Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 45 | Issue 4 Article 3

Summer 1970

The United States Supreme Court: A Creative Check of Institutional Misdirection?

Fletcher N. Baldwin
University of Florida

COMMENT

In the Comment which follows Professor Baldwin presents a brief for an extremely creative Supreme Court. In contrast to those who suggest limiting the function of the Court, either by subject matter or by judicial restraint, the author would have it protect the compact upon which the community is based, by taking an active role to insure that the compensation implied in the compact flows in fact not only to the community but to the individual.

THE UNITED STATES SUPREME COURT: A CREATIVE CHECK OF INSTITUTIONAL MISDIRECTION?

FLETCHER N. BALDWIN*

At some point, as nations mature, an institution, individual, or group takes hold to set the tone and ground rules of the theoretical compact between individual, community, and government. In most instances there is a long term evolutionary process which continually refines, through trial and error, the rights and obligations of citizenship on the one hand, and the human rights-benefits which flow to the individual on the other. The construction which implements this notion of dual compensation is at times due to an abrupt shift in "public interest" policy. Such a shift usually results in community confusion, and there is no fool-proof system which can avoid the confusion or contradiction. As history illustrates, many theoretically successful individual-community compacts have been polluted in practice by just such a problem.

Each community should be concerned with searching for a system of checks that enhance, although perhaps not necessarily insure, human rights compensation by the community. All too often governments forget why they are governing, just as individuals forget their societal responsibilities. At such a stage of mental lapse there must be an institution, or institutions, empowered to assert its prestige in the controversy, in an attempt to re-establish the balance of legitimate community/individual expectations.

This article will examine one such institution—the United States Supreme Court. The emphasis is upon a limited aspect of the work of the

* Professor of Law, Holland Law Center, University of Florida on leave, Fulbright Professor of Law, Makerere University College, Uganda.

Court, that of final authoritative interpreter of the entire community process, with the human rights provisions of the Constitution as the frame of reference. In this regard, the standing of the Court has suffered, needlessly, in recent years,[1] and this article is an appeal to community and individual alike to assist the court in reaffirming its creative role.

FAIRNESS—A VITAL COMPONENT OF MUTUAL COMPENSATION[2]

In the late twentieth century the non-conformist has sharpened our awareness that mutual compensation theory, which would bind individuals and protect the community, is neither functioning effectively nor being articulated accurately by the authoritative decision-makers.[3] Questions about the extent of human and community rights occupy considerable debate time. Yet when protests about possible civil liberties (human rights) violations are brought before the public, society seems confused as to the basis of consideration, judgment, and solution. These issues require deliberation and understanding. They are too important to go by default to either side of a particular confrontation; they are too fundamental to be left to the interpretation or manipulation of the political party in power.

All claims, in vacuum, stand on an equal footing. The fact that each man is born supports the concept that an individual claim is as important as any other single claim. However, contemporary man does not live alone. Whether he would prefer to live alone is not the question; the fact is that he does not and cannot live in isolation. As a result claims are not and cannot be absolute. Because pre-ordained needs do not exist, each claim by the individual and government must be justified.

The justification is based on the idea of a *community*.[4] Men have found it desirable and necessary to live together. It is inevitable that individuals must restrain some of their own ideals and pursuits for the

---

1. *See* Acheson, *Removing the Shadow Cast on the Courts,* 55 AM. B.J. 919 (1969).

2. This general idea is developed fully in Barnhart, *Human Rights as Absolute Claims and Reasonable Expectations,* 6 AM. PHIL. Q. 335 (1969).

3. *See, e.g.,* D. WALKER, RIGHTS IN CONFLICT (The Walker Report) (1968). *See also* T. GURR, E. H. GRAHAM, THE HISTORY OF VIOLENCE IN AMERICA (1969); Sibley, *Social Order and Human Ends: Some Central Issues in the Modern Problems,* POLITICAL THEORY AND SOCIAL CHANGE 221-55 (D. Spitz ed. 1967).

4. For purposes of this article the following definition of Community is adopted:

> A 'Community' is a group of people, organized in varying degree on a geographic basis and affected by interdependences or interdetermination in the social process by which they seek values. A more complete description of any Community would outline the participants (group and individual), the range of values sought, the situations or interaction, the base values at the disposal of different participants, the strategies employed in different contexts, and finally, the outcome achieved in the shaping and sharing of values.

McDougal, *Jurisprudence for a Free Society,* I GA. L. REV. 1, 4 (1966).

good of the whole. The community necessity implies a degree of responsibility, that the individual serve the needs of the whole. For this reason rules and regulations have been the community mainstay. Tribal communities with their customary laws were rigid in their enforcement of community values.[5] Rules and regulations negate unworkable absolute claims; however, they also imply that in agreeing to the negation man insists upon the right to share in corporate rewards. The effective communication of this idea as well as the idea of what is expected of man is found in the community pronouncement.

The question of what is expected of individuals in a community has developed through the idea of law.[6] On the other hand, to insure compensation by the community, there has grown up a set of values to be found, for example, in the Bill of Rights and the human rights amendments to the Constitution. The compact theory has been formalized with the "law of the land." But what are the compensating values and through whose eyes do we examine them?[7] The organized society is a fair focal point, but it is to be doubted whether the law as articulated and practiced by the organized society in the late twentieth century is accomplishing its purpose of joining men together through common goals and values. Is the law being vitalized and utilized as anything more than a sanctuary for conformists regulated by a code of threats coupled with the exercise of the force of society, or is it perhaps a body of predictions as to how and when that force will be applied?[8] Is the law the sum of specific principles articulated in the determination of controversies? Since the goals of men reflected in the community idea must be communicated has the law, traveling under the guise of human values, become merely a set of rules established by the appointed authorities of a political unit? Is it precedent or a dynamic instrument that promotes community and individual expectation while preserving a degree of stability?[9] The

5. *See generally* M. GLUCKMAN, THE IDEA OF BAROTSE JURISPRUDENCE (1965). *See also* R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (1968).

