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Paul Weiler

Osgoode Hall Law School of York University

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TWO MODELS OF JUDICIAL DECISION-MAKING

PAUL WEILER*

Toronto

I. Introduction.

The philosophy of the judicial process will soon be of great practical significance for the Canadian legal scene. The traditional, inarticulate, legal positivism of Canadian lawyers and judges is rapidly becoming outmoded by recent developments. First, the determination of our new Prime Minister to achieve an entrenched Bill of Rights will, of necessity, confer on the courts the power and the duty to make fundamental value judgments which cannot flow mechanically and impersonally from the language of the document. Second, the British House of Lords has decided to change its long-standing rule that its earlier precedents could not be overruled. Presumably, and hopefully, the Canadian Supreme Court will continue to imitate slavishly its English counterpart by following this decision.¹ Third, Canadian scholarship about the Supreme Court has begun to utilize some of the advanced techniques of the behavioural sciences in order to study judicial decision-making.² Two related developments should follow. Our judges will grow increasingly conscious of the freedom and the responsibility they have to develop and alter the law. Both academics and the public will become aware of the fact of judicial power and then go on to question its legitimacy.

It is only too true that we will be decades behind the same course of developments in our neighbour to the south. There is a

*Paul Weiler, of Osgoode Hall Law School, York University, Toronto.

¹ The Canadian position as regards *stare decisis* is exhaustively reviewed and evaluated in MacGuigan, *Precedent and Policy in the Supreme Court* (1967), 45 Can. Bar Rev. 627; *cf.* also Joanes, *Stare Decisis in the Supreme Court of Canada* (1958), 36 Can. Bar Rev. 175.

² S. R. Peck, *A Behavioural Approach to the Judicial Process: Scalogram Analysis* (1967), 5 Osgoode Hall L.J. 1; *The Supreme Court of Canada 1958-1966: A Search for Policy Through Scalogram Analysis* (1967), 45 Can. Bar Rev. 666. The work of my colleague, Professor Peck, was noteworthy not only in breaking new ground in analysing Supreme Court decision-making but also in the degree of newspaper comment to which it gave rise.

favourable cast to this situation. We have available to us a significant body of American experience, and of jurisprudential reflection concerning it, which we can use in intelligently understanding and evaluating the process of change that the Canadian judicial process is likely to undergo. Moreover we can choose between at least two, substantially different conceptions of judicial decision-making which have been elaborated in some detail in American legal thinking. One theory characterizes the judicial function as, essentially, the "adjudication of disputes" within the legal system. The other holds that at least some courts are primarily engaged in "policy-making", in a manner largely indistinguishable from the other political agencies in our society. It is my intention to draw together, in a systematic way, these two very sophisticated theories, to show the conclusions which flow from the insights that lie at the root of each "model", and to indicate the important problems which, as yet, detract from the adequacy of each. In doing so, I shall also record the significance of many apparently unrelated phenomena within the Canadian judicial system.

What theoretical significance do I attach to the use of these models? Sociological theory tells us that the position of judge in any society carries with it a set of shared expectations about the type of conduct that is appropriate to that position.³ These expectations have reference not only to the proper *physical* behaviour of one who occupies that position but also to the mode of reasoning to be used in making his judicial decisions. There are several possible decision-making roles that can be proposed by society for its judges, each having different supporting reasons for their acceptance. Two of these roles are the subject of this article, "adjudicator" and "policy-maker". Both embody fundamental value choices for the society which, presumably, are made after some consideration of these competing justifications. Once the choice is made, the expectations that are connected with this one role must be shared by at least a substantial majority of the participants within the system in order that it have some institutional stability. Finally, the institutional position of the judge is reciprocally connected with society's wishes about how they should

³ The concept of "role" is basic to sociology, and I can do no more than indicate its relevance to this article. A very good general discussion is Ralf Dahrendorf, *Homo Sociologicus*, in his *Essays in the Theory of Society* (1968), pp. 19-87. Effective use is made of the concept of "judicial role" by Grossman, *Lawyers and Judges* (1965), pp. 13-20. Becker, *Political Behaviouralism and Modern Jurisprudence* (1964), esp. Ch. 3; *Judicial Structure and its Political Functioning in Society* (1967), 29 *J. of Pol.* 302.

behave in their decision-making capacity. It is this connexion between the role we give to our judges and the design of the structure within which they operate that the two models are intended to display.

Hence, the function of each model is to trace the institutional implications of each of these fundamental value judgments about the appropriate mission of the judge. One model is based on the value judgment that judges should make policy choices as a political actor; the other assumes it is desirable that judges confine their activity to the settlement of private disputes. As we shall see, there are real differences in the social arrangements which are most compatible with these two distinctive judgments about the appropriate judicial role. We should be able to verify the existence of these proposed differences in actual practice, or in recommendations about changes in the existing system. Moreover, not only do these theoretical models serve as a framework for explanations of how judges *do* behave, they also assist our appraisal of how judges *ought* to behave.

Finally, the use of these two schematic representations of the judicial process should serve to illuminate a significant moral problem that has surfaced recently in American legal discussion of the role of the judiciary. Once an institution has gained inertial force and power as a result of shared expectations about how it is and ought to operate, it is then available as an instrument for serving social purposes that are not compatible with the original model. Is it legitimate for those who believe in an alternative model of judicial behaviour to make covert use of the existing organization? To what extent will such "parasitic" utilization of one version of the judicial process induce actual changes in the existing system which make it more compatible with the form that naturally flows from a new conception of appropriate judicial decision-making? To these, and other problems, this article is addressed in a preliminary way.

II. *The Adjudication of Disputes Model.*⁴

The two models whose traits I am going to describe both agree in

⁴This model has been developed primarily by Professor Lon Fuller especially in an unpublished paper *The Forms and Limits of Adjudication and in Collective Bargaining and the Arbitrator*, [1963] *Wis. L. Rev.* 3. Other noteworthy contributions include Hart and Sacks, *The Legal Process* (tent. ed., 1958), and Mishkin and Morris, *On Law in Courts* (1965). Needless to say, many other writers have contributed to the elaboration of this model and I will refer to their work where relevant in the text.

rejecting the viability and the desirability of the traditional Anglo-Canadian model of judicial decision-making. The latter suggests that a judge decides his cases by the somewhat mechanical application of legal rules which he finds *established* in the legal system. They are, in this sense, *binding* on him completely apart from his own judgment as to their fitness of his purpose. This theory has an historical, if not a logical, relationship with the dictates of an Austinian, positivist conception of law and a rigid notion of the division of powers.⁵ The "adjudication of disputes" model shares, to some extent, the assumption that judges have a distinctive and limited function. However, it emphatically denies the conclusion that it is *possible* for a judge to be purely passive, and *desirable* that he make decisions without a necessary exercise of his judgment about what the law ought to be.

As was stated earlier the purpose of the model is to show the necessary inter-relationship between the function which judicial decision-making is primarily intended to perform, the institutional characteristics which are implied by such a function, and the qualities in judicial decision-making which flow naturally from this institutional background. In short, the job we give judges to perform determines the design of the judicial process; the nature of the structure influences the manner in which judges carry out their tasks; the form of judicial action limits the issues judges may appropriately resolve. Hence the adjudication model rejects the tacit assumption, often made, of "institutional fungibility".⁶ The latter holds that the same substantive policies can and should be achieved in the same undifferentiated way, whatever be the organizational form in which various actors are allowed to strive for these ends. To the contrary, the specific institutional form of adjudication, by comparison with that of legislation, for instance, limits both the goals for which judges should strive and the means they should use for achieving these goals.

To summarize the model very briefly, it conceives of the judge as the adjudicator of specific, concrete disputes, who disposes of the problems within the latter by elaborating and applying a legal

⁵ On the influence of positivism on the Canadian judiciary, see Read, *The Judicial Process in Common Law Canada* (1959), 37 *Can. Bar Rev.* 265; McWhinney, *Legal Theory and Philosophy of Law in Canada*, in *Canadian Jurisprudence* (1958), p. 3. For a defence of Austin against the charge of "mechanical jurisprudence", see Morrison, *Some Myths about Positivism* (1958), 68 *Yale L.J.* 212.

⁶ This notion is formulated and criticized in Dworkin, *Does Law Have a Function?* (1965), 74 *Yale L.J.* 640.

regime to facts, which he finds on the basis of evidence and argument presented to him in an adversary process. The body of rules and principles which are to govern the private conduct of the participants in the legal order are largely settled by forces outside adjudication, although the judge does play a collaborative role in articulating and elaborating these principles.⁷ However, the primary focus of adjudication is the settlement of disputes arising out of private lines of conduct, by evaluating such conduct in the light of established rules and principles. As we shall see, the whole institutional structure of adjudication—its incidence, access to it, the mode of participation in it, the bases for decision, and the nature of the relief available in it—are all defined by and flow naturally from this function. The key elements within the adjudicative model are (1) settlement of disputes, (2) the adversary process and (3) an established system of standards which are utilized in the process to dispose of the disputes.

Settlement of Concrete Disputes

The first characteristic of “adjudication” is that it has the function of settling disputes (between private individuals or groups, or the government and the individual). These disputes are not future-oriented debates over general policy questions, although, as we shall see, the latter can enter into the final resolution of the problem. Rather, the disputes which are necessary to set the process of adjudication in motion involve “controversies” arising out of a particular line of conduct which causes a collision of specific interests. There is no *logical* or *factual* necessity about this proposition. There can be exceptions and the question of defining the limits of the adjudicative function can be difficult and debatable in the marginal areas.⁸

The legal problems presented to adjudication can be at least several degrees removed from a purely private and concrete dispute. At the other extreme is the decision of a court, completely on its own motion, to issue a statement establishing or changing an existing rule of law, with no argument of counsel at all. This is rare, but not unheard of, as is shown by the recent example of the House of Lords overruling the *London Street Tramways* rule

⁷ Fuller, *Human Purpose and Natural Law* (1958), 3 *Natural L.F.* 68, at p. 74.

⁸ See Hart and Sacks, *op. cit.*, footnote 4, pp. 652-662; Hart and Wechsler, *The Federal Courts and the Federal System* (1953), p. 75 *et seq.*; Bickel, *The Least Dangerous Branch* (1962), p. 113 *et seq.*

of the inviolability of its own precedents.⁹ Much more common is the use by the court of an opinion disposing of a particular dispute to issue general statements about the law that are not absolutely "necessary" for the decision.¹⁰ Intermediate between these two is the case of the advisory opinion, where the court is asked for its opinion on the constitutional legality of proposed legislation.¹¹ A recent example is the Reference about the governmental ownership of off-shore mineral rights.¹² Here the court does not decide for itself the occasion when it will articulate the law and it does have the benefit of the argument of counsel. Moreover, historically, an important *raison d'être* of the creation of a Canadian Supreme Court was its ability to give expert, authoritative advice to the executive.¹³ However, as we shall see, there are good theoretical grounds for believing such a role inappropriate to a court and the defensibility of these grounds is aptly corroborated by this example.¹⁴ A court should confine itself to settling concrete, private disputes between individuals who apply to the adjudicator for the resolution of their problem.

Not all modes of settling specific, concrete, "private" disputes can be characterized as adjudication, though. Another possible technique is that of "mediation".¹⁵ Essentially, this process is designed to induce an agreement of the parties as to the specific type of settlement which is preferable in the interests of each at the time of settlement. By contrast, adjudication results in an

⁹ See Leach, Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls (1967), 80 Harv. L. Rev. 197.

¹⁰ A recent example is *Hedley Byrne v. Heller*, [1963] 2 All E. R. 575. Of course I do not mean to suggest that this decision on the issue of a general duty of care is not "binding" simply because the court then went on to hold that there was no duty in the facts which gave rise to *Hedley Byrne*.

¹¹ A general description of this practice is contained in Grant, *Judicial Review in Canada: Procedural Aspects* (1964), 42 Can. Bar Rev. 195. I shall return to a fuller discussion of this issue later.

¹² *Reference Re Ownership of Off-Shore Mineral Rights* (1968), 65 D.L.R. (2d) 353, [1967] S.C.R. 792.

¹³ Russell, *Bilingualism and Biculturalism in the Supreme Court of Canada* (unpublished report to the Royal Commission on Bilingualism and Biculturalism, 1966), pp. 13-14.

¹⁴ McWhinney, *Federal Supreme Courts and Constitutional Review* (1967), 45 Can. Bar Rev. 578, at pp. 598-600. I shall return to this problem later.

¹⁵ See Northrop, *The Mediatl Approval Theory of Law in American Legal Realism* (1958), 44 Va. L. Rev. 347. Some interesting work has been done on mediation in Chinese law: Cohen, *Chinese Mediation on the Eve of Modernization* (1966), 54 Calif. L. Rev. 1201; Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China* (1967), 55 Calif. L. Rev. 1284. Labour arbitration has also been a fertile field for theories of mediation as the optimum means of dispute-settlement.

authoritative settlement which is imposed on one (or both) of the parties whatever be his attitude toward it. Not all authoritative settlements can be properly attributed to adjudication, especially those which purport to be nothing more than the fiat of one who wields "legitimated power"¹⁶ because of his position in a hierarchical system (nor, by the way, those that proceed from chance, as the throw of the dice). Although this conclusion might be obvious, it has an interesting corollary for the exercise by the decision-maker of a type of managerial or discretionary function. Why this type of forward-looking disposition of the problem (which shifts values between the parties in the light of society's best future interests)¹⁷ is inconsistent with adjudication can only be seen by considering the "adversary" nature of the latter.

An Adversary Process

An adversary process is one which satisfies, more or less, this factual description: as a prelude to the dispute being solved, the interested parties have the opportunity of adducing evidence (or proof) and making arguments to a disinterested and impartial arbiter who decides the case on the basis of this evidence and these arguments.¹⁸ This is by contrast with the public processes of decision by "legitimated power" and "mediation-agreement", where the guaranteed private modes of participation are voting and negotiation respectively. Adjudication is distinctive because it guarantees to each of the parties who are affected the right to prepare for themselves the representations on the basis of which their dispute is to be resolved.

This is the minimum descriptive content of adjudication as an adversary institution and from it flow certain consequences about the nature of the process itself. Before discussing these it is appropriate to outline some of the reasons why this quality of adjudication might be considered desirable, since it is by no means inevitable. Other kinds of dispute-settlement are in use not only in other societies, but also in our own.¹⁹ In the first place, the advers-

¹⁶ This position is formulated by Fuller, *The Problem of Jurisprudence* (temp. ed., 1949), pp. 701-705.

¹⁷ The implications of such a process of dispute settlement are developed in Radin, *The Chancellor's Foot* (1935), 49 *Harv. L. Rev.* 44.

¹⁸ This characterization of adjudication is suggested by Fuller in the works referred to in footnote 4.

¹⁹ The juvenile court is an example of an institution about which there is serious debate whether or not it should be subjected to the adversary form: cf. Handler, *The Juvenile Court and the Adversary System*, [1965] *Wis. L. Rev.* 7.

ary process decentralizes participation even in the *governmental* system of dispute-solving by eliciting aid for the arbiter's understanding of the case from those who are most likely to see the relevant necessities in the situation (both factual and legal) from different points of view.

Second, by doing so it enables the arbiter to adopt a relatively passive pose, which enhances his ability both *to be* and *to seem* impartial. He is able to become impartial because he need not form premature hypotheses with which to discover the necessary factual and "legal" bases for a proper decision, since the parties are doing this for him. Any biases which are necessitated by the formulation of tentative but premature positions are counteracted by opposing biases. Needless to say, the presentation and reception of proof and arguments must to some extent be reciprocal and it is for this reason that an arbiter even in the adversary system can only be *relatively* passive. Because he is able to withstand the temptation of making early assumptions, he is less likely to filter out later data inconsistent with those assumptions. As such his decision is more likely to be the right and proper one in the circumstances. Moreover, his ability to remain passive will likely enhance the parties' belief that he was impartial, was motivated only by a desire to decide as the situation appeared to him, and had no "axe to grind". Both of these factors give a peculiar moral force to the decision and the parties' sense of the impulse of the arbiter to decide "rightly" enhances its acceptability to them, and the likelihood that they will adhere to it and implement it.²⁰ Of course this "acceptability" cannot flow only from "impartiality" because the throw of the dice is even more impartial. There has to be a confidence in the rationality of the process, as determining the rightness of the result. We shall turn to this problem later.

Finally, the adversary system, by its very nature, gives the parties a meaningful sense of participation in the working out of their own destinies in the solving of their disputes. It is true that the substitution of combat by trial for combat by force perhaps maintains and develops harmful attitudes which offset the values of the above. Still, the adversary process (by comparison with "legitimated power" and public "mediation") can result in the parties settling privately many disputes which come into better perspective as the respective positions become prepared for trial.

²⁰ Fuller has suggested that this sense of rationality to adjudicative decisions is the prime force making them acceptable; Fuller, *op. cit.*, footnote 16, pp. 705-708.

This has the beneficial result of limiting the use of governmental machinery as an intervening force in private lives and the preservation of the integrity of this "scarce resource" for occasions where it is really needed.²¹

The inter-relationship of the "adversary" quality of the adjudicative process with the latter's function of deciding concrete disputes is apparent. On the one hand, the adversary process itself is institutionally feasible only if a relatively limited number of points of view need be put before the arbiter, thus requiring only a limited number of participants representing each. To the extent that the parties involved in adjudicated disputes tend to proliferate, the whole process of individual presentation of a case, together with the testing of one's opponent's case, becomes unworkable and the passive position of the arbiter will be untenable. The requirement that the dispute be *concrete* furnishes a relatively precise criterion for delimiting those who are allowed to participate, that is, a requirement that any participant have a significant personal interest in the disposition of the concrete dispute.

