of this process of education.

While a legitimate policy is easily accepted by American lawyers as the justification for a rule, principles (in the way that I am using the term) are not. I have often been asked by students how any standard can be adopted if it looks backward rather than forward. This skepticism does not root in a rejection of the conventional proposition that courts exist primarily to adjudicate disputes on the basis of preexisting and reasonably knowable rules (although some students of law have limited faith in that proposition). The skepticism rather is directed toward any noninstrumental account of the judicial function or any particular legal rule. What a court is or does can be justified only in terms of anticipated effects. If disputes should be resolved on the basis of preexisting and reasonably knowable rules, it is because people will then behave in a socially desirable way.

The position of those who are skeptical of principles can perhaps be understood best by a typical response that might be given to my discussion of the policy of socialization as justification for the rule in the insurance case. The soft version of my argument is that socialization is a secondary justification because we know so little about law as a moral teacher. In response to this the principle skeptic might say that we know, or at least intuit, enough to use the policy as a primary justification for the rule. This elicits the hard version of my argument, which assumes that proof of the socializing

It would, however, be rescued from *this* imputation if the claims of all had been impartially considered before legislation, even though in the result the claims of one section were subordinated to those of others.

Some might indeed argue that all that in fact could be meant by the claim that a choice between the competing claims of different classes or interests was made "for the common good," was that the claims of all had been thus impartially surveyed before decision. Whether this is true or not, it seems clear that justice in this sense is at least a necessary condition to be satisfied by any legislative choice which purports to be for the common good. We have here a further aspect of distributive justice, differing from those simple forms which we have discussed. For here what is justly "distributed" is not some specific benefit among a class of claimants to it, but impartial attention to and consideration of competing claims to different benefits. H.L.A. HART, *THE CONCEPT OF LAW* 162-63 (1961). See generally K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

effect of the rule is nil, but insists that the rule is justified by the principle that a wrongdoer should not profit from his own wrong and that that is a principle because it is related—in some as yet to be explained way—to conventional morality.

To my hard argument the principle skeptic may be conciliatory: We cannot know that the socializing effect of the rule is nil, nor can we ascertain how we would react to the rule if we could know. He may, on the other hand, be more insistent: If the effect of the rule is shown to be nil, the rule can be justified only by internal or institutional policies, such as *stare decisis*; that is to say, policies that have to do with the institution of adjudication, policies that must be followed for the best interest of society. A principle, or any other concept related to conventional morality, rests on sand, for, to change the metaphor, conventional morality and anything related to it is in the eye of the beholder. The judge who attempts to justify a rule in these terms is saying no more than that he likes the result.

Why conventional or common morality is more than personal preference and how courts work with it in adjudication are issues to be dealt with later.¹¹ But the argument of the insistent principle skeptic, if taken in his terms (which insists upon converting principles into policies), might prove too much: Judge-made policies must be regarded as socially desirable. Giving objective content to the concept of social desirability would present the skeptic with difficulties not dissimilar to those he confronts when faced with distinguishing conventional morality from personal preference. In the insurance case the policy of socialization is a legitimate policy only if society can be said to desire the behavior which the rule seeks to establish. One who believes that principles are nothing but personal preferences may be hard put not to believe this of judge-made policies as well. Such skepticism entails either a rejection of all common law or of the proposition that courts have an obligation to justify the rules they announce. "Because I like it" is not a justification for a rule; it is an exercise of fiat.

As to the conciliatory principle skeptic, I have already conceded that principles are contextual and that effects are part of context. Thus, our disagreement is narrow. Where we disagree, I think he is wrong, and I shall in the next section, by contrasting commercial contracts with intentional torts, try again to persuade him, but even

11. See pp. 243-54; 285-311 *infra*.

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if I fail it does not matter much. For whenever he is wont to convert what I call a principle into a policy, he shall find that his policy operates in adjudication like my principle and not like what he and I are both content to call a policy.

B. *Strong Duties, Weak Duties, and their Remedial Consequences*

4.

Common law rules that are justified primarily by policies are apt to impose 'duties on individuals different from those imposed by rules that are justified primarily by principles. The difference can be seen by contrasting commercial contracts with intentional torts, that is, by enlarging the discussion of the cantaloupe and insurance cases to the general class of cases to which they belong.

It is a rule of contract law that a person who freely promises to perform a legal act at a specific future time is under a duty to perform his promise if it is bargained for and given in exchange for goods or services. The promisor's duty, however, is a weak one, for if at the time of performance the promisor decides (generally because it is less expensive for him) to pay damages rather than to perform his promise, his decision in the average case will be virtually condoned.¹² He is expected to act in his own best interest even though he is under an obligation to act differently.¹³

Some would attempt to account for this by denying it, by insisting that the breach would be condemned. Their's is an uphill struggle, for they must contend with the entire law of damages—particularly the limited role of specific performance—and excuses in contract law. It generally does not matter—frustration and impossibility are exceptions—why a contract is not performed. While there are exceptions,¹⁴ the willfulness of a breach (formally at least) is irrelevant to the question and extent of liability.

Holmes's explanation of the phenomenon described above was to deny the breach. "Nowhere," he said, "is the confusion between legal and moral ideas more manifest than in the law of contract. Among

12. Our attitude toward the promisor who fails to perform changes of course as we move from an arm's length commercial transaction to a fiduciary relationship. We would say that we count the principle of promise-keeping more in the latter than in the former case.

13. The promisor's "best interest" includes the nonlegal as well as the legal consequences of his breach.

14. The most important may be in the application of the *Hadley v. Baxendale* rule. See, e.g., McCORMICK ON DAMAGES 574-75 (1935).

other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”¹⁵ But Holmes’s explanation insisting as it does, that the promisor’s duty is in the alternative, cannot square with the language of the law, its operation, or the deal of the parties. In the ordinary case the parties bargain for performance and often fail even to address the consequences of nonperformance. We describe a promisor’s failure to perform his promise as a breach of contract; we do not describe his duty as being in the alternative, that is, to perform or pay damages. And where contracts are renegotiated, the law may treat the initial promise as a preexisting duty.¹⁶

Although Holmes’s explanation, therefore, is unsatisfactory and often rejected today, contract theorists have had trouble with the fact that generally we do not condemn a promisor who acts in his own best interest.¹⁷ If the primary justification for the rule—that a promise supported by consideration obligates a promisor to perform—were the principle that a man should keep his word when it is seriously given in trade and likely to induce a change of position in others, it would be difficult to explain our attitude toward the promisor’s failure to keep his promise.¹⁸ How could we come as close to condoning his breach as we do? Would we not disapprove of his conduct rather than accept it as the normal behavior of a rational profit-maximizing individual? I think we would emphatically disapprove, and, if so, a promisor would be under a strong, rather than a weak, duty.

I do not mean to imply that the above circumstances would require totally different rules of contract damages, although some rules might need modification. It is often the case on the civil side that breach of a duty, weak or strong, results in the imposition of a remedial obligation to pay compensation and no more. If one believes—as Holmes perhaps did not—that law, among other things, is attitude as well as power, one is not driven to assume that there is, or ought to be, a perfect fit between duties and remedies. We can learn much about the duty imposed by a rule of law if we investigate the legal consequences of its breach, but there is much that such investigation does not teach us.

15. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

16. See, e.g., *Lingenfelder v. Wainwright Brewery Co.*, 103 Mo. 578, 15 S.W. 844 (1891).

17. See, e.g., 1A CORBIN ON CONTRACTS § 182 (1963).

18. The principle is, of course, the secondary justification. Its existence explains why Holmes’s description is troublesome.

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If the primary justification for the contract rule is not a principle, it must be a policy: promises are enforceable in order to facilitate commerce. Such a judge-made policy is widely regarded as socially desirable and, relatively speaking, neutral. It does not, however, have its roots in conventional morality as does a principle, for example, that a man should keep his word. The principle that a man should keep his word is, of course, the secondary justification for the contract rule, and it is the existence of this justification that properly inhibits us from flatly condoning the promisor who elects not to perform.

The primary justification for the contract rule is a policy of efficiency, one aimed at a better allocation of resources. Efficiency can and has been claimed to be not only the higher, but, indeed, the only morality.¹⁹ I do not wish to deny the desirability of an expanded gross national product, the moral spinoffs from better resource allocation, or the existence of a moral commitment toward work and craftsmanship, a commitment which sometimes may coincide with the concept of efficiency. But efficiency by itself is not a part of our conventional morality, a part of the underlying values and attitudes, that translate into "standards of conduct which are widely shared in a particular society . . .,"²⁰ and that constitute the raw material from which the law derives principles.²¹ This is not to say, of course, that efficiency is immoral, or that many rules which are justified by principles cannot be examined for their impact on efficiency. Such examination is an important—perhaps the most important—task for the lawyer-economist.²² I do mean to say that we hinder our understanding of adjudication if we confuse efficiency with morality. This point can be focused more sharply by turning from contracts to intentional torts.²³

It is a rule of tort law that to inflict intentional physical harm upon another without cause is illegal. This rule imposes a strong

19. See, e.g., G. TULLOCK, *THE LOGIC OF THE LAW* 253-57 (1971), for a contemporary statement.

20. H.L.A. HART, *supra* note 10, at 165.

21. Cf. Arrow, *Somehow, It Has Overcome*, N.Y. Times, March 26, 1973, at 39, col. 2. Observe that I am talking about conventional or common morality, and not about the relative merits of a wise philosopher's ethical system, derived from one or another form of utilitarianism, as contrasted with either a theologian's or wise philosopher's system that ranks values according to divine will or some form of contract or intuitionist theory. See pp. 279-80; 285 *infra*.

22. See, e.g., G. CALABRESI, *THE COST OF ACCIDENTS* (1970).

23. I recognize that there is an approach to this subject very different from the one I shall present. It is an approach employed by Calabresi and Melamed to investigate a related set of problems. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Their presentation is elegant, sophisticated, and important. It is, as they call it, "one view of the cathedral." See *id.* at 1089-90 n.2. What follows is another view.

duty upon the potential tort-feasor: we would not think of condoning his assault because he stood ready to compensate his victim. We would condemn his assault although he paid a full measure of damages.

I would contend that the primary justification for this tort rule is a principle, but one might undertake to justify it by resort to policies. First, the law wishes to deter assault and battery. This is doubtful as a justification for the same reason as in the insurance case: the criminal law is there; civil liability may add some deterrence, but probably little. Second, the law wishes to improve the allocation of resources in society. The victim has been injured by the assault, the injury is an externality, and assuming that the tort-feasor is the least expensive cost avoider, the cost of the externality should be imposed upon him.

If this latter, efficiency policy were the sole justification for the tort rule, we would condone the conduct of the tort-feasor once he tendered full compensation. It is also the case that Holmes would have been more nearly correct about contract law, if its rules were justified solely by policies of efficiency.²⁴ Moreover, if the efficiency justification for the tort rule were—as similar policies in contract law are—the primary justification, we would regard the tort-feasor as we regard the contract-breaker: a rational, profit-maximizing individual.

This distinction between a strong and a weak duty does not confuse a legal with a moral obligation. Yet it might mistakenly be thought to entail such a confusion. The argument would go as follows: While Holmes is wrong in declining to admit to a distinction between duties and remedies, it is also wrong to assume that our condemnation of the intentional tort-feasor, or our failure to condemn the contract-breaker, traces to a legal duty rather than to a moral one. Attitudes toward wrongdoers are only the reflection of moral conviction.

Our attitude does reflect our moral conviction, but where that moral conviction is the basis of a legal rule (as it is where the rule is justified primarily by a principle), it is confusing to insist that our attitude toward one who breaks the rule and pays damages is only a moral attitude and not a legal one.²⁵ Indeed, to hold such a

24. The secondary justification is a principle. See note 18 *supra*.

25. Where the legal rule is justified by a policy it is confusing to deny to law a share in framing our attitude toward the rule-breaker who pays damages. It is not only confusing, it makes it very difficult to account for the growth of the common law, as the subsequent discussion suggests.

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position, it would seem to be necessary to go all the way with Holmes: He argued that the legal duty in torts—as well as in contracts—is only a duty “to pay a compensatory sum.”²⁶ If he is misguided—and he plainly is—about contracts, he just is wrong about intentional torts.

5.

To speak of weak and strong duties clarifies our understanding of legal rules and, as I shall attempt to show, helps to explain at least one aspect of the growth of remedial law. The breach of a strong duty (one created by a rule that is justified primarily by a principle) empowers a court to pay less attention, in the remedy it fashions, to the surprise of the defendant than does the breach of a weak duty (one created by a rule, primarily justified by a policy).

If the buyer in the cantaloupe case knew he was in breach of duty when he rejected the shipment of cantaloupes, should it have mattered to the court in imposing forfeiture that he did not know and had no way of knowing that a consequence of his breach would be the loss of his warranty claim against the seller? In the actual case those were the facts and the court had considerable difficulty with the problem. It was only on rehearing and after the intervention of the secretary of agriculture, who urged the drastic remedy, that the court ordered forfeiture.²⁷

The decision on rehearing was wrong. While the policy of the Perishable Agricultural Commodities Act justifies a rule of forfeiture, it was improper to apply the rule in the case before the court. The buyer could not have anticipated forfeiture, for there were no published decisions or regulations to warn him that forfeiture was the method which would be used to deter rejection.²⁸ The conventional understanding, based on the remedial law of sales contracts, was that a rejection would result merely in compensatory damages.²⁹ It can be assumed that the buyer relied upon this understanding when he decided to reject. The nice question for the court, therefore, was how to count this reliance.

26. Holmes, *supra* note 15, at 462. Indeed, Holmes sees the duty in contracts and torts as a “prediction” of what a court will do.

27. See *L. Gillarde Co. v. J. Martinelli & Co.*, 169 F.2d 60 (1st Cir. 1948).

28. See H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 46-49 (tent. ed. 1958) [hereinafter cited as HART & SACKS].

29. The buyer will be liable for the price, the seller for breach of warranty. See *L. Gillarde Co. v. J. Martinelli & Co.*, 168 F.2d 276 (1st Cir. 1948).

Under the statute, the secretary of agriculture had the power to promulgate regulations, and a regulation he might have promulgated, but did not, was forfeiture for improper rejection. See 7 U.S.C. § 4990 (1970). See also discussion pp. 254-61 *infra*, of prospective and retroactive law making.

The answer to that question should depend upon the nature of the buyer's duty. If he had reason to believe that, although he stood ready to pay the seller what the law seemed to require, his breach, nevertheless, would be condemned, it is hard to see why his surprise over forfeiture should count. The law's condemnation would constitute a sufficient warning or signal to the buyer. The signal would say, in effect: "Do not, on the basis of existing remedial law, make a careful calculation as to the cost of a breach and expect a court to accept the cost-benefit analysis as a reason for not changing the law. Your duty is not discharged by paying compensatory damages if there are independent reasons for imposing additional sanctions. Indeed, your case is analogous to the insurance case. There, too, the duty was a strong one and the law's signal clear. Thus, if the conventional understanding of the remedial law, at the time the beneficiary took the life of the insured, had been that the insurance would be paid to the beneficiary, the latter's surprise at a contrary decision would not deter a court from denying him the insurance."

The fact is that, in the cantaloupe case, the law did not furnish the buyer with this kind of signal. His was a duty not to reject, but it was to be anticipated that he would conduct himself as a rational, profit-maximizing businessman. To do this successfully, he had to pay close attention to many factors, not the least of which was the monetary cost of rejection imposed by the law. The signal he received told him that profit-maximizing behavior, while not necessarily encouraged, would be condoned. If one believes that signals are an important part of law and that courts must respect reliance upon them, one is bound to conclude that forfeiture was improper.³⁰

The cantaloupe case may profitably be contrasted with the 1923 decision of the New York Court of Appeals in *Oppenheim v. Kridel*,³¹ holding a woman, for the first time, liable for the tort of criminal conversation.³² Criminal conversation is the civil counterpart of the crime of adultery. While the crime applied to women, the common law's benighted view of the female had served as a shield against civil liability. Legislative reform and judicial enlightenment made the *Oppenheim* decision possible. But what of Ms. Kridel's surprise when she found herself under a judgment requir-

30. The buyer's duty in the cantaloupe case does not become a strong duty (in the sense that I am using the term) because forfeiture is added to the legal consequences of a breach. The buyer still receives a signal to act as a profit maximizer. The rules that surround his transaction are still based on an efficiency-type policy.

31. 236 N.Y. 156, 140 N.E. 227 (1923).

32. The court put the question in the case in terms of whether "a wife [can] maintain an action for criminal conversation as well as a husband." *Id.* at 158, 140 N.E. 227.

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ing her to pay Mrs. Oppenheim damages? Suppose Kridel had claimed at the trial that she took the risk of having an affair with Mr. Oppenheim after carefully weighing all the consequences of being caught, that her decision was a close one, and that it would have tipped the other way had she known the possible dollar cost of her unleashed passion. There is little doubt that such a defense should be rejected. Kridel was under a strong duty. The law's signal made it clear that her cost-benefit analysis would not count as a defense.³³

C. *Policies and Principles as Sources of Law in a Democracy*

6.

The role of surprise is also important in adjudication where a defendant claims that he did not know, and could not have known, that he was under any duty to act in a fashion different from the way in which he did act. Such a defense is central to the problem of the growth of decisional law and to the subsidiary question of when a court should announce a rule prospectively rather than retroactively, as the older common law tradition dictates. These difficult issues can be profitably analyzed by employing the distinction between principles and policies.

The underlying problem about the growth of decisional law results from the task judges face when they attempt to comply with the two sets of obligations under which they must labor. The problem may be put this way: It is the conventional wisdom that courts exist primarily to adjudicate disputes. A dispute generally concerns the legality of someone's conduct and it is expected that the legality of the conduct will be judged as of the time it took place. It is also expected that the judging will be in accordance with reasonably knowable, preexisting rules.³⁴

The received understanding, moreover, is that courts must justify the rules they announce and keep those rules and their justifications up-to-date.³⁵ This latter requirement implies change; the former, stability. How a court should cope with the tension thus produced de-

33. Observe that I am talking only about surprise. The law's remedies must satisfy other criteria if it is to be just; even as in the criminal law, the punishment must fit the crime.

34. Some may prefer the word "standards" to the word "rules." For my purpose, I do not think it matters. Compare Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), with Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972).

35. If courts did not justify rules, if they just announced them, the task of determining how the rule would articulate in other factual contexts would be substantially more difficult.

pends in part upon whether the primary justification for a rule is a principle or a policy. Why this is so requires a closer look at principles and policies and attention to some of their characteristics which I have alluded to, but, until now, postponed discussing.

I have claimed that when a court justifies a common law (as distinguished from a statutory or constitutional) rule with a policy, it is proceeding in a fashion recognized as legitimate only if two conditions are met: The policy must be widely regarded as socially desirable and it must be relatively neutral.³⁶ While recognizing that there will always be problems of degree and foreseeability,³⁷ a court should not use a policy if it imposes disproportionate burdens on a particular group (as contrasted with the population generally), unless there are special reasons that can be adduced for imposing those burdens.³⁸ As will be seen the above requirements greatly limit judicial power. They are not self-evident; however, the first probably requires less by way of explanation than does the second to be perceived as part of conventional practice.

The conditions of social desirability and of neutrality are required by the conception and practice of American democracy. Perhaps the point can best be developed by considering the objections one might have to common law rules that seem justified by policies failing to satisfy either or both conditions. I have given one example earlier, the policy of protecting infant industries.³⁹ But let us consider a more complex example. Would it be proper for a court, over time, to establish a set of common law rules regulating labor disputes that were justified by the policy (announced without legislative authority) of promoting collective bargaining?

The first question is whether collective bargaining is widely regarded as socially desirable at the time the rules are announced. The phrase is inescapably, and purposely, imprecise. It does not imply a unanimous view, nor even a consensus. It does require that there be a substantial and respectable body of opinion in support of the policy. The way in which a court can tell whether a policy is widely regarded as socially desirable is to look, first of all, to the corpus of law—decisional, enacted, and constitutional—to determine whether relevant policies have received legal recognition. The policy

36. See pp. 226-27 *supra*.

37. Cf. Solow, Book Review, 80 YALE L.J. 1696 (1971).

38. Of course it is possible to consider the effect on a specific group as an externality and include it as part of the question of social desirability. The separation, however, aids analysis.