6. *See generally* M. BARKUM, LAW WITHOUT SANCTIONS (1968).

7. Part II *infra* sets forth some of the questions that must be asked before one can begin to understand the diverse opinions as to a definition of law. No one definition is satisfactory but an all inclusive one might be helpful in raising questions:

> Law is (1) a complex whole, (2) which always includes norms regulating human behavior, (3) that are social norms, (4) the complex whole is orderly and (5) the order is characteristically a coercive order (6) that is institutionalized (7) with a degree of effectiveness sufficient to maintain itself.

Bohannan, *The Differing Realms of the Law,* 67 AM. ANTHROPOLOGIST 33 (Special Pub'l the Ethnography of Law, L. Nader, ed., 1965). *Compare* Friendman, *Legal Culture and Social Development,* 4 L. & SOC. REV. 29 (1969).

8. *See* 2 R. POUND, JURISPRUDENCE 6 (1959).

9. *See* E. ESRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 366-411 (1936); Jones, *The Creative Power and the Function of Law in Historical Perspective,* 17 VAND. L. REV. 135 (1963).

question is whether the implication of compensation, in the compact, as implemented, is reciprocal.

To this problem, there are no simple answers. Several factors, however, seem clear. A community must apply its rules *consistently* and in keeping with the human rights provisions of its constitution. Since the community by its very nature makes demands, the individual can at least in turn insist that the community demands be made in a consistent manner. If man cannot depend upon the community to be consistent in its demands and compensation, then the community is acting *unfairly*.[10] If there is any credibility to the compact theory, it is that responsibility is universal; neither the individual nor the community can escape its demands. Social support requires individual rewards,[11] and without *mutual* compensation the essence of the compact theory is destroyed.

Human rights are just and reasonable demands made within the complete—social, economic, political and technological—community context.[12] If human rights are perceived as compensation, the demands require analysis not only from a community but also from an individual expectation standpoint. The analysis, production, and distribution of human rights is, however, open ended. Men have a great variety of needs, wants, and desires which cannot be arbitrarily limited. The environmental factors affecting matters of fairness must be considered. What guidelines are to be established for distribution? Who sets the guidelines? Where the community condemns poor education or a poor standard of living and simultaneously denies opportunities to those with a poor education or a poor living standard on emotional grounds, then it is clear that the community is in part renouncing the compact. Although this may be said to be peculiarly a political and democratic question, where the community denies renouncing the compact the question becomes one of fair treatment.[13] But to "speak" of fair treatment, just as to speak of human rights, is not synonymous with "possession." Community fairness requires legitimate credentials. One cannot pronounce, even with the force of a mob, authoritative human rights. A community's announcing "fairness" does not establish it.

The exercise of self-styled human rights will not assure recognition. A dispassionate agency lending constitutional support for particular human rights must reaffirm the legitimate community/individual expectations. The agency has the continuing burden of making the moral

10. Barnhart, *supra* note 2, at 337.
11. *Id.*
12. *Id.* at 338.
13. *Id.* at 339.

proclamation of human rights relevant to the community environment. If unsuccessful, at least an authoritative agency has pointed out the community failures and predicament. The thinking of the agency must be original and pliable just as the community is said to be creative and changing. The creativity implicit in the human rights community expectation portion of the Supreme Court's work requires an intellectual freedom and ability to give meaning to the conglomerate of cultural principles implicit in the community compact concept. The ideal is that of mutual compensation—mutual expectation.

THE NECESSITY FOR RESTRENGTHENING THE DOCTRINE OF JUDICIAL REVIEW

One of the difficulties with the idea of the Court as an independent body having the power to articulate, from a given set of circumstances, the bounds of mutual compensation is its restricted (limited focus) frame of reference. From what vantage point are claims and expectations to be considered? Attention must first be given to fairness in deciding the limits and extent of freedom of self fulfillment. However, community concepts of self fulfillment which are generally reflected in the laws of the community are confusing, they disclose many miens and a closet full of hats.[14]

The concept of law that binds a particular compact is utilized by the community as its primary agent of (a) social control and (b) balancing values where there are conflicting interests. The form that the law should take has been proved and discussed by legal scholars for centuries. The critical variable seems to be the content.

Professor Lon Fuller has pointed out that the content of law is a moral question engulfing certain values which each community considers as truly necessary and relevant to its continued existence.[15] This notion implies a broad frame of reference for law. There are, however, continued attempts by scholars to insist that law to be "law" must be treated narrowly, must refer to a fundamental resource. John Austin and H.L.A. Hart have assumed the need for an intellectual maturity on the part of the evolving society which demands the capacity for separating law from all other types and degrees of social practice.[16]

The various examinations inevitably disclose a legal-social obligation dichotomy. To Austin, law is what the ruler says it is. His command is

14. M. LERNER, AMERICA AS A CIVILIZATION 432 (1957).

15. L. FULLER, THE MORALITY OF LAW 152-86 (1964); *Compare* H.L.A. HART, THE CONCEPT OF LAW (1961).

16. *See generally* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1954 ed.) and H.L.A. HART, *supra* note 15.

ultimate authority, the embodiment of the power of the state. Citizens under such a structure are obliged to act when commanded to do so where a legitimate rule controls. Such decisions are therefore enforced from a position of power, not reason. For Austin there must first be an identification of the rule and the enforcement thereof. Moral obligations are not the subject of sovereign enforcement. A high court would seem to have very little creative duties in such a system. A one party state could fit comfortably into the Austinian scheme.[17]

Hart, however, in attempting to refine Austin's theory developed the rule of recognition. The rule of recognition, a power conferring rule, requires a distinction between rules imposing duties and rules conferring legal obligations.