Moreover, the existence of a concrete dispute between interested opponents is itself a prerequisite for intelligent decision-making within an adversary system. It is necessary that each of the parties be able to seek valuable relief from the arbiter (or protection therefrom) in order that he have an incentive to provide as capable an argument as is possible from his own point of view to the relatively passive arbiter. Only if all relevant sides to the dispute are adequately represented can the adversary system operate intelligently. This is an important factor to be considered in evaluating the proposal for a general power of "prospective overruling" since the incentive to argue in favour of changes in outmoded legal rules is lost or diluted under such a system.²² It should be noted, parenthetically, that there is no reason to suppose that the incentive necessary to ensure effective adversary representation is adequately measured by the amount of relief necessary to respond to the disputed situation. The justification for thus measuring the type and amount of relief derives from the adjudicative

²¹ Mishkin and Morris, *op. cit.*, footnote 4, p. 147.

²² Prospective overruling has become a highly-touted technique for judicial policy-making in recent years. Its inconsistency with an adjudication model of the judicial process is suggested in Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law* (1965), 79 *Harv. L. Rev.* 56. This argument is rebutted, in part, in Curran, *Time and Change in Judge-Made Law: Prospective Overruling* (1965), 51 *Va. L. Rev.* 201.

function itself and it is then available as the incentive necessary for the adversary process.²³

Limitations of the Adversary Process

Before going on to describe the implications of the adversary process for adjudication, the essential limitations of this type of institution must be noted. In a sense this type of institution achieves its purposes indirectly, by analogy to a competitive market. The individual adversaries pursue their private interest, a specific decision by the adjudicator in their favour. To this end they each do their best to advance all the reasons which support the principle that favours their own position and to pick out and demolish all the weak links in their opponent's arguments. The neutral adjudicator, able to see the same problem from the relevant opposing points of view, achieves the public good by selecting and establishing the principle with the strongest notional support. The appropriateness of the metaphor of the "invisible hand" is apparent.

The same analogy shows the inevitable inadequacies of the process. Sometimes the marginal gains to be achieved from allowing opposing parties to prepare and present a case for adjudication are simply not justified in the light of the "opportunity cost" to the particular individuals or to society at large. We then adopt the institution of the "umpire" who makes an immediate, authoritative decision on the facts as they appear to him. The cost of an occasional erroneous decision is the price that must be borne if the game is to be viably carried on. As is suggested in welfare statutes, an umpire-like decision can be made at first instance, with full-scale adjudication available only if it is protested.²⁴

In a competitive market, the indirect gain for society of a more rational allocation of resources can be distorted and dissipated when inequality of bargaining power is achieved by some of the

²³ See the criticism of the specific technique used in *Molitor v. Kaneland Community Unit School District* (1959), 163 N.E. 2d 89, in Mishkin and Morris, *op. cit.*, footnote 4, pp. 310-314.

²⁴ See McRuer Royal Commission, *Inquiry into Civil Rights*, Report 1 (1968), Vol. 3, p. 1135 *et seq.* Another example of the unsuitability of adjudication is the interim labour injunction process. Here the management interest in a speedy remedy comes into direct conflict with the union interest in accuracy of result. At present, in Ontario, the balance completely favours the management interest even where the *ex parte* injunction is not used. Unions simply are not given an adequate opportunity to prepare their cases and the adversary process has become a facade. Yet to allow full scope for the workings of adversary adjudication would be to sacrifice the management substantive interest involved even where it is fully supported in the law. An alternative system is necessary, probably a variant of the inquisitorial model, using the Labour Relations Board.

participants. So also the adversary process, as a rational institution for settling disputes, makes sense only when relative equality of representation is guaranteed. This can be achieved to some extent by a system of legal aid, although the inequality in legal talent is inevitable. Moreover, as we have seen, this affects not only the fairness of the decision for the immediate parties but also the quality of the legal principles established for the society as a whole. An alternative, institutional form is the "inquisitorial" system, where the decision-maker independently investigates and prepares the record for the case and then makes a decision, with or without the benefit of argument from the parties about this record.²⁵ What this gains from the elimination of the distorting effects of inequality, it tends to lose in a heightened appreciation of a problem (and its solution) from several points of view. Again, the analogy to the issue of government planning versus market allocation is clear. In any event, the use of adjudication must depend on an over-all judgment about its appropriateness in the circumstances.

The Need for Standards

It is unnecessary at this time to describe in detail the various procedural demands which are made on the process of decision-making by the fact that it takes place in the form of adversary adjudication. Suffice it to say that one can deduce from the latter the necessity that the arbiter be "unbiased" and that the rules of natural justice be adhered to. Especially important are rules relating to *ex parte* communications and decisions being based on the "record" rather than on information or principles not available to the parties during their argument.²⁶ However, one important general thesis about adjudication can be derived from the two preceding characteristics, relating to the "rationality" of the process and the perceived "rightness" of the results.

It has been suggested that the chief value of the institution of adjudication is the moral force which inheres in its decisions because they stem from a context in which they appear most likely to be right.²⁷ First of all, they are the product of a neutral, unbiased,

²⁵ An example of the inquisitorial system is the Conseil d'Etat in French administrative law. There are good reasons for believing this may be the most appropriate form of designing a system of judicial review of administrative action, at least of non-business claims.

²⁶ An interesting problem that is raised by this requirement is the propriety of a judge deciding a case on a basis not suggested by the parties in argument. Cf. Wyzanski, *A Trial Judge's Freedom and Responsibility* (1952), 65 Harv. L. Rev. 1281, at pp. 1295-1297.

²⁷ See Fuller, *ops cit.*, footnote 4, *passim*.

and impartial viewpoint (and we assume that the requirements of the latter are met).²⁸ Second, because the decision focuses on a specific and concrete problem, it is most likely to result from a sympathetic understanding of the general issues that inhere in this situation. These principles will be given a more pointed impact because of their immediate and particular implications. Moreover, because only a very concrete issue needs to be resolved, the decision can be carefully limited to those problems which are adequately perceived, and thus real dangers of "absentee management" can be avoided. This is particularly true if the attitude to precedent within the system recognizes the *incremental* nature of adjudicative law-making and is careful to limit the untoward effects of unfortunate general language in the opinion.²⁹ Thirdly, as we have seen, this sympathetic perception of the competing interests involved is enhanced by the enlistment of representatives of each who have a real incentive both to display the real demands of their own interests and to expose the fallacies in the arguments advanced by the other side. I suggest, however, that all of these tendencies towards rationality inherent in "adjudication" can only be operative if there is available to the participants in the process a shared consensus about the standards to be utilized in making the decision. Ordinarily these standards are the components of a legal system.

Before going on to discuss my reasons for making this statement, I must note that this affinity between legal standards (of conduct) and adjudication is not completely symmetrical. It is not necessary that enforcement of standards of conduct proceed via the institution of adjudication in determining instances of their breach. Some standards may be left completely self-applying and enforcing, and thus may be considered to be "conventional morality" only.³⁰ Others may be officially applied by an arbiter

²⁸ See Lederman, *Independence of the Judiciary* (1956), 34 *Can. Bar Rev.* 769, 1139. An interesting discussion has ensued about the conformity to this principle of an institution where arbitrators are paid by the parties. In Hays, *Labour Arbitration: A Dissenting View* (1966), p. 112, it is suggested that some arbitration awards are decided in a way designed to preserve the arbitrator's employability. A reply in Meltzer, *Ruminations about Ideology, Law, and Labour Arbitration* (1967), 34 *U. of Chi. L. Rev.* 545, at p. 547, suggests, *inter alia*, that since arbitrators must satisfy two parties with contradictory interests to preserve their employability, here an "invisible hand . . . links the private ends of arbitrators with the public interest in justice".

²⁹ Shapiro, *Stability and Change in Judicial Decision-making: Incrementalism or Stare Decisis?* (1965), 2 *Law in Transition Quarterly* 134.

³⁰ See Hart, *The Concept of Law* (1961), p. 89 *et seq.*

without any opportunity for prior representations by the parties, perhaps because of the need for a quick determination (although there may be an opportunity to complain about the decision afterwards, for instance to a baseball umpire). Still others may be officially applied and enforced without adversary participation because of the desire to avoid what are believed to be the harmful effects of the attitudes created in "trial by combat" together with a belief that even occasional mistakes will not be significantly harmful.³¹

Despite this, there is no doubt that official administration and enforcement even of private standards of conduct is a valuable (and often necessary) means of enhancing the effectiveness of the latter. Law has been defined as "the enterprise of subjecting human conduct to the governance of rules".³² Voluntary private adherence to rules is meaningful only if the system affords an authoritative avenue for obtaining relief from another's non-adherence and effectively sanctions the latter. It is probable (for reasons stated before) that an adversary system of official administration is the most valuable technique for ensuring adequate and accurate application of the standards to prior conduct (where conditions of time, and so on make its use feasible). If the gap between the legal system as stated, and its actual administration, becomes too wide, the enterprise of law will be unsuccessful.³³

We must now consider the reverse side of this relationship, where I make the stronger proposal that there is a necessary connexion between the "existence" of standards and the workings of "adjudication" as we have characterized it. It should again be emphasized that this "necessity" of which I speak is neither *logical* nor *factual*. Rather it is a tendency which we can discern in the working out of human purposes and the social conditions which are necessary for this. A more precise statement is that, all other conditions being equal, the greater the availability of viable standards for decision, the more likely that the process of adjudication will be successful.³⁴

Why does the institution of adjudication require the existence

³¹ An instance, perhaps, being the juvenile court, insofar as it is influenced by the "rehabilitative ideal"; Allen, *Criminal Justice, Legal Values, and the Rehabilitative Ideal* (1959), 50 *J. Crim. L. & Pol. Sc.* 226.

³² Fuller, *The Morality of Law* (1964), p. 122 *et seq.*

³³ Fuller, *op. cit., ibid.*, p. 81 *et seq.*

³⁴ Perhaps it is preferable to speak of an "affinity", rather than logical necessity. This is the term Professor Fuller uses in characterizing the relationship of law and morality.

of standards for decision? Of what type are these standards and what does it mean to say that they "exist"? Taking these questions in reverse order, in order that standards "exist", there must be a shared consensus between the adjudicator and the parties about what the standards are which the former is going to apply. Secondly, the parties must reasonably have expected, at the time they acted, that these standards would be used to evaluate their private conduct. Of course, some legal rules can be directed only to the arbiter himself dealing with purely remedial problems. We draw our standards from the legal order which regulates private conduct because a primary objective of the use of adjudication is to preserve the viability of this legal order by settling authoritatively the disputes arising within it. Successful adjudication requires that there be a shared consensus about these rules, especially insofar as they can be utilized to evaluate the conduct of the parties which gives rise to the dispute.

In order that adjudicative decisions be characterized by the quality of rationality which is a prerequisite for their moral force and acceptability, the arbiter must have some principles which he can utilize in explaining to himself and to the parties his reasons for deciding one way or the other. The arbiter is under a duty to articulate a reasoned basis for his decision (whether or not he writes an opinion), because he is not conceded the power of *enactment*.³⁵ He is not considered to have a *legitimate* power to exercise a discretion to settle a matter just because it needs settling, and without giving reasons for deciding on the particular disposition he selects.³⁶ Hence, he cannot merely confront an undifferentiated factual situation and decide by an intuitive "leap in the dark". He needs a set of ordering principles which enable him to make sense of the situation and abstract those relevant facets of it which can be organized into a reasoned argument.

Second, the adjudicative process can have the enhanced quality of rationality, which derives from its focusing on a specific, concrete dispute for decision, only if there are standards or principles which enable the adjudicator to single out the relevant, problematic facets of the situation on which he is going to concentrate his attention. If there is no framework of settled principles within which

³⁵ See Friedman, On Legalistic Reasoning—A Footnote to Weber, [1966] Wis. L. Rev. 148, at p. 158 *et seq.*

³⁶ The obvious contrast is the act of voting by legislators. Legislation or enactment, does not involve an institutional commitment to, or expectation of, a reasoned, principled support for a decision.

he can operate, and every aspect of every situation is always open to question, then the adjudicator will not be able to focus his attention on unresolved problems. Thus, he will not be able to attain a significantly higher quality of rationality in the solution which he produces for the problem.³⁷

Thirdly, to the extent that adjudication entails adversary participation, and the presentation of proofs and arguments to the arbiter, the process is meaningless unless the parties can know before their preparation and presentation of the case the principles and standards which the arbiter is likely to find relevant to his disposition of the dispute. It is impossible to make an intelligent argument "in the air" and without any idea of which factors are considered relevant by the person whom one's argument is attempting to persuade. If a relatively passive attitude is necessarily conducive to impartiality (although this does not exclude some reciprocal clarification of views), and a high degree of rationality in result thus depends directly on the quality of the preparations and representations by each side, then a consensus of standards is needed in order that intelligent alternative positions are established and that an adequate "joinder of issue" results.

The Limits of Adjudication: Polycentricity

Assuming that there must be a shared consensus about the proper standards to be applied in deciding the case, and that these standards must, in a sense, "pre-exist" the decision (rather than be a product of it), does this mean that the outmoded theory that the judge merely "finds" and applies the law is a necessary concomitant of the "adjudicative" model? Is the institution of adjudication compatible with a creative and imaginative judiciary which continually develops and renews our law in the light of changing social conditions, a conception that modern jurisprudence says is not only a *necessary* part of judicial decision-making, but a *desirable* part as well? Certainly those people who have developed and proposed the theory underlying the adjudicative model believe that judges can and must be collaborators in the development of the legal standards they apply. While recognizing the positive values in authoritative settlement of legal rules and standards (especially as we have seen, as regards the due functioning of the institution of adjudication itself), they believe that changes in

³⁷ Compare Shapiro, *op. cit.*, footnote 29 above, on the rebuttable presumption of the adequacy of the *status quo* and the necessity of this for rational decision-making as a consistent, practical achievement.

previously settled rules may positively be demanded by the goal of fostering these values.³⁸ Can this assumption be consistent with their general theory?

There are two distinct facets to this problem. In the first place the theory does lead us to one necessary conclusion about the limits on the process of adjudication. In some situations there are disputes which simply are not "justiciable".³⁹ This does not necessarily mean that they involve social problems which are inherently unsuited for adjudication, but rather that there are no standards available for rational, judicial decision-making. It is impossible to elaborate a reasoned decision which disposes of the case in the light of an intelligible pattern of established legal rules. This situation occurs where there are neither "enacted" legislative provisions proceeding from "legitimated power", residuary doctrine in the "unwritten" area of the law (or both), nor an existing "community" consensus of shared purposes or standards from which the adjudicator can reason. Examples of such areas are problems in international relations or labour arbitration.⁴⁰ In such a case, there is no logical necessity of adopting the theory that the legal system is necessarily closed and gapless; and that whatever is not prohibited is thereby permitted; It may often be much more desirable to accept the fact that there are areas which the law does not cover and thus not attribute the cloak of legality to positions which rely on the status quo or unilateral initiative.⁴¹ It is important to remember, though, that in these areas the problems can intelligibly be made amenable to sensible adjudication if standards are provided for the latter process. However, the adjudicative process itself is dependent on the prior establishment of these standards elsewhere. We shall assess later whether, and to what extent, the adjudicative model can legitimate an active, creative role by the court in articulating and settling the legal principles to be applied to the dispute before it.

³⁸ The whole of Hart and Sacks, *op. cit.*, footnote 4, is a testament to this effect; compare also Halbach, *Stare Decisis and Rules of Construction in Wills and Trusts* (1964), 52 Calif. L. Rev. 921.

³⁹ Stone, *Non Liqueur and the Function of Law in the International Community* (1959), 35 Br. Y.B. of Int. L. 124; Summers, *Justiciability* (1963), 26 Mod. L. Rev. 530.

⁴⁰ See Stone, *op. cit.*, *ibid.* Another example is the question of management's right to change working conditions in the "unwritten" area of the collective agreement. I have dealt with this problem extensively in a forthcoming paper.

⁴¹ This is the thesis of "non liqueur", which is elaborated by Stone, *op. cit.*, *ibid.*, in his article on international law. I have utilized this thesis for the analogous problem in labour relations, mentioned in the previous footnote.

If valid, the preceding analysis does justify the further conclusion that there are some types of problems which are *inherently* non-justiciable. This does not mean that, as a matter of fact or logic, the adjudicative process cannot be given the job of dealing with this type of problem. Rather, it is inherently unlikely that the problem can be *successfully* handled within this institution. The reason is that the purposes for which we strive cannot be achieved if we "subject this area of human conduct to the governance of rules". Although rules may be desirable in many areas of human life, there are some with which they are incompatible.⁴² Since adjudication works only if it utilizes rules, establishing duties and claims of right, and assessing responsibilities, it cannot work effectively where rules are undesirable.

If, despite this, we seek to use the adjudicative model for settling disputes in this area, either of two opposing tendencies is probable. One possibility is that only the external forms of adjudication will be observed while the substance of the process is ignored. To some extent, this may remain at low visibility, and the products of the process will retain the same moral force as before. However, eventually the loss of integrity in the functioning institution will be perceived, perhaps with consequent ill effects for its use elsewhere. On the other hand, the use of adjudication may result in a re-definition of society's goals by imposing its own forms and structures on the means and techniques used to achieve these goals. This is apparent, for instance, in the drive to create *per se* rules, or strong (if rebuttable) presumptions to replace the exercise of relatively unfettered discretion.⁴³ When this happens gradually, without any conscious re-examination of the desirability of *legal* intervention in the area, the result is a legal regime which may be substantively deficient.

Can anything further be said about the nature of social ob-

⁴² An excellent study of the ideology of "legalism" and the fallacies inherent in overuse of rules is Shklar, *Legalism* (1964).