39. See p. 226 *supra*.

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of protecting an infant industry, for instance, might be recognized by legislation granting tax relief to such an industry.⁴⁰

Many policies, embodied though they may be in law, are unstable, for the extent to which a policy is deemed socially desirable changes with experience and depends upon power configurations in society.⁴¹ As the power of particular interest groups grows or declines, a policy's social acceptability may change. Collective bargaining by public employees is certainly a contemporary example.⁴²

In determining the extent of a policy's social desirability, a court should examine such things as political platforms, and take seriously—for this purpose—campaign promises and political speeches. The media is a source of evidence and so too are public opinion polls. Books and articles in professional journals, legislative hearings and reports, and the reports of special committees and institutes are all evidence.

It is clear that there were various times in this century, prior to the enactment of the Wagner Act in 1935, when the policy of collective bargaining commanded sufficient public regard to satisfy the first condition. It was viewed by many as serving a variety of desirable goals: achieving industrial peace; enabling employees to participate in their own governance; fostering the establishment of a durable interest group that might operate effectively in the political arena; and, substituting the collective contract for the private contract which often imposed harsh working conditions and low wages on employees.⁴³

Yet many were opposed to collective bargaining.⁴⁴ The question must be put whether the first condition of a legitimate common law policy—that it be widely regarded as socially desirable—is sufficiently stringent. Should a policy command at least majority support before it becomes available to a common law court? I think not, although I understand the temptation to insist upon such a condition, and some policies may, indeed, satisfy it. Most, however, are not susceptible to proof of majority support, and it does not seem to me that courts have ever behaved as if they were limited by so strict a requirement. Moreover, majority support is a stricture we fail to

40. As remarked above this would not count as even a partial justification for a judge-made rule granting further protection to the favored industry. But the reason goes to the policy's lack of neutrality, not to its social desirability. See p. 226 *supra*.

41. When a policy is enacted by a legislature, a court, of course, must apply the statute. But see pp. 262-64 *infra*.

42. See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT (1969). The problems are discussed in H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES (1971).

43. See H. WELLINGTON, LABOR AND THE LEGAL PROCESS 7-46 (1968).

44. *Id.*

impose on other branches of government. We know enough about interest group politics and public apathy to be confident that many legislative and executive policies would not be endorsed by a popular majority. Of course, legislative policies are promulgated only by the act of a majority of elected legislators and the executive too is elected. Regular elections are plainly the control, shaping and in reserve, that our system lodges in the people. This control is absent where courts announce policies. But at least as much protection is provided the people by the second condition under which courts labor. Common law policies must be relatively neutral; legislative and executive policies are constrained by no such requirement. The condition of neutrality (a common law policy is illegitimate if its burdens are borne disproportionately by a particular group, unless there are special reasons for imposing those burdens on that group) is, I submit, one to which courts generally attempt to conform and sometimes they succeed in their efforts.⁴⁵

That the condition of neutrality is required by democratic theory is perhaps a controversial claim, but it does seem necessary when one attempts to put aside his own commitment to any particular policy that fails of neutrality. The condition merely insists that a judge, who has purposely been insulated from the play of interest group politics by the structure of American government, ought not to justify rules by accepting the demands of one interest group at the expense of another "innocent" group, that may not even be a party to the litigation. The method of interest group politics is the *method of legislation*. It is inconsistent with common law adjudication in America because there is too little power held in reserve by the people to make it acceptable.

In the collective bargaining example that is before us, an employer is apt to be a party in the litigation and one argument for a set of rules promoting collective bargaining is the claimed failure of the market to protect the economic interest of individual employees. Monopsony (a buyer's monopoly), in a strict or modified form, results in exploitation. One factor of production—capital—gets more than it would under competitive conditions; another—labor—gets less. If this were the general economic situation the

45. See generally HART & SACKS, *supra* note 28, at 366-669.

The citation is, of course, "in gross" and many readers will have a case or two at the ready to "disprove" the assertion. A case or two does not disprove anything. But a reasonable man may, after reading hundreds of cases, come away with a conclusion different from mine. I think most will not, however, particularly if they keep the principle-policy distinction in mind. Principles often do have effects that disadvantage "innocent" groups. See pp. 224-25 *supra*.

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second condition for a legitimate common law policy would be satisfied. While collectivizing the employment relationship might not be an optimal solution to the underlying problem, it is likely to result in redistribution to the exploited group at the expense of the exploiter group, without substantially worsening the position of other groups.⁴⁶ Exploitation counts as a special reason for imposing burdens on employers, for although its elimination may not result in better resource allocation, most of us believe its existence is unfair.⁴⁷

Monopsony, however, may not be typical of the economy. Indeed, as best we know, it clearly is not.⁴⁸ And while there may be sufficient short-run imperfections in the labor market⁴⁹ and other reasons, such as industrial democracy and labor peace, to undermine one's faith in the private employment contract,⁵⁰ the general absence of monopsony raises difficulties for establishing collective bargaining through the common law. Should its establishment improve the economic position of organized employees, the burdens of redistribution are most apt to fall upon a particular group in circumstances where there are no special reasons for that group to bear them.

This is apt to happen because product prices in the organized sector will rise, employment in the organized sector will decrease, and an over-supply of labor in the unorganized sector will depress the economic position of "innocent," unorganized workers.⁵¹

It would appear, therefore, that, whatever the merits of collective bargaining (and, in my judgment, they are substantial), its promotion is not a legitimate common law policy. It cannot serve as a justification for common law rules, for it fails of neutrality in the sense I have employed the term. It is too partisan. This does not mean that the promotion of collective bargaining is not a legitimate legislative policy, whether accompanied by a compensating grant to unorganized workers or not. Nor does it mean that any of the many judicial rules announced in labor cases before the enactment of the Wagner Act are wrong or right. All that can be said of those rules, on the basis of this discussion, is that they cannot be justified

46. See A. REES, *THE ECONOMICS OF TRADE UNIONS* 91-92 (1962).

47. It is often easier to decide that a result is unfair than it is to determine what would be fair. For a discussion of this see H. WELLINGTON, *LABOR AND THE LEGAL PROCESS*, *supra* note 43, at 35.

48. See R. BUNTING, *EMPLOYER CONCENTRATION IN LOCAL LABOR MARKETS* (1962).

49. See generally N. CHAMBERLAIN, *THE LABOR SECTOR* 357-428 (1965).

50. See H. WELLINGTON, *LABOR AND THE LEGAL PROCESS*, *supra* note 43, at 26-38.

51. See A. REES, *supra* note 46, at 69-99, 194-202. See also Johnson & Mieszkowski, *The Effects of Unionization on the Distribution of Income: A General Equilibrium Approach*, 84 Q.J. ECON. 539 (1970).

by their effect on the collectivization of the employment relationship.⁵²

The collective bargaining and infant industry examples then do suggest that a policy, if it is to serve as justification for a common law rule, must be both socially desirable and—relatively speaking—neutral. I have claimed that this double requirement is imposed by the conception and practice of American democracy. Another way to make the point is to stress the comparative institutional advantage of legislatures, as contrasted with courts, in the area of policy formation.

The traditional statement of this point would emphasize the legislature's comparative institutional advantage in determining the social desirability of a policy. While there can be no question that the fact-finding facilities available to legislatures through committee hearings and investigations are frequently helpful and are facilities that a court cannot command, this advantage is less than meets the eye. On many issues more than enough factual information is generated without hearings; legislative facts abound and for every expert there is his equal and opposite number. Each has published widely; each researched extensively. Judges, then, often have as many useful legislative facts as do legislators. And they can know, as well as legislators, what is widely regarded as socially desirable by weighing many of the same factors legislators would take into account in formulating their own positions. Unlike legislators, they must eschew parochial and partisan political factors. Like legislators, however, they must consider the more broadly based factors that I have adumbrated above. Moreover, like legislators, they must choose among competing, socially desirable policies by determining which is the more desirable. There is no better process available for selecting a socially desirable policy.⁵³

The comparative advantage of the legislature lies elsewhere. First, it has a vast array of techniques for implementing and monitoring a policy, *e.g.*, rules to be enforced by courts, the establishment of administrative agencies that must report back and seek appropriations, tax relief, and tariff assistance. A common law court can rarely do more than announce a rule and enforce a judgment. Second, the political arena is more likely to be available to those groups that

52. Compare *Stillwell Theatre v. Kaplan*, 259 N.Y. 405, 182 N.E. 63, *cert. denied*, 288 U.S. 606 (1932), with *Vegeahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896), and *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011 (1900).

53. *But cf.* Dworkin, *Judicial Discretion*, 60 J. PHIL. 624 (1963).

have the energy and interest to plead specially. Politics is the art of the possible; legislation is the science of accommodation. The possible is conditioned by the ballot box; accommodation can compensate the "innocent." The judiciary is not so restrained or susceptible, nor does it have available to it the legislature's largesse.

Since many policies which might serve as justification for rules fail of neutrality, in that they are too partisan, common law courts, if they are to exercise power legitimately, are drastically limited in their capacity to implement policies. This is so even though at any particular time a policy may be viewed as socially desirable by a substantial segment of society. In our system of government the implementation or effectuation of such policies is in the first instance legislative business. Courts that take on this task exercise power without authority and engage in what can be called acts of judicial legislation.

7.

Yet there is a line of objection to this conclusion that deserves attention: In the collective bargaining example, for instance, a court may have to decide a case that is very nearly in equipoise; that is, the existing rules and their justifications seem closely balanced. Either decision *A* (holding for the union) or decision *B* (holding for the employer) seems at least initially possible to the judge. The case is a hard one, requiring a nice exercise of judgment. The judge, moreover, is personally persuaded that the promotion of collective bargaining is good for labor-management relations, and, accordingly, a wise policy for the nation. He also has concluded that it is a policy that fails of neutrality. He perceives that decision *A* will advance the establishment of collective bargaining; decision *B* will thwart it. Must he, on the basis of the above teaching, nevertheless disregard these perceptions in the decision he reaches?

Such a conclusion, the objection goes, would plainly be wrong; to ignore the effect on the establishment of collective bargaining in such a situation is mindless. In the case put, nothing much is at stake except the effect: the promotion or thwarting of collective bargaining. Therefore, that effect must receive serious consideration by some decisionmaker.

The answer to this is that a great deal more than the effect on collective bargaining is at stake. What is at stake, as the prior discussion should have made clear, is a steady and consistent concern with the integrity of one aspect of our democratic system and an un-

willingness to undercut that system for a result that one may, in a totally noninstitutional and, therefore, totally unreal world, approve.⁵⁴

8.

Policies which satisfy the conditions of social desirability and neutrality tend, nevertheless, to tax the judicial process. Thus, if we were to assume that collective bargaining was a legitimate common law policy, an employer who insisted that a rule justified by the policy was not reasonably knowable to him when he acted would be raising a potentially serious objection. How seriously a court should take this objection depends upon the particular rule to be imposed and the nature of the prior law. The rule may be no more than an extension of that law, even though the justification for it is novel. On the other hand, it may be a substantial departure, one that causes the employer no little surprise and, accordingly, one to which the employee or union plaintiff is not clearly entitled. This may happen because policies often tend to be unstable, the extent of their social desirability turning on changing power configurations in society. It can happen for other reasons as well, which are illuminated by returning to the question of forfeiture in the cantaloupe case. I suggested before that the forfeiture issue was a remedial matter and discussed the case in those terms.⁵⁵ Where one is concerned with policies of efficiency, the distinction between remedy and right tends to blur as that discussion illustrated (and as Holmes made too much of). Thus, one can view the forfeiture question as the extinction of the buyer's right to U.S. grade one cantaloupes.

Two questions suggest themselves. Why was the buyer surprised by the court's ruling? The answer cannot be, as it might be in the collective bargaining case, that the buyer did not know the policy that would be employed to justify the rule announced. He can be taken to have known that the policy of the Perishable Agricultural Commodities Act was to deter the improper rejection of produce. The answer rather is that the policy of the Act could have been effectuated in a number of ways and that there was nothing in prior published decisions or regulations to suggest that a rule extinguishing his right was to be the chosen instrument for furthering the policy. This problem of potentially alternative rules (and, therefore, of dis-

54. *But cf.* Kennedy, *Legal Formality*, 2 J.L. STUDIES 351 (1973).

55. *See* pp. 233-34 *supra*.

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cretion) available to a decisionmaker is endemic to rules justified by policies.⁵⁶

Second, how can one accommodate the buyer's reasonable claim that preexisting law gave him a right to grade one fruit and imposed a duty on the seller to deliver same with the need for law to grow, which requires the extinction of the buyer's right in these circumstances? The answer is to be found in the nature of policies. They are instrumental justifications for rules. To satisfy the policy here, the forfeiture rule need not be applied retroactively. The buyer has already rejected. No judicial decision can change that. Nor is there reason to suppose that retroactive, as opposed to prospective, application of the new rule will better drive home the lesson to buyers of perishable agricultural commodities as a class. And that alone is what the policy requires and what the forfeiture rule is designed to accomplish.

9.

To turn from policies to principles, I have claimed that they derive from conventional morality. Conventional morality is a difficult concept; difficult, too, is the question of the derivation of legal principles. Perhaps the place to begin is to recognize, first, that there is a moral point of view, the features of which divide philosophers. Professor John Rawls's "conception of right" is a good summary of an aspect of one version. A "conception of right is a set of principles, general in form and universal in application, that is to be publicly recognized as a final court of appeal for ordering the conflicting claims of moral persons."⁵⁷

Second, as elucidated by philosophers, the moral point of view may not distinguish between private individuals and individuals acting in their official capacities.

Third, when one assumes a moral point of view, arguments—taking the form we normally call reasoning—are possible. R.M. Hare tells us that the necessary ingredients in moral arguments are: "logic (in the shape of universalizability and prescriptivity), the facts, . . . the inclinations and interests of the people concerned," and "a certain power of imagination and readiness to use it."⁵⁸ Professor Hare devotes a great deal of attention to some of these ingredients, and

56. The problem is a constant one for administrative agencies working with major regulatory statutes. Rule-making is a frequent solution, one which the National Labor Relations Board has resisted. See *N.L.R.B. v. Wyman Gordon Co.*, 394 U.S. 759 (1969).

57. J. RAWLS, *A THEORY OF JUSTICE* 135 (1971). See generally K. BAIER, *THE MORAL POINT OF VIEW* (1958).

58. R.M. HARE, *FREEDOM AND REASON* 94 (1963).

to follow him is to go deeply into moral philosophy which, I believe, is not necessary here. We need only recognize that when, as a private individual, we take a moral point of view, we must be prepared to reason, and that, as a private individual, we will often have to ask ourselves: "To what action can I commit myself in this situation, realizing that, in committing myself to it, I am also (because the judgment is a universalizable one) prescribing to *anyone* in a like situation to do the same" ⁵⁹

Fourth, in any society's "set" of moral principles (and ideals)—that is to say, the moral principles and ideals which are widely shared by the members of the society—there are many that one can understand only in the context of the society and its history. Such an understanding may not be important to a private individual who has the freedom to develop his own set of principles and ideals. However, for the individual who may be required as an official to take a moral point of view, understanding his society and its history is vital.

This brings us to the main subject. I have claimed, in effect, that when dealing with legal principles a court must take a moral point of view. Yet I doubt that one would want to say that a court is entitled or required to assert *its* moral point of view. Unlike the moral philosopher, the court is required to assert *ours*. This requirement imposes constraints: Judicial reasoning in concrete cases must proceed from society's set of moral principles and ideals, in much the same way that the judicial interpretation of documents (contracts, statutes, constitutions—especially constitutions) must proceed from the document.⁶⁰ And that is why we must be concerned with conventional morality, for it is there that society's set of moral principles and ideals are located.

In *The Concept of Law*, Professor H.L.A. Hart describes conventional morality as "standards of conduct" (that I assume reflect underlying values and attitudes) "which are widely shared in a particular society, and are to be contrasted with the moral principles or moral ideals which may govern an individual's life, but which he does not share with any considerable number of those with whom he lives."⁶¹

59. *Id.* at 47-48 (emphasis in original).

60. One who has never had to work with ambiguous contractual, statutory, or constitutional language may find this analogy absurd. Surely, he would argue, there always must be more certainty in the most ambiguous document than there is in a society's set of moral principles and ideals. He might become less certain about this, however, if he were to read, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), along with Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (1969).

61. H.L.A. HART, *supra* note 10, at 165.

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Moral ideals are different from moral principles. Their realization is "an achievement deserving praise."⁶² They connect with moral principles (which impose obligations) in that they are a guide to the virtuous, inviting him "to carry forward beyond the limited extent which duty demands," to be, for example, especially concerned with the interests of others and to make sacrifices which are not required.⁶³

A society's moral ideals evolve, but cannot be detached from history and tradition. One must ask what those ideals have been to know what they are. This is important because a society's moral ideals help us understand how its moral principles apply in concrete situations. And that is the role of moral ideals that concerns us.

Our concern with moral principles is more substantial. And among the features of such principles that Hart notices, two seem of special relevance. First, he states that "[m]oral obligations . . . are within the capacity of any normal adult. Compliance . . . is taken as a matter of course . . ."⁶⁴ In the United States, that statement, particularly the latter portion, may seem troublesome if conventional morality is a unitary concept for the entire nation. Regional, racial, ethnic, and economic differences make the country a sometimes United Subcultures of America. Nor does the problem disappear, although it may be mitigated, if we take each state to be the relevant unit.

Although the sub-culture problem is real, too much can be made of it. Much of the cleavage that results from diversity manifests itself in interest group politics. Diverse groups can pursue different policies while sharing a basically common morality. More important, the melting pot phenomenon is a real one which the events of the recent past have tended to obscure. The American people have a history and tradition which interact with their common problems to fashion attitudes, values, and aspirations that tend toward a dynamic, but nevertheless relatively cohesive, society, and that make it possible to discern a conventional morality. This morality may impose obligations that sometimes are beyond the capacity of some normal adults; therefore, compliance with its obligations may not be "a matter of course." Yet, it is a morality that is at the least *knowable* to socialized persons. This is not to imply that individuals would always agree about the implications of a moral duty or the particular behavior that a moral principle requires. It is merely to insist that normal adults know when particular behavior raises serious moral questions.

62. *Id.* at 177.

63. *Id.* at 178.

64. *Id.* at 167.

Hart describes a second feature of morality as its "immunity from deliberate change." He states:

It is characteristic of a legal system that new legal rules can be introduced and old ones changed or repealed by deliberate enactment. . . . By contrast moral rules or principles *cannot* be brought into being or changed or eliminated in this way. . . . [S]uch statements as "As from tomorrow it will no longer be immoral to do so-and-so" and attempts to support these by reference to deliberate enactment would be astonishing paradoxes, if not senseless. For it is inconsistent with the part played by morality in the lives of individuals that moral rules, principles, or standards should be regarded, as laws are, as things capable of creation or change by deliberate act. Standards of conduct cannot be endowed with, or deprived of, moral status by human *fiat*, though the daily use of such concepts as enactment and repeal shows that the same is not true of law.

Much moral philosophy is devoted to the explanation of this feature of morality, and to the elucidation of the sense that morality is something "there" to be recognized, not made by deliberate human choice.⁶⁵

Of course, it is not the case—and Hart never suggests it is—that because morality "is something 'there,'" it is static and unchanging. It changes as people's awareness and consciousness change; and they change as the world of ideas (including law) changes and the circumstances of life evolve.

Because of its nature—because it is "there," yet changing—the way in which one learns about the conventional morality of a society is to live in it, become sensitive to it, experience widely, read extensively, and ruminate, reflect, and analyze situations that seem to call moral obligations into play. This task may be called the *method of philosophy*.⁶⁶

If a society were to design an institution which had the job of finding the society's set of moral principles and determining how they bear in concrete situations, that institution would be sharply different from one charged with proposing policies. The latter institution would be constructed with the understanding that it was to respond to the people's exercise of political power; in America, that means interest group politics.⁶⁷ The former would be insulated

65. *Id.* at 171 (emphasis in original).

66. Cardozo talks of the "method of philosophy" in *THE NATURE OF THE JUDICIAL PROCESS* 30-50 (1931). He gives the phrase a meaning different from the one I intend.