Fuller argues that where social obligation becomes increasingly the object of an explicit responsibility, a legal system is created. Again the uncertainty lies in "the precise point at which a legal system can be said to come into being."[18] Professor Myres McDougal, in exploring this point, notes that regardless of who the decision-makers are in a particular set of circumstances, one thing is certain, the interest and control is found beyond the written rules. "We are interested in decisions, what's done, the consequences of the making and application of rules for human beings."[19] A decision on what is the law stems from competing demands. The legal process should express the desires and goals of all members of the community tolerating the legal system. The expectations cannot be found in completed terms on a 1787 parchment.[20]

> The task of a contemporary interpreter is to examine and assess this entire flow of prior communication for the closest possible approximation to the genuine shared subjectivities of our present community members as to what their constitution really provides on basic issues.[21]

Professor McDougal agrees that the interpreter must take into account the community's shared expectations. He points out that the decision makers' primary goal is to act rationally in pursuing the primary objective of interpreting and articulating genuine community values. This

17. *See* Georges, *The Court in the Tanzania One-Party State,* EAST AFRICAN LAW AND SOCIAL CHANGE 26 (G. Sawyer ed., 1967).
18. *See* L. FULLER, *supra* note 15, at 131.
19. McDougal, *supra* note 4, at 2.
20. *See, e.g.,* Ferry, *Must We Rewrite the Constitution to Control Technology?* SAT. REV., Mar. 2, 1968, at 50.
21. *See* McDougal, *supra* note 4, at 5.

task requires an understanding and respect for human rights.[22] The task of the interpreter, in this case the court, must be considered in the context of community process. The genius of the task, as set by Professor McDougal, is that it takes into account the complexities of the various community demands.[23]

Social demands are fickle, fluctuating with the conditions of the times. In the late nineteenth century the concept of the well-ordered society was one that was free from as much government control as possible.[24] Industrialists in an economically struggling nation worked for a central government which would encourage and protect trade, keep the value of the currency high, and allow the capitalistic enterprises a great deal of economic latitude.[25]

Until the period of depression in the late 1920's and 1930's, there continued to be objection to government control. However, with the occurence of the depression government control became a welcomed intervention. Freedom from government restraint was traded for freedom from hunger and unemployment.

The tradition of confusion as to what or who should govern and how this governing should be carried out is reflected in the dilemma of American democracy. On the one hand there is adherence to a constitutional government with emphasis on the human rights of the individual and the limited powers of the government, the separation of powers, a close watch over civil liberties, and protection against any arbitrary encroachments by the state. Yet on the other hand, there is the rule of the majority, the police power concept. Where the two conflict and the community wishes to remain intact, an authoritative decision-maker must be drawn into the dispute.[26] Fairness requires an impartial and reasoned set of credentials eminating from the decision-maker. But in the final analysis why pin the hopes of the community on a court of last resort?

THE DILEMMA: JUDICIAL REVIEW AND EARLY CONCEPTS

Edmond Cahn writing in *The Great Rights*[27] described this dilemma as it was faced by the constitutional framers in trying to discover how to incorporate a philosophical arbitrator into a practical setting. The im-

22. M. McDOUGAL, H. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENT AND WORLD PUBLIC ORDER 35-77 (1967).
23. *Id.* at 27-34; *see also* 2 R. POUND, *supra* note 8, at 7.
24. *See* 2 R. POUND, *supra* note 8, at 120-21.
25. K. POLANYI, THE GREAT TRANSFORMATION (1967).
26. *See* M. McDOUGAL, H. LASSWELL & J. MILLER, *supra* note 22, at 35-39.
27. Cahn, *A New Kind of Society*, THE GREAT RIGHTS 1-12 (E. Cahn, ed., 1963).

mensely difficult task for the framers was not so much articulation but implementation. It was not new for a document or for national leaders to articulate philosophic rhetoric that sounded like *equality, justice,* and *liberty.*[28] The United States Constitution embodied only *the vague outlines* of implementation of article III.

The idea of judicial review was not born with the Constitution. Lord Coke's dictum in *Dr. Bonham's Case*[29] evolved a concept that was to live much longer than the holding:

> It appears that when an act of Parliament is against common right and reason . . . the common law will control it and adjust such act to void.[30]

This language was employed as a rationale by the colonists to argue against the Stamp Act.[31] It appears again in *The Federalist No. 78*

> It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things to keep the latter within the limits assigned to their authority. The interpretation of laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meanings as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[32]

The new nation chose initially to adopt The Articles of Confederation. The document was a creature of the states, not of the people. Review was not given to a national body. This document had a brief reign. The delegates to the Philadelphia Convention of 1787, for whatever reasons, chose to ignore their task of rewriting the Articles. Instead, these delegates produced the Constitution. The document itself, was in part a counter-

28. *See* M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967); A. D'ENTREVES, NATURAL LAW AN HISTORICAL SURVEY (1965); CONSTITUTIONS AND CONSTITUTIONALISM (2d ed., W. Andrews ed., 1963); L. STRAUSS, NATURAL RIGHT AND HISTORY (1965).

29. 77 Eng. Rep. 647 (C.P. 1610).

30. *Id.* at 118.

31. *See* E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 141-50 (1958).

32. Hamilton, *The Federalist No. 78,* THE FEDERALIST 521, 525 (J. Cooke, ed. 1961).

institutional check within the institutional framework.