⁴³ One place where this has occurred is the doctrine of the "duty to bargain in good faith" in American labour law; see Duvin, *The Duty to Bargain: Law in Search of Policy* (1964), 64 *Col. L. Rev.* 248. A classic example of the imposition of the structures of law on a problem when it is subjected to adjudication is the quick adoption of the "one man, one vote" standard in American Reapportionment cases. The substantive undesirability of this is admirably suggested in Shapiro, *Law and Politics in the Supreme Court* (1964), pp. 216-252. Yet he never seems to appreciate the consequences which naturally flow from use of adjudication as the institution for solving the problem of malapportionment. For a different point of view on the same problem see Auerbach, *The Reapportionment Cases: One Person, One Vote—One Value*, [1964] *Supreme Court Review* 1.

jectives which are incompatible with the governance of rules? Professor Fuller has suggested that such problems are typically managerial, or allocative, and that these manifest the quality of *polycentricity*,⁴⁴ which makes them unfit for adjudication. Strictly speaking, the issues of "polycentricity" and "amenability to rules" are not the same thing but they are closely related and most fruitfully discussed together.

A polycentric problem is one which has many centres of stress and direction of force, only some of which are likely to be the focus of attention when a decision in the area is made (as, for instance, in adjudication). Because it has these many different critical areas, and because they are all inter-related, a decision's immediate effects are likely to be communicated in many unforeseeable ways and affect many other areas of human concern. Since these other fields are likely to involve interests that are not directly and effectively represented in the adversary mode of adjudication, it is undesirable to have decisions made in a model allowing only the restricted types of participation there available. For instance, the articulation of a new rule or precedent, since in fact it is a generalization, will affect many others besides those directly involved in a dispute before the court. Problems of *stare decisis* thus are inevitably polycentric.⁴⁵

This is not a unique discovery, although the mode of analysis may be especially clarifying. There are few, if any, areas of human concern which are not polycentric, in the sense that they involve relationships which can have unforeseen consequences. The difficult question is whether or not the problem-area is sufficiently polycentric to make this latter quality especially significant in our dealing with it. Can the manner of dealing with the problem be so designed as to minimize its polycentricity, and any untoward effects thereof? For example, it is probable that a suitably defined and administered theory of *stare decisis* could do much to eliminate the unfortunate effects of wording in the decision on unforeseen circumstances and interests (and depend on those interests which are foreseen being adequately represented within the adjudicative proceedings).⁴⁶

⁴⁴ The meaning and implications of this concept are developed by Fuller, *op. cit.*, footnote 4, drawing on ideas originally formulated in Polanyi, *The Logic of Liberty* (1951).

⁴⁵ Stone, *Social Dimensions of Law and Justice* (1966), p. 654 *et seq.*

⁴⁶ Fuller, *The Forms and Limits of Adjudication* (unpublished paper), pp. 39-40. This analysis is aptly complemented by that of Shapiro on the incremental nature of judicial law-making in the article cited in footnote 29.

It should be apparent that polycentricity constitutes an obstacle to the intelligent use of legal rules. Rules are essentially generalizations which abstract a particular facet or quality from a situation, and prescribe a legal result should this abstracted condition obtain. The social consequences of the legal result can vary greatly, depending on the relationships between the abstracted conditions specified in the rule and the rest of its actual environment. Any such generalization is fraught with uncertainty and risk. It is essentially a matter of judgment whether the values inherent in the use of *rules* warrant their creation and enactment. Similarly problematic is the desirability of applying the rule in a decision made after an adjudicative hearing participated in only by representatives of those relatively restricted interests vindicated by the rule. Because the values in both rules and adjudication are so great, we so often make these judgments.

However, one area of human relationships where polycentricity simply cannot be avoided or ignored is that which we wish to make the subject of managerial control. As I stated earlier, these problems are essentially allocative, distributing benefits and burdens, or productive facilities, in the most efficient pursuit of certain over-riding goals.⁴⁷ As such they require an almost completely unstructured discretion in the person making the concrete decision. To the extent that we wish to control the exercise of this discretion, the best social technique which has been developed as yet is the competitive market,⁴⁸ which combines great flexibility with an extremely comprehensive control of almost every facet of the decision (together with its facility for conveying information very efficiently to the decision-maker).⁴⁹

Several factors make allocative decisions so significantly polycentric: first, the extremely complex network of inter-relationships involved render every possible abstraction necessarily unwieldy and crude; second, every decision that is made necessarily changes all of the related conditions so substantially that a new basis must be found for the next decision. For these reasons, even if the first decision is based on a rule or generalization which, while imperfect, is as good as possible, still the effect of the first is to change conditions so significantly that a new rule must be articulated to make

⁴⁷ Cf. Fuller, *op. cit.*, footnote 32, pp. 170-178.

⁴⁸ See Coase, *Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues* (1965), 41 J. L. & P.U. Ec. 161.

⁴⁹ See Dahl and Lindblom, *Politics, Economics and Welfare* (1953), p. 369 *et seq.*

a second decision rational. The rules must continually be changing as earlier decisions render outmoded the earlier generalizations on which they themselves were based.

An example of the type of issue which is subject to the first problem is the pursuit of the "rehabilitative ideal" in the criminal law, especially in the juvenile court. Rather than articulating a relatively precise rule of conduct which is to be adhered to in private conduct, and then utilized in an adjudicative proceeding to evaluate such conduct, the official agency is charged with the task of doing what is "best" for the child, if it believes that conditions warrant it. Obviously both of these decisions must be the subject of very wide discretion, such that the adjudicative model of "dispute-settlement" is unlikely to be either very successful or very meaningful to the participants. If we do require law and adjudication in the juvenile court process, we will seriously limit the aims which can be achieved within it.

The second problem is best illustrated by the administrative regulation of the economy, especially in the distribution of scarce, licensed "rights" to exploit certain natural or governmentally-created monopolies (or oligopolies). Here again it is impossible to do more than indicate the various factors which are to govern the exercise of a broad discretion in allocating television licences, for instance, (at least after certain threshold standards are met). Moreover (unlike the juvenile court situation, dealing with one, relatively independent case), the fact that the resource to be allocated is scarce, and that there may be many competing candidates, means that each decision when made changes the whole economic basis for making the next decision. If any type of sophisticated allocation is attempted (approaching what might be done by the market), then any system of relatively stable standards becomes completely impossible. The adjudicative institution is technically incapable of dealing successfully with a situation which requires wide participation of various interested parties and groups, continuing investigation of changing conditions, and a very flexible process of making decisions and changing the legal environment. What is required, in effect, is an administrative body which exercises managerial control at the top of a hierarchical organization.⁵⁰

Needless to say, the intricate relationship of polycentricity in

⁵⁰ Another current example is the relative incapacity of the Ontario Municipal Board, which functions explicitly in a lawyer-like adjudicative fashion, to deal adequately with such once-and-for-all decisions as the allocation of a shopping centre site to one municipality in a region.

social problems, the amenability of situations to rules, and the desirability of utilizing the institution of adjudication form a very complex problem for human and personal judgment. No easy answers can be derived from it about the limitations in the practical world of adjudication, but hopefully the analytical model should greatly clarify the exercise of this judgment.⁵¹

Judicial Creativity: Its Legitimacy

There are some fields of human relationship which can and should be subjected to law, "to the governance of rules", and for which the institution of adjudication is, in principle, suited. Suppose that there are no established rules in such an area or that the existing rules are out of step with contemporary social demands. Is it inconsistent with the appropriate role of a court, when it disposes of a particular dispute, that it formulate and apply a new legal standard, and thus establish it within the legal system generally? The adherents to the adjudication model emphatically reject the idea that there is a sharp dichotomy between "the law as it is" and "the law as it ought to be" (or "policy").⁵² Holding that an existing legal system, adequately conceived, is always in a process of development, they have tried to articulate a viable theory for a *limited, creative* role of the courts in the development of this system. Although it is true that courts are institutionally distinctive, and that there are some innovative tasks which must be left to the legislature, still the courts must collaborate with the latter in reworking the legal status quo.

In the first place, the chief value of adjudication, the enhanced rationality of its decisions, is primarily attained by the fact that general principles or standards can be focused on concrete fact-situations where the social implications of the principle can be thrown into dramatic relief. This enables the judge to utilize the arguments of the participants in order to create an intelligent, integrated pattern from the relevant legal rules within the immediate area.⁵³ The judge is able to use the rules to elicit the most meaningful "type-situation" from the concrete facts and then devise the most adequate resolution of the problems inherent in it. Of necessity then, there must be some development of the law in the

⁵¹ In this sense, the polycentricity-adjudication analysis escapes the very acute examination and criticism of Stone, *op. cit.*, footnote 45.

⁵² See Fuller, *Positivism and Fidelity to Law* (1958), 71 *Harv. L. Rev.* 630.

⁵³ *Cf.* Hart, Comment, in Paulsen, ed., *Legal Institutions Today and Tomorrow* (1959), pp. 40-48.

adjudicative process, stemming from the "elaboration" and "integration" of accepted principles in the light of different fact-situations, as they are presented to the court. This process obtains its rationality and objectivity from the basic premise that all legal rules or standards are the expressions of a human and social purpose, and that any such rule must be intelligently interpreted, applied, and developed so as to achieve this purpose in the "type-situations" presented to the court.

However, there are some cases where the adjudicative institution is presented with issues which clearly require the implementation into law of new social purposes, and which cannot be honestly arrived at merely by extending the reasonable implications of what has been done before.⁵⁴ Is creative development in this area inconsistent with the adjudicative function? The answer apparently depends on whether we are asking the judge "to impose new directions or aims on society" or whether we are merely asking him to "articulate the existing aspirations" of his own society.⁵⁵ In other words, the judge must ask whether there is sufficient warrant in existing extra-legal community standards and aspirations to justify his concluding that they constitute a shared consensus of purpose within which the participants in the process of adjudication can operate. If so, he is then entitled to develop and apply the legal implications of these purposes.

In any event, as the whole legal system becomes relatively developed and sophisticated, and as legislative and administrative enactments proliferate and cover most new fields of possible judicial developments, these problems of complete judicial innovation and intervention become less and less important. Rather, existing common law doctrine and legislative provisions provide relevant starting-points for judicial reasons.⁵⁶ Interested parties can participate in this problem solving vicariously and beforehand. All parties concerned are able to appreciate that the courts are going to treat all such rule-formulations as the expressions of human purposes. The rules are subject to continual reasoned

⁵⁴ The classic example used by both Hart and Sacks, *op. cit.*, footnote 4, and Mishkin and Morris, *op. cit.*, footnote 4, is the judicial development of the right of privacy. A contrary example might be the development of a qualified privilege to defame a public figure, discussed in my *Defamation, Enterprise Liability, and Freedom of Speech* (1967), 16 U. of T.L.J. 278.

⁵⁵ Fuller, *The Forms and Limits of Adjudication*, *op. cit.*, footnote 4; see also Mishkin and Morris, *op. cit.*, *ibid.*, pp. 102-103, 120 *et seq.*

⁵⁶ See Landis, *Statutes and the Sources of Law*, in *Harvard Legal Essays* (1934), p. 213; Gelhorn, *Contracts and Public Policy* (1935), 35 Col. L. Rev. 679.

elaboration and re-evaluation in the light of these purposes.⁵⁷ The demands of objectivity and communicability, made by the adjudicative institution, can be satisfied by relating all doctrinal developments to the pre-existing legal situation and continually realigning the existing pattern of legal rules in the light of changing community purposes. In this way the judges are enabled to make their distinctive contribution to the "collaborative articulation of shared purposes". They accept pre-existing doctrinal starting points (common law or statutory), and develop their implications for all of the various situations a court faces, in a reasoned and coherent fashion.

"Rational" Decision-Making

To many minds, this conclusion is extremely problematic and faced with grave philosophical difficulties. Is the claim of the adjudicative model to "objectivity" and "rationality" (and the moral force derived therefrom) essentially untenable? It is fundamental to adjudication that its decisions be principled, in the sense that the arbitrator can justify his disposition of a specific case by a process of reasoning from accepted postulates. Herbert Wechsler has suggested that considerations of social or political morality require that such an unrepresentative body as a court be limited to those decisions alone which can be reached from "neutral principles", those which "quite transcend the immediate result that is achieved".⁵⁸ This conclusion purportedly is based on an adequate understanding of the role and function of adjudication which, as we have seen, is designed to settle disputes that have arisen within the structure of an established legal order. It is basic to a legal order that it largely consist of general rules governing private conduct, rather than *ad hoc* orders. Adjudication resolves disputes in the light of these general rules and thus helps achieve and maintain this legal order.

Yet the whole of modern legal scholarship is based on a rejection of the view that abstract generalizations, in the form of legal rules or principles, can, in fact, determine the decision of particular cases. In the first place, the stated rules (especially in the area of the "unwritten" common law) always contain hidden ambiguities

⁵⁷ See Witherspoon, *Administrative Discretion to Determine Statutory Meaning: The Middle Road* (1962), 40 *Texas L. Rev.* 753, at p. 823 *et seq.* Cf. also Halbach, *op. cit.*, footnote 38.

⁵⁸ Wechsler, *Toward Neutral Principles of Constitutional Law* (1959), 73 *Harv. L. Rev.* 1, at p. 15. This seminal paper has spawned a whole literature on the role of a Supreme Court in constitutional review.

and vagueness, which become more and more significant as social conditions underlying the rule change. Next, the "secondary" rules, those which denote which of the "primary"⁵⁹ rules are to be taken as *institutionally settled*,⁶⁰ are even more ambiguous and open to discretionary application. In fact, the accepted techniques for divining the proper meaning of a statute, or the significance to be attached to a series of cases, usually "march in pairs", furnishing a mode for justifying the selection of whichever rule the adjudicator wishes to apply.⁶¹ Thirdly, as we have seen, it is basic to the model's claim of rationality for adjudication that a narrow legalism or positivism be rejected. The courts should not look only to those rules which are clearly established by statute or precedent and then rely on the tacit assumption that whatever conduct is not prohibited by these rules is thereby permitted in law. Rather, the courts must collaborate in intelligently developing the law and furnishing the most sensible solution to the relevant *type-situation*. It is asserted that only in this way will the demands of reckonability and objectivity in fact be achieved.⁶² Not only is the theory unable to rely on the "logic of the law" as the governing standard for adjudication of disputes, but it, in fact, emphatically rejects this as the standard.

Thus the ultimate adequacy of the adjudication model depends on its resolution of a conundrum at its very roots. It must demonstrate the compatibility of a principled adherence to legal values with a continuing re-evaluation of special rules as sensible solutions to social problems. This philosophical task is only in its early stages now and its success is by no means assured.

The lines along which a solution is being developed might be summarized as follows: while social justice must be a prime factor

⁵⁹ The distinction between "primary" and "secondary" rules is suggested in Hart, *op. cit.*, footnote 30, Ch.V. It is criticized in Sartorius, *The Concept of Law* (1966), 52 *Archives for Phil. of L. and Soc. Phil.* 161.

⁶⁰ The notion of "institutional settlement" is elaborated in Hart and Sacks, *op. cit.*, footnote 4, p. 2 *et seq.*, as a more appropriate term denoting "legal enactment".

⁶¹ The classic statement of the opposing pairs of acceptable techniques for "finding" statutory or decisional law is in Llewellyn, *The Common Law Traditions* (1960), pp. 77-90, 521-535.

⁶² Llewellyn, *op. cit.*, *ibid.*, is a whole book devoted to proving this. A very appropriate analogy has been suggested in Fuller, *American Legal Realism* (1934), 82 *U. of Pa. L. Rev.* 429, at p. 437. If an animal is too tightly penned, and is trying to break out, it is almost impossible to predict beforehand when he will succeed. Only if you confer on judges the legitimate power to do justice, and make them advert to this function explicitly in their judgments, will you get some reckonable idea of how it will affect their decisions, in tandem with the law.

in the judicial resolution of disputes, judges must not exercise a discretion to make fundamental policy choices for society. The pursuit of substantive values must be limited by adherence to legal values, such as the need for objectivity, communicability, and impersonality of judicial decisions. The maintenance of a viable legal order and the task of retrospective adjudication of disputes should shape and control both the occasions for and the extent of judicial creativity. These independent, institutional values are served by limiting judicial advances by an environment or fabric of established *principles*. Self-imposed respect for this legal framework imprints a distinctive quality of judicial decision-making such that the latter is not appropriately characterized as legislative policy-making. Judges are not, and should not be, political actors.

What does this theory imply, in greater detail?

If we assume that adjudication must often utilize rules which have not been previously established with a settled meaning, three alternative sources are available. The judge might turn to extra-legal standards which, by and large, he passively refracts into the legal order. This might be said to be most consistent with democratic law-making; yet it has several problems.⁶³ How does the judge establish the existence of these standards—by his own intuitive perception, by a Gallup poll, or by more refined questionnaire techniques? Should popular standards be the criterion for judicial law-making or should the law attempt to lead and educate such popular standards (especially for a defined regional or minority group)? To the contrary, a second position suggests that it is more consistent with democratic theory if substantive values, such as freedom of speech, equal protection of the law, and so on, are imposed on society by the courts. The latter must exercise their discretion in the light of their own, hard-won and ineradicable attitudes and policy preferences.⁶⁴

For reasons of institutional competence and democratic theory, the adjudication model rejects both these alternatives. The court

⁶³ A very illuminating debate about these problems, between Professors Cohen and Schwartz, is contained in Auerbach, Garrison, Hurst and Mermin, *The Legal Process* (1961), pp. 297-302. The classic judicial debate on this problem is between Frank and Hand in *Reppouille v. U.S.* (1947), 165 F. 2d 152 (2nd cir.).