67. See, e.g., R. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961); R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); N. POLSBY, *COMMUNITY*

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from such pressure. It would provide an environment conducive to rumination, reflection, and analysis. "Reason, not Power" would be the motto over its door. The empirically minded critic, however, might insist that finding moral principles and determining how they bear in concrete situations are tasks for the behavioral scientist and that the institution should be designed as a research institute rather than as a philosophical temple. And he would not necessarily be wrong if his were a country without scarcity of funds, talent, or time. But the task for a behavioral science institute is formidable. The scientific discovery of moral principles, their interrelationship and importance, and the way in which they work in a particular context, requires a methodology considerably more complicated than a scientific prediction of which candidate will win an election. Moral issues are complex and the issues in all their complexities must be unpacked. A researcher for such an institute could not ask a simple, straightforward question and expect an answer to have any meaning. Nor is it generally necessary to use scientific methodology. Speaking to the related problem of behavioral science criticism of ordinary language philosophy, Professor Stanley Cavell has said:

[W]e must bear in mind the fact that these statements—statements that something is said in English—are being made by native speakers of English. Such speakers do not, in *general*, need evidence for what is said in the language; they are the source of such evidence. It is from them that the descriptive linguist takes the corpus of utterances on the basis of which he will construct a grammar of that language. To answer some kinds of specific questions, we will have to engage in . . . 'laborious questioning' . . . and count noses; but in general, to tell what is and isn't English, and to tell whether what is said is properly used, the native speaker can rely on his own nose; if not, there would be nothing to count. No one speaker will say everything, so it may be profitable to seek out others; and sometimes you (as a native speaker) may be unsure that a form of utterance is as you say it is, or is used as you say it is used, and in that case you will have to check with another native speaker. And because attending so hard to what you say may itself make you unsure more often than is normal, it is a good policy to check more often. A good policy, but not a methodological necessity. The philosopher who proceeds from ordinary language, in his use of himself as subject in his collection of data, may be more in-

POWER AND POLITICAL THEORY (1963); D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1951). *But cf.* Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections between Law and Political Science*, 20 *STAN. L. REV.* 169, 249-61 (1968).

formal than the descriptive linguist (though not more than the linguistic theorist using examples from his native speech); but there is nothing in that to make the data, in some general way, suspect.⁶⁸

An advocate of the method of philosophy, however, might have serious qualms about the design of his hypothetical institution if its purposes were not only to find moral principles and determine how they bear on concrete situations, but also to enforce them, or—to bring it directly to point—to justify legal rules by an appeal to discovered moral principles.

The major difficulty for the official charged with the task of determining how the moral principles bear in a particular case is in disengaging himself from contemporary prejudices which are easily confused with moral principles. He must escape the passion of the moment and achieve an appropriately historical perspective. This entails, among other things, disinterested attention to the society's moral ideals. For such a task, behavioral science methodology is suspect: there is no reason to suppose that the scientist is better able than others to shed contemporary prejudices. It misunderstands the problem to put it in terms of "value-free" research. Scientists, as well as philosophers, live in their society. The problem is interest free research and here the dangers for scientist or philosopher are substantial.

This problem is not entirely solved by the institutions we do have, but the common law manages reasonably well. Judges do not resort to moral principles in their pristine form as justification for common law rules. Rather, those principles are worked through a process which has some promise of filtering out the prejudices and passions of the moment, some promise of providing the judge with distance and a necessary historical perspective.

The process of deriving legal principles is best examined through example. But first, I must digress for a moment. I have, by implication, claimed that courts, because they are protected from political pressures, are better situated to deal with moral principles than legislatures. Yet, legislators, of course, are often professionally concerned with morality. One cannot begin to think about statutes dealing with the death penalty, contraception, or abortion without coming quickly upon moral questions. Like judges, philosophers, and

68. Cavell, *Must We Mean What We Say?*, in *ORDINARY LANGUAGE: ESSAYS IN PHILOSOPHICAL METHOD* 75, 78 (V.C. Chappel ed. 1964) (emphasis in original). *But see* Matces, *On the Verification of Statements about Ordinary Language*, *id.* at 64.

scientists, legislators live in their society. Accordingly, statutes draw upon and are evidence of conventional morality.⁶⁹ But the environment in which legislators function makes difficult a bias-free perspective. It is often hard for law-makers to resist pressure from their constituents who react to particular events (a brutal murder, for instance) with a passion that conflicts with common morality. While we rarely lynch people today, we frequently adopt a “lynching” frame of mind that is deeply at odds with our moral ideals. Nor is it an easy matter for legislators to find conventional morality when there are well-organized interest groups insisting upon moral positions of their own.

Nevertheless, legislation is law, law which judges are bound to apply. However, in this country, if truth be told, they are rather less bound than often is claimed. Not only is there constitutional review of legislation; there is also statutory interpretation. Both methods of judicial control of the legislative process *may* be perfectly legitimate in our system. Both will be examined in later sections of these notes with an eye on the distinctions between principles and policies,⁷⁰ but I now return to the derivation of legal principles at common law.

10.

If an academic with more time than wit were to canvass the profession for its opinion of important law review articles, he would find high on the profession’s list Warren and Brandeis, *The Right to Privacy*.⁷¹ It is an extraordinary essay by many tests, especially for its attempt to fashion a legal principle from changes in moral perceptions.

Warren and Brandeis do not, *in terms*, talk of changing morality. Yet their essay is infused with the idea. After rehearsing how “the common law, in its eternal youth,” moved from the protection of “corporeal property” to “incorporeal rights issuing out of it,” and then to “the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, goodwill, trade secrets, and trademarks,” they describe the law’s development as “inevitable.” “The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only part of the pain, pleasure, and profit of life lay in physical things.”⁷² And the law must continue to grow as

69. See pp. 287, 291 *infra*.

70. See pp. 262-64 & 265-311 *infra*.

71. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

72. *Id.* at 194-95.

man's understanding of himself and his relationship with others change and as technology advances. More protection is necessary. This seems clear to the authors.⁷³

They perceive that changes in moral principles do not directly—even if they do inevitably—change common law. Their purpose, therefore, is “to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual”⁷⁴ The heart of the Warren-Brandeis enterprise is the search for this principle by an examination of decisional law. The quest takes the authors through the cases protecting the right to literary and artistic “property.” They undertake to demonstrate that the rules announced by the courts granting protection to unpublished manuscripts often cannot be justified by an appeal to “the idea of property in its narrow sense,” for “it may now be considered settled that the protection afforded by the common law to the author of any writing is entirely independent of its pecuniary value, its intrinsic merits, or of any intention to publish the same and also wholly independent of the material, if any, upon which, or the mode in which, the thought or sentiment was expressed.”⁷⁵

The earlier cases, however, were not wrong; but their justification was too narrow. That justification can be enlarged (some would say transformed) by examining the background from which it is derived: moral obligations imposed by the “intensity and complexity of life, attendant upon advancing civilization.”⁷⁶ Thus, Warren and Brandeis say,

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed—and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings

73. *Id.* at 196.

74. *Id.* at 197.

75. *Id.* at 203-04.

76. *Id.* at 196.

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and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.⁷⁷

With the principle of an “inviolable personality” as justification, Warren and Brandeis could urge on the common law rules protecting the individual from gossip spread upon the pages of newspapers or of photographs displayed without regard to the wishes of the subjects.

Yet, the two gentlemen from Boston may have been too precipitate. I say this, not because of all the difficulties we have come to see with the Warren-Brandeis tort,⁷⁸ but, rather, because even if the two were right about the morality from which they drew their legal principle of an “inviolable personality,” they could not have known this with sufficient certainty to entitle them to insist upon the principle as so all-encompassing a legal justification. Common law courts must go more slowly. They must be reasonably confident that they draw on conventional morality and screen out contemporary bias, passion, and prejudice, or indeed, that they distinguish cultivated taste from moral obligation. Warren and Brandeis were perhaps unable to make that distinction.⁷⁹

While Warren and Brandeis were perhaps too precipitate, some courts have been too slow. They have discounted, more than is appropriate, the technique employed in *The Right to Privacy*; for apart from pace, that article does model better than anything in the literature the emergence of a common law principle.

11.

*Roberson v. Rochester Folding Box Co.*⁸⁰ is an excellent example of the inadequate judicial response I have in mind. It is instructive to inquire what a proper judicial performance there might have entailed. Such inquiry may further illuminate the relationship between principles and policies.

Abigail Roberson was an attractive person whose photograph the defendant was moved to use—without her consent—in an advertising campaign to sell flour. For this she sought damages and an injunc-

77. *Id.* at 205.

78. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

79. Cf. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 *LAW & CONTEMP. PROB.* 326, 329 (1966).

80. 171 N.Y. 538, 64 N.E. 442 (1902).

tion. No prior judicial decision had granted or denied relief in similar circumstances; the case was thus one of first impression.

The court's opinion, which denied recovery to Miss Roberson, reveals that the issues in the case were framed to a considerable extent by the Warren-Brandeis article. The court carefully considered the literary property and other cases which those authors argued rested on the principle of an inviolate personality. Such an understanding of these earlier cases would have carried the day for Miss Roberson, for, if those cases were premised on that principle, her claim would seem to have fallen within their logic. On the other hand, one could (as Warren and Brandeis recognized themselves) understand the literary property and related cases in more limited terms, terms which reflected the understanding of the profession before the appearance of *The Right to Privacy*. That was the understanding that did, in 1902, convince the *Roberson* court. The court found no property of Miss Roberson in her photographic likeness and felt that the establishment of a right to privacy was best left to the legislature.

The court was wrong, if Warren and Brandeis were even partially correct about the morality of the times from which they derived their principle of an inviolate personality. Their argument might be recast in a more traditional judicial mold, one which would be more apt to screen out contemporary bias, prejudice, and passion, more apt to reduce the influence of cultivated taste.

The Warren-Brandeis description of the growth of the common law is particularly pertinent in this context: "From corporeal property arose the incorporeal rights issuing out of it, and then there opened the wide realm of intangible property, in the products and processes of the mind . . ." ⁸¹ They saw this legal development as "inevitable," for the "intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things." ⁸²

Viewing the "advance of civilization" and its relation to the common law somewhat differently, one might see a movement from corporeal property rules, justified primarily by principles related to a powerful moral conception of property as an institution, to rules increasingly, but never totally, justified by policies of a nature similar to those at work in the law of contract. This is a movement related to the growth of the corporation and the rise of credit to what might

81. Warren & Brandeis, *supra* note 71, at 194.

82. *Id.* at 195.

be called the contractualization of the property concept. Finally the movement leads to the reestablishment, with respect to "property in the . . . processes of the mind," of rules primarily justified by a principle: one that has its ancestry in ancient property law, but that ill fits the then contemporary view of property. As Warren and Brandeis tell us, while "there may be some propriety in speaking [of] property . . . the principle . . . [is] that of an inviolate personality."⁸³ But the transition to the new justification for a common law rule must be made gradually; links to the old property must not be broken all at once. The process must be more evolutionary than Warren and Brandeis would have it.

The court in *Roberson* should have attempted to retain the link while recognizing the emergence of the new principle. This would have required dividing the problem into manageable segments. Adjudication does not require that the judge fashion a fully conceptualized tort, one that accounts for the unknown future. Adjudication required only a determination of how the emerging Warren-Brandeis principle should have counted in the *Roberson* fact situation and this should have been determined by a judicial re-examination of doctrine.

The court in *Roberson* faced a situation in which the invasion of privacy commercially benefited the invader. Miss Roberson could have entered into an enforceable contract with the defendant. The use of her likeness would have served as consideration for its promise to pay her cash. In this sense, her likeness was property which was taken without compensation or consent. The defendant was unjustly enriched, for the rules that comprise the legal doctrine of unjust enrichment are themselves supported by a combination of principles, derived from common morality, and by policies similar to those found in contract law. *Roberson* required the court to acknowledge the growing weight of one of these principles: "that of an inviolate personality."

Miss Roberson, therefore, should have been compensated for the defendant's invasion of her privacy. Its continuing invasion should have been enjoined. The common law, when reexamined in light of changing morality, dictated that privacy in her case should have been treated as a property right, while instructing the judge how to count the principle, and allowing him to award damages for her pain and suffering. There is nothing in the doctrine of unjust en-

83. *Id.* at 205.

richment that would deny such recovery. One does not know what the reasonable value of her likeness was except in terms of her pain and suffering. She did not consent and probably would not have, but the best a court can do is to assume that under any circumstances she would not have consented for less than the emotional cost entailed in seeing her picture used to sell flour.

To recognize a principle, such as the principle of an inviolate personality, by relating it as closely as possible to existing doctrine is *a way in which common law grows and the way in which new rules justified by principles emerge*. It is the process that protects the people from the philosopher-king or the behavioral science panjandrum; it is to the method of philosophy what the vote is to the method of politics.⁸⁴

D. *The Retroactive and Prospective Application of Decisional Law*

12.

I have attempted, through example, in the prior sections to account for the evolution of a common law rule, justified by a principle. But would there be a problem if Abigail Roberson had won her lawsuit? The Rochester Folding Box Co. would then have been enjoined from continuing to display her photograph; it also would have been under a judgment to pay her damages for its past conduct. And with respect to damages, might the company claim unfair surprise? To borrow from an earlier formulation in this paper, Rochester's argument might go as follows: It is the received understanding that courts exist primarily to adjudicate disputes. The dispute between Roberson and the Rochester Folding Box Co. is over the

84. *Roberson* is a case in which the plaintiff is asking a court to determine the weight of a principle by a reexamination of doctrine. The plaintiff wants the court to increase the ambit of legal protection, to create a tort. One can imagine a case in which a defendant asks a court to reexamine the weight of a principle, by a reexamination of doctrine, in order to shrink the ambit of legal protection. See *Oppenheim v. Kridel*, 236 N.Y. 156, 140 N.E. 227 (1923), the criminal conversation case discussed earlier, pp. 234-35 *supra*. *Oppenheim* held that the tort could be committed by a woman against a woman. Suppose the defendant had argued, not as she did (that a woman, unlike a man, had no cause of action), but that the principle of privacy, with respect to sexual behavior, evolving as it was and increasingly being recognized at law, required the court to abolish the tort of criminal conversation, and that this was particularly so since the criminal law afforded adequate protection to the institution of marriage. The defendant's case is a hard one to make out, given the then New York adultery statute. It invites the court to perform a task that is, however, "meet and fit" for the judicial process. Nothing could be less in order than for the court to say to the defendant: "you are asking us to legislate. The proper forum, therefore, is the legislature." Such language here is as inappropriate as it was in the actual *Roberson* decision. There is no difference between applying principles to shrink law or to expand law.

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legality of the company's use of Roberson's photograph. It is expected that the legality of that use be judged as of the time it took place. It is expected, moreover, that legality be determined in accordance with reasonably knowable, preexisting rules. When Rochester began using Roberson's photograph, there was no rule making its use illegal. Accordingly, while the above discussion suggests that, for the future, such use be banned—for courts must keep rules and their justifications up-to-date—that discussion should have no application to the past. To apply the rule retroactively is to sacrifice Rochester to the growth of common law. Such a sacrifice is unfair. It is also unnecessary. The rule should be applied prospectively, and the injunction is, therefore, proper; damages, however, are not, and for the same reason that forfeiture was improper in the cantaloupe case.⁸⁵

This argument is without merit because it dramatically misunderstands the justification for the rule that would grant damages to Miss Roberson. That rule *is* reasonably knowable and preexisting within the convention of common law adjudication.

To be sure, if the common law were a game—like chess or baseball—Rochester would have cause to complain. For if common law were a game, it would differ in two relevant respects: In the stock situation, the application of a rule would be unrelated to its justification; and the common law would be static. Thus, a rule and its justification would not change. Indeed, one would not say, under such circumstances, that rules must be “reasonably knowable”; one would say that rules must be “knowable.” Moreover, the requirement that a rule be “preexisting” would imply a certainty to which no dynamic enterprise should aspire and which none can achieve.

Rochester might press its position and admit that the common law is dynamic. Perhaps, within the convention of common law adjudication, the rule protecting Roberson was preexisting and reasonably knowable. The convention, however, presupposed only the retroactive application of rules. If we relax that constraint, greater certainty is possible and growth of law still permissible. Once again, the cantaloupe case and the forfeiture rule come to mind.

Rochester is wrong, the cantaloupe case, distinguishable, and the key to the distinction is in the difference between principles and policies. In the cantaloupe case, forfeiture can be justified only in

85. See pp. 242-43 *supra*.

terms of its effect. In terms of effect it is a matter of indifference whether the forfeiture rule is applied retroactively or prospectively. Given the state of the law at the time the case arose, however, the retroactive application of the rule constitutes unfair surprise to the buyer and a windfall to the seller. Under these circumstances, one can say that as between the parties it would be unfair for the rule to be applied retroactively. The cost-benefit analysis made by buyer and seller did not take forfeiture into account.

The background law might have been different. Although there had been no specific holding, the reasonable implication of prior decisions might have led informed professional opinion to the conclusion that a rejection would entail forfeiture. In those circumstances, fairness between the parties would demand that forfeiture be applied retroactively.

Roberson resembles the hypothetical cantaloupe case. Indeed, all cases that have any claim to being correctly decided and in which a "new" rule is justified by a principle are cases where informed professional opinion knows that the defendant's conduct is potentially illegal. This follows from the description in the prior sections of the way law grows: changing morality that is there and knowable to the normal adult is filtered through existing common law doctrine. The radical shift in a rule exemplified by the cantaloupe case is alien to the emergence of a new rule exemplified by *Roberson's* suit.

There is another way of formulating this point that may help illuminate it. A rule that is justified by an efficiency-type policy *effectuates* that policy. The only reason for such a rule being applied retroactively is fairness to the parties, who have made a cost-benefit analysis in reliance upon the rule. On the other hand, a rule that is justified by a principle *vindicates* that principle. The only reason for applying the rule at all is to achieve a fair result between the parties. By definition, the principle looks to the past; the policy looks to the future.⁸⁶

In *Roberson* the principle that the plaintiff urged on the court to justify an award of damages and an injunction carried the same weight at the time of decision and at the time the defendant published plaintiff's picture. How much weight a particular principle

86. This may seem an oversimplification; and indeed it is, for in almost every case both policies and principles are involved. I have recognized that fact from the beginning. The point I have tried to emphasize, however, is that in most adjudication one finds that either a principle or a policy is the primary justification for the announced rule. If *Roberson* had been decided along the lines I have suggested, the primary justification for the rule announced would be the principle advanced by Warren and Brandeis.

carries may change over time, as the conditions of society change and as our awareness of them changes in response.

But the change is not *that* sudden. It follows, if Miss Roberson was entitled to an injunction, that she also was entitled to damages. Rochester cannot claim *unfair* surprise.

13.

If in the *Roberson* case the New York Court of Appeals had decided a similar case 25 years earlier and had held for the defendant, how should that prior decision have affected the description of the judicial process set forth above? The answer is in no way at all. The function of the court remains the same, namely, to determine what weight the privacy principle carries in the dispute before it. The methodology also remains the same: The judge must rethink and rework doctrine. The doctrine, in view of a decision that bears importantly upon the case, would, however, be different from what it was in *Roberson* itself.

A new and interesting question that the hypothetical *Roberson* presents is whether a court, when dealing with a rule justified by a principle, may overrule a prior decision prospectively, or whether, as at common law, a retroactive overruling is required. I think the answer is retroactive or not at all, but it may be helpful first to try arguing the opposite.

The claim would be that a reworking of doctrine could lead the judge to conclude that privacy is *now* of sufficient legal significance for him to hold that Rochester's conduct constituted a tort, but that Rochester was entitled, nevertheless, to rely upon the prior decision. Accordingly, what Rochester did to Miss Roberson would not entitle her to damages.

The difficulty with this position is similar to the difficulty in *Roberson* itself: a judgment declining to award damages but granting an injunction. In the hypothetical *Roberson* case, to say that the defendant was entitled to rely on the prior decision is the same as saying that privacy is not of sufficient legal significance to make the defendant's violation unlawful.

If the judge were to determine that the privacy principle required overruling the prior decision, he would be saying that the law had evolved and rendered that decision no longer good law. He would not, however, be able to fix an exact point in time when the former decision lost its operative effect.