Whether intended as broadly as interpreted is a matter of considerable debate.[33] The debate sometimes ignores the fact that the task of implementing the ideal was assumed by the Court in part as a result of the default of other institutions. This is not to say that the Court has ever enthusiastically endorsed its role of "creative" implementor of community credentials. Most of the post Civil War civil rights legislation died a violent death at the hands of the Court. Furthermore, concepts of property have permeated much governmental thinking from inception to modern times.[34] The framers of the Constitution talked a great deal about granting rights to the people;[35] however, the Constitution was conceived for the most part within a property orientation framework.

Irving Brant, writing in *The Great Rights* and later in *The Bill of Rights,*[36] describes the key role such architects as James Madison played in shaping the future of the United States. In planting the libertarian spirit not only Madison, contends Brant, but most of the founders, liberal and conservative alike, were ready and in fact did pin "their faith on representative self government based on the great body of the people."[37] This ideal seems to speak to the universality of man, notwithstanding the fact that it reflected the needs and the hopes of the few.[38]

There were earlier signs of the American democratic spirit. For Brant one such sign was the Declaration of Independence which encompasses rather than conflicts with the spirit of the Constitution.[39] The Declaration presented for all to read the case for the colonies against the crown. Under certain clearly defined and specified circumstances, it stated, the people have a right to revolt. Rebellion against established authority is a serious matter, and the founders did not want the idea to become too popular. Because the crown was unresponsive to the needs of the colonies, the new United Colonial government would respond. The Constitution set out methods of orderly change designed to prevent any destruction of the nation.[40] But this was only part of the Declaration. The colonists did not merely argue that their list of grievances granted them the right to armed revolution. They also contended that free men should

33. *See generally* F. McDonald, We the People: The Economic Origins of the Constitution (1958), and R. Hofstadter, The American Political Tradition (1948).
34. *See generally* K. Polanyi, *supra* note 25.
35. *See* R. Hofstadter, *supra* note 33, at 1-44.
36. I. Brant, The Bill of Rights Its Origins and Meaning (1965).
37. *See* Brant, *The Madison Heritage,* The Great Rights, *supra* note 27, at 17.
38. *See* R. Hofstadter, *supra* note 33.
39. *See* Brant, *supra* note 37.
40. *See* Dennis v. United States, 341 U.S. 494 (1951).

not be subjected to a system of government that did not embody the two major human rights principles: liberty and democracy. A system was devised that would fit this interpretation of the intent of the Declaration. That intent, conceived in an earlier day, bore fruit in the Constitution. It was incomplete, however, without effective implementation. When the issue arose in *Marbury v. Madison*,[41] the starting point was article III. The difficulty for Chief Justice Marshall was that article III is not complete in its description of the judicial power. But by combining article III with article VI, the Supremacy Clause, Marshall was able to establish the point that the Constitution is the Supreme Law of the Land and that the Court, the Supreme Court, would stand as the last resort, ready to insure the constitutional provisions involving the idea of mutual compensation.[42] Marshall was careful, as his successors would be, in his wording of *Marbury*. He was aware of a basic tenet of the American system, that the Court does not have the final *say*.[43] The Court could not "withstand for long an executive or legislative power that had the consensus of the nation behind it."[44] Judicial review built upon such a flimsy foundation presents not only the weakness of the Court but also its strength. Judicial construction can, as can mob violence and rule, undo the compact. How does one know when the Court is performing its definite task as authoritative decision-maker in the human rights arena? In the 1933-36 era there were many who argued that the Court, "in considering itself the supreme economic authority" was performing a task delegated by the people to the other branches of government.[45]

One must keep in mind that the main question for the Court, in this context, must be to undertake "a disciplined, responsible effort to ascertain the genuine shared expectations of the particular parties to a community conflict."[46] When the Court has ventured beyond this limited task, in the early stages of the New Deal for example, not only could one see a Court with little commitment to the concept of the individual first in the mutual compensation scheme but one could also see its lack of ultimate power. With a lack of ultimate power, the question of the

41. 5 U.S. (1 Cranch) 137 (1803). *See* Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

42. E. CAHN, THE PREDICAMENT OF DEMOCRATIC MAN 34 (1961).

43. I am discussing the educational role and not the enforcement aspects of judicial review. *See* Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127.

44. THE GREAT RIGHTS, *supra* note 27, at 9.

45. *See* R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 72 (1941), and Mendelson, *Mr. Justice Frankfurter and the Process of Judicial Review*, 103 U. PA. L. REV. 295 (1954).

46. M. McDOUGAL, H. LASSWELL & J. MILLER, *supra* note 22, at 40.

Court's assuming too much authority in the human rights field seems to raise more emotional than practical issues. The relevant question should be *why* would the Court refuse to act in a case involving a mutual compensation conflict? The question involves genuine reflection upon community needs and goals. The question requires an analysis of *fairness.* To understand fairness one must study and analyze the impact upon the individual of the community institutions. A crisis affecting human rights is not solely a moral crisis—majority belief versus minority right being the usual conflict—but also an institutional crisis.[47] The institutional structures that have grown up around the Constitution are rooted in the failure of the community to respond with creative sensitivity to deep-seated human rights issues. The failure can be seen in the political arena as well as in mob scenes multiplying daily.

Negative Aspects of Technological Growth

Have community expectations been unfair in practice? The rights of persons living under our constitutional form of government are at times illusory.[48] First, there is no unanimous agreement as to the general values and goals of the community. Nor is there consensus with respect to the forms the various societal institutions should assume. Self concerns and vested interests tend to confuse the real purpose behind the idea of mutual compensation—human dignity. Although the concept of human rights has undergone considerable and complex alterations in the technological age,[49] the initial consideration of *individual* in determining the degree of allowable infringement has survived.[50] What constitutes *allowable infringement* at times becomes confused and perhaps synonymous with economic expectations. What, in fact, does the community want? Luxury? Security? Where the wants conflict with human dignity, what survives? Where other branches of government do not respond to these questions in a fair manner, can they at least be examined in a dispassionate judicial setting? These questions are basic to the whole compact theory of mutual compensation. They are questions judicial in nature.