⁶⁴ Cf. Thurman Arnold, *Professor Hart's Theology* (1960), 73 *Harv. L. Rev.* 1298; Clark and Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition* (1961), 71 *Yale L. J.* 255. As we shall see later, these policy choices should be made in the light of the tactical position defined by any opposing attitudes of judicial colleagues or affected interests.

does not have the capacity to detect the existence of a popular consensus and, in any event, if it exists, surely the representative institutions in society are capable of reflecting it. Nor is it compatible with the conception of a court as the retrospective adjudicator of specific, private disputes that it make policy of the same type and in the same way as the overtly political organs of the community. However, is the third alternative, that of the reasoned, principled and impersonal search for, and elaboration of, the "right" values and standards for a society, a viable one? Is it not true that basic socio-moral judgments are essentially emotive and subjective, and thus not open to rational justification?

The adjudication model would reject this epistemological evaluation of ethical propositions but would suggest a very careful and complex statement of the alternative (and one not to be identified with the older, pseudo-scholastic theories of natural law). Interestingly enough, a parallel movement in epistemology relies heavily on the judicial model in rehabilitating ethical theory after the onslaughts of philosophical positivism.⁶⁵ As we have seen, an appropriate judicial decision must be justifiable by a reasoned opinion which establishes the judgment as a conclusion from accepted premises.⁶⁶ The source of these premises is formally determined by the same institutional and functional structure which limits adjudication to reasoned, principled decisions in the first place. Because adjudication affords adversary participation and argument within a legal system of "entitlements", of claims and duties, the existence of a discretion to impose personal preferences is illegitimate. The litigants have the right to demand *the* correct result.⁶⁷

That this is the ideal demand put on adjudication does not mean that it is uniformly achievable to a high degree. That reckonability, and communicability, and impersonality of decision is the necessary concomitant of the judicial process does not mean that, in principle, its attainment will be self-evident and indisputable, or that, in fact, it is a human, *institutional* possibility. There is almost always an element of fiat within the narrow interstices left by the

⁶⁵ See Wisdom, *Gods, in Logic and Language* (Flew, ed., 1952), p. 187, at pp. 195-196; Toulmin, *The Uses of Argument* (1958); Perelman, *The Idea of Justice and the Problem of Argument* (1963); Perelman, *Justice and Justification* (1965), 10 *Natural L. F.* 1; Perelman, *What the Philosopher May Learn from the Study of Law* (1966), 11 *Natural L. F.* 1. This whole philosophical development, and its implications for law, is discussed in Stone, *Legal Systems and Lawyer's Reasonings* (1964), pp. 323-337.

⁶⁶ See Friedman, *op. cit.*, footnote 35.

⁶⁷ Dworkin, *Judicial Discretion* (1963), 60 *J. of Phil.* 624.

reasoning process⁶⁸ and the social background and environment of the judge may substantially distort his processes of reasoning. What is demanded by a viable institution of adjudication is that the pursuit of reasoned decisions be the *ideal* towards which the institution tends and that judges accept the demand that their subjective, idiosyncratic preferences be overcome.⁶⁹ On such a perceived quality to the process rests the "legitimacy" of its results.

Legal Principles and Legal Values

Whence are derived the premises on which the whole process of reasoning must depend? Conventional moral philosophy accepts the theses (though perhaps inconsistently) that actions must be based on principles, that these principles must be based on correct perceptions of the facts, and that they must form a coherent system. However, it is said that the basic value premise underlying an ethical system must be chosen, and that this choice can only be personal and essentially arbitrary.⁷⁰ To accept this position for the judicial process would make a mockery of the demand for reasoned, adversary participation in adjudication, and the necessity for a legal system that its rules will be applied in a reckonable way to settle any disputes (to say nothing of the requirements of democratic theory).⁷¹ It would mean that not only does human failure sometimes detract from the rationality of adjudicative reasoning, but that such rationality is *logically* unattainable for any case. To the contrary, the premises for judicial reasoning can and must be found within the "force fields of the law",⁷² as principles that underlie the common law, or are derived from specific statutory and constitutional provisions, or form the enduring and established moral values of the society within which the judge operates.

At the basis of the adjudicative model then, is the thesis that the legal order is made up of more than simple, authoritative *rules*. Equally as important are those policies and social purposes which are refracted into the settled *principles* of the system.⁷³ Rather than

⁶⁸ Fuller, Reason and Fiat in Case Law (1945-46), 59 Harv. L. Rev. 376; also Friedman, *op. cit.*, footnote 35.

⁶⁹ Frankfurter, John Marshall and the Judicial Function (1955-56), 69 Harv. L. Rev. 217, esp. at pp. 228-229; Freund, Rationality in Judicial Decisions, from Rational Decisions: Nomos VII (1964), p. 109.

⁷⁰ One of the main examples of this tendency is Hare, Freedom and Reason (1963).

⁷¹ Yet this seems to be the position of Miller, On The Choice of Major Premises in Supreme Court Opinions (1965), 14 J. Pub. L. 251.

⁷² Llewellyn, *op. cit.*, footnote 61, p. 221.

⁷³ Two recent articles have substantially clarified our understanding of the operation of "principle" in the legal system. They are: Dworkin, The

mechanically prescribing a result (which even legal rules cannot do, because of the necessity for the exercise of judgment in their application), these principles link ends (values) and means (legal techniques) in a way which supports a particular decision.⁷⁴ Such principles are in fact part of an adequately conceived legal system, and not simply a facet of the non-legal background.

Why is this so? In the first place such legal principles do come to be institutionally settled or conventionally established, although there is no criterion specifying exactly when this occurs. Legal principles have a dimension of greater or lesser weight in support of judicial reasoning which, conventionally, must take account of them. Finally, and most important, when these principles point collectively in a particular direction, the judge must accept this result notwithstanding his personal policy preferences. He has no greater discretion to reject a result cumulatively demanded by a constellation of principles than one prescribed by a specific rule, because, in each case, the parties are entitled to demand this legally correct answer from him.

Principles which are part of a legal system can be both substantive and jurisprudential. The latter would include the conventional techniques for interpreting statutes or assessing precedents. There is no doubt that real problems exist in determining when any legal principle becomes established or eroded, what it means for a particular case, and what is the relative weight which it properly has. This, along with the fact that there are usually competing but established premises, sometimes leads writers to say the judge has, and must have, a right to choose on the basis of his own preferences or attitudes.⁷⁵ This conclusion simply does not

Model of Rules (1967), 35 U. of Chi. L. Rev. 14; Hughes, *Rules, Policy and Decision-Making* (1968), 77 Yale L. J. 411. A classic example of the type of principle I am going to describe is the "neighbour" concept laid down in *Donoghue v. Stevenson*, [1932] A.C. 562, premising tort liability on reasonable foreseeability of risk.

⁷⁴ The notion of a legal "principle" and its distinction from "policies" or "purposes" is delineated in Witherspoon, *op. cit.*, footnote 57, esp. at p. 833.

⁷⁵ See Miller, *op. cit.*, footnote 71, at pp. 259-261. This conclusion does appear to be *prima facie* reasonable. If lawyers feel a case is arguable on the law at an appellate level, there must be some plausible legal basis supporting their risk of their client's money. If this is true, the judge must have a choice between two plausible legal theories and thus is free to decide for his personal policy preference. Yet this logic founders on the fact that we do accept the "certainty" of the law in many areas and thus go to court in only a small minority of cases. If this is true we must have some viable standards that tell us when the law is settled. These standards are also used, and must be used, in selecting law for cases that do get to

follow if it is true that litigants have a right to the most supportable decision in the circumstances, and that this is the ideal towards which courts must tend. Just because any one answer is no more than a probability, and selection between two competing probabilities demands judgment, this does not mean that there is no rational way for exercising a judgment about which is more probable. Moreover, the fact that the exercise of this judgment may be unreviewable does not mean that a court is delegated the discretion to choose in the light of its subjective preferences.

Not only is it true that such objectivity and rationality are the ideals towards which judges *ought to* tend but there are institutional characteristics in appellate court judging which make such impersonality more or less achievable. The existence of practices such as a group decision, written opinions, concurring or dissenting views, adversary argument, and so on do facilitate judicial decision-making within the adjudication model.⁷⁶ Within such an environment the craft of appellate court judging in the light of established standards becomes effective and transmissible. The judge is able to discourse with a professional audience through the medium of accepted techniques of reasoning. Although a judge can never be certain that he is right, he can persuade and reconcile to some extent those of opposing views, simply by the force of his argument. The fact that such an ideal is approachable to some extent by those who wish to achieve it is not affected by the likelihood that craft techniques are an inefficacious *external* control for those who do not want to serve this ideal of judicial objectivity.

Needless to say, neither the existence of such values or principles, nor their demands for the particular case, are open to objective, self-evident certainty. Yet no more self-evident is the tacit epistemological assumption underlying much legal theory, that if statements are neither analytic nor factual they cannot be rationally defended. An alternative philosophy holds that all judgments range along a spectrum of probability, they are all accepted by a tacit, personal commitment, but they are communicable and

court, in order to support the legal system as a whole. The fact that in these cases the answer is uncertain, and no more than a probability one way or the other, does not preclude a judge honestly and rationally deciding which legal case is more plausible. It is true that a judge's conception of what the law ought to be can and should enter into this resolution of the legal rule to be applied. But it is also true that legal values, where relevant, can and should play a major role. See Sartorius, *The Justification of the Judicial Decision* (1968), 78 *Ethics* 171.

⁷⁶ See Llewellyn, *op. cit.*, footnote 61, pp. 18-61.

inter-subjectively acceptable.⁷⁷ They do not become persuasive by a process of deductive reasoning from self-evident premises, since there are none of the latter. Rather we start with an existing fund of premises within a system which may give rise to problems or doubts. The renewal or reworking of these principles is undertaken in the light of probable arguments, which appeal to the "reasonable" man within the community. These arguments function not as links in a chain (which is as weak as its weakest link) but rather as the legs of a chair or the threads in a fabric of cloth, mutually supporting each other.⁷⁸

Legal argument in adjudication finds these supports or premises in those standards which are compatible with the institutional demands of the system. These principles must be such as could reasonably have been utilized in self-evaluation of conduct at the stage of private activity, or in the preparation and presentation of proofs and argument to the relatively passive court, and which will be legitimate and acceptable to those who must obey them, largely voluntarily. These standards must presently represent what the community would *fairly* feel are endorsed and publicized within it, and are thus warranted for use by the judiciary in deciding, retrospectively, disputes brought before it. Such standards do not come fully formed to the court and do not represent simply average behaviour, or average social reaction to behaviour. Rather, the court has the independent role of engaging in a reasoned colloquy with society, of collaborative articulation of what truly are the enduring, shared, moral standards and purposes of the society. It is, of course, true that there is great danger that such a reasoned dialogue can miscarry and that the judge's perception of the demands of reason can be distorted by his personal background and attitudes. This does not mean that the judge cannot approach his goal of obtaining adherence to his authoritative decision and choice of values from "the universal audience, that is, the audience composed of all men both rational and competent".⁷⁹

Thus it is important that jurisprudence shed the fallacy that simply because the legal rules do not decide the case with objective, impersonal, logically necessary and self-evident certainty, and because the same issue appears to opposing counsel and majority

⁷⁷ See Polyani, *Personal Knowledge* (1958); *The Tacit Dimension* (1966).

⁷⁸ Wisdom, *op. cit.*, footnote 65; pp. 195-196.

⁷⁹ Perelman, *What the Philosopher May Learn from the Study of Law*, *op. cit.*, footnote 65, at p. 12.

and dissenting judges to be reasonably amenable to different solutions, then there is no *reasoned* way of *justifying* one solution as more *probable* than another. Modern jurisprudence, as modern epistemology, must accept the idea that reasoned argument can win the adherence of other minds to propositions to which they actively and personally commit themselves.

In the law, an achievable ideal is a reasonable degree of regularity and reckonability of decision. Since judges and lawyers operate within a "law-conditioned matrix" of rules, doctrines, principles, techniques and operative ideals, there can be a mutual dialogue between them which is felt by all to partake of a substantial and sufficient degree of objectivity that what is valuable in the ideal of the "Rule of Law" is attained. Although judges, as a matter of logic, have a substantial degree of freedom, the semi-articulate demands of their craft and office demand that they begin with a communicable sense of what is established in the authorities and then build on and rework these materials in the pursuit of justice and reasonable results. Such creative work is not demonstrably *the* right answer. Yet the sense of responsibility of judges is as sufficient for their purpose as that of the scientist in ensuring that they are working within the leeways and "flavour" of the legal system to project their new solutions in accordance with the mutually-accepted "force fields" or "grain" of the established legal order. The sense of an argumentative appeal to the ideal, professional audience is sufficient to the responsible exercise, in good faith, of the discretion to pursue justice through law.⁸⁰

The Tentative Quality of the Model

This is the theory, in any event, but one must be somewhat sceptical for the moment about its ultimate adequacy. A verdict is not yet possible concerning the viability of a middle way between a precedent-oriented legal positivism and a policy-oriented legal realism. It awaits further work on both the *logical* and *institutional* feasibility of significantly rational and impersonal reasoning concerning social values. Exhaustive research is necessary into specific areas of adjudicative reasoning, going beyond the appellate reports

⁸⁰ Hyman and Newhouse, Standards for Preferred Freedoms: Beyond the First (1965-66), 60 N.W. U. L. Rev. 1, build on similar epistemological theories of Polyani, Patterns of Plausible Inference (1954), to reach a similar conclusion. Despite the fact that judges make decisions about values, and make them on the basis of probable judgments, they can aspire to a reasoned, impersonal conclusion serving legal values as well as their own ideas of social policy.

to fields such as labour arbitration,⁸¹ administrative decision-making,⁸² and so on. Of one thing we can be sure. If, in fact, a Bill of Rights is adopted and entrusted to our courts, the problem will be immediately pressing. The results of any such detailed analyses will be of substantial, practical value in determining the direction in which our own appellate courts will tend.

III. *The Judicial-Policy-Maker Model: The Judge as Political Actor.*

A second distinctive model of the judicial process has been developed in recent years, largely by American political scientists. Of course, it is not original in recognising the inescapable fact that judicial decisions must involve the creative exercise of a court's judgment. It builds on the work of American Legal Realism, which showed that the mechanical application of rigid, automatic rules does not and cannot dispose of individual cases. Men, as judges, decide cases and this activity is one for which they are personally responsible.

However, as we have seen, the "adjudication" model also begins with this assumption. Judges must collaborate with other bodies in society in the development and elaboration of the law "as it ought to be". Yet this collaborative role is institutionally distinctive.⁸³ The creative articulation of new legal rules is limited and incremental; it is based on a moving background of established legal principles; it is related to the dispute-settling focus of courts because the new rule must be appropriate for retrospective application to the facts giving rise to the instant case; finally, the adoption of the new rule must be justified in a reasoned opinion which establishes the probable "rightness" of the new rule. This whole set of limitations on judicial law-making is necessary in order to *legitimate* the final product. However, this legitimacy does not require a mechanical deduction of the rule from legal premises in which it somehow pre-exists, as in a "brooding omnipresence in the sky". The reasoning in the opinion is not of a logical-deductive type. Yet, it is supposed to be sufficiently communicable that it is open, in principle at least, to prior vicarious participation by the parties in the adversary process.

⁸¹ See Fuller, *Collective Bargaining and the Arbitrator*, *op. cit.*, footnote 4.

⁸² See Fuller, *op. cit.*, footnote 32, pp. 170-178.

⁸³ An excellent article illustrating this distinctive mode of reasoning in the specific context of judicial overruling of earlier decisions, is Israel, *Gideon v. Wainwright: The 'Art' of Overruling*, in *The Supreme Court and the Constitution* (1965), p. 263.

Many political scientists, by contrast, believe that judges should be perceived as political actors, continuously engaged in the formulation of policy for society. To say that judges are political actors is not simply to assert the truism that they are part of the governmental system, "authoritatively allocating values in society". Nor is it characteristic of only this model that judges exercise personal judgment in each decision they make and that no conclusions are automatic. What is distinctive is the thesis that judges make policy, or legislate, through essentially the same mode of reasoning as other actors in the governmental system.⁸⁴ Moreover, at least for some courts, such political action is becoming, and is seen to be becoming, their primary concern, and adjudication of disputes is growing secondary.

Legislators have traditionally been contrasted with courts by the fact that society considers it acceptable for them to justify authoritative policy-making by reference to their own value preferences, or the interests of those who support or have access to them. Legislators do not feel institutionally committed to the formulation of new legal rules only if they can be justified by a reasoned opinion relating the development to accepted doctrinal premises. This model suggests that some courts also are not, and should not be, so institutionally committed.

The quality of political decision-making both influences and reflects the make-up of the institution within which it is carried on. If, as, and when judges become candid policy-makers, courts will take on a "political" character, and judges will be subjected to "political" pressures. This new orientation of the "policy-making" model should render appropriate for judges the same analysis that is applied to other political actors, as regards the recruitment of the men who make these decisions, the timing of their policy pronouncements, the influences brought to bear on the court, both internally and externally, and the success which attends its policy promulgation. The new model explains, in an illuminating way,

⁸⁴ A typical statement is that of Shapiro, *op. cit.*, footnote 29, at p. 136: "All of this is by way of preliminaries to the body of this article which seeks to show that we can describe a method of decision-making that is shared by courts and other political agencies. Such an effort is essential to political jurisprudence because it had traditionally been argued that courts are unique in that they have a peculiar, and non-political, method of decision-making based on either neutral principles of law, or rational and non-discretionary operations of legal logic, or both. If I can begin to show that judges' decisions actually exhibit the same methods as those of other policy makers in the political process, then one of the key arguments against political jurisprudence will be at least partially undermined."

many recent judicial phenomena that have followed the proposal and adoption of the new political role by some courts in some legal systems. Moreover, it shows the linkage of the various components in the judicial system, as it becomes redesigned for its new institutional function. I shall compare the new model with the old, showing the changes we may expect in the existing system if and when judges turn from adjudication to concentrate on policy-making. I will not be interested in empirical proof, by scalogram analysis or otherwise, that courts do or do not make decisions based on "policy", rather than "law". Assuming that judges may internalize the role of "political actor" rather than "adjudicator", I hope to make clear the institutional significance of this fact.⁸⁵

Judicial Recruitment and Accountability

If our model of the judicial process is to be built around the assumption that the judge is primarily a policy-maker, a "legislator", the first problem that arises concerns the manner in which he gains access to the institutional position within which he acts, and the manner in which he can be held accountable for his actions in this position. The corresponding implications of the "adjudication" model can be stated very briefly: the most necessary prerequisite for judicial office is legal training which must be accompanied by some degree of moral probity and respectability; the judge does not campaign for office on the basis of a policy programme, but rather is selected for his legal ability, as adjudged primarily by his peers in the profession; once in office the judge has tenure for life until retirement age, subject only to removal for misbehaviour: the latter ground for "impeachment" should never include substantive results in particular decisions.