What he would be determining is that informed professional opinion no longer considered the prior decision a stable precedent, one that could be relied upon by the defendant. If this is correct, it would seem arbitrary for a judge to write an opinion which justifies overruling the earlier decision without also requiring the defendant to compensate the plaintiff.⁸⁷

14.

Unquestionably, the most extensive—and authoritative—examination of the prospective and retroactive application of decisional law is to be found in the United States Reports. The Supreme Court has been concerned with the question as it bears upon the application of constitutional rules, most particularly rules dealing with the rights of criminal defendants.

I should like to examine some of these cases, as if they were (to the extent that it is possible) common law decisions. This enables me to put aside questions of federalism and habeas corpus and to test the assertions of the last several pages concerning the legitimacy of prospective and retroactive overruling of prior decisions and the relationship thereto of principles and policies. The cases to be considered, all involving the Fourth or Fourteenth Amendment, are *Wolf v. Colorado*,⁸⁸ *Mapp v. Ohio*,⁸⁹ *Linkletter v. Walker*,⁹⁰ *Katz v. United States*,⁹¹ and *Desist v. United States*.⁹²

In *Wolf*, which was decided in 1949, state police, without a search warrant and in a manner that would clearly have violated the Fourth Amendment, seized the records of a physician. The records were introduced into evidence in a criminal prosecution. The Court held that the "security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is, therefore, implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."⁹³ The Court, however, declined to apply the federal exclusionary rule of *Weeks v. United States*⁹⁴ to state courts; the

87. Cf. Mr. Justice Harlan's dissent in *Desist v. United States*, 394 U.S. 244, 258-59 (1969).

88. 338 U.S. 25 (1949).

89. 367 U.S. 643 (1961).

90. 381 U.S. 618 (1965).

91. 389 U.S. 347 (1967).

92. 394 U.S. 244 (1969).

93. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

94. *Weeks v. United States*, 232 U.S. 383 (1914).

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rule that the Fourth Amendment bars “the use of evidence secured through illegal search and seizure.”⁹⁵ Said the Court:

[T]he ways of enforcing such a basic right [“the security of one’s privacy against arbitrary intrusion by the police”] raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible to quantitative solution.⁹⁶

Mapp, decided in 1961, overruled *Wolf* on this issue; indeed, in the language of the dissent, it “suddenly [turned] its back on *Wolf*”⁹⁷ It justified the exclusionary rule in state proceedings by an appeal to both policy and principle; but whether the Court took policy or principle to be the primary justification was unclear. It did summarize its position as follows:

In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”⁹⁸

Linkletter, a 1965 case, removed any doubt as to what the Court considered to be the primary justification for the exclusionary rule. Its opinion sounds in policy:

In short, just as other cases had found the exclusionary rule to be a deterrent safeguard necessary to the enforcement of the Amendment, . . . *Mapp* bottomed its rule on its necessity as a “sanction upon which [the Fourth Amendment’s] protection and enjoyment had always been deemed dependent under . . . *Weeks*”⁹⁹

95. *Wolf v. Colorado*, 338 U.S. at 28.

96. *Id.*

97. *Mapp v. Ohio*, 367 U.S. 643, 680 (1961) (Harlan, J., dissenting).

98. *Id.* at 656.

99. *Linkletter v. Walker*, 381 U.S. 618, 635 (1965).

Linkletter, which was the Court's first serious adventure with the prospective-retroactive problem, held only that *Mapp* did not apply to state court convictions which had become final before *Mapp* was decided. There is every reason to suppose, however, that had *Linkletter* been decided after the Court had gained confidence in the new doctrine, it would have held in *Linkletter* as it did with respect to a related question, that *Mapp* be "given wholly prospective application"¹⁰⁰ (except for Miss Mapp, herself).

Given the Court's justification for the exclusionary rule—a policy to deter police—there is no reason for *Mapp* not to be wholly prospective, if making it prospective is prudent. The issue is similar to forfeiture in the cantaloupe case: there, concern was with the subsequent behavior of buyers as a class; here, with police conduct. Police conduct that is past cannot be changed.¹⁰¹ The lesson will not be driven home better by making *Mapp* retroactive.¹⁰²

In *Katz v. United States*, decided in 1967, the Court overruled prior decisions and held electronic surveillance, unaccompanied by a physical trespass, subject to the Fourth Amendment. There can be no doubt that this "new" rule was justified by an extension of the principle that made unreasonable searches, accomplished through a trespass, a violation of the Fourth Amendment. In a sense the situation presented in *Katz* was similar to the hypothetical *Roberson* case discussed earlier. The task for the Justices in *Katz* was relatively easier, however, because the prior cases with which they had to contend—*Olmstead*¹⁰³ and *Goldman*¹⁰⁴—"[had] been so eroded by . . . subsequent decisions that the 'trespass' doctrine there enunciated [could] no longer be regarded as controlling."¹⁰⁵ A reworking

100. *Desist v. United States*, 394 U.S. 244, 246 (1969).

101. "The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved." *Linkletter v. Walker*, 381 U.S. at 637.

102. Nor do I see anything improper in applying the exclusionary rule to Miss Mapp. The Court would be making a reasonable classification in treating her differently from others similarly situated if it were to upset her conviction, "for the practical reason that case law is not likely to keep up with the needs of society if the litigant who successfully champions a cause is left with only that distinction." *Willis v. Department of Cons. & Econ. Dev.*, 55 N.J. 534, 541, 264 A.2d 34, 37-38 (1970). The Court's own explanation is in *Stovall v. Denno*, 388 U.S. 293 (1967), and turns both on the incentive to litigate and the case or controversy requirement of Article III. See generally Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962). Compare Mishkin, *The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965), with Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966).

103. *Olmstead v. United States*, 277 U.S. 438 (1927).

104. *Goldman v. United States*, 316 U.S. 129 (1942).

105. *Katz v. United States*, 389 U.S. 347, 353 (1967).

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of doctrine was the method by which the Justices were able to determine how much weight to give the Fourth Amendment's principle of privacy.

Desist, a 1969 decision, gave *Katz* (except for Mr. Katz) wholly prospective application. That decision was wrong for the reasons urged in the *Roberson* hypothetical. But, one might ask, is there not a difference? It might be correct to say that the principle of privacy used to justify the rule in *Katz* must have retroactive application, but *Desist* is about the exclusionary rule, which, as we have seen, is a rule justified by a policy. The Court in *Desist* was not careful in its language when it said *Katz* was prospective only; it neglected to separate the principle at stake in *Katz* from the policy at issue in *Desist*. What it should have said was that *Weeks* and *Mapp* do not apply to cases like *Katz* where the illegal search took place before *Katz* was decided; that the reason for this is simply that the police have already acted; that retroactively is not necessary to bring the lesson home to them; and that the explanation given to justify a prospective decision in *Linkletter* also justifies *Desist*.

The difficulty with such an explanation of *Desist* is that it assumes that when a court is dealing with a policy there are no constraints imposed on it by principles. I have never meant so to contend; in fact I emphatically reject such a proposition. While a court has considerable discretion when working with policies, it may not act arbitrarily. And that is just what the Court did in *Desist*. If the Fourth Amendment's privacy principle extends to searches which do not entail a trespass, so, too, does the exclusionary rule which was the *existing* policy at the time of the search in *Desist*.

If the Court could show that the policy of deterrence would not be effectuated by the exclusionary rule in situations where an illegal search did not involve a trespass, the case would be different. Such a demonstration, however, would have nothing to do with the retroactive-prospective issue. Its logic would deny to *Katz* the rule of *Weeks* and *Mapp*, both prospectively and retroactively. No such showing can be made, although it may be that the exclusionary rule fails across-the-board to serve the policy that purports to justify its existence.¹⁰⁶

106. See *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). On the exclusionary rule and its justification in terms of principle, in special situations, see pp. 270-72 *infra*.

E. *Principles and Policies in Statutory Interpretation*

15.

In the insurance case discussed earlier no statute controlled the outcome. The court, acting at common law, announced the rule that a beneficiary who intentionally takes the life of the insured is barred from recovering that money. It justified this rule by an appeal to the principle that a wrongdoer should not profit from his wrong. This principle should serve as justification for a similar rule, barring inheritance by an heir who intentionally takes the life of his ancestor, even though the controlling statute of descent and distribution makes no exception for the cause of the ancestor's demise and provides that one who occupies the family relationship of the heir to his ancestor shall inherit.¹⁰⁷

There are two styles of explanations—with several variations—for construing the statute of descent and distribution to reach the result of disinheriting the murdering heir. One begins by recognizing that a court generally cannot determine whether the enacting legislature canvassed the type of questions raised by the case, let alone the concrete problems which the court must resolve and concludes by asserting that, if the legislature had addressed the issue, it would have decided that a wrongdoer should not profit from his wrong. The second approach proceeds from the same initial premise about the legislature, but then asserts that it is the court's own responsibility to address the issue, and, accordingly, that the rule and its justification should be the same as in the insurance case.

The difference between the two approaches is really a matter of style and preference for one or the other a matter of taste. The court is acting on its authority; also, the legislature probably would have acknowledged the principle.

Suppose, however, that the assumption concerning the legislature, which is shared by both approaches, proved unavailable. The descent and distribution statute might address the cause of the ancestor's demise and provide that: "No person finally adjudged guilty . . . of murder in the first or second degree, shall inherit . . ." ¹⁰⁸ The

107. Cf. *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889). See generally Wade, *Acquisition of Property by Willfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936).

108. 21 OHIO REV. CODE ANN. § 2105.19 (Page 1968).

heir, although intentionally having taken the life of his ancestor, might have been convicted of manslaughter.

In such a case, it is clear that the legislature has canvassed the general problem. It has not, however, resolved the case, for it has not, in terms, addressed the issue in the case. Nor is there any way—absent an extraordinarily clear legislative history—of knowing why the statute failed to address manslaughter or what the legislature would have concluded had its enactment specifically dealt with that issue.

Yet the fact that one is in substantial doubt as to what the legislature would have concluded does not preclude a court from employing the first approach to statutory construction. In his Cardozo Lecture on reading statutes, Mr. Justice Frankfurter observed:

In the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment. Only if its premises are emptied of their human variables, can the process of statutory construction have the precision of a syllogism. We cannot avoid what Mr. Justice Cardozo deemed inherent in the problems of construction, making 'a choice between uncertainties. We must be content to choose the lesser.' But to the careful and disinterested eye, the scales will hardly escape appearing to tip slightly on the side of a more probable meaning.¹⁰⁹

The "lesser" uncertainty, the slight "tip," would, I should think, to the "disinterested eye," favor a determination that legislative intent required the heir to recover. Bearing in mind what Mr. Justice Holmes has told us, namely, that a canon of statutory construction is no more than an axiom of experience,¹¹⁰ does not, in these circumstances, make it inappropriate—indeed, it makes it entirely appropriate—for a court to appeal to the canon, *expressio unius est exclusio alterius*. In these circumstances, experience is the best way to determine the lesser uncertainty.

Most students of the law, however, probably would agree that a judgment holding for the heir in the supposed case was improper.¹¹¹ Some might criticize the decision by denying that its interpretation

109. Frankfurter, *The Reading of Statutes*, in *OF LAW AND MEN; PAPERS AND ADDRESSES* 45, 67-68 (P. Elman ed. 1956). The Cardozo quotation is from *Burnet v. Guggenheim*, 288 U.S. 280, 288 (1933).

110. *Boston Sand & Gravel Co. v. United States*, 274 U.S. 41, 48 (1928).

111. See HART & SACKS, *supra* note 28, at 106-10.

of legislative intent is correct and arguing that the lesser uncertainty bars the heir. I think that argument has force only if accompanied by a heroic—and unfortunately fictitious—assumption about the reasonableness and consistency of enacted law, an assumption that shifts, or hides, responsibility as between court and legislature.

The court should assume responsibility by imposing on the legislature a clear statement rule: to depart from an established *principle*, the legislature must speak plainly. The exercise of judicial power entailed in the application of such a rule is, of course, the exercise of quasi-constitutional, judicial review. The court, in a mild way, is resisting legislative purpose. It is interposing itself, in a noncooperative fashion, between the legislature and the people. Such an exercise of power is, nevertheless, both common and legitimate.¹¹² Its legitimacy stems from the nature of principles and the comparative advantage of courts over legislatures in elucidating principles. Legislative power to disregard principles exists in our form of government, but it must be exercised without doubt.

The clear statement requirement is broader than the distinction between principle and policy, for there are situations in which it applies that are not illuminated by that distinction.¹¹³ But the clear statement rule is not a requirement that we would feel at all comfortable about if it were imposed to restrain a legislature from disrespecting a policy.¹¹⁴ And this is so even if the policy might legitimately serve as justification for a rule at common law. One need hardly view the world through the lens of classical economics to see all about him statutes that reject policies of efficiency and that are interpreted according to their general purpose.¹¹⁵ The explanation for this is simple enough: courts do not have a comparative institutional advantage in designing the future.¹¹⁶

112. Consider as an example *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944). The Railway Labor Act empowers a union, designated by a majority of employees in an appropriate unit, to represent all employees. In terms, it says nothing about the nature of this representation. The Court has held, however, that the union is under a duty to represent all employees fairly. Its reasoning in part was as follows:

It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.

Id. at 202 (footnote omitted).

113. *See, e.g.*, *United States v. Bass*, 404 U.S. 336 (1971) (federalism); *Kent v. Dulles*, 357 U.S. 116 (1958) (delegation to administrative official).

114. Unless, of course, the policy had constitutional roots. *See* pp. 267-70 *infra*.

115. *See, e.g.*, The Fair Labor Standards Act, 52 Stat. 1060 (1937), as amended, 29 U.S.C. §§ 201-19 (1970).

116. This section is a very preliminary inquiry into a vast subject.

II. Constitutional Double Standards

F. *Common Law Perspectives on Judicial Review*

16.

To a considerable extent, lawyers see the Supreme Court as an institution different from its common law counterparts.¹¹⁷ The essence of that difference is judicial review: the "sovereign prerogative" that makes the "least dangerous branch of . . . American government . . . the most extraordinarily powerful court of law the world has ever known."¹¹⁸ The existence of judicial review—the power of the Supreme Court in a case or controversy to declare governmental action, and particularly congressional and state legislation, unconstitutional—has, from time to time, placed a heavy burden of explanation upon constitutional scholarship. Since the power first was exercised by the Court in Chief Justice Marshall's 1803 opinion in *Marbury v. Madison*,¹¹⁹ either the legitimacy or the scope of the power has been an overarching problem in constitutional theory. Legitimacy and scope are intertwined; intertwined too are explanations.¹²⁰

With varying degrees of persuasiveness, legitimacy is claimed by an appeal to the text of the Constitution, particularly to Articles III and VI. It is claimed too by an appeal to history, to the intention of those men who made the Constitution. The purpose or function of judicial review is perhaps the most important justification advanced on behalf of the Court's power.¹²¹ "The search must be for a function, . . ." says Alexander Bickel, "which differs from the legislative and executive functions; which is peculiarly suited to the capabilities of the courts; which will not likely be performed else-

117. See generally E. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* (1962).

118. A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS I* (1962).

119. 5 U.S. (1 Cranch) 137 (1803).

120. See generally G. GUNTHER & N. DOWLING, *CASES AND MATERIALS ON CONSTITUTIONAL LAW I-49* (8th ed. 1970).

121. The literature is extensive. See, e.g., R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969); A. BICKEL, *supra* note 118; C. BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (1960); C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 67-98 (1969); M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* (1964); Bok, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L. REV.* 1 (1971); Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 *STAN. L. REV.* 169 (1968); Rostow, *The Democratic Character of Judicial Review*, 66 *HARV. L. REV.* 193 (1952); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *HARV. L. REV.* 129 (1893); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959). See also L. HAND, *THE BILL OF RIGHTS* 1-30 (1953).

where if courts do not assume it"¹²² Professor Bickel finds that function by postulating "that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values."¹²³ And he sees in the Supreme Court and the institution of judicial review a means of protecting those "certain enduring values."

The text of the Constitution is also appealed to when the question shifts from the legitimacy to the scope of judicial review. A dominant figure is Mr. Justice Black and the language of the First Amendment is perhaps the best known example.¹²⁴ Among Mr. Justice Black, certain commentators, and other Justices there is substantial disagreement as to how closely the text of the Constitution comes to being a sufficient delineation of the scope of judicial review. As to scope, history again is examined, and purpose or function is of enormous importance. To quote Bickel once more: "[T]he framers expected the Supreme Court to exercise a power of judicial review . . . [but] they certainly had no specific intent relating to the nature and range of the power and to the modalities of its exercise. This is the more noteworthy since *judicial review is an issue in the allocation of competences*"¹²⁵

In Part I, I have argued in effect that the power of common law courts to make law—"the range of [their] power and . . . the modalities of its exercise"—is, to a very substantial extent, also "an issue in the allocation of competences." My approach to the problem of making common law has been to examine two types of justifications for rules: policies and principles. It is the aim of Part II to suggest that there may be utility in applying this type of analysis to the making of constitutional law.

17.

Although the Supreme Court is special, it is nevertheless a court of law. While it has vastly more power, it has many of the same strengths and weaknesses as common law courts. It is not directly responsible to the people; Justices are not elected. The Court is designed to be unresponsive to the pressure and play of interest group politics; Justices are insulated from such pressures. As with common law courts, the Court is not well-suited to the development of policies.

Because it is insulated and because constitutional law as well as common law can serve to filter out the passion and bias of the

122. A. BICKEL, *supra* note 118, at 24.

123. *Id.*

124. *See, e.g.,* Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

125. A. BICKEL, *supra* note 118, at 104 (emphasis added).

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moment, the Supreme Court is an institution well-positioned to translate conventional morality into legal principle. The Court is more powerful than a common law court when it acts as a constitutional tribunal. The restraints, however, also are greater, for the power of judicial review can be exercised only when the principle the Court employs is related to constitutional text. Common law courts are not so restricted.

One analogy to common law might seem made, and made neatly: The scope of judicial review should be sharply restricted where the primary justification for the exercise of judicial power is a constitutional policy; it should be searching where the primary justification is a principle.

Problems of judicial review, however, are complicated. In some areas of constitutional law—those that least resemble common law—analysis based on the distinction between principles and policies may not be fruitful. It fails to take one very far where the issue is the reach of federal power under the commerce clause, the war powers, or executive privilege. Indeed, its utility is perhaps limited to the critical area of individual rights against the state. And even here there are difficulties. First, the Constitution sometimes *imposes* upon the Supreme Court the task of searching review under a constitutional provision which is justified primarily by a policy. Second, the task of distinguishing principles from policies in the constitutional sphere is even more difficult than it is at common law.¹²⁶

An example of the first complication is the protection of speech in the First Amendment. While I have considerable sympathy with attempts to cast freedom of expression in noninstrumental terms, to see it as a principle, an end in itself, an aspect of “individual self-fulfillment,”¹²⁷ the Court¹²⁸ and most commentators¹²⁹ place their emphasis elsewhere.¹³⁰

126. It is also the case that, with the Constitution even more than with common law, principle-policy analysis can give no more than a partial view. For one alternative and promising approach see C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

127. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970). See, e.g., Scanlon, *A Theory of Freedom of Expression*, 1 *PHIL. & PUB. AFFAIRS* 204 (1972). This aspect of the First Amendment is to be found as well in the concept of liberty in the due process clauses of the Fifth and Fourteenth Amendments. See note 298 *infra*.

128. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

129. This is the case, moreover, irrespective of whether the commentators see considerable or limited power in Congress to enact legislation raising serious First Amendment questions. Compare Bork, *supra* note 121, with Meiklejohn, *The First Amendment Is an Absolute*, 1961 *SUP. CT. REV.* 245.

130. This is not to say that all Justices see the First Amendment only as a policy. Rather, it is to claim that most see the principle or principles involved as the secondary justification and the policy as the primary justification. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

The speech clause of the First Amendment is seen as predominantly instrumental: Its policy justification is nothing less than the functioning and survival of American democracy. Holmes, dissenting in *Abrams v. United States*, put it this way:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by *free trade in ideas*—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.¹³¹

Abrams was a case involving political speech and the central concept Holmes had in mind was free trade in political ideas. By "truth" he probably meant "consumer" sovereignty. This can at times be a worrisome notion, for Holmes is right: "Every idea is an incitement."¹³² There may be some room for reasonable disagreement as to *when* and *where* consumer sovereignty should yield.¹³³ There is also room for doubt and disagreement as to the scope of protection required by the Amendment's policy. Should it reach the artistic, scientific, and pornographic? Does it apply to nonverbal conduct?