Herbert Marcuse argues that community goals of commodity sophistication at times cause want-blurring in some individuals.[51] Commodities and the creation of more luxuries at times overshadow the

47. *See, e.g.,* J. Galbraith, The New Industrial State (1967).

48. This point is forcefully made in Graves, *The Revolt of Black Students,* 1969 Utah L. Rev. 13.

49. J. Ellul, The Technological Society 432-36 (1967).

50. *See generally* B. De Jouvenel, Sovereignty 247-71 (J. Huntington, trans. 1967).

51. H. Marcuse, One-Dimensional Man 7 (1967).

desire to demand and accept the obligations of a libertarian society.[52] In this context the "individuals" become Riesman's "Other Directed Man";[53] their director being the commodity-directed institutional community. It was to this point that Marcuse alluded when he labeled the logic behind institutional growth "totalitarian" which

> [p]recludes the emergence of an effective opposition against the whole. Not only a specific form of government of party rule makes for totalitarianism, but also a specific system of production and destruction which may well be compatible with pluralism of parties, newspapers, 'counter-vailing powers'. . . .[54]

Psychiatry can delve into man's most inner thoughts. Operant conditioning can establish patterns of response.[55] Scientists talk about the creation of a "superior race."[56] The national government can propose a National Data Center to collect the most intimate information for government scrutiny in the name of efficiency without stirring up too much protest.[57] Why? Does the answer lie, in part, in the way the potential intrusion is presented? The presentation stresses progress. The presentation implies that where every product is new and improved there will be little room for poverty or infirmity.[58] Poverty and infirmity continue, control methodology improves.[59] Community compromise has prevented these issues from destroying individual goals.[60] The potential is, however, present. When the potential is finally realized, can a creative decision-

52. *Id.* 203-46. *See also* K. KENISTON, THE UNCOMMITTED 425-47 (1965).
53. D. RIESMAN, THE LONELY CROWD (1950).
54. H. MARCUSE, *supra* note 51, at 3.
55. Mee, *The New Knowledge Industry,* 10 IND. UNIV. REV. 10, 17 (Winter, 1968).
56. Experimentation has gained greater acceptance in recent years. Following World War II it had fallen into disrepute as a result of the German "experience." But today it is not uncommon to find those who urge genetic experimentation. *See* LIFE SCIENCE LIBRARY, THE BODY 12 (1964). *See also* Lamborn, *Social Control Through the Reconstitution of Man,* 21 U. FLA. L. REV. 452 (1969).
57. *See* Ferry, *supra* note 20, at 51.
58. Utopian thinking is impractical and self-defeating, we therefore cling to a technological empiricism that merely perpetuates the status quo . . . paradoxically, then, we live in a society in which unprecedented rates of technological change are accompanied by a fundamental unwillingness to look beyond the technological process which spurs this change. Even those who are most concerned over the future course of our society continue to conceive that course in primarily technological terms, emphasizing quantity, comparisons, economic output, and dollars and cents. And the imagination and commitment needed to define a future qualitatively different from the technological present are deflected —even for those most concerned with out social future—by a series of specific fallacies about the social process.

K. KENISTON, THE UNCOMMITTED, 430-31 (1965), *see also* Mee, *supra* note 55.
59. Lamborn, *supra* note 56.
60. *Id.* at 455-58.

maker, free from confused rhetoric, readjust the concept of mutual compensation? At that point the question is irrelevant, because the answer is all too obvious. The questions at present, although emotionally stirring, need responses from authoritative decision-makers with a degree of creative flexibility. The task is difficult by its very nature. For the vast majority the mutual compensation theory means that the social self, the concern for conformity, dominates regardless of probable suppressed concern for where one is going and why.[61] The present demand by the economic and political institutions for self-preservation considerations center around and include as part of its terms *conformity.*[62]

Andrew Hacker contends that the majority has an outward manifestation of power, yet is powerless because there is a clear jurisdictional division between policy that they can involve themselves in and policy they will be excluded from. He argues that the demography of government, public as well as private, is a continual, though subtle, manipulation of the status quo.[63]

The notion that there are many counter forces in this country that will institute checks upon government and economic institutional misdirection can lead to the undoing of the idea of a community/individual compact. To rely upon "advertised" counter forces can result in a dilution of the potential creative role of the Court. For example, the institution of the main-line church in the United States, an "advertised" counter force, represents the limited wants and desires of its parishioners. The ready acceptance of the church greatly inhibits its prophetic participation, its role as critic and gadfly. There are, however, winds of change revitalization within the institution. There are also disturbing tensions and conflicts. The institution of the church is being challenged by individuals and

---

61. Andrew Hacker seems to suggest that the reason is probably that no one really understands what Marcuse and others are trying to say. Where, for example, are our self-styled Americanism purifiers?

> It is not that would-be American censors are that much more tolerant for we still have our ration of self-appointed loyalists ready to harass authors deemed to be corrupting of the commonwealth. The difference is that our watchdogs, whether governmental or entrepreneurial, are basically illiterate. Once they get to give letter words their incapacity for comprehension soon becomes evident. Marcuse's security stems chiefly from the fact that most of our own professional patriots have neither the training nor the intellect to understand the implications of his analysis.

Hacker, *Philosopher of the New Left,* N.Y. Times (Mar. 10, 1968) (Book Rev.) at 37, col. 2.

62. Hacker, *Freedom and Power, Common Men and Uncommon Men,* 4 NOMOS, LIBERTY 308, 316-18 (Friedrich ed., 1962). *See also* Reich, *The New Property,* 73 YALE L.J. 733 (1964). The concept of conformity flows through the works of Marcuse, Keniston, Ellul, and others. *See also* P. GOODMAN, GROWING UP ABSURD (1960) and W. OGBURN, SOCIAL CHANGE 180-86 (1966).