None of these propositions is at all self-evident, and, in fact, actual systems of judicial recruitment vary more or less from this ideal type. It should be evident, though, that the policy-making model of the judicial role logically demands a radical recasting of the system. First of all the process of preliminary recruitment must undergo substantial change. The reason is that the recruitment system that is generally used will substantially influence the type

⁸⁵ The implications of this model are widely accepted among those members of the political science profession studying the judiciary. Two scholars whose work is especially fruitful in delineating the general implications of the "political actor" model are Messrs Martin Shapiro and Arthur Miller. Their various writings are cited throughout the text. The best short text dealing with this model is Krislov, *The Supreme Court in the Political Process* (1965).

of candidates who come forward.⁸⁶ For instance, a system oriented towards, and dominated by, lawyers will result in a different product than one oriented towards and run by politicians.⁸⁷ This is so because the different practices operate at the conclusion of different "socialization processes", (whose development in turn they foster), affecting the values and viewpoints of the judges they recruit.

Rather than focusing on legal ability and training as the key elements in judicial qualifications, the policy-making model holds that a person's political programme and abilities should be most important.⁸⁸ In fact, the logic of the system demands that these be evaluated in some manner other than an apolitical appointment process. Instead, judges should either be directly elected, or the various groups whose interests are affected by the judges' decisions should have some more formalized and legitimized form of participation in the making of the selection. For instance, appointments to a body which decides questions of constitutionality, in particular distribution of powers between federal and provincial governments, should not be made by only one side of this conflict of interests. In Canada, as the personal judgment of the members of the Supreme Court is perceived as highly important in federalism cases, there have been demands that the federal government share its exclusive appointing power, at least for cases of this type.⁸⁹ Indeed, there is no real reason why judges on such a body should be legally trained at all (however helpful this may be), since other abilities may be just as relevant (as, for instance, is the case in parliament). Perhaps a type of senatorial, second chamber may be the best avenue for taking a second look at legislation and evaluating its proper impact on federalism.⁹⁰

It is interesting, though, that while a more explicit theory of the policy-making role of judges has led to open consideration of how their backgrounds and attitudes will affect various interests in society, there have been important countervailing forces at work.

⁸⁶ Jacob, *The Effect of Institutional Differences in the Recruitment Process* (1964), 13 *J. of Pub. L.* 104.

⁸⁷ Grossman, *op. cit.*, footnote 3, pp. 18-20.

⁸⁸ Two famous examples are the disputes over the appointments of Justices Brandeis and Parker to the United States Supreme Court: See Peltason, *Federal Courts in the Political Process* (1955), pp. 34-35.

⁸⁹ Russell, *op. cit.*, footnote 13, pp. 95-99, 115 *et seq.*; McWhinney, *op. cit.*, footnote 14, at pp. 605-607.

⁹⁰ *Cf.* McWhinney, *op. cit.*, *ibid.*; also McWhinney, *Judicial Review in the English-Speaking World* (3rd ed., 1965) for a broader view of the institutional possibilities for constitutional review of legislative action.

In the first place there have been strong pressures to overturn the traditional confinement of judicial appointments to members of the party having the choice.⁹¹ It has been suggested that this is inconsistent with the traditional "impartiality" of the judge, and in any event results in the overlooking of much talent for legal craftsmanship. No attention is paid to the fact that legislative policy-making is necessarily partisan and largely unrelated to skilled legal technique. Of course, there is a big difference between political service as a reason for appointment and political values and programme as the criterion.

Secondly, there has been increased effort in recent years to bring the organized bar into a position of strong influence in the appointment process.⁹² This is designed to ensure an informed judgment of legal craftsmanship by a prospective appointee's peers and thence, perhaps, to "depoliticize" completely the selection of judges. The analogy is drawn between judges and scientists and it is claimed that only a lawyer's professional peers can evaluate his technical ability. Yet this is not true if judges, unlike scientists, are policy-makers who do not decide on the basis of objective, communicable, neutral criteria. If so, a different role must be afforded to organized groups such as the Canadian Bar Association, in order that it be legitimate.⁹³ Both "legalism" and close connexions with positions of power in the organized bar have strong substantive (and usually conservative) policy overtones. Even where the epitome of bar influence is achieved, through the "Missouri Plan", one can perceive the return of politics in organized group efforts to reach positions of influence within its operations.⁹⁴

What is even more interesting, perhaps, than the question of appointments, is the problem of accountability. It is basic to the theory of political democracy that responsibility of policy-makers to those whom they affect by their decisions is ensured by making them submit themselves to an electorate (or else making them accountable to those who do submit themselves). Yet it is interesting to note the empirical findings that judicial elections are

⁹¹ See Angus, *Judicial Selection in Canada—The Historical Perspective* (1967), 1 *Can. Leg. Studies* 220.

⁹² Clark, *Appointments to the Bench* (1952), 30 *Can. Bar Rev.* 29; Angus, *Appointing Canadian Judges* (1966), 49 *J. Am. Jud. Soc.* 224.

⁹³ See Grossman, *op. cit.*, footnote 3, pp. 212-221.

⁹⁴ Watson, *Downing and Spiegel, Bar Politics, Judicial Selection, and the Representation of Social Interests* (1967), 61 *Am. Pol. Sci. Rev.* 54.

traditionally rare, or *pro forma*, or non-partisan.⁹⁵ Even where there is a real contest, it is inconsistent with society's symbolic image of the judiciary to make the subject of campaigning an incumbent's decisional record.⁹⁶ One can safely assume that greater concentration on, and amplification of, a judge's policy-making role will quickly erode this sentiment.

Even those most insistent on the judge's free, creative, policy choices (and the implication thereof for the appointment process), find it difficult to "think the unthinkable" and face the problem of impeachment.⁹⁷ One of the reasons, obviously, is the connotation of punishment inherent in the term, which stems from its historical identification with moral misbehaviour. There is no reason at all why judges should not be subject to the process of *removal* (perhaps under a new name), not because of their moral shortcomings, or even because of negligent work, but simply because the representative organs of society (or the electorate itself) disagrees with the substantive content of their policy decisions. There are obvious reasons why this is undesirable in the case of adjudicative decisions primarily designed to dispose of concrete disputes between specific individuals. The moral quality of the latter stems largely from the belief that the decision-maker is completely impartial and that his decision is influenced by no considerations other than those relevant to the specific dispute. He must not be, or seem to be, concerned about an unpopular decision's effect on his continuance in office. Obviously, however, if the prime focus of judicial decisions is the creation of legislative policy for society, then this function is inherently partisan. As such it should be subject to the same type of influence as other subordinate arms of the elected bodies in our system of government. Perhaps judges should hold office "at pleasure", and change with administration, as do department heads, for instance. In other words, judicial policy-making entails the same type of problem as does administrative policy-

⁹⁵ Jacob, *Judicial Insulation—Elections, Direct Participation, and Public Attention to the Courts in Wisconsin*, [1966] *Wis. L. Rev.* 801; Jacob, *The Courts as Political Agencies: An Historical Analysis*, in *Studies in Judicial Politics* (Vines and Jacobs, eds, 1962), p. 9; Vines, *The Selection of Judges in Louisiana*, *ibid.*, p. 99.

⁹⁶ Ladinsky and Silver, *Popular Democracy and Judicial Independence*, [1967] *Wis. L. Rev.* 128.

⁹⁷ Clark and Trubek, *op. cit.*, footnote 64, at pp. 272-273 suggests the necessity of examining an appointee's values in judicial selection but, notably, does not even advert to judicial removal; cf. Traynor, *Who Can Best Judge the Judges* (1967), 53 *Va. L. Rev.* 1266.

making and the "tenured" judiciary should be no more sacrosanct than the independent administrative agency.⁹⁸

It has been hypothesized that the Supreme Court of the United States, which makes policy from a supposedly sheltered, independent position, is really subject to control by the popularly-elected branches of government. This is so because the power of appointment is exercised sufficiently often to allow for changes in popular attitudes to be reflected in the composition of the court.⁹⁹ The President, with the advice of Senate, can appoint judges who are responsive to the majority will. The logic of the policy-making model of the court leads to the conclusion that this fact should be legitimized and that the existing system should be greatly rationalized so as to make accountability much more effective, in the ways suggested above. Does this logic lead to a further conclusion? Insofar as a court is considered primarily a policy-maker (for instance, the United States Supreme Court), should its adjudicative functions be stripped from it and bestowed elsewhere? Perhaps it should be subject to the same type of differentiation which overtook the English House of Lords in the nineteenth century, when it divided itself into "lay" and "judicial" branches. This, of course, does not mean that an adjudicative supreme court should consider itself bound to accept the mode of reasoning which characterized the judicial House of Lords soon thereafter.¹⁰⁰

Occasions for Judicial Action

The theory of the judge as a policy-maker¹⁰¹ gives one a fresh point of view not only on the question of who becomes such a "political actor", and how, but also on the question of when and how he is able to act, or be induced to act. The classic theory of the court as adjudicator indicates that the judge's function is to settle disputes when requested by one of the parties. Unlike most other political actors, he remains passive and is unable to seize the initiative to make his decision when he feels the time is propitious. Only if there exists a specific "case and controversy" which is still extant at the time of decision is the latter permis-

⁹⁸ Cf. Bernstein, *Regulating Business by Independent Commission* (1955), esp. Ch. 4; also Welborn, *President's Regulatory Commissioners and Regulatory Policy* (1966), 15 J. of Pub. L. 3.

⁹⁹ Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker* (1958), 6 J. of Pub. L. 279, at pp. 283-286.

¹⁰⁰ As to which see Denning, *From Precedent to Precedent* (The Romanes Lecture, 1959).

¹⁰¹ What Shapiro calls *Political Jurisprudence* (1964), 52 *Kentucky L. J.* 267.

sible. On the other hand, once the judge is requested to act by a party to a dispute, then the judge is obliged to decide one way or the other. He cannot take the position (at least in a fully-developed legal system) that he can find no answer or solution to the disputed question.¹⁰² All this of course flows naturally from the theory that the primary goal of judicial activity is dispute-settling, rather than policy-settling.

It should be apparent that such an account of "when" a judge engages in political action is highly anomalous to one who believes the latter to be the prime focus of judicial activity. According to this theory, the courts are merely another branch of government to which various interest groups seek access in order to have their political desires satisfied. As such, courts have certain institutional characteristics which render them peculiarly suited to satisfying better certain interests and to giving greater protection to particular groups (especially those which may be under-represented elsewhere).¹⁰³ The courts tend to develop a specific clientele group which becomes adept at bringing relevant influence to bear on the courts, and which probably acts in a reciprocal fashion to protect the interests of the judicial institution and to preserve its effectiveness and power.

In the context of such a systematic political explanation of the courts' work, the classic theory of the occasion for judicial action just does not make sense. In the first place, there is no reason why the development of a group interest in a particular policy decision (which can be obtained only from a court) should coincide with the occurrence of a specific dispute in which a representative of the group is involved. This creates a preliminary problem of obtaining access to the court. Even this is probably overshadowed by the difficulty of obtaining access in a specific suit which raises in an especially favourable way an issue whose resolution will constitute the desired political decision. The group must be able to manage effectively the course of litigation so as to preclude the court being required to make the policy decision in an unfavourable context, in order to decide a case which, by the rules of the game, must be adjudicated.

¹⁰² Compare Bickel on "The Passive Virtues", in *op. cit.*, footnote 8, Ch. 4; McWhinney, *op. cit.*, footnote 14, at p. 603, gives some examples of the West German Constitutional Court holding back its decisions for years until they became politically moot.

¹⁰³ *E.g.*, those supporting "freedom of speech"; see Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* (1966), pp. 34-39.

In Canada there are several recent phenomena which the two models help illuminate. In a recent decision, the Canadian Supreme Court rejected the attempt by the Jehovah Witnesses to get a favourable policy response to the actions of the Quebec Government directly aimed at them.¹⁰⁴ The court applied the classic adjudication requirement of a "lis" to frustrate the efforts of a group which had inspired most of the Supreme Court doctrines in the previous decade, favourable to political freedoms. On the other hand, in a politically charged context, the federal government used the Reference device¹⁰⁵ to obtain from the court a policy ruling that measurably improved its bargaining position in the dispute over offshore mineral rights.¹⁰⁶ This case clearly showed the political desirability to a policy-making court of having discretionary control over its own jurisdiction. It needs this power so that it can protect its institutional resources and legitimacy by choosing the strategic time and occasion for its policy initiatives.¹⁰⁷ Just as in the case of judicial appointments, arguments in favour of reform of the courts' jurisdiction, based on technical considerations of efficiency, do have political significance when viewed through the "policy-making" model.¹⁰⁸

Access to the Courts

This shades into the related issue of allowing representation to groups which are interested in a general policy result but are not involved in a particular controversy that raises the issue of this policy before a court. The adversary theory of adjudication assumes that parties interested in the specific dispute will represent sufficiently the opposing general positions so as to put adequately all the elements which make up a rational decision and, in any event, if they do not make an effective case, only the interested parties really suffer from an adverse judicial decision. Yet, if the essence of judicial decision-making is the formulation of general policy for society, it is obvious that all those whose positions are af-

¹⁰⁴ *Saumur v. A.-G. of Quebec*, [1964] S.C.R. 252; this case is discussed in detail in Cavarzan *Civil Liberties and the Supreme Court: The Image and the Institution* (Osgoode Hall, LL.M. Thesis, 1965), p. 84 *et seq.*

¹⁰⁵ This device is described admirably in Grant, *op. cit.*, footnote 11 *passim*; also Cavarzan, *op. cit.*, *ibid.*, pp. 80-84.

¹⁰⁶ *Supra*, footnote 12.

¹⁰⁷ McWhinney, *op. cit.*, footnote 14, at pp. 598-600, 604.

¹⁰⁸ Cf. Abel, *The Role of The Supreme Court in Private Law Cases* (1965), 4 *Alta L. Rev.* 39; Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians* (1951), 29 *Can. Bar Rev.* 1038, at pp. 1048-1057; Cavarzan, *op. cit.*, footnote 104, p. 72 *et seq.*; Russell, *op. cit.*, footnote 13, p. 104 *et seq.*

ected by the policy have an interest in the best possible argument being made to the court. Since, in fact, it is unrealistic to rely as a general matter on the specific parties to the case (if for no other reason than that of finance), there is a tendency in such a theory to develop a device for allowing interested groups representation in judicial policy-making by allowing them to participate in the argument which influences the court. Such a device, in fact, is available in Canada in the form of "intervention" or the "amicus curiae". In constitutional matters, the federal and provincial Attorneys General must be notified and allowed to appear and argue this issue. In the case of references, the Supreme Court has power and has often used it, to allow private groups to appear and even to appoint counsel to argue on behalf of such an interest.¹⁰⁹

These various considerations have contributed to the formulation of a new theory of "litigation as a form of pressure group activity", of interest groups "lobbying the Supreme Court".¹¹⁰ The theory is intended as a response to its analogue under the adjudication model, that judge-made law (or policy) emerges accidentally from the fortuitous circumstance of litigation which reaches the court for the purpose of obtaining a settlement of a specific dispute or controversy, a "trouble case". Now, as organized groups perceive the possibilities for social change inherent in litigation the quality of randomness to judicial policy-making becomes substantially diluted.¹¹¹ A very valuable recent paper by Mr. Hakman¹¹² has thrown substantial doubt on conclusions drawn from the work of Mr. Vose that such lobbying activity was a valid explanation for any significant part of the present judicial activity in the American Supreme Court. This is really irrelevant to a theoretical model which prescribes what ought to be, and what might well become the case in the near immediate future. Hence it is worth while to describe briefly some of the present evidence for the concept.

¹⁰⁹ Grant, *op. cit.*, footnote 11, at p. 207.

¹¹⁰ See Vose, *Litigation as a Form of Pressure Group Activity* (1958), 319 *Annals* 20; *Interest Groups, Judicial Review, and Local Government* (1966), 19 *Western Pol. Q.* 85; *Caucasians Only* (1959); Ginger, *Litigation as a Form of Political Action* (1963), 9 *Wayne L. Rev.* 458; Hakman, *Business Influence in the Judicial Process* (1957), 1 *Western Bus. Rev.* 124; Barker, *Third Parties in Litigation* (1967), 29 *J. of Pol.* 41.

¹¹¹ Deutsch, *Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science* (1968), 20 *Stan. L. Rev.* 169, at pp. 222-223.

¹¹² Hakman, *Lobbying the Supreme Court—An Appraisal of Political Science Folklore* (1966), 35 *Fordham L. Rev.* 15; *cf.* also Dolbeare, *Trial Courts in Urban Politics* (1967), pp. 37-45.