There is, however, no room for doubt that the primary justification for the constitutional protection of speech has been understood by the Court to be an efficiency-type policy: The speech clause of the First Amendment seeks to promote the dissemination of political ideas. Accordingly, constitutional language apart, one might think of the legislature as under a weak duty. One might expect it to approach a problem in terms of trade-offs. A free market in ideas, like a free market in cantaloupes is not lightly to be disregarded. But it is, after all, instrumental, a way of getting to a desirable position: the successful functioning of the political process. In any given situation, therefore, a prudential consideration of all the factors may suggest a departure from the normal "free market" approach. And the legislature, so long as it is acting reasonably, is apt to be better suited than the Court to consider the relevant factors.

Suppose the language of the First Amendment were as follows:

131. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added).

132. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

133. See Bickel, *The "Uninhibited, Robust, and Wide-Open" First Amendment: From "Sullivan" to the Pentagon Papers*, 54 COMMENTARY, Nov. 1972, at 60.

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“The proper functioning of the American political process is best served by free trade in ideas; accordingly, Congress and the States shall, when enacting legislation, give due respect to the effect of a law upon the free expression of views and opinions” Under such circumstances and given the Court’s instrumental account of freedom of expression, I submit that only if a legislature acted irrationally or unreasonably (well accepted, although admittedly shifting, standards) would judicial review permit the Court to hold a law invalid as interfering with free expression. Such a constitutional provision would require judicial review, but of a restricted nature.¹³⁴

The First Amendment, of course, is written differently: “Congress shall make no law . . . abridging the freedom of speech” That language, while hardly self-defining even with regard to plainly political speech, must charge the Court with a more searching scope of review than the one encapsulated in a word like “rationality.”

I would suggest, however, that the received justification of the First Amendment has imposed limits on the way the Court can approach questions raised under it. These limits are due to the fact that “judicial review is an issue in the allocation of competences” and they would not exist if the primary justification for the Amendment were seen as a principle rather than a policy. Doctrines such as vagueness¹³⁵ and overbreadth¹³⁶ thus figure importantly in the law of the First Amendment and statutory interpretation is everywhere in evidence.¹³⁷ Each represents a judicial technique that is at least as much procedural as substantive; each invites legislative reexamination of the underlying issue. The message that these techniques carry to the legislature is: “If you must, do it again; but do it with more care, with fewer side effects, with responsibility duly and specifically assumed.”

These doctrines are employed where closely balanced questions are presented and where the Court is comparatively at sea. It does not have available—on its understanding—a principle and, therefore, has

134. Cf. C. BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 217-21 (1960).

135. See, e.g., *Rabeck v. New York*, 391 U.S. 462 (1967); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1963); *Edwards v. South Carolina*, 372 U.S. 229 (1962); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961). On vagueness see generally Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

136. See, e.g., *United States v. Robel*, 389 U.S. 258 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960). See generally Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

137. See, e.g., *N.L.R.B. v. Fruit & Veg. Pack. & Wareh. Local 750*, 377 U.S. 58 (1964); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

no institutional advantage over the legislature. It has a general policy to set off against a specific one. The specific policy applies to a limited situation and represents a legislative judgment that in the here and now the specific policy is more important. It is difficult for the Court to second guess that kind of a cost-benefit analysis. Yet because the Court views the First Amendment as instrumental, that is what it must do if it takes on the question directly.¹³⁸ Accordingly, the Court is apt to sidestep as best it can while recognizing that the language of the Amendment does impose upon it a special responsibility.¹³⁹

18.

The second complication in principle-policy analysis is the heightened difficulty in constitutional law of distinguishing principles from policies. The due process clauses of the Fifth and Fourteenth Amendments, as substantive limits on legislation, are the provisions I wish to examine with this difficulty in mind. My hope is to justify what has been called a double standard of judicial review;¹⁴⁰ I will argue that Holmes probably was right in *Lochner*,¹⁴¹ that the holding in *Griswold v. Connecticut*¹⁴² is correct, and that while the Court went too far in *Roe v. Wade*,¹⁴³ the majority did properly understand the breadth of its obligation.

Before I embark on so ambitious an undertaking, however, I would like to consider briefly a procedural due process problem that illustrates the difficulty and the utility of a principle-policy analysis. In *Wolf v. Colorado*¹⁴⁴ the Court refused to apply the federal exclusionary rule of the Fourth Amendment to a search and seizure (which

138. Cf. Bickel, *supra* note 133.

139. Take, as a related example of the utility of the principle-policy distinction, the "penumbral" First Amendment question of whether political neutrality can constitutionally be imposed upon a public employee. See *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 93 S. Ct. 2880 (1973), where the Court gave a substantive and affirmative answer. The issue in part is whether such an imposition violates the employee's right of free association. Surprisingly, we know little about that right. Is it mainly instrumental, as Tocqueville argued, "a necessary guarantee against the tyranny of the majority"? A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 177 (J. Maynard & M. Lerner eds. 1966). If it is, then its reach must be judged in terms of the goal it seeks to serve. And that goal—preventing the tyranny of the majority—may well be furthered by the political neutrality of public employees rather than by their active involvement in the political process. If, on the other hand, the right of free association were seen as desirable in itself (and quite apart from whether it furthers a separate societal goal), the power of Congress to restrict the political activities of federal employees should, indeed, be meager.

140. See, e.g., G. GUNTHER & N. DOWLING, *supra* note 120, at 838.

141. *Lochner v. New York*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

142. 381 U.S. 479 (1965).

143. 410 U.S. 113 (1973).

144. 338 U.S. 25 (1949).

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did not involve physical assault upon an individual) found illegal under the Fourteenth Amendment. Mr. Justice Frankfurter, writing for the Court, saw the exclusionary rule as justified by a policy of deterring police behavior. He did not see it embedded within "the concept of ordered liberty," a phrase (there were others) that in 1949 set forth the scope of judicial review of state criminal proceedings under the due process clause of the Fourteenth Amendment.

*Rochin v. California*¹⁴⁵ was decided three years later, Mr. Justice Frankfurter again writing for the Court. *Rochin* too involved a state criminal prosecution; the principal evidence against the defendant also had been obtained illegally; the standard of review remained "the concept of ordered liberty." *Rochin*'s conviction, however, was upset. And the facts made the difference: The police had forcibly entered *Rochin*'s apartment in search of narcotics and saw some capsules on a nightstand. When *Rochin* gulped them down, the police took him to a hospital and, without his permission, had a doctor pump *Rochin*'s stomach, the contents of which were found to include morphine capsules.¹⁴⁶

Unless one insists upon converting every principle into an untestable policy, *Rochin*, when viewed in light of *Wolf*, must be seen as announcing a rule justified at least primarily by a principle. As in the insurance case with which this paper began, one could talk instrumentally. Various policies are available: Perhaps the rule is designed to deter physical assault by the police or perhaps it aims, through a process of socialization, to affect attitudes and thereby influence behavior. Yet surely *Rochin* is correct even if it has no effect on the behavior of anyone. "This is conduct," said Mr. Justice Frankfurter, "that shocks the conscience." And he went on:

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive rights of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized con-

145. 342 U.S. 165 (1952).

146. *Id.* at 166.

duct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."¹⁴⁷

G. *Substantive Due Process: Background*

19.

Close scrutiny of economic regulation under the due process clauses was out of favor when the Court decided the *Lincoln Federal Labor Union* case in 1949.¹⁴⁸ The case involved state "right to work" laws and among the unsuccessful constitutional challenges raised was a liberty of contract, due process contention: "the [right to work] laws are specifically designed," said the appellants, "to deprive all persons . . . of 'liberty' (1) to refuse to hire or retain any person in employment because he is or is not a union member, and (2) to make a contract or agreement to engage in such employment discrimination against union or non-union members."¹⁴⁹ On his way to rejecting this contention, Mr. Justice Black, in the opinion of the Court, reviewed the past:

In 1907 this Court in *Adair v. United States*, 208 U.S. 161, considered the federal law which prohibited discrimination against union workers. Adair, an agent of the Louisville & Nashville Railroad Company, had been indicted and convicted for having discharged Copping, an employee of the railroad, because Copping was a member of the Order of Locomotive Firemen. This Court there held, over the dissents of Justices McKenna and Holmes, that the railroad, because of the due process clause of the Fifth Amendment, had a constitutional right to discriminate against union members and could therefore do so through use of yellow dog contracts. The chief reliance for this holding was *Lochner v. New York*, 198 U.S. 45, which had invalidated a New York law prescribing maximum hours for work in bakeries. This Court had found support for its *Lochner* holding in what had been said in *Allgeyer v. Louisiana*, 165 U.S. 578, a case on which appellants here strongly rely. There were strong dissents in the *Adair* and *Lochner* cases.

In 1914 this Court reaffirmed the principles of the *Adair* case in *Copping v. Kansas*, 236 U.S. 1, again over strong dissents, and

147. *Id.* at 172-73. See *Olmstead v. United States*, 277 U.S. 433, 471-85 (1928) (Brandeis, J., dissenting); *Boyd v. United States*, 116 U.S. 616 (1886).

148. *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

149. *Id.* at 533.

held that a Kansas statute outlawing yellow dog contracts denied employers and employees a liberty to fix terms of employment. For this reason the law was held invalid under the due process clause.

The *Allgeyer-Lochner-Adair-Coppage* constitutional doctrine was for some years followed by this Court. It was used to strike down laws fixing minimum wages and maximum hours in employment, laws fixing prices, and laws regulating business activities. . . . And the same constitutional philosophy was faithfully adhered to in *Adams v. Tanner*, 244 U.S. 590 . . . [where] this Court with four justices dissenting struck down a state law absolutely prohibiting maintenance of private employment agencies. The majority found that such businesses were highly beneficial to the public and upon this conclusion held that the state was without power to proscribe them. . . .

This Court beginning at least as early as 1934 . . . has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. . . . Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.¹⁵⁰

Subsequent cases suggest that judicial review of economic legislation under the due process clauses is now *de minimis*, that for good or ill the Court now finds itself in a doctrinal strait jacket.¹⁵¹

20.

The development of procedural due process under the Fourteenth Amendment—and particularly its employment to control the states' administration of criminal justice—is a very different story, one that must be discussed because of the difficulty, at the margin, of distinguishing substance from procedure and for the light procedural due process casts upon the double standard problem before us. Much of the judicial and extrajudicial debate has focused upon the incor-

150. *Id.* at 534-37.

151. *See, e.g.,* *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

poration of some or all of the provisions of the Bill of Rights into the due process clause of the Fourteenth Amendment.¹⁵²

*Palko v. Connecticut*¹⁵³ (decided when the Court was contracting the scope of its review of economic legislation) rejected a contention that the Fourteenth Amendment incorporated Amendments I-VIII. The defendant argued that Connecticut had placed him twice in jeopardy for the same offense, that this would have been unconstitutional under the Fifth Amendment had it been attempted by the national government, and that Connecticut had thus deprived him of due process of law. Writing for the Court, Mr. Justice Cardozo flatly rejected the incorporation argument and held that what Connecticut had done was not inconsistent with "the concept of ordered liberty." Although Mr. Justice Black was on the Court and joined the *Palko* majority, his was to become the most insistent voice for incorporation. Justices Frankfurter and Harlan were the dominant spokesmen for the application to the states of procedural due process through the elaboration of "the concept of ordered liberty."¹⁵⁴

Looking back, the debate seems overly sharp and its resolution (as a general matter, in contradistinction to any particular holding), not unexpected. Contemporary technology, a population moving frequently across state lines, and the expanding role of the federal government in law enforcement have made America too much one country for considerations of federalism to sustain at a constitutional level any dramatic difference between the procedural safeguards afforded criminal defendants in federal and state proceedings. And increasingly the constitutional standards developed for the nation under the Bill of Rights have been applied to the states through the due process clause of the Fourteenth Amendment.¹⁵⁵ In one sense then, the incorporationists or partial incorporationists have won.¹⁵⁶ Yet,

152. The remainder of the debate—its "substantive" aspect—has concerned the interpretation of the first eight Amendments and particularly the increased protection afforded the individual under some portions of the Bill of Rights by the Warren Court. See, e.g., the majority and dissenting opinions in *Katz v. United States*, 389 U.S. 347 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966).

153. 302 U.S. 319 (1937).

154. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968) (Black, J., concurring); *id.* at 171 (Harlan, J., dissenting); *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring); *id.* at 68 (Black, J., dissenting). See generally Henkin, *Selective Incorporation in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963); Kadish, *Methodology and Criteria in Due Process Adjudication: A Survey and Criticism*, 66 YALE L.J. 319 (1957).

155. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

156. Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances do not disclose a denial of "fundamental fairness." Once it is decided

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if one sees “the concept of ordered liberty” as contextual, as bound up with the expectations that are generated in this country during this phase of its economic, social, and political history, one would expect to find “ordered liberty” increasingly elaborated by reference to the procedural standards the Bill of Rights imposes on the central government.¹⁵⁷

Mr. Justice Black, however, did not admit this. Moreover, it seems fair to say that for him, and perhaps others, a major benefit of incorporation (and perhaps a reason for his advocacy of it) was that incorporation would separate judicial review of the states’ administration of criminal justice from judicial review of the states’ regulation of economic affairs. And it would anchor the former in a substantially more extensive constitutional text and, in his view, subject it to substantially greater judicial scrutiny.

Black’s distaste for economic due process (and for all substantive due process)¹⁵⁸ was of a piece with his distaste for the procedural due process approach—symbolized by *Palko*—that undertook to test constitutionality with “the concept of ordered liberty.” If this formula, “based on natural justice, or others which mean the same thing,” Black said in dissent, is “to prevail, [it] require[s] judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary.” This is not for a court. “The power to make such decisions is of course that of a legislative body.”¹⁵⁹

While the text of the Bill of Rights does give direction to the Court’s inquiry in the area of procedural due process (and, as I have suggested, it would be a major source of constitutional law vis-à-vis the states *without* incorporation), the text does not begin to resolve the scope of judicial review question.¹⁶⁰ Constitutional text does, however, separate procedural due process analytically from questions of judicial review and double standards in the area of substantive due process.

that a particular Bill of Rights guarantee is “fundamental to the American scheme of justice” . . . the same constitutional standards apply against both the State and federal Governments.

Benton v. Maryland, 395 U.S. 784, 795 (1969).

157. Cf. *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968).

158. See p. 290 *infra*.

159. *Griswold v. Connecticut*, 381 U.S. 479, 511-12 (1965) (Black, J., dissenting). The burden of these notes—in part at least—is to disprove this point of view, to deny its validity in both constitutional and common law adjudication.

160. The substantive aspect of procedural due process would, in my judgment, profit from a principle-policy analysis. See discussion of *Wolf* and *Rochin* at pp. 270-72 *supra*. Consider the approach with respect to the privilege against self-incrimination.

21.

Separated too by constitutional text from judicial review in the substantive due process area are questions of review under the First Amendment. Yet the double standard question often seems to focus mainly on the justification for a different scope of review in economic due process cases, on the one hand, and free speech cases on the other. While it may be that the marked difference in the modern Court's approach to speech and economic liberty cannot be borne by constitutional text, one would surely intuit from the language of the Constitution a difference in the scope of review and, accordingly, a double standard of some sort.¹⁶¹

History is at least partially responsible for juxtaposing economic due process and the First Amendment. First, the "absorption" of the First Amendment into the due process clause of the Fourteenth¹⁶² coincided with the heyday of the "*Allgeyer-Lochner-Adair-Coppage* constitutional doctrine." And absorption was justified by an appeal to the fundamental nature of speech rather than to the language of the First Amendment. Mr. Justice Brandeis, for example, concurring in *Whitney v. California*, said:

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all *fundamental* rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach and the right of assembly are, of course, *fundamental* rights.¹⁶³

Second, speech remained fundamental as other "fundamental rights comprised within the term liberty" lost their "fundamentalness" with the demise of economic due process. Indeed, speech seemed to gain status in the rhetoric of the Court.¹⁶⁴

161. See C. BLACK, *supra* note 134.

162. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

163. *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (emphasis added).

164. Consider Cardozo's words in *Palko*:

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption . . . This is true . . . of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.

Palko v. Connecticut, 302 U.S. 319, 326-27 (1937). Another reason for the attention

Yet, as with procedural due process and the Fourteenth Amendment, so with speech and the Fourteenth Amendment: Absorption seems inevitable even without resort to the claim that speech is somehow intrinsically more important than economic liberty, that speech is in a "preferred position."¹⁶⁵ In contrast to economic liberty, the Constitution places a direct restraint on Congress where speech is at issue. In contemporary America a radically different standard for state legislatures would impose a burden on our federalism it could not endure. In this sense the absorption of the First Amendment and the selective incorporation of federal procedural due process are the other side of the commerce clause coin: The expansion of federal power makes the Bill of Rights a source of law that the Court in elaborating the Fourteenth Amendment could not long ignore.¹⁶⁶

22.

No appeal, however, to the language of the Constitution (either directly or through incorporation, absorption, or analogy) is available to explain a different scope of review under the due process clauses themselves of legislation restricting personal or civil as distinguished from economic liberties.¹⁶⁷ The "*Allgeyer-Lochner-Adair-Coppage* constitutional doctrine" did not involve such a distinction. While the bulk of decisions from that period were concerned with economic legislation, searching review of laws restricting personal liberties was

paid to a different standard of review in First Amendment and substantive due process cases is that the "new equal protection," see, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), and the "new due process," see, e.g., *Roe v. Wade*, 410 U.S. 113 (1973), and pp. 285-311 *infra*, developed later.

165. See *Kovacs v. Cooper*, 336 U.S. 77 (1949).

166. This is a common way in which the general law grows. Direct analogies exist in nonconstitutional and quasi-constitutional law. When Congress enacted the Railway Labor Act and the National Labor Relations Act, it gave a form of legislative power to the unions. It imposed no explicit restraints, however, on the unions' exercise of power. The Court found such restraints implicit in the grant of power, and the restraints tracked (by analogy) the equal protection clause of the Fourteenth Amendment. See *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944).

The growth of common law protection of members in private associations, particularly labor unions, is another example. Procedural and substantive safeguards for union members were developed by analogy to the protection of the citizen from overreaching by the state. Among the substantive rights most frequently honored (that is to say, judicially established) was the right of free speech. See Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 *YALE L.J.* 175, 199 (1960).

A further example is the application of the Uniform Commercial Code to transactions that are not, in terms, within the Code. See, e.g., *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966).

167. The same is true of the "old" and the "new" equal protection. The literature is vast. See generally G. GUNTHER & N. DOWLING, *supra* note 120, at 983-1048. Compare Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 *HARV. L. REV.* 7 (1969), with Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 *SUP. CT. REV.* 41.

also undertaken. In *Meyer v. Nebraska* the Court upset a statute drastically restricting the teaching of "any subject to any person in any language other than the English language." "Plaintiff in error," said the Court, "taught [German] in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] Amendment."¹⁶⁸ In *Pierce v. Society of Sisters*, the Court held an Oregon statute mandating attendance at public school—as opposed to any other kind—unconstitutional under the due process clause. Plaintiffs were granted "protection against arbitrary and unlawful interference with their patrons and the consequent destruction of their business and property."¹⁶⁹ For "patrons" one may read parents or guardians, and of their interest the Court said: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."¹⁷⁰

With the Court's abandonment of any serious review of economic legislation, cases like *Meyer* and *Pierce* must also be abandoned or a new theoretical justification found.¹⁷¹ If abandonment once might have been possible, it no longer is. Indeed, the demand for a new justification, and thus for a double standard in the application of substantive due process, is now a first order task of constitutional theory.

In 1965, the Court in *Griswold v. Connecticut*¹⁷² held that state's anti-contraceptive statute unconstitutional. A bewildering mishmash of theories was advanced; they add up to substantive due process. In 1973 the Court struck down the Texas and Georgia abortion statutes;¹⁷³ it did so—and indicated it was doing so—under the due process clause of the Fourteenth Amendment.¹⁷⁴

Explanations for a double standard go back at least to Mr. Justice Stone's *Carolene Products* footnote in 1938. Stone suggested that the contraction of judicial review in the economic area did not necessarily entail a similarly reduced scope of review (1) where "legislation appears on its face to be within a specific prohibition of the

168. 262 U.S. 390, 400 (1923).