63. Hacker, *supra* note 62, at 319-20.

small groups to engage in revolution.[64] At times the revolutionaries utilize the same manipulation of the status quo of which they accuse the church.

The university, entangled in relevant as well as irrelevant and dangerous struggles seems to be one of the chief agents in the neutralization of embryo counter-institutional forces. This neutralization is caused in part by the very activists who oppose it.[65]

State and federal legislatures—directly responsive, in theory, to the wishes of the people,—cannot be considered as bastions of libertarian idealism if past and present performance is any indication.[66] This is not to imply that official as well as unofficial authoritative agencies in the community do not, at times, work effectively to insure human and community needs. Where there is a genuine sharing of values, community expectations are being met without the resort to the Court for contemporary interpretation of individual/community expectations. It is where polarization occurs that enlightenment about human rights and public order must be articulated. During times of deep stress the Court has been accustomed to exercise its enlighting function. The Court, drawn into a new era of "constitutional and social development," as an authoritative decision-maker has the potential to effectuate clarification of the community goals.

> Beset as we are by mounting external threats and deep internal conflicts, not merely the kind of public order we can achieve but even our very survival, may depend upon the wisdom with which these problems can be resolved. The point I would emphasize, however, is that our inherited constitutional doctrine imposes upon us no rigid, automatic solutions to these problems: every interpreter confronted with one of these problems must make a creative choice; the critical issue is with what enlightenment about the requirements of common interest he makes this choice.[67]

---

64. Compare the various articles in the 1967 Symposium issue of The Great Ideas Today, especially Cox, *Why Christianity Must Be Secularized,* THE GREAT IDEAS TODAY 1967, 8 (R. Hutchins & M. Adler eds. 1967). *See also* H. COX, THE SECULAR CITY (1964); J.A.T. ROBINSON, THE NEW REFORMATION? (1965); D. PICHASKE, A STUDY BOOK ON THE MANIFESTO (1967); R. SHINN, TANGLED WORLD (1965), and P. TILLICH, THEOLOGY OF CULTURE (1964).

65. *Cf.* C. KERR, THE USES OF THE UNIVERSITY (1963); K. KENISTON, THE UNCOMMITTED (1965); Symposium, *Youth 1967: The Challenge of Change,* 36 AMER. SCHOLAR 539-645 (1967); Los Angeles Times, May 12, 1965, § 4, at 1, col. 4.

66. *See generally* K. POLANYI, THE GREAT TRANSFORMATION (1957) and H. MARCUSE, ONE DIMENSIONAL MAN (1967). *See also* Bork & Bowman, *The Crisis in Antitrust,* 65 COLUM. L. REV. 363 (1965).

67. McDougal, *Jurisprudence for a Free Society,* 1 GA. L. REV. 1, 17 (1966).

Extremism has left the Court little choice.[68]

THE ROLE OF THE COURT IN A "POSITIVE STATE"

In order to clarify community goals the Court as well as society must understand the circumstances around which conflict revolves. The task of trying to understand and articulate the comprehensive set of community values in a given controversy is not one the Court has in the past been willing to accept as a general task of judicial review. Yet, as Professor Arthur S. Miller points out, there are several junctures in constitutional development where the role of the Court in articulating principles has caused a turning point, or to borrow his language, "milestones of constitutional development."[69] Such decisions as *Marbury v. Madison*[70] and *Gibbons v. Ogden*[71] immediately come to mind as well as *Brown v. Board of Education*[72] and *Baker v. Carr.*[73] Yet at many past junctures the Court has not assessed the depth of the community goal commitment. Present governmental "revaluation" of the task of the Court is a result of one such juncture, President Franklin Roosevelt's New Deal.[74] If a date in history is ascribed to the beginning period it would have to be 1933-36. The position assumed by the court as natural watchman of *laissez faire* economics was successfully challenged by the New Deal. In winning the battle, however, the idealism of the New Deal ideal lost the war. The reversal of judicial review in matters "economic" was so complete that today the Court continues to adhere to its 1936-37 procedural principle that allows private as well as public "welfare" programs to proceed without much fear of judicial evaluation.[75] Evaluation is left to the particular institution or the streets.

The structures erected by the New Deal to insure desirable individual security had little outside control. Coupled with a persistent insistence upon continuing on a legitimate capitalistic or commodity oriented course, the New Deal was considered the vehicle through which more could share

68. *See* W. O. DOUGLAS, POINTS OF REBELLION (1969).

69. *See* Miller & Scheflin, *The Power of the Supreme Court in the Age of the Positive State: A Preliminary Excursus Part One: On Candor and the Court, or Why Bamboozle the Natives?,* 1967 DUKE L.J. 273, and Miller, *Constitutional Revolution Consolidated: The Rise of the Positive State,* 35 G.W.L. REV. 172, 173 (1966).

70. 5 U.S. (1 Cranch) 137 (1803).

71. 22 U.S. (9 Wheat) 1 (1824).

72. 347 U.S. 483 (1954).

73. 369 U.S. 186 (1962).

74. *See* Miller, *supra* note 69, and Miller, *Notes on the Concept of the "Living" Constitution,* 31 G.W.L. REV. 881 (1963).

75. *But see* Briar, *Welfare from Below—Recipients' Views of the Public Welfare System,* 54 CALIF. L. REV. 370 (1966), and Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues,* 74 YALE L.J. 1245 (1965).

in community rewards. Under a community concept of economic well being, the federal legislative and executive, as well as state governments and massive economic private sectors, were largely left to their own devices in determining not only the economic growth and direction of the nation but also *who should or should not benefit from governmental and corporate largess.*[76] This was the birth of *the positive state,* the community defining economic well-being, not by balance but by positive act. Although seemingly in ideological conflict with the commodity idea, the two were soon to join forces in diluting one of the real attempts by government to aid all in the community.[77] The marriage of the commodity oriented idea to the positive state has resulted in a structural involvement in the control of economic planning. This marriage and its offspring have had a profound effect upon the basic human rights identified in the introduction.