The most significant evidence stems from the activity of the National Association for the Advancement of the Coloured People (N.A.A.C.P.) in inducing the Supreme Court to develop doctrines favourable to the "integration" interest in the United States. Especially important was the gradual development of such doctrines from easy cases as deprivation of the right to vote in elections and then in primaries, through restrictive covenant litigation, to "separate but equal" public education, and finally anti-miscegenation statutes.¹¹³ Such a development shows the importance not only of a "conceptual bridge" in "legal" reasoning,¹¹⁴ but also a "political" Supreme Court awakening and educating the nation to the problem. The N.A.A.C.P. was faced with many tactical problems: finding specific cases for litigation and ensuring that they do not become moot; obtaining control over the litigation and thus ensuring expert development of the evidence (including policy facts) and argument for the court: gaining control over the course of litigation in this whole area to ensure that the best possible case reached the Supreme Court first; and then maintaining the initiative in the complete implementation of the favourable policy results obtained. The success of this whole effort is demonstrated not only in the substantive results sought but also in the development of the doctrine that this particular N.A.A.C.P. activity (and all others of its type) are protected by the constitutional value of freedom of association for political purposes.¹¹⁵ In a sense the latter result means that the courts have provisionally accepted the theory of litigation as a form of group political activity.

Yet Harlan J.'s dissent does show the problem of meshing the conception of litigation as a form of political lobbying with an institutional set-up designed for adjudication of disputes. There is always a possibility that a conflict of interest will arise between the nominal party to the case (who may be very concerned about the specific dispute) and the group which controls the litigation (which is concerned primarily with a favourable policy result). Suppose the lawyer hired by the latter gets an offer of a favourable settlement for the individual party which will deprive the court of a chance to speak? Suppose the individual case is not as favourable an avenue for the policy judgment as another piece of litigation being promoted by the same group that pays for the lawyer of the nominal party? The suggested remedy to the situation is a change

¹¹³ See Vose, *Caucasians Only*, *op. cit.*, footnote 110.

¹¹⁴ Fuller, *op. cit.*, footnote 62, at p. 441.

¹¹⁵ *N.A.A.C.P. v. Button* (1963), 371 U.S. 415.

in the rules of participation that allows a direct constitutional attack on legislation by affected groups or their members.¹¹⁶ The implications of this for the judicial process are obvious.¹¹⁷

Other American examples can be given of phenomena that partially support the theory. Professor Paul Freund has described the competing efforts of the Roosevelt government and of private economic interest to formulate for (and get in front of) the courts the most favourable case (from each respective point of view) raising the issue of the constitutionality of New Deal legislation.¹¹⁸ Mr. Vose has shown that the original development of the Brandeis brief (which collects for the court policy facts showing the reasonability, and thus the constitutionality, of impugned social legislation) derived from the efforts of the National Consumers League to function as a pressure group which could more effectively put the argument in favour of constitutionality than the nominal party at interest in litigation.¹¹⁹

The *amicus curiae* brief raises two further problems. First, it shows the conflict between the real interests present in the "private adjudication" and "public policy-making" models of judicial activity. If the focus of judicial decisions is on the settlement of private disputes, then too unrestricted a system of *amicus curiae* briefs will be unduly burdensome to the parties interested in the particular dispute. In this connexion, the United States Supreme Court rules requiring the consent of the parties to private briefs reflect the theory of the adversary nature and control of the judicial process.¹²⁰ One might contrast the position of Mr. Justice Black which is a forerunner of a model that allows groups to lobby via their briefs, to bring policy information to the court, and to attract support for an activist role of the court.¹²¹ Secondly, since the

¹¹⁶ Birkby and Murphy, Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Courts (1964), 42 Texas L. Rev. 1018.

¹¹⁷ In effect it would place private groups in the same position as governments who are able to give constitutional questions to the courts on References. Hence the problem discussed by Cavarzan in regard to the second *Saumur* case would be resolved, *op. cit.*, footnote 104.

¹¹⁸ Freund, *The Supreme Court of the United States* (1961), Ch. 6.

¹¹⁹ Vose, *The National Consumers' League and the Brandeis Brief* (1957), 1 *Midwest J. of Pol. Sci.* 267. Krislov has suggested, *op. cit.*, footnote 85, pp. 46-48, that the growth of government administrative agencies has led to group interests in litigation for or against the regulatory action of these agencies.

¹²⁰ It is provided by Rule 42 that a "brief of an *amicus curiae* may be filed when accompanied by written consent of all parties to a case", as quoted from Vose, *Litigation as a Form of Pressure Group Activity*, *op. cit.*, footnote 110, at p. 29.

¹²¹ "I have never favoured the almost insuperable obstacle our rules put

amicus curiae brief is designed to influence the court by presenting it with data relevant to its formulation of policy with which to dispose of a particular dispute, it raises the question of what exactly are the available means for influencing a judicial decision and which of these are to be considered proper. The political actor model of the judicial process puts both of these problems in a new light.

Influencing Judicial Policy-Making

One necessary conclusion is that the adversary process will become increasingly unsuited for the judicial process as it becomes more and more concerned with overt policy-making. When the court administers a relatively well-defined set of rules and principles, and applies them to settle private disputes, it makes sense to confine the bases of decisions to a record prepared for it by the parties during an adversary hearing.¹²² Because *ex parte* communications to the adjudicator are traditionally prohibited, due to their incompatibility with this process, the *amicus curiae* device is necessary to get before the court those considerations that are relevant to the interests of other affected parties. Such devices as telegrams, or picketing, or parading¹²³ are so unthinkable as means of influencing courts that they can be criminally prohibited in the face of a constitutional value for freedom of speech.¹²⁴

Still, the second model of the judicial process holds the prime function of the judge to be general policy-making, rather than adjudication. None of the aforementioned techniques for making

in the way of briefs sought to be filed by persons other than the actual litigants. Most of the cases before this Court involve matters that affect far more than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* briefs." Black S.C.J., quoted in Vose, *op. cit.*, *ibid.*, 30. In an informative article, Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy* (1963), 72 *Yale L. J.* 694, the author traces the *amicus* brief from a friend of the court who helped "Shepardize" the cases. Then it allowed *private* partisanship in the face of procedural problems of pleading, joinder, and related litigation. Finally it came to its modern role allowing *public* partisanship in favour of policy goals by groups such as the A.C.L.U.

¹²² Cf. *R. v. O.L.R.B.*, *ex parte Trenton Construction Workers*, [1965] 2 O.R. 376, where the High Court quashed an attempt by the Labour Board to take official notice of some of its earlier findings. The decision is commented on in Arthurs, *Challenge and Response in the Law of Labour Relations* (1967), 2 *U.B.C.L. Rev.* 335.

¹²³ As happened in the United States Communist trials in the 1950's; see Vose, *Litigation as a Form of Pressure Group Activity*, *op. cit.*, footnote 110, at pp. 28-29.

¹²⁴ Cf. *Cox v. Louisiana* (1965), 379 U.S. 536; Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, [1965] *Supreme Court Review* 1; Kamin, *Residential Picketing and the First Amendment* (1966), 61 *N.W.U.L. Rev.* 177.

a group position known, and influencing a policy decision, would be considered highly offensive to a legislature. Judges of the United States Supreme Court have expressed distaste at *amicus* briefs which do no more than indicate the position of an affected interest group to possible decisions.¹²⁵ This attitude appears equally anomalous within the policy-making model. A problem that perhaps is more important than the responsiveness of the court to affected interests is its access to the type of "policy" facts which enhance the quality of the decision it will make. The viability of the adversary process for this purpose is extremely doubtful.¹²⁶

One suggested means is the famous Brandeis brief, which presented to the courts a summary of the legal and extra-legal literature that was relevant to a constitutional problem. However, the purpose of this brief was merely to demonstrate the existence of a body of informed opinion supporting the *reasonableness* of the legislative rule of law. What the judicial policy-maker is concerned with are studies of policy facts supporting the *soundness* of a judicial rule of law (now to be created).¹²⁷ The unchallenged Brandeis brief is as inapt for this purpose as is the adversary production of evidence for the record. This may not justify the action of the Supreme Court of Canada in the *Saumur* case in prohibiting payment of costs to the victorious party for preparation of a Brandeis-type brief, so as to discourage its use.¹²⁸ Perhaps it does justify a rule of self-restraint which prohibits judicial policy-making that depends on the resolution of conflicting versions of substantial, informed opinions about the reasons for a new legal rule. Only if the parties to the dispute could not reasonably claim unfair surprise at "judicial notice" of a social consensus concerning the desirability of a new rule is its judicial adoption warranted.¹²⁹ Absent such a principle of judicial self-restraint, there will be continually-growing tension between the demands of rational policy-making and the limitations of the adversary process.

One method by which a solution to the problem may be sought is the increased use of legal periodical literature, by judicial notice or otherwise. Presumably the Canadian Supreme Court will con-

¹²⁵ Krislov, *op. cit.*, footnote 121, at p. 711.

¹²⁶ Miller and Scheffin, *The Power of the Supreme Court in the Age of the Positive State*, [1967] *Duke L.J.* 273, 522, at pp. 536-545.

¹²⁷ Wyzanski, *op. cit.*, footnote 26, at pp. 1295-1296.

¹²⁸ *Saumur v. City of Quebec and A.-G. of Quebec*, [1953] 4 D.L.R. 641, at p. 666.

¹²⁹ See Hart and MacNaughton, *Evidence and Inference in the Law*, in Lerner ed., *Evidence and Inference* (1959), pp. 64-65.

sign its earlier prohibition of the citation of *Canadian Bar Review* articles to the oblivion it deserves.¹³⁰ We must then face the issues raised by their use, especially when the problem is enhanced by articles that deal with a case which is in process of being brought before a particular tribunal, and suggest and defend certain proposed decisions. This would not appear to be inconsistent with the adjudicative model, which envisages "the collaborative articulation of shared purposes" as the proper mode of judicial-legal reasoning. However, it would be highly improper if it were thought that the article was not written solely in the spirit of purely disinterested scholarship, but rather was "planted" by one of the parties in an effort to influence judges by showing them the "weight" of scholarly opinion.¹³¹ Yet would our attitude be the same if writers were commissioned to write articles in popular journals which support one position, and which then are used to help try to convince (or force) legislators to agree with this position. If the primary focus of judicial activity becomes policy-making, it will become less intelligible to condemn use of partisan materials written by those "with an axe to grind".¹³²

Another type of influence which has been condemned from much the same point of view is that of the law clerks, just now coming to be used in Canada. I do not refer to the type of criticism which suggests that clerks have been infiltrated into the American judicial process, attained some share of judicial power, and used it to further "left-wing" aims. There is little or no evidence that this is true in fact, as is shown by the only in-depth study of the influence of the clerks.¹³³ However, the existence of law clerks raises a more fundamental problem, that of the "institutional decision" in the judicial process, and this points us to the whole complex of problems inherent in the process of "small group" decision-making.

The allegation is made that law clerks, by aiding the judge, participate to a certain extent in the making of the decision and thus (perhaps very subtly) change the process of decision and

¹³⁰ Nicholls, *Legal Periodicals and the Supreme Court of Canada* (1950), 28 *Can. Bar Rev.* 442; Cf. Newland, *Legal Periodicals and the United States Supreme Court* (1959), 3 *Midwest J. of Pol. Sci.* 58; *Innovation in Judicial Technique: The Brandeis Opinion* (1961), 42 *Southwestern Soc. Sci. Q.* 22.

¹³¹ As is perhaps intimated in Vose, *Caucasians Only*, *op. cit.*, footnote 110, p. 161.

¹³² This was feared by Representative Patman in a criticism of the use of law reviews, quoted by Newland in *Legal Periodicals and the United States Supreme Court*, *op. cit.*, footnote 130, at pp. 73-74.

¹³³ Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks* (1961), 40 *Oregon L. Rev.* 299.

affect the products of it. The same tendency is at work in an extreme form in administrative adjudication where the pros and cons of the institutional decision have long been debated.¹³⁴ The worst danger is that the judge will make an intuitive judgment about the case and then ask his clerk to write an opinion justifying this result in the light of the "authorities". This tendency would deprive adjudication of the peculiarly moral probity which stems from its essential rationality, the effort to articulate a reasoned response to arguments made by the participants to the decision-maker within an adversary framework. There is no empirical evidence of this as yet in the judicial process.

The Collegiate Character of Judicial Decision-Making

This is an illustration, though, of a problem which pervades the workings of any "collegiate" court because of the essential social and institutional character of the latter. As we have seen, at the root of the adjudicative model is the thesis that the forms and limits of the process are shaped by its institutional structure. Added to this are further complexities stemming from the fact that a court is a "small group" which must make up its *collective* mind. There are two different facets of this type of analysis. In the first place, there are certain theoretical concepts which apply to any collective judicial body, whatever be the model which primarily informs the role accepted by its members. In the second place, important implications can be drawn, from analysis of the possibilities inherent in the *social* character of the court, about the ability of individual judges to effectuate a *policy-making* role.¹³⁵

It is now a truism that personal relationships on a court are going to have some effect on its product, even if individual members feel compelled to make all decisions in the light of relatively objective (or neutral) rules and principles. One's perceptions of the preferable solutions to ambiguous problems will be affected by the way those whom we respect, or are attracted to,¹³⁶ react to the same problem. "Small group" analysis deepens our level of understanding of these intuitively sensed propositions and shows us, in particular, the importance of leadership.

A small body such as a court, particularly since it does not find

¹³⁴ See Hector, *Problems of the C.A.B. and the Independent Regulatory Commissions* (1960), 69 *Yale L.J.* 931, at pp. 744-748.

¹³⁵ Murphy, *Elements of Judicial Strategy* (1964), is an exhaustive study of this problem.

¹³⁶ Or, indeed, the opposite.

it necessary or desirable to formalize its proceedings to any great extent,¹³⁷ does require the application of human energy for several purposes: first, to get the work of the body accomplished, and at as high a level of performance as possible; second, to preserve relatively amicable relationships among the various members so that a high level of satisfaction of each with his relationship to and work with the body is maintained; third, to maintain sufficient unity in the court (and the appearance of it) in order that the collective products of its workings will be effectively accepted by other individuals and groups in society. The jobs of accomplishing these objectives can be described, respectively, as "task" leadership and "social" leadership.¹³⁸ The first usually involves an individual with a personality type which enables him to focus on the job to be done, to suggest effective means for performing it, and to induce other members to apply themselves, first to doing it, and second, to doing it right. The other necessary function is performed by a personality type who is able to relieve tensions induced by the performance of the task and to prevent intellectual disagreements from causing a disruption in personal affection (or at least, creating disaffection). These relatively simple, theoretical observations can be of great importance in determining who is to be the titular leader of the group (since he will be expected to perform both functions, at least if he tries to) and the relationship which the latter should create with the rest of the group. They lead to the conclusion that those judges whose personality and abilities render them likely "task" leaders, are most likely to influence the judicial role and policy values implemented in the decisions of the court.¹³⁹

Small group psychology may also have fruitful implications for the "judicial strategy" of a member of the court interested in implementing his own policy preferences. For instance, it is obvious that a single judge can attempt to obtain the necessary majority for his position either by appealing to a colleague's intellectual premises or his emotional affinities. As such, it is in his interest to work to obtain a position of relative intellectual eminence and of affection in the eyes of his colleagues. Again the Chief Justice of

¹³⁷ By comparison with a legislature, for instance.

¹³⁸ Danelski, *Conflict and Its Resolution in the Supreme Court* (1967), 11 *J. of Conflict Resolution* 71; Murphy, *Courts as Small Groups* (1966), 79 *Harv. L. Rev.* 1565; Danelski, *The Influence of the Chief Justice in the Decisional Process*, in Murphy and Pritchett, eds, *Courts, Judges and Politics* (1961), p. 497; see also Howard, *On the Fluidity of Judicial Choice* (1968), 62 *Am. Pol. Sci. Rev.* 43.

¹³⁹ Danelski, *Conflict and Its Resolution in the Supreme Court*, *op. cit.*, *ibid.*

the court is in a better strategic position for obtaining such a position of influence, although probably only marginally so.

Of much greater interest are the implications of economic analysis, and in particular of game theory, for the process of negotiation, or bargaining, to reach a group decision. The conditions for bargaining are present because all the participants are agreed on the necessity for reaching a group decision and each has an effective bargaining counter in his vote and the threat of writing a separate opinion (especially a dissent). It is obvious that the individual judge who is most effective at bargaining has a great advantage over his fellows in (1) achieving a favourable majority vote, (2) obtaining the most favourable operative doctrines in any institutional opinion, and (3) minimizing the likelihood of any majority adopting against him an opinion which is radically harmful to his policy interests.

The fact that the court is a collective group introduces important complications. The structure of the institutional decision¹⁴⁰ is an important factor determining the nature of the bargaining which must be undertaken. Because there are several members of the court and a majority must be attracted to a position, the development of sub-groups or blocs in the court is facilitated. Obviously the nature of the majority required is also important. If, as in Canada, only a majority vote for a decision is needed, and seriatim opinions are issued, bargaining may not be intensive. By comparison, in the United States Supreme Court, where a general opinion creates authoritative policy only if it is accepted by a majority of the court, instances of "legislative" manoeuvring are well-documented.¹⁴¹

Suppose, for example, it appears to a judge in a case that he is not going to be in the majority. He has at least three alternative strategies. First, he can try to bargain with the majority by offering his silent concurrence, in exchange for some dilution of the general doctrine in the opinion. His concurrence may have some marginal value because of the desirability of maintaining the image

¹⁴⁰ There can be great differences, ranging from decisions without opinions, to decisions of the court (as the Privy Council), to decisions of the court with concurring or dissenting opinions (as the United States Supreme Court) to decisions of the court with seriatim opinions (as the Canadian Supreme Court). Interesting analyses are contained in Wetter, *The Styles of Appellate Judicial Opinions* (1960), and McWhinney, *Judicial Concurrences and Dissents: A Comparative View of Opinion-Writing in Final Appellate Tribunals* (1953), 31 *Can. Bar Rev.* 595.