169. 268 U.S. 510, 536 (1925).

170. *Id.* at 535.

171. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court sees *Meyer* and *Pierce* as First and Fourteenth Amendment cases. *Id.* at 482.

172. 381 U.S. 479 (1965). Cf. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

173. *Roe v. Wade*, 410 U.S. 113 (1973) (Texas); *Doe v. Bolton*, 410 U.S. 179 (1973) (Georgia).

174. 410 U.S. at 153.

Constitution such as those of the first ten Amendments," (2) where "legislation . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," e.g., "right to vote," "dissemination of information," "political organizations," "peaceable assembly", or (3) where legislation is "directed at particular religious . . . or national . . . or racial minorities." And with respect to (3), Stone asked "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."¹⁷⁵

Whatever may be said of Stone's footnote,¹⁷⁶ nothing in it explains the scope of judicial review in *Griswold* or in *Roe*. Moreover, Stone's third category, qualified as it is to include any political prejudice against discrete and insular minorities, seems to abandon the distinction between personal and economic liberty,¹⁷⁷ and this at a time when, and in a case where, the Court was drastically reducing its role in the economic sphere.

In addition to Stone's attempt, there are at least two other general lines of argument made for the distinction between judicial treatment of economic and personal liberties, both of which may mistakenly be thought related to principle-policy analysis.

First, it may be argued that personal liberties are more important, and in that sense more fundamental, than economic liberties. In the hands of a good philosopher this can be a sophisticated and seductive argument. It often is, as Professor Robert McCloskey has observed, an elitist argument—it has "the smell of the lamp about it."¹⁷⁸ Of course, this does not make it bad philosophy and it may even be that one can develop a theory of constitutional law based upon a philosophical system that ranks values in terms of their essentiality. I do not think this has yet been done and it should be made clear that it is an enterprise sharply different from the principle-policy distinction that I have been attempting. I do not entertain the notion that principles are in any way more important or fundamental or of an intrinsically higher value than policies. I think only that the

175. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

176. See, e.g., G. GUNTHER & N. DOWLING, *supra* note 120, at 1052-56.

177. For example, a professional group may be a discrete and insular minority subject to political prejudice, as the opticians in Oklahoma discovered. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

178. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 46.

two are different types of justifications for legal rules, with resulting institutional implications stemming from the nature of American democracy.

Moreover, the relationship I envision between principles and morality is a relationship between legal principles and conventional morality. Conventional morality is not necessarily the best morality and makes no claim to be, as does, and perhaps is, the great philosopher's. Each generation's best influences the conventional. We may all think somewhat differently about some aspects of morality, for example, after Rawls.¹⁷⁹ But the impact of professional philosophical thought on common morality is slow and philosophical positions undergo a life-change, having to do with absorption and assimilation and interaction with the best of the past and with the conditions of society.

Second, McCloskey has suggested that "[p]erhaps the decision to leave economic rights to the tender mercy of the legislative power is based on the idea that the Supreme Court is peculiarly ill-equipped to deal with this subject."¹⁸⁰ But, as developed by McCloskey, this is a trivial notion, a straw man to be knocked over, for he explains the point in terms of the complexity or difficulty of the underlying issue, and, as so told, he rightly concludes that economic regulation on the average is intrinsically no more difficult to review than other kinds of legislation. In hard cases, judicial review is hard work, so too—it might be added—is a great deal of what judges do at common law.

McCloskey's suggestion, however, can be cleansed of its triviality: "Judicial review is an issue in the allocation of competences" and principle-policy distinctions are one way of getting at comparative institutional advantage. The problem is how to use that tool in determining the extent to which a double standard of review is justified. The place to begin is with an old villain, *Lochner v. New York*.¹⁸¹

H. *Substantive Due Process: Economic Regulation*

23.

Lochner was an early case in the now discredited line that Mr. Justice Black referred to as the "*Allgeyer-Lochner-Adair-Coppage* constitutional doctrine."¹⁸² The case raised the validity, under the

179. J. RAWLS, *supra* note 57.

180. McCloskey, *supra* note 178, at 51.

181. 198 U.S. 45 (1905).

182. *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 535 (1949).

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Fourteenth Amendment, of a New York statute fixing maximum working hours for bakery employees.¹⁸³

The three opinions (one for the Court, holding the statute unconstitutional, and two dissents) are crisp by contemporary standards. Nor thereby do they either gain or lose persuasiveness. Mr. Justice Peckham—long on clarity, short on reasons—wrote for five. First, the “general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment Under that provision no state can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right.”¹⁸⁴ Second, such circumstances, it would seem, include valid state legislation, that is, legislation falling within the rubric of police powers. “Those powers, broadly stated . . . relate to the safety, health, morals and general welfare of the public.”¹⁸⁵ Third, “[v]iewed in the light of a purely labor law, with no reference whatever to the question of health . . . [the New York] law . . . involves neither the safety, the morals nor the welfare of the public, and . . . the interest of the public is not in the slightest degree affected by such an act.”¹⁸⁶ Fourth, while the law may purport to be a health measure, it is not. “We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee.”¹⁸⁷ Fifth, other arguments concerning health are frivolous. “Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual”¹⁸⁸ Accordingly, the statute was held unconstitutional.¹⁸⁹

183. 198 U.S. at 46 n.1.

184. *Id.* at 53.

185. *Id.*

186. *Id.* at 57.

187. *Id.* at 59.

188. *Id.* at 61.

189. The contemporary formulation of the 1905 holding might be that there is an insufficiently compelling state interest to justify a legislative intrusion into an area of fundamental individual liberty (privacy?). For health to be “compelling,” it must be “clearly” involved. *Id.* at 61.

The elder Harlan (who was to write for the Court in *Adair*) dissented for himself and Justices White and Day. Accepting the majority’s general framework, he sounded a note of judicial restraint.

[I]n determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the

Holmes dissented in what has become one of his famous opinions. However, whether his opinion should be read as supporting a sharply limited scope of judicial review in all substantive due process cases—and thus a single standard—is difficult to say, for Holmes dissented in *Meyer v. Nebraska*,¹⁹⁰ but joined the Court in *Pierce v. Society of Sisters*.¹⁹¹

This much we do know: Holmes saw *Lochner* as “decided upon an economic theory which a large part of the country does not entertain.”¹⁹² He made it clear that he did not view the judicial function in constitutional adjudication as having to come to terms with the wisdom or folly of an economic theory reflected in a statute duly enacted by a state legislature. A constitution, he said, “is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It 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.”¹⁹³

Holmes’s characterization of the Court’s opinion as resting upon the economic beliefs of a majority of the Justices fits a contemporary view of the issue raised in the *Lochner* case. Today, most of us would see the New York statute as a protective labor law responsive to a legislative loss of confidence in the private contract regime. Opposition to the statute accordingly is likely to be viewed as a display of confidence in the private contract and the underlying economic order with which it is associated; opposition by the Court would thus seem to raise private contract and laissez faire economics to the level of constitutional dogma.¹⁹⁴

protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation. . . . Nor can I say that the statute has no appropriate or direct connection with that protection to health which each State owes to her citizens, . . . or that it is not promotive of the health of the employees in question, . . . or that the regulation prescribed by the State is utterly unreasonable and extravagant or wholly arbitrary. . . . Still less can I say that the statute is, beyond question, a plain, palpable invasion of rights secured by the fundamental law.

Id. at 69-70.

190. 262 U.S. 390, 412 (1923).

191. 268 U.S. 510 (1925).

192. 198 U.S. at 75.

193. *Id.* at 75-76.

194. See H. WELLINGTON, LABOR AND THE LEGAL PROCESS, *supra* note 46, at 7-46.

Yet *Lochner* purported to see the issue as one of personal liberty. This is not necessarily inconsistent with Holmes's characterization of the Court's approach or, indeed, of a present-day analysis, if one equates laissez faire economics with personal liberty. Many did and some do. But, as Holmes said, the economic theory was widely questioned at the time of *Lochner* and it seems fair to add that it was questioned by some *because* it was viewed as intruding upon personal liberty. Time has changed some to many.¹⁹⁵

24.

An examination of *Lochner* in principle-policy terms would ask whether the due process clause should afford any protection to liberty to contract and, if so, why. Suppose a statute were enacted abolishing private contract and substituting in its place a State Board of Exchange. All transactions formerly made by contract now must be made through the Board, which is given power to set prices and conditions of performance and to reject transactions that are not within the public interest.¹⁹⁶

In attacking the constitutionality of this law one would not want to stress the instrumental, namely, that the statute may be grossly inefficient. It is difficult to see what credentials the Court has entitling it to second-guess the policy decision of the legislature on such a question. If substantive due process does impose some obligation on the Court to address this aspect of the legislation, it must be limited indeed. Yet assuming that the statute either will have a beneficial effect on the allocation of goods and services or, more properly, that that is not an issue of serious judicial concern, might an objection to the constitutionality of the statute be mounted in terms of personal liberty? Freedom to enter into transactions is a component of personal liberty that does have a connection with conventional morality. It is valued by the individual for itself, as a means, and apart from ends.

This kind of personal liberty counts vastly less as a moral (and therefore, legal) principle than it used to. Principles are contextual and part of context is effect.¹⁹⁷ We have become increasingly aware of the effects—the externalities—attendant upon private ordering through contract. Indeed, some insist, and they may be at least par-

195. *Id.*

196. Put to one side any commerce clause difficulties or problems with the delegation doctrine.

197. See pp. 224-25 *supra*.

tially correct, that this awareness has become an obsession, leading to the establishment of unwise policies and to the advocacy of new policies that could be disastrous.¹⁹⁸ Be that as it may, the connection between free trade and personal freedom has been undermined in the attitudes and convictions of the bulk of Americans. Moral support for laissez faire economics is no longer prominently displayed in the atlas of national values.

If one is inclined, moreover, to view property as a concept different from contract, he will find that property too has undergone a time-life change. The uses to which ownership has been put—the property-power relationship¹⁹⁹—and the diffusion of ownership via the corporation, have dramatically eroded the prominence of property's place in conventional morality. But it too has a long half-life. I would suppose that a statute granting compensation, but outlawing the ownership of all private homes, raises serious constitutional questions under the due process clause. One can believe in the desirable effects of such a statute. One can also believe that home ownership is viewed in the morality of the nation as an extension of the individual's personality and, at this time, arguably beyond the reach of legislation.

My point is not that either hypothetical statute would be unconstitutional. That is a question that cannot be answered in the abstract. My point is that each case should be viewed as presenting a serious substantive due process question, that because judicial review is, to a considerable extent, "an issue in the allocation of competences," review should be searching. The wisdom of the legislation in instrumental terms is to be assumed, or virtually assumed. Serious review, however, should be given to the claim of personal liberty that properly may be raised with respect to each statute. The Court's task is to ascertain the weight of the principle in conventional morality and to convert the moral principle into a legal one by connecting it with the body of constitutional law.

The law in this area (economic liberty) has gone too far in casually rejecting due process. The modern Court insists upon collapsing the principle that is at stake into the policy which is properly seen as legislatively settled. While the principle generally is weak and insufficient to justify a declaration of unconstitutionality, that is no

198. The view is not limited to those who are unsympathetic to substantial changes in the American economy. *See, e.g.,* P. PASSELL & L. ROSS, *THE RETREAT FROM RICHES* (1973).

199. *See* *Truax v. Corrigan*, 257 U.S. 312, 368 (1921) (Brandeis, J., dissenting).

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excuse for the Court's frequent refusal to address the issue.²⁰⁰ In this sense the modern Court is the mirror image of the *Lochner* majority, which converted every policy into an overblown principle.

A double standard of judicial review is justified, but the distinction is not to be drawn between economic regulation, as such, and personal liberty, as such, but between policies and principles. The old economic due process cases were probably wrong in result when decided and clearly would be wrong if so decided today. They are also wrong in method. The bulk of the contemporary cases are also wrong in method, but generally correct in result, for today economic freedom is a principle of relatively insubstantial weight.

It is not, however, a principle of relatively insubstantial weight because it is fundamentally less important than other principles. Conventional morality today simply does not attach much weight to it. And that is what should count in constitutional adjudication, not the relative merits of any one school of philosophy or economics. The Fourteenth Amendment, as Holmes has said, does "not enact Mr. Herbert Spencer's Social Statics." Nor does it enact Mr. John Rawls's *A Theory of Justice*.²⁰¹ What it does enact, as the following discussion of contraception and abortion may further show, is an approach to institutional differentiation that is closely related to the common law's approach: one derived from the nature of American democracy.

I. *Substantive Due Process: Contraception*

25.

If prior to 1965 a state were to have enacted a statute, making plain in the preamble that a reduction in population growth was its goal and adducing reasons for such a policy relating to the state's environment and its economy, there would be little room, under the approach I have been urging, for the Court to question the validity of the statute's purpose. Nor, I take it, would there have been under any other than contemporary approach to due process. If, however, the statute's means of achieving the goal were to make it a crime

200. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). It is interesting to observe that in statutory interpretation economic due process is alive and well. See *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965); *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 217-26 (1964) (Stewart, J., concurring).

201. This is not to say that J. RAWLS, *supra* note 57, is irrelevant to a proper interpretation of substantive due process. See p. 280 *supra*.

for married persons to have sexual intercourse "between the tenth and twentieth day after the onset of the female partner's last menstrual period," that would, under principle-policy analysis, raise a serious constitutional question, a question of personal liberty under the due process clause. The Court would have to ask itself whether such a restriction offended conventional moral standards and, if—as it seems to me is clearly the case—it did, whether constitutional doctrine could be interpreted to sustain or invalidate the legislation. Invalidation seems to me proper based on some of the reasoning in Mr. Justice Harlan's opinion in *Poe v. Ullman*.²⁰²

Poe v. Ullman and *Griswold v. Connecticut*,²⁰³ on the merits, and apart from the justiciability questions on which *Poe* was decided, are more complicated cases. On the one hand, the purpose of the Connecticut statute was to regulate morals; on the other, the means established to effectuate that purpose were less clearly offensive to conventional morality. The statute provided that:

Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.²⁰⁴

The statute, which applied to married persons, had as its major purpose effectuating either the state's opposition to "all forms of promiscuous or illicit sexual relationships, be they premarital or extra marital . . ." ²⁰⁵ or the state's opposition to birth control based on a conclusion that contraception was immoral.²⁰⁶

Unlike the hypothetical statute, which in *purpose* is only tangentially related to moral considerations, the Connecticut statute purported to be a regulation of moral conduct. Means and ends here raise different aspects of what would have to be conceptualized as the regulation of morality. Accordingly, if I am right about the distribution of institutional competence between legislature and Court, the constitutionality of the statute's purpose as well as the means chosen to achieve that purpose should be subject to searching judicial review.

This conclusion most emphatically does not mean that conventional morality would be found to disapprove of the state's opposi-

202. 367 U.S. 497, 539-55 (1961) (Harlan, J., dissenting).

203. 381 U.S. 479 (1965).

204. *Id.* at 480.

205. *Id.* at 505 (White, J., concurring).

206. *Poe v. Ullman*, 367 U.S. at 545 (Harlan, J., dissenting).

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tion to "all forms of promiscuous or illicit sexual relationships" or that, even if it did, constitutional law could be reworked to permit a determination of unconstitutionality on this ground, at this time. It does mean, however, that the Court should not in the future dispose of statutes restricting the sexual activities of consenting adults by assuming that the purpose of the statute is permissible, that the judicial function is limited to examining its means.

It is now appropriate to state what has been assumed throughout (and was observed earlier),²⁰⁷ namely, that the existence of legislation counts as evidence of conventional morality. It counts, as does the entire *corpus juris*. But it is far from conclusive: There is the time elapsed since enactment (the Connecticut statute dated from 1879), the unreliability of drawing conclusions from subsequent legislative inaction, and, most importantly, the nature of the legislature which is responsive to shifting power configurations in a community, but not advantageously positioned to find shifting conventional morality in the community.

26.

While the defendants in the *Griswold* case were convicted under a general aiding and abetting statute for giving married persons birth control advice, the Court saw the case as involving the constitutionality of the anti-contraceptive statute: The issue addressed was whether it was constitutional for a state to make it a crime for a married couple to *use* a contraceptive device.

The opinion of the Court was concerned with justifying its prior rejections of economic due process, finding a way of preserving the learning of such cases à *Meyer* and *Pierce*, and holding the Connecticut statute unconstitutional, while at the same time avoiding the charge that it was fashioning constitutional law out of the Justices' personal preferences. This, the Court, in an opinion of Mr. Justice Douglas, attempted to do by seeming to eschew the proposition that due process had any content independent of other constitutional provisions (although a majority of the Justices explicitly stated that it did), resting *Pierce* and *Meyer* on the absorption of the First Amendment into the Fourteenth, and holding that Connecticut had violated the constitutional "notions of privacy surrounding the marriage relationship."²⁰⁸

The Constitution, of course, does not, in terms, grant a right to

207. See pp. 248-49 *supra*.

208. *Griswold v. Connecticut*, 381 U.S. at 486.

(or even a right of) privacy and, given the concerns of the Court, it seems strange that it would undertake so dramatically to disassociate itself from the text it was construing. The Court's reasoning was as follows: (1) "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."²⁰⁹ (The Court fails to explain how substantive content can be given to such a formulation unless judges engage in a process of analysis closely related to determining the content of due process.) (2) "Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one The Third Amendment in its prohibition against the quartering of soldiers . . . is another The Fourth Amendment . . . [and the] Fifth Amendment in its Self-Incrimination Clause" are still others.²¹⁰ (3) Moreover, the Court quoted, but left to the reader's imagination, the relevance of the Ninth Amendment.²¹¹ (4) "The present case . . . concerns a relationship lying within the zone of privacy created by [these] several fundamental constitutional guarantees."²¹² And (5) the Connecticut statute sweeps "unnecessarily broadly . . ."²¹³ in its regulation of privacy within the marriage relationship.

Mr. Justice Goldberg, joined by the Chief Justice and Mr. Justice Brennan, wrote a concurring opinion accepting the proposition that liberty in the Fourteenth Amendment "protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights." Justice Goldberg also unwrapped the Ninth Amendment to support this view: "The language and history of [that] Amendment reveal that the framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."²¹⁴

In *Poe v. Ullman*, Mr. Justice Harlan had urged the unconstitutionality of the Connecticut statute. In *Griswold*, he disassociated himself from the Court's opinion, primarily, it would seem, because of its assumption that "the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some rights assured by the letter or

209. *Id.* at 484.

210. *Id.*

211. *Id.*

212. *Id.* at 485.

213. *Id.*

214. *Id.* at 486, 488.

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penumbra of the Bill of Rights.”²¹⁵ Harlan’s approach to substantive due process was one with his approach to procedural due process and over the years his had been a strong and insistent voice for the *Palko* approach: “[T]he proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause . . . because the enactment violates basic values ‘implicit in the concept of ordered liberty.’ ”²¹⁶

Harlan had worked with admirable craftsmanship in *Poe v. Ullman* to demonstrate why the Connecticut statute failed under the *Palko* test, why it was appropriate to subject it to “strict scrutiny,” rather than to a test “going merely to the plausibility of its underlying rationale”²¹⁷ (this test, we may assume, Harlan would apply in a case like *Lochner*). His opinion speaks of a right to marital privacy as an aspect of liberty within the due process clause. Fundamental importance is given to the family, the home as its seat, and the centrality of the relationship between husband and wife to family and home. He draws heavily, in his opinion, upon the purpose of the Fourth Amendment, finding that its interpretation “amply shows that the Constitution protects the privacy of the home against all unreasonable intrusions of whatever character.”²¹⁸ And he reasons that it is appropriate to extend constitutional protection to “the life which characteristically has its place in the home.”²¹⁹ “*Pierce* and *Meyer* . . . as was said in *Prince v. Massachusetts* . . . ‘have respected the private realm of family life which the state cannot enter.’ . . . Of this whole ‘private realm of family life’ it is difficult to imagine what is more private or more intimate than a husband and wife’s marital relations.”²²⁰ And that, ultimately, is Harlan’s problem with the Connecticut law:

Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law. Potentially, this could allow the deployment of all the incidental machinery of the criminal law, arrests, searches and seizures; inevitably, it must mean at the very least the lodging of criminal charges, a public trial, and testimony as to the *corpus delicti*. Nor could any imaginable elaboration of presumptions, testimonial privileges, or other safeguards, al-

215. *Id.* at 499.