> The prospects of containment of change, offered by the politics of technological rationality, depend on the prospects of the Welfare State (positive state). Such a state seems capable of raising the standard of *administered* living, a capability inherent in all advanced industrial societies where the streamlined technical apparatus—set up as a separate power over and above the individual's power—depends for its functioning on the intensified development and expansion of productivity. Under such conditions, decline of freedom and opposition is not a matter of moral or intellectual deterioration or corruption. It is rather an objective social process insofar as the production and distribution of an increasing quantity of goods and services makes compliance a rational technological attitude.[78]

THE FORMULATION AND DEFINITION OF THE COMMODITY ORIENTED POSITIVE STATE

The term "commodity oriented positive state" is utilized here to mean "affirmative governmental responsibility" for economic security.[79]

---

76. *See* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues,* 74 YALE L.J. 1245 (1965).

77. For an analysis of the struggle between the court and President Roosevelt see R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941). For an abbreviated economic overview of the New Deal see K. POLANYI, THE GREAT TRANSFORMATION 223-36 (1967).

78. H. MARCUSE, ONE DIMENSIONAL MAN 48 (1967).

79. Instead of least government being best government, the intervention of government into socio-economic matters has made it possible for more people to enjoy a higher degree of freedom. In broad constitutional terms, this is the advent of the Positive State, characterized by a government willing to further the

It can be state or national affirmative action and includes, for example, welfare programs, educational concern, permissive attitude toward corporate employment benefits (such as taking over workmen's compensation) and licensing provisions. Prior to the New Deal Era, federal and state governments adhered to the "hands off," negative aspects of government control. The New Deal expressed, in reversing the role at the federal level, governmental acceptance of responsibility for the maximization of individual well being. The demand for food, for jobs, and for security were met with program upon program aimed at insuring economic stability. Although at the time the Supreme Court reflected the policy of the *negative* state, there were isolated examples of judicial support for embryo positivism. In *Home Building and Loan Ass'n. v. Blaisdell*[80] the Court upheld a state mortgage moratorium law. In *Nebbia v. New York*[81] the Court sustained price fixing legislation. For the most part, however, the Court sought to retain the early concept of *laissez faire* government by striking down positive legislation aimed at economic well being. In 1935 the Court held legislation providing for a code to govern the oil industry to be an unconstitutional delegation of legislative power to the President.[82] In *Retirement Board v. Alton R. Co.*[83] the Court not only held the Railroad Retirement Act unconstitutional, but also gratuitously condemned the entire effort made in enacting such legislation. In *Lousiville Bank v. Radford*[84] the Court unamimously declared the Fraizer-Lemke Act, relating to the relief of farm mortgages, to be unconstitutional. In the most far reaching of its day's work, the Court in *Schecter Poultry Co. v. United States*[85] held the National Industrial Recovery Act to be unconstitutional.[86]

---

well-being of the citizenry. Governmental programs evidencing this basic alteration are largely legislative in origin, although some may be traced to the executive branch. The development, so far as its fullest realization is concerned, is recent history. As for the Supreme Court, it is familiar history that the Justices at first resisted and then in the 1930's capitulated to the on-rushing welfare principle. After about a century and a half of relative somnolence, in which it did little or nothing that might be said to advance the cause of human freedom, the Court in recent years has begun to assist in the process of maximizing liberty through government action.

Miller, *Notes on the Concept of the "Living" Constitution,* 31 G.W.L. REV. 881, 891 (1963).

80. 290 U.S. 398 (1934).

81. 219 U.S. 502 (1934).

82. Panama Refining Co. v. Ryan, 293 U.S. 389 (1935).

83. 295 U.S. 330 (1935).

84. 295 U.S. 555 (1935).

85. 295 U.S. 495 (1935).

86. The National Industrial Recovery Act, 48 Stat. 195 (1933), was an attempt to establish, in part, rules of fair dealing with customers and to furnish labor certain guarantees respecting hours, wages and collective bargaining.

The Court continued to adhere to the doctrine of negativism until 1937, when after many complex factors developed,[87] it reversed itself and submitted to the growing demands for a positive state.[88] The reversal was so complete that from 1937 to the present date the Court rarely intervenes into matters considered by it to be "economic in nature."[89] However, with such a dramatic shift in ultimate decision making has also come the rise of administrative government. The ideal, embraced in the judicial scrutiny of governments of laws, gave way to the pragmatic government of men.[90] The pragmatism was based upon a "public interest" orientation.[91] The balance was struck in favor of the community not its individual inhabitiants.

Charles Reich has pointed out some of the dangers that have evolved as a result of the well meaning though unhampered "public interest" orientation. He notes that the concept of property is changing so rapidly that revisions in the methods of protection traditionally afforded the individual must be considered. He argues that the "public interest" orientation is in reality governmental largess.[92] Because the government is now the dispenser of wealth, whether that wealth be translated into a license to drive a taxicab or to practice medicine, social security benefits, missile contracts, or a television station license, mutual compensation must be redefined. The resulting fiction seems to be that benefits are a privilege granted by government and hence the mutual compensation concept, as interpreted in the Constitution, must usually be surrendered in order to receive the benefits of largess.[93] The argument is that since most benefits are not required governmental functions in the first instance, to withhold or revoke or attach conditions or select the category of recipient must be given wide latitude. Such programs, the supporters argue, cannot be said to violate constitutional rights.[94]

The proponents of this position point out that the "case or controversy" requirement for judicial review takes the court out of contention for a position of decision-maker in matters of broad governmental

87. *See generally* R. Jackson, *supra* note 45.