¹⁴¹ Cf. Murphy, *op. cit.*, footnote 135, Ch. 3; Bickel, *The Unpublished Opinions of Mr. Justice Brandeis* (1957).

of a unified court and the extra precedential value which is given to a unanimous or near-unanimous decision. Of course, the marginal cost to the majority of weakening the doctrine may outweigh any damage which could be done by a dissent from the minority judge.¹⁴² Second, a judge could just dissent alone (or with any others who join him fortuitously) and appeal in his opinion to the bar of history. Such a tactic has little real cost to the dissenter, although it may also be of little effect (but then it may not be, depending on the configuration of political forces which the court faces).

However, the opportunity cost of such a tactic may be great if there is a viable alternative, the use of one's vote and opinion, to create and maintain a bloc of several judges (in political terms, an informal "party") who may be in the minority in this case. A bloc in a small group can have tremendous leverage if the rest of the members are distributed randomly (although this will rarely be the case) and, in any event, will dispose of much more effective power than an individual judge.¹⁴³ The formation and maintenance of a bloc over time requires much the same talent and effort as has been indicated above for an individual majority. Economic analysis and game theory can show the theoretical implications of different sized blocs within different sized groups.

A final interesting theory in this area stems from the institutional fact that the individual preference of the judges must be expressed in a vote. The fact of the "paradox of voting"¹⁴⁴ (that there may be no rational way of summarizing various ranges of preferences) can be utilized effectively by a Chief Justice (as presiding officer) in selecting the order in which to put specific issues to a vote (by not putting his preference first) and by individual judges in deciding how to vote at each series of steps along the way.¹⁴⁵

There have been several recent calls for greater collaborative work by the Canadian Supreme Court, especially by Professor

¹⁴² See Murphy, *op. cit.*, *ibid.*, p. 54 *et seq.*; a classic example of a case where a unanimous court was considered imperative was *Brown v. Board of Education* (1954), 347 U.S. 483, the school segregation case.

¹⁴³ Schubert, *The Power of Organized Minorities in a Small Group* (1964), 9 *Admin. Sc.Q.* 133; Krislov, *Power and Coalition in a Nine-Man Body*, [1963] *Am. Behavioural Sci.* 24; Krislov, *Theoretical Attempts at Predicting Judicial Behaviour* (1966), 79 *Harv. L. Rev.* 1573.

¹⁴⁴ There is a great deal of literature on this problem, admirably reviewed in Riker, *Voting and the Summation of Preferences* (1961), 55 *Am. Pol. Sci. Rev.* 900.

¹⁴⁵ *Cf.* Murphy, *op. cit.*, footnote 135, pp. 85-89.

McWhinney.¹⁴⁶ He suggests the American practice of a formal judicial conference about a case, where the differing analyses by the judges are thrashed out, and a common authoritative opinion of the court agreed-to, if possible. Obviously, even within the adjudication model, this is a much more preferable mode of elaborating the law than the practice of writing and delivering individual, seriatim opinions which do not even refer to each other. However, the alternative institutional system, which can be viewed as a variant of a legislative forum voting on possible outcomes, is much more amenable to frankly political strategies, an informal party system, and the like. Presumably, it would be made use of in this way as the Supreme Court's work became overtly political.

Let me sum up the import of the preceding analysis: Assume that Canada is to have an entrenched Bill of Rights to be administered by the judiciary, ultimately the Supreme Court. Of necessity its language will be vague, difficulties of amendment and social change will render earlier interpretative decisions outmoded, and the legislature will not be available as a last-ditch court of appeal to resolve basic value conflicts that will be raised (for example, freedom of speech versus the law of obscenity and libel). Faced with the necessities of this function which is conferred on it, and buttressed by the "new jurisprudence", the Supreme Court will take on an overt "policy-making" role.

The logic of this new role will immediately begin to press against the institutional limitations which have been derived from the earlier "adjudication" role. Politicians will fight strongly against conferring an important "say" in the selection of judges upon a special interest group such as the Canadian Bar Association. In fact, great attention will be paid to the background and values of judges who are considered for appointment. Individual disputes will be perceived as merely the occasions for policy-making, rather than the prime *raison d'être* of judicial action. There will be conflicting pressures exerted by individuals, groups, governments and the courts to retain the initiative in determining the timing and content of judicial policy announcements. In the course of this, the doctrines of "lis" (or "case and controversy") and standing will be eroded to a certain extent. Similarly, the claims of the immediate parties to the dispute will become secondary to the interest of other groups affected by the general policy that is

¹⁴⁶ McWhinney, *op. cit.*, footnote 140, at pp. 624-625; Laskin, *op. cit.*, footnote 108, at pp. 1042-1048.

formulated. The courts will want further information and argument than can be provided by these immediate parties within the confines of the adjudicative hearing. The limitations of the adversary process will be felt to be outmoded and will be hard-pressed to remain intact.

A Bill of Rights assumes that it is desirable to give legislation, once it is enacted by a representative body, a "sober, second look" by a second institution charged with evaluating the legislation's effects on important aspects of political freedom and due process. This second institution must necessarily make basic policy judgments, if the Realist analysis of such decisions in the United States is correct, but it will do so in an atmosphere somewhat removed from the political pressure that produced the original legislation. How might a judicial institution evolve, whose main function was the administration of a Constitution in this way? Its members would include lawyers but also laymen drawn from a broad spectrum of experience and would be politically evaluated and appointed. They would have fixed terms with security but not be appointed for life (or until seventy-five) in order that changes in political administration could quickly reverse the majority in this "court". Controversies brought before it might or might not result from individual disjointed instances, and policy announcements would be more or less abstract. The "court" would receive representations from various interested groups, would maintain a staff for independent investigations of its own, would be able to speak in private to those who might be affected in order to get their "off the record" opinions and reactions to various possible policies. Presumably small, informal "party" arrangements would evolve within the institution so as best to further the values held in common by different groups.

The Extent of Judicial Power

Such speculations obviously do not reflect the immediate possibilities for institutional change when and if the Supreme Court (rather than the Senate, for example) is charged with the administration of a Bill of Rights. Minor adjustments are inevitable but major revisions are remote. What further problems face a court when it adopts the role of policy-maker and how are they illuminated by our model of the judge as "policy-maker"?

The model of the judge as "political actor" has largely concerned itself with the conversion of judicial preferences into

judicial votes, and the way these policy preferences come to be represented on or participate in the judicial decision-making process. There have been a few isolated "impact" studies of the Supreme Court decisions but these have concentrated largely on the issue of the degree of compliance, and why and when particular individuals chose to comply. It is very rare, though, that the "policy" approach to the judicial process consciously adverts to the question of how this model of the judicial process is related to the question of compliance, or the effectiveness of judicial policy-making.¹⁴⁷ After analysing some of the problematic areas in the political impact of judicial decisions, we shall try to relate explicitly the effectiveness of the court to its mode of operation.

The impact, on actual problems of social life, of judicial decisions is usually dependent on the attitudes expressed by key leaders and opinion-makers in the society. A classic example of this is the problem of enforcement of the school segregation decision when the leaders of the South almost unanimously refused to accept it.¹⁴⁸ We must analyse the various ways which a court has of bringing influence to bear on the key decision-makers who must be brought to accept its decision. This problem can be looked at from several points of view. First, what happens to the specific dispute in which the court has made its policy decision? Second, what is the effect of the court's general policy decision when it remains "valid law" according to accepted rules of the legal system? Third, what is the response to this policy of those other institutions in society with power to reverse the new value-laden rules?

The first problem that a court faces is inducing its subordinates in the judicial hierarchy to adhere to the specific decision which has been made about the controversy at hand and to intelligently develop and apply the general policy and doctrine which was laid down to dispose of the instant dispute. The judicial hierarchy has been likened to a bureaucracy.¹⁴⁹ The Supreme Court at the top attempts to transmit a mandatory policy from above but depends on the judicial holders of lower echelon posts to accept and intelligently utilize this policy in regard to all of the problems with

¹⁴⁷ One exception is Wells and Grossman, *The Concept of Judicial Policy-Making: A Critique* (1966), 15 J. Pub. L. 286, a very important article.

¹⁴⁸ See Peltason, *Lonely Men* (1961), p. 58; Bickel, *op. cit.*, footnote 8, Ch. 6.

¹⁴⁹ Murphy, *Lower Court Checks on Supreme Court Power* (1959), 53 Am. Pol. Sci. Rev. 1017.

which the highest court can never deal. (Moreover, it is precisely because of the need for an intelligent division of labour that a hierarchical or bureaucratic structure of the judiciary must be devised.) Now it is obvious that the success of the judicial leaders will be enhanced to the extent (1) that the lower echelons are persuaded of the intellectual validity of the policy, or (2) that the court disposes of sufficient sanctions to make the costs of non-adherence not worth the gains, or (3) that the lower echelons are convinced of the value of the institutional organization itself and the necessity, above all, of adhering to the wishes of the highest court in the land.¹⁵⁰

The peculiar nature of the judicial bureaucracy increases the ability of a lower court to resist higher level policies where these conditions do not obtain, where the policy is not persuasively defended, where the political costs of disobedience may be exceeded by the local sanctions for obedience, and where the "legitimacy" of the institution is on the wane. There are few if any meaningful, direct sanctions for non-adherence to higher-level policy (even including the theoretical contempt power for the specific decision). Any new cases must go through difficult channels to get to the top of the hierarchy. The position of the inferiors is secure in tenure, and they do not hold their position in any way dependent on their judicial superiors. Finally, the policies themselves, in a judicial opinion, are normally ambiguous in the extreme, and it is considered quite legitimate to give these policies either a creative or wooden interpretation. The possibilities of lower court obstructionism are great, and the necessity for lower court co-operation is even greater.¹⁵¹

It is important to appreciate quite clearly the scope for sabotage of upper court policy available to those lower court judges who strongly disapprove of it (for instance, public school segregation).¹⁵² The upper court judgment is considered decisive, as far as its language is concerned, only insofar as it deals with the concrete dispute in issue before it. Despite the contrary impression derived from scalogram analysis, the real impact of judicial policy-making is derived from opinions, not votes. These opinions may be more or less ambiguous and, in any event, there may be competing versions (in a collegiate court) of the rule expressing the policy adopted. Moreover, conventional jurisprudential theory does

¹⁵⁰ Krislov, *op. cit.*, footnote 85, pp. 135-136.

¹⁵¹ See Dolbeare, *Trial Courts in Urban Politics* (1967), pp. 126-127.

¹⁵² See Peltason, *op. cit.*, footnote 148.

not concede to judges the power to give an exhaustive formulation of the rule which they make "valid law".¹⁵³ The doctrine of *ratio decidendi* enables lower courts legitimately to widen or narrow the scope of the rule in a decided case in a way inconsistent with the "spirit" of the latter. Finally, the upper court does not control the incidence or order of new cases coming before it. Thus they cannot achieve by themselves continuous reformulation of the new rule so that it can become established, and not easily avoided, legal policy.¹⁵⁴

Much the same analysis can be made about the strategies and tactics available for exercising the influence necessary to obtain lower court acquiescence, as is made of exercising influence on one's colleagues. There is somewhat greater feasibility in the use of sanctions (the sharp, and publicized, reversal) and less for bargaining, but the same conditions of intellectual respect and emotional affinity remain. Most important of all is the aura of legitimacy which must surround the court, especially if this is necessary to offset competing political pressures brought to bear on the incumbents in the offices who are sought to be influenced. For lower court judges it is difficult to conceive of law as automatically applicable, or as being obeyed for fear of sanctions. Since they are locally based, and may be locally elected or appointed, they would be influenced by local constituencies, and not really worried about loss of office or even a contempt decree imposed by the upper court. Only if they respect the *legitimacy* of the hierarchical judicial process, as giving the instant decision legal *validity*, will they be encouraged to stand independent of their community and form and direct public opinion in support of immediate obedience. Needless to say, to the extent that all judges in the bureaucracy share the same philosophy of the process (especially the adjudicative), such legitimacy will be attributed most to those opinions which best reflect this philosophy in their reasoning.

The same analysis is true of the executive or legislature against whom the court's lack of "purse or sword" is most obviously a weakness. They accept judicial decisions even when they disagree with them, not because they fear any direct sanction, but rather (1) because they are convinced of the legitimacy of the courts'

¹⁵³ Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent*, in Guest, ed., *Oxford Essays in Jurisprudence* (1961), pp. 148, 164-168.

¹⁵⁴ Stone in *The Ratio of The Ratio Decidendi* (1959), 22 *Mod. L. Rev.* 597, suggests that common law rules become established law only after a series of cases have applied them.

exercise of power, or (2) because they feel it necessary in their own interests to preserve the court as an institution. Studies have shown that it is unlikely that judicial activity can be more than a temporary check on a President and Congress, unified on a national consensus.¹⁵⁵ For one thing, these bodies jointly control membership on the court and can easily replace, over a period of time, those incumbents whose policies are inconsistent with the preferences reflected in the representative institutions.¹⁵⁶ Yet, in the short run, such replacement is ineffective and, in any event, a sufficient consensus may not exist to overcome strategically represented minorities (especially Congress). Hence, if the President, for instance, bows to a judicial decree with whose policy he disagrees, it must be because he accepts the "legitimacy" of this decision, or because he wants to protect the institutional basis of judicial authority for his own later use, or because he fears that disobedience of the court's "legal" orders will be reflected in disrespect for his own.¹⁵⁷

Even as far as lower public officials or private citizens are concerned, the impact of judicial policy on their conduct is not automatic. In fact, the same analysis we made of the lower court bureaucracy can be made of such officials as the Attorney General and school segregation,¹⁵⁸ school superintendents and religious influences in public schools,¹⁵⁹ administrative agencies and due

¹⁵⁵ See Dahl, *op. cit.*, footnote 99, at pp. 293-295.

¹⁵⁶ By contrast, one of the chief problems for Canadian federalism after the 1930's was the inability of the federal government to replace the members of the Privy Council with men having different ideas about constitutional interpretation. Of course, now that the federal government does have this power, this is an argument for changing the structure of the reviewing court: *supra*, footnote 89.

¹⁵⁷ For instance, President Truman bowed to the dictates of the Supreme Court in the Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer* (1952), 343 U.S. 579. Needless to say, other governmental institutions can respond to judicial policy-making by overruling it through legal means. Cf. Stumpf, Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics (1966), 14 J. Pub. L. 377.

¹⁵⁸ *Krislov, Constitutioncy v. Constitutionalism: The Desegregation Issue and Tensions and Aspirations of Southern Attorneys General* (1959), 3 Midwest J. of Pol. Sci. 75.

¹⁵⁹ Patric, *The Impact of a Court Decision: Aftermath of the McCollum Case* (1957), 6 J. Pub. L. 455; Sorauf, *Zorach v. Clauston: The Impact of a Supreme Court Decision* (1959), 53 Am. Pol. Sci. Rev. 777; Katz, *Patterns of Compliance with the Schempp Decision* (1965), 14 J. Pub. L. 396; and Birkby, *The Supreme Court and the Bible Belt: Tennessee reaction to the Schempp Decision* (1966), 10 Midwest J. Pol. Sci. 304; cf. also Wasby, *Public Law, Politics and the Local Courts: Obscene Literature in Portland* (1965), 14 J. Pub. L. 105.

process or other legal requirements,¹⁶⁰ or police officers and arrest and interrogation practices.¹⁶¹ Judicial penalties are ineffective because these groups will reflect contrary (and sanctioned) pressures from their own constituencies and because they will be protected personally by the latter from penalties such as damage awards or jail sentences. For instance, if police superintendents speak out against the policy and legitimacy of controls on police powers, and refuse to take *active* steps to ensure that these are adhered to by lower echelon members of the police force, then these due process policies will, at best, be useless and, at worst, have even greater harmful effects than the evils they are designed to prevent.¹⁶²

Not only are lower public officials substantially immune from judicial policies which they do not voluntarily accept, but their decisions will determine largely the response from private individuals. Only if these officials take active steps to implement and enforce judicial policies will these succeed in influencing the behaviour of those private groups which are adversely affected by the judicial decision. Another important intervening variable is the attitude taken by the lawyer in interpreting judicial decisions and advising on the relative necessities of compliance. If lower officials or lawyers agree with the policy, they can imaginatively develop and project its underlying purposes in different situations and counsel or require adherence to this sensible elaboration. On the other hand, if they disagree with the policy, there is ample scope for a wooden interpretation which, on its face, complies with the letter of the law while subverting its spirit.

The Acceptability of Judicial Policies

A common problem for both the adjudicative and policy-making models of the judicial process is that of the *acceptability* of its decisions. For both, there can be an obvious divergence between the law (or policy) announced in the books and those which are actually implemented at various levels of social endeavour. The adjudicative model of necessity envisages a law-making role to the process, but one which is interstitial, undertaken within relatively narrow limits. It creates the expectation that the judge

¹⁶⁰ Handler, *Controlling Official Behaviour in Welfare Administration* (1966), 54 Cal. L. Rev. 479.

¹⁶¹ Lafave and Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions* (1965), 63 Mich. L. Rev. 987; *Improving Police Performance Through the Exclusionary Rule* (1965), 30 Mo. L. Rev. 391, 566.