216. *Id.* at 500.

217. *Poe v. Ullman*, 367 U.S. at 548.

218. *Id.* at 550.

219. *Id.* at 551.

220. *Id.* at 552.

leviate the necessity for testimony as to the mode and manner of the married couples' sexual relations, or at least the opportunity for the accused to make denial of the charges.²²¹

Thus, while there is a sharp difference in due process methodology between Harlan and Douglas's opinion for the Court, and an equally visible difference in the level of craftsmanship displayed, they are united in their emphasis on protecting marital privacy and they share a common hypothetical fear. Douglas asks: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."²²²

Concurring also in the Court's judgment but failing to join its opinion was Mr. Justice White. He shared Harlan's view of due process, spoke not of privacy, but directly of liberty, and found the Connecticut statute too "sweeping"²²³ in scope, given the freedom restricted by it, the statute's purpose (preventing promiscuous or illicit sexual relationships), its history of nonenforcement, and the general "availability [of contraceptive devices] in that state"²²⁴

Mr. Justice Black dissented: Due Process incorporates the first eight amendments; it has no additional independent force. Harlan's approach is different from the Court's in *Lochner* only to the extent that Harlan's personal values are different from those of Mr. Justice Peckham. If *Pierce* and *Meyer* are good law, they are good law because the Fourteenth Amendment incorporates the First. Nor was Black persuaded by the Court's theory: "I like my privacy as well as the next one," he said, "but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."²²⁵

Mr. Justice Stewart found himself equally unpersuaded by the opinion of the Court and unable to distinguish the discredited *Lochner* line from the case before him.²²⁶

27.

The Connecticut anti-contraceptive statute, according to Mr. Justice Harlan, embodied a "moral judgment that all use of contracep-

221. *Id.* at 548.

222. *Griswold v. Connecticut*, 381 U.S. at 485-86.

223. *Id.* at 507.

224. *Id.* at 505.

225. *Id.* at 510.

226. *Id.* at 527-31.

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tives [including use by married couples] is improper.”²²⁷ The Justice tells us that “[a]ppellants cite an impressive list of authorities who, from a great variety of points of view, commend the considered use of contraceptives by married couples.”²²⁸ He goes on to say:

[N]ot too long ago the current of opinion was very probably quite the opposite . . . and . . . even today the issue is not free of controversy. Certainly, Connecticut’s judgment is no more demonstrably correct or incorrect than are the varieties of judgment, expressed in law, on marriage and divorce, on adult consensual homosexuality, abortion, and sterilization or euthanasia and suicide. If we had a case before us which required us to decide simply and in abstraction, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views.²²⁹

There seems to be little conviction in Harlan’s defense of what he calls Connecticut’s moral judgment banning the use of contraceptives by married persons. He tells us that “even today the issue is not free of controversy” and he attempts to strengthen the constitutional validity of the statute considered in abstract by lumping birth control with euthanasia and suicide. What is important to recognize, however, is the meaning of Harlan’s statement “that the State of Connecticut has expressed *its* moral judgment that all use of contraceptives is improper.”²³⁰ Whatever the Justice may have thought this meant, it can only mean that in 1879 an active, organized, and legitimate group was successful in persuading the legislature to enact the anti-use law, that in the intervening years no other group had been successful in obtaining its repeal, and that the law embodies *a* moral judgment.

At the time of the *Griswold* case, the moral judgment contained in the statute, on analysis, would seem to be inconsistent with conventional morality. As I have argued, the task of the Court is to make that analysis and connect it with constitutional doctrine without the usual deference to the legislature or presumption that the statute is constitutional. So much is required by a realistic appraisal of comparative institutional competences. The analysis cannot, how-

227. *Poe v. Ullman*, 367 U.S. at 546.

228. *Id.*

229. *Id.* at 547.

230. *Id.* at 546 (emphasis added).

ever, satisfy one who demands mathematical exactness: He is bound to find all law disappointing.

The place to begin analysis is with Harlan's statement that "the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected."²³¹ This intimacy resists standardization through a detailed official code of behavior and only the most general legal controls may be placed on it. Enormous discretion for working out the particulars of the relationship must belong to each couple.

I take agreement upon the existence of this discretion to be a central part of the compact made by a husband and wife with the state at the time of marriage. It is a compact that creates a complex of moral as well as legal rights and obligations on the part of the couple and the state, rights and obligations intrinsic to the institution of marriage, that change as the institution changes, but that have and retain a logical, internal consistency.

The functional need for discretion establishes the area of liberty (or privacy, if one insists) granted to individuals in marriage. This liberty imposes two types of moral obligations: one between husband and wife, the other between the couple and the state. Interference by the state with this granted liberty can intrude on the marriage relationship in ways that are profoundly at variance with the marriage compact.

Apart from the personal degradation that would be endured if the Connecticut statute were enforced, one might ask whether the statute does not substantially interfere with a major reason for marriage. Is not part of the compact the establishment of a state protected institution for the nurturing and growth of love? Is not the pursuit of sexual gratification a vital aspect of love? And does not the fear of unwanted pregnancy materially reduce the prospects of sexual gratification?

Love and sexual gratification can and do exist outside of marriage and they can and do fail to exist in marriage, but this is not the point. The point is that the state has undertaken to sponsor one institution that has at its core the love-sex relationship. That relationship demands liberty in the practice of the sexual act.

The Connecticut statute is, therefore, as Harlan seems to suggest, an arguably unconstitutional condition on the privileges that flow

231. *Id.* at 553.

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from a state-supported institution. "It is one thing when the State exerts its power either to forbid extramarital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."²³²

To determine whether the ban on the use of contraceptives is indeed an unconstitutional condition in the marriage context requires further rumination and reflection in the quest to find conventional morality. Thus far, the argument is that the act of marriage entitles the married couple to a large area of liberty in respect to their love life and that the Connecticut statute restricts that liberty. The claim is not that there are no limits on liberty; one would hesitate to urge that the state cannot regulate at all, for, as I have insisted, conventional morality, rather than the morality of some wise philosopher, is the test.

Let me, then, make some assertions that I submit are clear in this society: The state would be taken to have broken its moral obligation, arising from its compact, were it to ban sexual intercourse between married couples or were it to regulate the frequency, the day, or the time of day that intercourse was to be permitted. And while such hypothetical regulations are distinguishable from a prohibition on the use of contraceptives, the distinction with respect to the second hypothetical is more apparent than real.

A ban on intercourse would be a clear violation of the compact between the state and the couple and, for this reason, it is difficult to imagine the simultaneous existence of such a ban and marriage in anything resembling its present form. This is not the case, however, with respect to a statute stipulating the occasions on which a couple's sexual appetite may be indulged. Yet such a statute would be deeply inconsistent and in sharp conflict with the entire concept of the marriage relationship. It reminds one of the fine print in a contract for the sale and purchase of an automobile that totally contradicts the general import of the transaction;²³³ it smacks of fraud.

232. *Id.* Harlan's emphasis, of course, was on the criminal nature of the Connecticut law and the consequences to marital intimacy attendant on its enforcement. This drove him to develop a privacy justification for his holding and, as it seems to me, an undue reliance on the Fourth Amendment and its protection of life in the home.

233. The leading case is *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). In another context, I said this:

It will be recalled that [Henningsen and similar cases] involve the legal effect of promises made by a manufacturer, and contained in the contract of sale, dealing with the liability of the manufacturer for injury resulting from defective auto-

And so, too, does the Connecticut statute, given its potential effect on the love life of the married couple and contraceptive practices in Connecticut *circa* 1965.

First, the ban could dramatically diminish pleasure because of the fear of unwanted pregnancy. There can be no question that this can impose a major strain on the state-protected relationship. Second, prior to the Connecticut statute's invalidation, legal consequences were not imposed on married couples for using birth control devices. Third, some types of contraceptives could be purchased at any drugstore in the state.²³⁴

Points two and three are, to be sure, merely bits of evidence relevant to the task of determining conventional morality in the context of the question whether the anti-use statute is an unconstitutional condition on the marriage compact. While various inferences may be drawn from the evidence, and while some common behavior is widely regarded as immoral even by those who engage in it, the evidence of public acceptance of contraceptive practices is far more compelling than the existence of the statute which had some relevance to moral views in 1879, but carries little weight 85 years later. Points two and three are some evidence and there is substantially less evidence to the contrary. They represent, therefore, a preponderance of the evidence in a situation in which no more is required because of the nature of the underlying question presented to the Court.

If I am correct in my analysis of conventional morality with respect to the Connecticut statute and in my observations about *Lochner*, *Meyer* and *Pierce* represent powerful legal precedent for the holding in *Griswold*. Penumbras were not necessary, zones of privacy, an unfortunate invention, and reliance on the Fourth Amendment, a mistake. Nor does the correctness of the *Griswold* decision depend upon Harlan's understanding of the Connecticut statute as embodying that state's 1879 moral judgment. Mr. Justice

mobiles. Courts have paid less and less attention to the exculpatory terms of such promises (or warranties as they are called) which, . . . are written by one party and accepted by another who has little choice and who is not likely to read or understand. The growing trend is toward strict manufacturer's liability—that is, liability irrespective of language or negligence—for an injury resulting from defective automobiles. One might well justify these cases . . . in terms of a general holding forth. Here it is a holding forth by the manufacturers in their sales campaigns of an automobile that is safe to drive. This holding forth is a major factor in determining fairness between purchaser and maker, and creates a community morality, departure from which the courts may properly consider a violation of community standards appropriately enshrined in law.

H. WELLINGTON, LABOR AND THE LEGAL PROCESS, *supra* note 43, at 197.

234. *Griswold v. Connecticut*, 381 U.S. at 506 (White, J., concurring).

White understood the statute as effectuating the State's opposition to "all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital . . ." ²³⁵ One may, as White did, find this, unlike Harlan's understanding of the statute, a "legitimate legislative goal," but its effect upon the marriage compact when understood in the light of the foregoing discussion supports White's conclusion: There is "nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedom of married persons, and therefore [I] conclude that it deprives such persons of liberty without due process of law."²³⁶

28.

Two issues were left open by *Griswold*. First, on neither the theory of the Court nor of Mr. Justice Harlan may the case be cited as authority for the proposition that a state statute prohibiting the distribution of contraceptives to married persons is unconstitutional. The Connecticut statute was unconstitutional because it made criminal the *use* of a contraceptive device by a married couple. For both the Court and Harlan, it was the invasion of privacy attendant upon the statute's hypothetical enforcement that was decisive. For both, a prohibition on distribution, therefore, would raise a discrete question.

In this respect, the rationale I have suggested for *Griswold* is broader: To virtually the same extent as a ban on use, a prohibition on the distribution of contraceptives to married couples would impinge on the area of sexual freedom writ large in the print of the marriage compact.

Second, my rationale of *Griswold* surely would not invalidate a use or distribution statute that excluded from its reach the married couple. Such a statute would raise different questions from those discussed in the last section of these notes, and would require a markedly different analysis, albeit an analysis within the general framework appropriate to constitutional principles.

Harlan's opinions also leave open the constitutionality of a use statute that excludes the married couple. His analysis is strongly dependent upon the marriage relationship and privacy within that relationship. Moreover, the Court in *Griswold* makes less, but still a very great deal, of that relationship: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life,

235. *Id.* at 505.

236. *Id.* at 507.

not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."²³⁷

The first of *Griswold's* open issues remained undecided at the time of judgment in the abortion cases. The second issue, however, had been decided inferentially (that is to say by way of equal protection, rather than due process) and by assertion, without a pretext of reasoning, in the spring of 1972.

*Eisenstadt v. Baird*²³⁸ brought to the Court a Massachusetts statute that made it illegal for single persons, but not for married persons, to obtain contraceptives in order to prevent pregnancy. The Court held that this statute was neither a health measure nor intended as a deterrence to premarital sexual relations. It was (where it applied) "simply . . . a prohibition on contraception."²³⁹ As such it represented, in the limited sense described earlier, the state's moral judgment.

Given this purpose, the Court considered it unnecessary to determine whether the statute violated the due process clause of the Fourteenth Amendment. A narrower ground was available. Quoting from an earlier opinion, the Court said: "The Equal Protection Clause of that amendment . . . does . . . deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute."²⁴⁰

Of course, whether the "different classes" (married, not married) are "wholly unrelated to the objective of the statute" depends on whether, as *Griswold* insists, the marriage relationship is important to that aspect of liberty that the Court calls privacy.²⁴¹ How, then, without offering a new rationale for *Griswold*, can the Court say:

237. *Id.* at 486. On the importance of the marriage relationship in another due process context, compare *Boddie v. Connecticut*, 401 U.S. 371 (1971), with *United States v. Kras*, 409 U.S. 434 (1973), and *Ortwein v. Schwab*, 410 U.S. 656 (1973).

238. 405 U.S. 438 (1972).

239. *Id.* at 452.

240. *Id.* at 447. The quote is from *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). In *Eisenstadt*, the Court stated that it was to apply the old ("rationally related") equal protection, and not the new ("compelling state interest") equal protection of *Shapiro v. Thompson*, 394 U.S. 618 (1969). See 405 U.S. at 447 n.7; Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Cf. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

241. This is so even though the Massachusetts statute allowed distribution of contraceptives to married persons, without trying to make the administratively difficult determination of whether its use will be in an adulterous relationship. Cf. *Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (1971).

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If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.²⁴²

On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious.²⁴³

With any effort at analysis thus abandoned, the stage was set for the abortion cases.

J. *Substantive Due Process: Abortion*

29.

Eisenstadt v. Baird set the stage for *Roe v. Wade*²⁴⁴ in the following sense: Harlan in *Poe v. Ullman* had undertaken a painstakingly careful inquiry into the concept of liberty protected through due process. While in my judgment his opinion strays from the correct approach, it is nevertheless an example of a proper judicial inquiry. The concept of liberty is not dealt with at large and in the abstract. It is addressed in the special context of the Connecticut statute and that statute's impact on the institution of marriage.

The Court in *Griswold* essentially follows Harlan. True, the craftsmanship is lacking and, of course, the issue is obfuscated by the Court's employment of a cumbersome methodology. But one feels a sense of concern with the limits of judicial power. Indeed, that concern alone explains—but fails to justify—the Court's methodology.

A sense of concern with appropriate limits is lacking, however, in *Eisenstadt*; the analytical struggle with the problem, abandoned or

242. 405 U.S. at 453 (emphasis in original).

243. *Id.* at 454.

244. 410 U.S. 113 (1973).

begged; the momentum for an overbroad, because it is under-analyzed, due process, set in motion. *Roe* soon followed.

The Texas statute there declared unconstitutional was of the strict variety: Except to save the life of the mother, it was a crime to "procure an abortion."²⁴⁵ The Court held that a pregnant woman has a "fundamental" "right of personal privacy," "founded in the Fourteenth Amendment's concept of personal liberty . . . [which is] broad enough to encompass the woman's decision whether or not to terminate her pregnancy."²⁴⁶ This right "is not unqualified and must be considered against important state interests in regulation."²⁴⁷ Those interests, however, must be "compelling" if they are to serve as the justification for limiting a "fundamental" right.²⁴⁸

The state, of course, has "an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and . . . it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'"²⁴⁹ The interest in the health of the mother becomes compelling "in the light of present medical knowledge . . . at approximately the end of the first trimester."²⁵⁰ "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability."²⁵¹ A fetus becomes viable when it is "potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."²⁵²

It follows from this, that:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State, in pro-

245. *Id.* at 117-18.

246. *Id.* at 153.

247. *Id.* at 154.

248. *Id.* at 155.

249. *Id.* at 162-63 (emphasis in original).

250. *Id.* at 163.

251. *Id.*

252. *Id.* at 160 (footnotes omitted).

Notes on Adjudication

moting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.²⁵³

30.

Roe perpetuates what seems to me a basic terminological mistake: The Court insists on describing the plaintiff's interest as "fundamental."²⁵⁴ This is misleading, for it suggests either that the text of the Constitution has singled out the abortion decision for special attention or that the judge, as wise philosopher, has imposed his ethical system upon the people. My claim has been that the plaintiff's interest is protected under the Fourteenth Amendment by reference to the people: that the meaning of liberty in that Amendment and its weight in the context of the Texas abortion statute depends, in the first instance, upon its weight in conventional morality.

Roe, moreover, adds a new terminological mistake to substantive due process: Regulation is to be judged under a "compelling state interest" test.²⁵⁵ This may be just another way of saying that the scope of judicial review in this context is "strict scrutiny" of legislation, rather than "the plausibility of its underlying rationale." Yet the formulation does not help analysis and in *Roe* it seems seriously to have misled the Court in dealing with the state's interest in protecting the health of the pregnant woman.

With respect to health and the appropriate scope of judicial review, contrast the legislature's institutional competence in dealing with matters of health and its competence in forming a judgment on the morality of people using contraceptives. Consider whether the Court's capacity is identical in both these cases or whether, as it seems to me, it is strong where the legislature is weak and vice versa.

In terms of comparative institutional competence, the regulation of health matters and the regulation of economic affairs are much the same. Judicial deference to legislative judgments on matters of economics and health are required. This does not mean that in the

253. *Id.* at 164-65.

254. For disagreement as to the meaning of "fundamental" in an equal protection case, see the opinions in *San Antonio Ind. School Dist. v. Rodriguez*, 93 S. Ct. 1278 (1973).

255. [T]he Court adds a new wrinkle to [the compelling state interest] test by transposing it from the legal considerations associated with the Equal Protection Clause Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it. 410 U.S. at 173 (Rehnquist, J., dissenting).

context of economic legislation a question of economic liberty may not be raised. Nor does it mean that personal liberty may not be seriously in question where legislation addresses health practices.

If one can put aside the state's interest "in protecting the potentiality of human life," the abortion cases nicely pose the question of judicial activism and judicial deference—as it used to be called—in the health field.

In *Roe* the Court undertook to show, by citing some studies, that, whatever may have been the danger of abortion in 1854 when the Texas statute was enacted, it now is the case that "[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low or lower than rates for normal childbirth."²⁵⁶ Indeed, "until the end of the first trimester mortality on abortion is less than mortality in normal childbirth."²⁵⁷

If this conclusion were scientifically impeccable, then the Texas statute—on the assumption that its only purpose is to protect the health of the pregnant woman—may fail under a rationality test.²⁵⁸ If several scientifically impeccable studies showed that normal childbirth is twice as dangerous to the mother as abortion during the first trimester, the statute, on grounds of health, would be a "clear mistake."²⁵⁹

Another way to put this is to suggest that even if the woman's interest in abortion (her liberty) counted no more than economic liberty counts today, the state's interest in protecting the woman's health might not be sufficient to save the Texas statute from an attack under the due process clause of the Fourteenth Amendment.

This, however, hardly justifies the Court's holding that during the first trimester "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the pregnancy should be terminated" and that "[i]f that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."²⁶⁰ This means, I take it, that the state may not require that the abortion be performed by someone who has been specially trained, in a hospital, only after consultation with one or more other physicians, and so forth. This means that the state may neither undertake, through

256. *Id.* at 149.

257. *Id.* at 163.

258. *But see* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 942 n.117 (1973).

259. A. BICKEL, *supra* note 118, at 35.

260. 410 U.S. at 163.

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laws specifically directed at abortions, to insure that a woman has genuinely consented, understanding the potential psychological effect abortion may have on her, nor may it attempt directly to upgrade her physical safety.

One would suppose that legislation of that sort aimed at any of the trimesters of pregnancy would satisfy anyone's test of rationality. Indeed, it is legislation that may even be wise. And the legislature is able better than the Court to make that instrumental decision.

The Court, however, has two grounds for precluding the state from enacting protective health legislation during the first trimester. First, in *Doe v. Bolton*²⁶¹ (the companion of *Roe*), it invalidated legislation requiring, among other things, that more than one physician approve an abortion. Its reason seems to be that this requirement *irrationally* singles out abortion for special treatment:

The reasons for the presence of the confirmation step in the statute are perhaps apparent, but they are insufficient to withstand constitutional challenge. . . . [N]o other voluntary medical or surgical procedure for which Georgia requires confirmation by two other physicians has been cited to us. If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure or deprivation of his license are available remedies. Required acquiescence by co-practitioners has *no rational connection* with a patient's needs and unduly infringes on the physician's right to practice.²⁶²

This ruling on the Georgia confirmation requirement apparently covers the second and third trimester as well as the first; that is, it invalidates legislation even after the state's interest has become compelling.

There really is little to say about this ground and the statement supporting it. It lacks persuasive force and treats the private physician with the reverence that one expects only from advertising agencies employed by the American Medical Association.

The Court could have put it better had it been candid enough to quote *Lochner*: "Statutes of the nature of that under review . . . are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed . . . upon the subject of the health of the individual whose

261. 410 U.S. 179 (1973).

262. *Id.* at 199 (emphasis added).

rights are interfered with"²⁶³ We now are fairly well agreed that New York should have been able to single out bakeries as raising special health problems. It is also the case that Georgia should have been able to single out abortions.

The second reason advanced by the Court for precluding a state from enacting protective health legislation is simply the flat assertion that during the first trimester the state's interest is not "compelling." Yet the Court does hold that it is compelling enough to sustain legislation proscribing "any abortion by a person who is not a physician"²⁶⁴

That concession gives the game away. Why, during the first trimester, is the woman not constitutionally entitled to have her abortion performed by anyone or at least by a para-medical? The answer is that it is too dangerous; her right is not *that* fundamental. Why then may the state not require that, before an abortion can be performed, the woman must consult some professional specifically trained to explain the potential psychological effects of that abortion; or that the abortion be performed in a state-certified facility? It must be that in the Court's *medical* judgment neither is necessary.

Of course lines have to be drawn. Medical procedures cannot be used by the state to circumvent the Court's holding in chief; but considerable deference on matters of health should be accorded the legislature.

I am bound to say, however, that even if I am wrong as to the appropriate scope of judicial review, even if review of health matters should be searching, the Court has failed to make its case. Search as one may, he will not discover why a woman's liberty is constitutionally impaired if her safety is improved or her consent assured. She may be inconvenienced somewhat, but surely that is not the issue. Liberty cannot mean instantaneous gratification. Even the First Amendment grants no such right.²⁶⁵

31.

Unlike health and like contraception, legislation "protecting the potentiality of human life"²⁶⁶ should be subject to searching judicial review, for it is natural to think of such legislation as addressing a moral issue directly. While important instrumental or policy rea-

263. *Lochner v. New York*, 198 U.S. 45, 61 (1905).

264. *Roe v. Wade*, 410 U.S. at 165.

265. *Cox v. New Hampshire*, 312 U.S. 569 (1941).

266. 410 U.S. at 162.

sons may be adduced for such legislation—economic growth, for instance—they are plainly secondary. The state of Texas had made its moral judgment on fetal life in the same sense that Connecticut, in *Griswold*, had pronounced its judgment on the morality of contraception.²⁶⁷

In the procedural posture of the *Roe* case, review of the state's judgment on fetal life was mandated by the plaintiff's claim that that judgment impermissibly abridged her liberty.²⁶⁸ The issue for the Court was how to weigh her interest in that liberty. This required inquiry into the nature of the principle the plaintiff was asserting and attention to the principle the state had vindicated.²⁶⁹

The Court itself approached the case more or less along these lines. It did not, however, get far. Indeed, much of Mr. Justice Blackmun's opinion is devoted to a history of abortion and is related only remotely to the task at hand.²⁷⁰ We are told that the constitutional principle asserted by the plaintiff is an aspect of the "right of privacy," "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action"²⁷¹ The privacy rationale was not helpful in *Griswold*, but given the Court's approach and even Harlan's, it was understandable. In *Roe* it is understandable only because of *Griswold*. This is not a good excuse, for in the abortion case "privacy" obfuscates rather than elucidates the concept of liberty. The Court itself seems to have understood this: "The pregnant woman cannot be isolated in her privacy The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation or education"²⁷² Yet, the Court offers no explanation for its Pickwickian usage.

The Court does have this to say, and it is relevant to the principle the plaintiff is asserting.

The detriment that the State would impose upon the pregnant woman by denying this choice altogether [whether or not to terminate her pregnancy] is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Ma-

267. See p. 291 *supra*.

268. The issue of the constitutional rights of the fetus was not raised independently. Nor can it be, for the Court held that a fetus is not a person under the Fourteenth Amendment. 410 U.S. at 158.

269. It is because a principle is being vindicated, rather than a policy effectuated, that the Court should engage in more searching review.

270. 410 U.S. at 130-52.

271. *Id.* at 153.

272. *Id.* at 159.

ternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.²⁷³

But this and the citation of a number of cases (*Eisenstadt*, *Griswold*, *Pierce*, and *Meyer*, for instance) are all the Court has to say on this branch of the case.

The Court does no better when it undertakes to examine the principle that the state advances in justification for prohibiting the plaintiff from terminating her pregnancy. First, a fetus is not a person within the Fourteenth Amendment.²⁷⁴ Second, the Court does not know "when life begins."²⁷⁵ It does know that "the unborn have never been recognized in the law as persons in the whole sense."²⁷⁶ And third, "[i]n view of all this, we do not agree that, by adopting one theory of life [namely, that it "begins at conception and is present throughout pregnancy"],²⁷⁷ Texas may override the rights of the pregnant woman that are at stake."²⁷⁸

32.

Consider a statute making it a crime for any person to remove another person's gall bladder, except to save that person's life. Assume the express purpose of the statute is to preserve gall bladders, it being determined that such organs can survive only so long as they are housed within a living person's body.

I think "this is an uncommonly silly law" (as Mr. Justice Stewart said of the Connecticut contraception statute).²⁷⁹ I think also that

273. *Id.* at 153.

274. *Id.* at 158. The Court seems to suggest that, if a fetus were a person within the Fourteenth Amendment, the constitutionality of the Texas statute would be secure. But "person" is not a unitary concept as cases involving corporations show, and, even if it were, it is possible to argue for a limited right to abortion. *See* pp. 306-08 *infra*. If the fetus were considered a person under the Fourteenth Amendment, its rights—whatever they might be—would limit the extent to which a state could grant a right to an abortion. *Roe* tells the states when they must grant such a right. It does not say that a state may not permit abortion in additional situations.

275. *Id.* at 159.

276. *Id.* at 162.

277. *Id.* at 159.

278. *Id.* at 162.

279. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965).

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it is unconstitutional, that it deprives any person with a diseased gall bladder of his or her liberty without due process of law.²⁸⁰

It is, to be sure, bizarre for a state legislature to concern itself with the survival of sick gall bladders. It is understandable that it be concerned with the survival of the unborn. This is not, however, the aspect of the problem to which I would now draw attention. I wish to examine the claim of the plaintiff that the gall bladder statute deprives him of his liberty. What is the principle that he is asserting and how does it relate to the principle urged upon the Court in *Roe*?

His claim is that he is entitled to rid himself of an organ that has caused him acute pain and may again, that to harbor that organ within his body imposes upon him a regimen that he finds highly uncongenial, and that the mental strain of a potential rupture is, to him, psychologically unsettling. The principle that he relates this to is one that is commonly recognized, namely, that every person has a right (qualified by context) to decide what happens in or to his body.²⁸¹

The obvious point to notice about that principle (and it is, of course, the principle asserted by the plaintiff in *Roe*) is its generality: It applies alike to female and male. Notice, however, a less obvious and, with respect to abortion, more important point: The principle itself has nothing to do with the destruction of the diseased gall bladder once it is removed or with the death of a fetus once removed from the womb.²⁸²

Writing in defense of abortion, Professor Judith Jarvis Thomson put it this way:

[W]hile I am arguing for the permissibility of abortion in some cases, I am not arguing for the right to secure the death of the unborn child. It is easy to confuse these two things in that up

280. If one does not believe that this statute violates the Fourteenth Amendment, then he really does not believe in substantive due process. He can content himself with the methodology of the Court in *Griswold* (which is back door substantive due process), follow Mr. Justice Black, or take his stand with Judge Learned Hand (which means he really does not believe in judicial review). See L. HAND, *supra* note 121, at 1-30.

281. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47, 48 (1971). See Rehnquist, J., dissenting in *Roe v. Wade*: "If the Court means by the term 'privacy' no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of 'liberty' protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of liberty." 410 U.S. at 172.

282. This explains why there is no necessary inconsistency in favoring abortion and disapproving of experimentation with a live but doomed fetus. See TIME, July 30, 1973, at 71.

to a certain point in the life of the fetus it is not able to survive outside the mother's body; hence removing it from her body guarantees its death. But they are importantly different. . . . A woman may be utterly devastated by the thought of a child, a bit of herself, put out for adoption and never seen or heard of again. She may therefore want not merely that the child be detached from her, but more, that it die. Some opponents of abortion are inclined to regard this as beneath contempt—thereby showing insensitivity to what is surely a powerful source of despair. All the same, I agree that the desire for the child's death is not one which anybody may gratify, should it turn out to be possible to detach the child alive.²⁸³

If this is, as it seems to me, correct and if medical science were to advance to such a state that, after twelve weeks, fetuses could be sustained as viable entities in surrogate wombs with a survival rate the same as that of naturally born infants, then the pregnant woman's claim to having the fetus removed and the claim of my poor fellow with the bad gall bladder would be identical. Each could justify his claim by an appeal to the same principle in a context that is different but not distinguishable. It should be observed, moreover, that since the principle appealed to by the plaintiff in *Roe* does not support an independent claim to "secure the death of the unborn child," there is some logic in the Court fixing on viability as the point at which substantial state regulation is permissible.²⁸⁴ At that point, quite apart from how one counts fetal life, the woman may still plausibly claim that she wants the fetus removed. She has no claim, however, to a procedure that entails the destruction of the fetus if the state provides a procedure that does not.²⁸⁵

33.

Assume for a short time the validity of Texas's position in *Roe*, namely, that "life begins at conception and is present throughout pregnancy" ²⁸⁶ Does the acceptance of this assumption (or its

283. Thomson, *supra* note 281, at 66.

284. The Court itself gives no reason for settling on viability: "With respect to the State's . . . interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb." 410 U.S. at 163.

As Professor Ely has said: "[T]he Court's defense seems to mistake a definition for a syllogism." Ely, *supra* note 258, at 924.

285. One may query whether *Roe* is a "definitive" decision. Medical technology may overtake it, for it seems likely that viability will be achievable earlier and earlier. I would suppose that this would mean that abortion entailing destruction of the fetus can be precluded earlier and earlier, at least if an alternative procedure for the removal of the fetus is made available.

286. 410 U.S. at 159.

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rhetorically more provocative version that the “fetus [embryo, fertilized ovum] is a person from the moment of conception”²⁸⁷) necessarily conclude the abortion issue? This is the question to which Professor Thomson attends in her short and splendid article from which I have just quoted. She has a good deal to say, all of it is interesting and some of it important to a proper understanding of *Roe*.

Given the assumption about fetal life (that she does not believe but accepts *arguendo*), Thomson wisely declines to defend an unqualified right to abortion. Her argument, nevertheless, is heroic: Some abortions, she claims, are justified by resort to the principle that “the mother has a right to decide what shall happen in and to her body.”²⁸⁸ Her major forensic tool is a vivid analogy:

[L]et me ask you to imagine this. You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist’s circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, “Look, we’re sorry the Society of Music Lovers did this to you—we would never have permitted it if we had known. But still, they did it, and the violinist now is plugged into you. To unplug you would be to kill him. But never mind, it’s only for nine months. By then he will have recovered from his ailment, and can safely be unplugged from you.” Is it morally incumbent on you to accede to this situation? No doubt it would be very nice of you if you did, a great kindness. But do you *have* to accede to it?²⁸⁹

Thomson’s question is meant to be answered “no,” and it seems to me that “no” is the only answer that can be defended by an appeal to our attitudes and practices.²⁹⁰ Nor do I see how her example can be distinguished from abortion where pregnancy results from rape.

Even if one does not grant this much (and I am sure there are those who will not), some features of Thomson’s position are worth

287. Thomson, *supra* note 281, at 48.

288. *Id.*

289. *Id.* at 48-49 (emphasis in original).

290. *Id.* at 62-66. Compare Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Thomson*, 2 PHIL. & PUB. AFFAIRS 117 (1973), with Thomson, *Rights and Deaths*, *id.* at 146.

noticing.²⁹¹ First, the violinist case would be very different if "you" had to be plugged into his circulatory system for nine minutes rather than nine months. The principle, that one is entitled to decide what happens in and to one's body, must not only be accommodated to other principles but must be flexible enough to tolerate relatively minor violations even for relatively minor reasons. Time is important and so too is the nature of the violation. A compulsory vaccination is different on both counts from a compulsory pregnancy.²⁹²

Second, if "you" agreed to be plugged into the violinist, your moral position, of course, would be dramatically changed. This may seem to diminish the claim to abortion of a woman who becomes pregnant after having consented to intercourse. But her situation is different and, while observable differences do not mean that she should prevail if the fetus is assumed to be indistinguishable in any relevant way from the violinist, they do suggest, to the extent it is possible to relax this assumption, that consent counts for less than might be thought.

The woman may have taken all the precautions she could. Contraception is not foolproof and "assumption of risk" can be pushed too hard. Sexual intercourse is not voluntary in the same way that going to a baseball game or agreeing to be plugged into a violinist is voluntary. It makes sense to speak of voluntariness in contrast to rape, but confusion on this issue should be carefully avoided. To say that Betty goes to the opera voluntarily, Betty voluntarily has sexual intercourse, and Betty voluntarily eats food is not to say that in each case Betty has exercised the same degree of volition.

On the other hand, even if sexual intercourse were—as eating is—a matter of life or death, the woman who became pregnant (but was not raped) is not in the position of Thomson's kidnapee, for the kidnapee received no benefit from being plugged into the violinist.

34.

I think that it is not only possible to relax the assumption that a fetus is like the violinist, but, indeed, that the assumption is impossible to maintain. Let me call attention to an attitudinal difference that I believe is quite generally held. In order to save the life of the mother, we are prepared to accept the death of the

291. I do not mean to claim that Professor Thomson would agree with all that follows.

292. Cf. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

fetus. Even Texas provided for this. Indeed, “[s]imilar statutes are in existence in a majority of the states.”²⁹³ However, suppose that the fetus is removed and placed in an incubator because it appears that it can live. Two days later it is determined that the mother will die if she does not receive a small blood transfusion. The only blood available that matches hers is the infant’s in the incubator. He will survive if he keeps his blood but will die and the mother survive if he gives it up. I do not think we are now prepared to kill the infant to save the mother.

We are not prepared to kill the infant to save the mother for reasons already remarked, namely, that the principle which supports some abortions does not give the “right to secure the death of [even] the unborn child.” But we are prepared to accept that death to save the mother. We are not prepared to accept the death of the infant in the incubator, however, because most of us perceive the fetus to have less of a right to life than the infant. Indeed, the infant has as much of a right to life as the violinist, for it would not matter if his mother were a virtuoso.

To take another example, we are not apt to be surprised by, or to think it madness if, a person favors the abortion of a badly deformed fetus and, at the same time, opposes infanticide. This again is an example of the nature of the principle appealed to in support of a limited right to abortion, but it too reflects a difference in attitude toward fetal and infant life. Surely we would be bewildered by one who favored infanticide and opposed abortion.²⁹⁴

35.

The example of the deformed fetus purports to show that its survival counts less than the survival of a deformed infant. It does not purport to say anything about the morality of aborting such a fetus. It is to this that I now turn. The claim I want to make is that, if one agrees with the main features of the argument thus far, common sense requires permitting abortion here.

Consider the following story: Mary and Jane are identical twins. Mary was married in the summer and went to Europe on her honeymoon. She became pregnant and found it difficult to sleep. She went to a physician and was given thalidomide which helped a great deal. Shortly thereafter, evidence of the effects of thalidomide on the de-

²⁹³. Roe v. Wade, 410 U.S. at 118.

²⁹⁴. One of course can be against both, for different reasons, or for both.

velopment of the fetus was published. Mary, learning of her predicament, seeks moral counsel.

The summer Mary was honeymooning in Europe, Jane was working in New York. While walking alone one afternoon she was assaulted and forcibly raped. A month later she discovered that, as a result of the rape, she had become pregnant. She too seeks counsel. The sisters go together.

We can explain to Jane that she would be a very nice person if she carried the fetus to term, but that it is morally permissible for her to have an abortion, even if the fetus were considered "a person from the moment of conception."

Having told this to Jane, what shall we say to Mary? I do not think that we can now tell her that it is impermissible for her to have an abortion and at the same time persuade ourselves that we are being fair to her. Nor do I think we have to. We can say to Mary (1) that we do commonly draw important moral distinctions between fetal life and other kinds of human life, (2) that this distinction does not mean that fetal life may be disregarded, but that it does enable us to make distinctions that otherwise would be morally impermissible, (3) that one such distinction, which has considerable intuitive appeal, counts the survival of a fetus that "would be born with grave physical or mental defect"²⁹⁵ less than the survival of a normal fetus, and (4) that while the chief appeal of the distinction roots in a widely held preference for the birth of a healthy child, it figures in the weight to be given the principle that a woman "has a right to decide what shall happen in and to her body." Support for the final conclusion may be found in two observations. First, it is, as a general rule, emotionally more painful for a woman knowingly to carry an unwanted defective fetus than it is for her to carry an unwanted healthy fetus. Second, when she engaged in intercourse, the chance of her having to carry a gravely defective fetus was a knowable risk, but—if we can argue from a conclusion—a risk she did not assume. For it is permissible, in assessing the degree of risk assumed, to notice the degree of volition involved in the act creating the risk in the first place. In this respect, Mary is not Jane; but neither is sexual intercourse going to an opera.

36.

The arguments I have been making take us about as far as is possible by noticing commonly held attitudes and reasoning from them.

295. MODEL PENAL CODE § 230.3, reproduced in *Roe v. Wade*, 410 U.S. at 205-07.

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This is a method for discovering conventional morality and I take some comfort in the fact that the American Law Institute's Model Penal Code also would permit abortion for rape, to save the life of the mother, or if "the child would be born with grave physical or mental defect."²⁹⁶ The work of the Institute is a check of sorts. Its conclusions are some evidence of society's moral position on these questions. It is, indeed, better evidence than state legislation, for the Institute, while not free of politics, is not nearly as subject to the pressures of special interest groups as is a legislature.

The Institute, however, would permit abortion in additional situations, most importantly where there was "a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother."²⁹⁷ I would like to be able to find support for that position in conventional morality, for it surely coincides with my personal preference. But the Institute's position is here the best evidence there is and that does not seem enough. I do not understand how, by noticing commonly held attitudes, one can conclude that a healthy fetus is less important than a sick mother.

Of course (and this is something of a paradox, for what the Institute recommends is some evidence of conventional morality), the Institute may propose to enlarge the woman's rights beyond what an appeal to conventional morality indicates she is entitled and a legislature can follow the Institute's proposals or go well beyond. Even apart from the woman's health, for example, it can (although I do not believe conventional morality does) consider the stage of fetal development.

The Supreme Court, however, has no such mandate when elaborating the concept of liberty in the Fourteenth Amendment. Conventional morality is the outer limit of the Court's legitimate authority and a proper understanding of substantive due process indicates, as I have attempted to show, that it is also much of what this branch of constitutional law is about.²⁹⁸ In this respect, *Roe v. Wade*, as a legal problem, is not very different from the insurance case and *Lochner* resembles those rejected cantaloupes.

296. *Id.*

297. *Id.*

298. It is also a good deal of what the Eighth Amendment's prohibition of "cruel and unusual punishment" is about. See *Furman v. Georgia*, 408 U.S. 238 (1972). Moreover, the same could be said of obscenity if one were to divorce it from the protection afforded political speech by the First Amendment, for one would then view it as an aspect of substantive due process. See *Miller v. California*, 93 S. Ct. 2607 (1973); *Paris Adult Theatre I v. Slaton*, 93 S. Ct. 2628 (1973); note 127 *supra*.