¹⁶² *Ibid.*

functions as the reasoned expounder of the implications of authoritative standards and shared purposes. Its decisions are supposed to be acceptable and obeyed because the primary function of courts (while deciding disputes) is to tell people what their laws really are, even as intelligently applied to new and unforeseen situations. Although the image of the "brooding omnipresence in the sky" falsifies reality by failing to convey the *human* origin of judge-made law, it does suggest, in an inarticulate fashion, the notion that the (human) judge's task is reasoned discernment, not radical, creative innovation.¹⁶³

When the focus of judicial activity becomes "policy-making", the court can no longer depend on the quality of acceptability inherent in a reasoned statement of the implications of already, authoritative standards and institutions. The court is now a political institution to which certain protected clientele groups turn for relief unobtainable elsewhere, and whose decisions (authoritatively allocating values) may affect adversely the interests of others. It is only natural for the latter group to turn to its own favourite (or "captive") political agency to grant relief against (or frustrate) the policies the court is attempting to implement. The process of enforcing the new policies becomes a political struggle in which the court has some peculiar weaknesses (having the power of "neither the purse nor the sword"). What general conclusions can we draw about the means which are available to it to combat the problem with which it is faced?¹⁶⁴

In the first place, the resources available to the court to achieve compliance are largely determined by its institutional makeup. At present, the latter reflects, substantially, the value judgments underlying the adjudication model. Judges remain passive, awaiting the initiative of litigants to create an opportunity for judicial policy-making. The latter is possible only when there is sufficient incentive in private individuals to try to fit their own problems within accepted "legal" categories to obtain available "legal" remedies, after having satisfied certain, accepted, procedural conventions. Moreover, participation in the decision-making process is radically limited in accordance with these very legal rules which determine whose interests are sufficiently relevant to the instant decision. Now these limitations on the operation of the judicial process are quite rational when seen in the light of the adjudicative explana-

¹⁶³ Mishkin, *op. cit.*, footnote 22, at pp. 62-69.

¹⁶⁴ See Murphy, *op. cit.*, footnote 135, Ch. 2, The Framework of Judicial Power; also Wells and Grossman, *op. cit.*, footnote 147.

tion. However, they are nothing but a distortion in the process if the latter is viewed from the policy-making point of view. Yet the latter model must accept these as, at present, the necessary conditions within which judicial policy-making, in the sense of effective problem-solving, strives for success.¹⁶⁵

What do these conditions indicate about the likely success of various judicial policies? In the first place there is a great lack of available knowledge (both information and theory) for the formulation of desirable policy. The adversary system may or may not be effective in establishing "adjudicative" facts. No one would contend that it is an intelligent way of establishing "legislative" or "social" facts. Nor are judges, drawn as they are exclusively from the legal profession, likely to have, or to maintain, sufficient "expertise" that they can take "official notice" of these facts. Second, there is unlikely to be effective presentation of the consequences of particular policies for those groups whose interests are inadequately represented within the adversary context. Thirdly, there is little or no opportunity for rational, incremental decision-making in technical areas that require constant supervision and "information feedback".¹⁶⁶ Courts must await the sporadic incidence of litigation and look for the information they need in the vagaries of a record, at least if the conventional limitations on the process are to be adhered to.

The lack of adequate information is joined with serious limitations on the remedies available. If the court wishes to penalize someone with a damage award, a fine, or a jail sentence, it must await the initiative of either a private litigant or a public prosecutor. If it wishes to sanction the person who wants to use the judicial process itself, it is limited to the penalty of "nullity".¹⁶⁷ Since convention drastically (though not wholly) limits the "legal" effect of precedents to the individual litigants involved, the success of judicial policy depends on the court's ability to induce voluntary adherence to its general policy expounded in the opinion. A court is incapable of dealing individually with more than a minute portion of the occasions when its policy should be applied and, as we have seen earlier, it lacks credible sanctions even in these cases.

¹⁶⁵ Dolbeare, *op. cit.*, footnote 151, esp. Chs 7 and 8, is a good study of the practical effects of these adjudicative limitations on an effective policy-making role for the courts.

¹⁶⁶ See Wells and Grossman, *op. cit.*, footnote 147, at pp. 305-307.

¹⁶⁷ This is one of the chief defects of judicial control of police through evidentiary rules.

For these institutional reasons, judicial policy-making will be successful only if it is expressed in self-executing terms, and then only if obedience is largely voluntary. In a sense these conclusions suggest limitations on the effectiveness of judicial policy-making which are quite close to those proposed on judicial creativity of the adjudication model. In order that judicial policy can be generally implemented, by way of self-execution, most of the ideals of legal craftsmanship must be adhered to.¹⁶⁸ Judicial policy must be adequately expressed in law, which requires that judicial votes in fact be based on opinions (not rationalizations) which adhere to the inner morality of the law (as adjusted to the demands of judge-made or "unwritten" law).¹⁶⁹ A person cannot orient his private conduct in the light of a rule which cannot be meaningfully understood as a legal rule.

Second, the judicial policy must be such as will be voluntarily accepted and obeyed by the great majority of those to whom it is addressed. This places substantial limitations on the ability of a court to make radical policy innovations which would not also be expressed in adequately representative institutions. In this sense judicial policy-making must be substantively interstitial, working within a broad framework of assumptions and interests accepted by the competing groups which are involved. Of course this is the very conclusion of the adherents of the adjudication model who assert that the limits of judicial creativity are reached when it comes "to create new aims for society" or impose on society "new basic directives", as opposed to participation in "articulating the implications of society's shared purposes".¹⁷⁰

And yet these conditions of institutional feasibility may not always be inconsistent with strongly-desired, substantive policy-making by the court. Many radical innovations may be expressed in a simple, easily-understood rule. A court may feel strongly enough about a new policy that it is willing to take the risk that certain points of view were not adequately put, that the type of remedy available to it is not ideal, or that implementation may not be automatic. The problem arises, then, whether a court should feel bound to institutional limits where these do not maximize substantive objectives.

¹⁶⁸ See Deutsch, *op. cit.*, footnote 111, at pp. 236-249.

¹⁶⁹ See Fuller, *op. cit.*, footnote 32, Ch. 2.

¹⁷⁰ *Supra*, footnote 55.

The Legitimacy of Judicial Activism in a Democracy

The usual argument that is made in favour of this position depends on the assumption that the court is an undemocratic body. To allow it to make policy choices in opposition to those of the representative organs in a society is inconsistent with the demands of majority rule. Moreover, it is self-defeating because the court cannot, in fact, overcome the pressures of a majority and judicial review deprives the people and their representatives of the opportunity for self-education in self-restraint.¹⁷¹

There is no doubt that the chief unresolved problem of a model of judicial policy-making is its compatibility with democratic or representative government. This is not so serious for an adjudication model which conceives of courts as elaborating principles that, in a sense, are established in a community's law or mores. It is not only acceptable, it is positively desirable for a court to collaborate with a legislature by developing the law (for the benefit, *inter alia*, of the "one man lobby")¹⁷² within its own limited and defined sphere of competence. Moreover, it can be assumed, when it acts outside the constitutional sphere, especially in the field of "lawyer's law", that the legislature is available as a final court of appeals to reverse any substantial errors. The result of this collaboration is that the legislature often saves its time for other more important functions peculiar to it and that it gets the benefit of the judgment of a court which may, in certain fields, be the best available.

However, where the court acts in a constitutional context, or in a field of great ideological division that is not amenable to quick legislative correction,¹⁷³ there are real problems for democracy if the court goes beyond the elaboration of established standards to choose and impose its own policy preferences. One of the issues about which this is peculiarly true is the role of the judiciary in

¹⁷¹ Most of the classic articles on the democratic character of judicial review are collected in Levy, ed., *Judicial Review and the Supreme Court* (1967).

¹⁷² This term was coined by Hurst, in *Makers of American Law* (1950). It means that courts are open to an individual litigant, whether or not he has any "political strength to have the law adjusted to meet contemporary standards of fairness, and adjusted retrospectively, for his benefit in the instant case."

¹⁷³ An example is the field of labour relations law. In the United States major changes in legislation occur only every twelve years (1935, 1947, 1959), despite the rapid changes in the industrial environment. On the relevance of this fact for the Judge's role see Wellington and Albert, *Statutory Interpretation and the Political Process* (1962-63), 72 *Yale L. J.* 1547, esp. at pp. 1565-1566.

striking down legislative enactments because of their infringement on freedom of speech. One adherent of the "policy-making" model, Martin Shapiro, has suggested a theoretical basis for rejecting this dichotomy between democracy and liberty and allowing adherents of civil liberties to overcome their qualms about the "counter-majoritarian" character of judicial "activism" or "policy-making".¹⁷⁴

In the first place, he suggests that other agencies of government are not all that democratic, in the sense of being responsive to the general will.¹⁷⁵ This is obviously true of independent, appointed, administrative agencies or other executive officials. Even directly-elected bodies like the United States Congress are fragmented institutions, with independent power centres (such as committee chairmen), supported by certain special interests whose goals they advance. The statutes they enact (or block) tend to be negotiated compromises of the competing claims of those with effective access to the process, and not at all necessarily responsive to the majority of the moment on that issue. Nor is their individual accountability to the electorate afterwards likely to be an effective sanction against ignoring the popular will. Hence, Professor Shapiro concludes, all the *political* agencies of government tend to be *more* or *less* democratic or representative.

Next, the courts, by comparison, are not at all that undemocratic and able to usurp illegitimate power.¹⁷⁶ True they are appointed for life, and are tenured, and impeachment is not a viable means of making a court responsible. However, judges do die or retire and new appointments are available to succeeding administrations. Because there are only a few judges in an upper court, a majority, out of line with contemporary ideals which have access to elected governments, can quickly be replaced. Second, judges are significantly accountable for their acts. Their decisions are exposed to view and public criticism since they must take responsibility for opinions addressed to the public that justify every step they take. Third, for the reasons discussed earlier, the judiciary's real power to differ with executive or legislative policies is severely limited by the capacity of the latter institutions to restrict or divert the impact of any judicial decision.

Hence, Professor Shapiro says that instead of conceiving of judicial policy-making as an abstract problem in majoritarian democracy, we should view the courts as an integral part of the

¹⁷⁴ Shapiro, *op. cit.*, footnote 103, Ch. 1 (1966).

¹⁷⁵ *Ibid.*, pp. 17-25.

¹⁷⁶ *Ibid.*, pp. 25-34.

whole political process which, *as a whole*, is more or less representative. Within this political process, the court is aptly fitted to represent certain interests that are peculiarly under-represented elsewhere in governmental circles. This is true, usually, because the interest is not organized in a way that allows it to lobby effectively to legislatures or administrative agencies or to wield the credible leverage of united political power. Such an interest group, that favouring freedom of speech for instance, finds judicial representation peculiarly congenial. If there is a written constitutional provision that can gain them access to a court, they find themselves in an adversary process where, presumably, the parties are viewed as equal whatever be their *political* strength. Hence the court should act as a political agency within the group struggle, building up and reinforcing those interests which are its peculiar clientele, by educating the public in their values.¹⁷⁷

There are many reasons why the political process is much more responsive to narrow, organized, economically powerful interest groups.¹⁷⁸ Even though formally undemocratic, judicial review in favour of the under-represented may make the over-all system more responsive. In a sense this also forms a sufficient criterion indicating the spheres in which judicial policy-making can be considered legitimate. All of this assumes, of course, that institutions should be treated as means, not ends.

Professor Shapiro explicitly attacks an opposing view which is very closely representative of the adjudication model. He argues that simply because courts were originally designed to administer corrective justice in private disputes, by applying fixed standards (though surely not mechanically), they are not prevented from taking on different, and perhaps incompatible, functions. In particular, they should be able to make policy as well, by deciding politically which rules they will apply to the dispute. In conclusion, people who favour freedom of speech should use the Supreme Court as just another governmental agency which is peculiarly suited to the purpose of their particular interest group.

A serious problem is explicitly recognized by Professor Shapiro in the "neutral principles" debate.¹⁷⁹ While he assumes that the

¹⁷⁷ Shapiro, *op. cit.*, *ibid.*, pp. 34-39; in Canada an analogous group which could gain effective "representation" in the Supreme Court, was the Jehovah Witnesses in the 1950's.

¹⁷⁸ Cf. McConnell, *Private Power and American Democracy* (1966).

¹⁷⁹ So called after Wechsler's article, *op. cit.*, footnote 58; see Shapiro, *The Supreme Court and Constitutional Adjudication of Politics and Neutral Principles* (1963), 31 *Geo. Wash. L. Rev.* 587.

search for such lawyer-like reasoning is inconsistent with the actual performance of a political function, still the court, as a political actor, is required to preserve its institutional power and prestige. In fact, much of the popular acceptance of the legitimacy of judicially-enacted policies stems from the belief that judges are impersonal or neutral. It is, of course, true that a great deal of judicial power stems from their protection of constitutional values. This substantive credibility can be lost by undue attention to legal niceties and restraint.¹⁸⁰

However, the main reasons why the courts are granted the legitimate authority to reverse the Congress on constitutional grounds is a certain half-symbolic, half-real, institutional self-limitation. People believe that the court does adhere to the demands of logic and neutrality, that it is insulated from ordinary political pressures, that it accepts the professional or craft demands on its reasoning, that it decides on the basis of factors which can be implanted in a record.¹⁸¹ The ability of the court to comply with these demands of law, while still engaging in overt policy-making, is being quickly eroded by certain social developments mentioned earlier (especially the growing recognition that decisive social changes can be achieved through constitutional litigation by organized groups). In order to protect the courts' institutional position, when in fact cases come to a court too quickly for acceptably neutral or general principles to be articulated, Professor Shapiro advocates the use of the language of legal doctrine, while recognizing that it may be only rationalization.¹⁸²

Although disagreeing that the mode of arriving at judicial decisions should be a process of reasoning from general legally acceptable principles, he does counsel, as a matter of political strategy and prudence, that this is how the opinion defending the decision be written. Because the immediate and more remote consumers of the judicial product, the bar and the public respectively, strongly entertain certain expectations about judicial impersonality, these must be satisfied in order that the court maintain the power and prestige necessary to pursue its political goals. In conclusion, while scholars may agree that the belief in a "prepolitical jurisprudence"

¹⁸⁰ See Deutsch, *op. cit.*, footnote 111, at pp. 216-221; Miller and Schefflin, *op. cit.*, footnote 126, at pp. 523-536.

¹⁸¹ Moreover, the institutional qualities which give rise to these expectations of judicial neutrality are the very reasons why politically powerless, under-represented groups, or even the "one-man" lobby, are able to gain some effective relief from courts.

¹⁸² Shapiro, *op. cit.*, footnote 43, pp. 24-32, esp. p. 27.

ence" is a myth, it is no part of political morality or strategy for scholarly friends of the court to destroy its effectiveness by exposing the myth.¹⁸³

One might reasonably doubt either the justice or the long-run efficiency of this approach.¹⁸⁴ Is it proper, or even possible, that judges should make use of a system of social practices to which they pay lip service in order to achieve results that are inconsistent with it? In other words, is it right that courts take advantage in this way of social acceptance of their distinctive role? Such acceptance is based on one idea of its function (adjudication), but the courts may use the institution to perform other functions (that is, policy-making). The success of this enterprise requires that voluntary adherence to the policy be maintained. Yet this is only obtainable if affected individuals are deceived about what is really going on, as regards the basis of their acceptance. This is the age-old problem of whether the end justifies the means, whether the pursuit of substantive good should be limited by respect for procedural means? If policy-making is to be taken over by an institution which has been developed and gained a life of its own for other purposes, should this not be expressly stated and even delayed until suitable amendments are made in the organization of the process itself?

Still the real problem we face is not conscious manipulation of the existing process but rather the use of adjudication in social situations for which it is ill-suited. A good example is the recent discussion of the desirability of compulsory arbitration of individual, interest disputes. This should not be seen as simply a choice between free collective bargaining and government-imposed settlements (although this is the primary issue). There is also the question of whether the institution of grievance arbitration, with the same personnel and practices, should be transferred bodily into a field where accepted standards are lacking, many unrepresented groups are vitally affected, and each specific issue is inextricably tied into all the rest. Of course, institutional values are not absolute and the least imperfect solution may, on occasion, involve the use

¹⁸³ *Ibid.* The empirical question of the basis of attitudes to the courts is only beginning to be investigated; see Dolbeare, *The Public Views the Supreme Court*, in Jacob, ed., *Law, Politics and the Federal Courts* (1967), p. 194.

¹⁸⁴ Miller, in *Some Pervasive Myths About the United States Supreme Court* (1965), 10 *St. Louis U.L.J.* 153, at pp. 188-189, calls this reasoning "squid jurisprudence"; see also Miller and Scheffin, *op. cit.*, footnote 126, *passim*.

of the mechanism available to us. But we have a duty both to recognize and to disclose the institutional implications of the policy choices we make.

IV. *Conclusion.*

I do not believe it is possible yet to decide which of these models expresses a more appropriate role for judges in our society. Nor does either version furnish a type of litmus test for discovering the nature of our present system. Probably, the various judiciaries in the common law are based on different mixtures of each role, however contradictory they may appear in the abstract. Our models are "ideal types", furnishing us with distinctive angles of vision on the same judicial reality, thus allowing us a more profound understanding and evaluation of tendencies within the existing system. Moreover, these two artificial constructs of the judicial process show us the practical significance of two as yet unresolved problems in legal philosophy. Is rational and communicable decision-making possible in choosing between social values? Is judicial choice about values that favour one interest over another a fair institution within a democracy?

In conclusion, I should emphasize my belief that the judicial process in Canada fits neither model as regards the appropriate mode of reasoning, although it is organized more or less along adjudicative lines. In fact, common law judging in Canada has truly been a wasteland of arid legalism, one that is only beginning to be relieved by a profounder vision of the scope of judicial action. For this reason alone, I am just as dubious about the desirability of judicial review of legislative action as about the present review of administrative action. Perhaps the proposal for a Canadian Bill of Rights should await the advent of judges who are products of a different legal education. It seems safe to predict that they will have been schooled in some version of the philosophies of judicial decision-making which I have sketched.