88. For a survey of the cases involved in the period 1935-1938 *see* C. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENTS 938-44 (1944).

89. Morey v. Dowd, 354 U.S. 457 (1957).

90. *See* Miller, *supra* note 62, and Reich, *supra* note 62, at 733.

91. Reich, *supra* note 62.

92. *Id.*

93. Note, *Unconstitutional Conditions,* 73 HARV. L. REV. 1959 (1960).

94. Massachusetts v. Mellon, 262 U.S. 447, 480 (1932). C. Reich points out that the government considers its granting of "benefits" to be a "gratuity" thus not subject to strict constitutional standards. Reich, *supra* note 62, at 740. Thus, the governmental frame of reference in their granting of "gratuities" would keep them at the same constitutional level as that of private corporate gratuities. *But see* Flast v. Cohen, 392 U.S. 83 (1968).

largess. The Court must wait for "a proper case" and then the holding affects only the parties to the litigation. In short the Court cannot focus upon the broad societal issues because by its very nature the Court is not designed for such an awsome task in a democracy.

JUDICIAL RECOGNITION: AN INCOMPLETE FOCUS

Ordinarily, judicial recognition of a specific problem ignores the broad complexities of the community process. Decisions of the Court generally present an authoritative rule that more often than not fails to delve into or become an integral part of the comprehensive social process.[95] Fear of what the Court is doing is, in reality, fear of the potential, as yet unrealized, of the Court as creative decision-maker. When the issue involves mutual compensation—*fairness of the social process*—broad community expectations should weigh heavily upon the intellectual deliberation of the Court. The argument supporting the "least dangerous branch" thesis[96] has no place here. There is a need, in an age of individual awareness, for an authoritative yet creative decision-maker which can clarify community goals, describe past trends in the social process, analyze, dispassionately, community conditions affecting the parties in the litigation, project future trends through critical analysis of behavioral and social science studies, and create and evaluate policy alternatives.[97] The task is complex and not readily acceptable. For example, the Court has specifically recognized "academic freedom" as a constitutionally protected right (state action questions aside). However, the nature of judicial review produces an incomplete focus on the problem. The incomplete focus ignores some of the most important issues steming from the demand for academic freedom. Mr. Justice Brennan writing for the majority in *Keyishian v. the Board of Regents of New York* (1967)[98] said:

> Our nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely

95. McDougal, *Law as a Process of Decision: A Policy Oriented Approach to Legal Study,* 1 NAT. L.F. 53 (1956).

96. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); Weschler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959). *Compare* Fuller, *An Afterword: Science and the Judicial Process,* 79 HARV. L. REV. 1904 (1966); Miller and Howell, *The Myth Neutrality in Constitutional Adjudications,* 27 U. CHI. L. REV. 501 (1959).

97. Professor McDougal's many works spell out in great detail the tasks required of the Court. His recommendations are more important for the seventies than ever before. The ideas outlined in the text are found in McDougal, *supra* note 67, at 15 (1966). They are expanded in, among other works, M. MCDOUGAL, H. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967).

98. 385 U.S. 589 (1967).

> to the teachers concerned. That freedom is, therefore, a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedom is no-where more vital than in the community of American schools." The classroom is peculiarly the "market-place of ideas." The Nation's future depends upon leaders trained through wide exposure to the robust exchange of ideas which discovers truth "cut of a multitude of tongues, [rather] than through any kind of authoritative selection."
>
> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, to evaluate and to gain new maturity and understanding; otherwise our civilization will stagnate and die.[99]

What has the Court said? Is there any identification of the controlling rules or community prescription? Does the Court consider if there have been institutional structures erected to prevent what, let us say, an activist might consider a "meaningful exercise" of academic freedom? Is there any attempt by the Court to recommend effective means of regulating authoritative demands upon academic freedom? What is the impact of such supportive rhetoric as that quoted above, upon the attitudes of the antagonists? Have the underlying issues that prompted *Keyishian* been explored? Has there been a creative evaluation of policy alternatives? Can those interested parties to the broad controversy adequately respond to statements *about* an academic freedom?

There is a barrier between the ability *to act* and *the acting*. Even the most committed Supreme Court, perhaps the Warren Court, has been handicapped by an incomplete focus. The difficulty lies, in part, in the idea that the Court is ill equipped to go behind an action to detemine with a great degree of scientific perception what has actually caused the dispute

99. *Id.* at 603.

and what measures need to be taken to correct a possible injustice.[100] But as Dean Pound points out:

> Law is not scientific for the sake of science. Being scientific is a means toward an end, it must be valued by the extent to which it meets its end, not by the beauty of its logical process or the strictness with which its rules proceed from the dogmas it takes for its foundation.[101]

The New Jersey Supreme Court recognized the problem in *Zimmerman v. Board of Education of Newark.*[102] Public school teachers in the state of New Jersey receive an annual contract. The first three years in the typical probationary period with tenure granted or denied at the beginning of the fourth year. In *Zimmerman* the plaintiff's contract was not renewed at the end of his third year. He sued for reinstatement.

---

100. The one troublesome roadblock to judicial protection of academic freedom is the confusion surrounding employee status. Cowan, *Interference with Academic Freedom: The Pre-Natal History of a Tort,* 4 WAYNE L. REV. 205 (1958). Is it a privilege or a right? Much of the confusion stems from Mr. Justice Holmes' statement that a public employee "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of City of New Bedford, 155 Mass. 216, 29 N.E. 517, 518 (1892). The United States Supreme Court has taken a different approach, although from the full text of McAuliffe it does not appear that Holmes meant exactly what he said. The present Court considers the constitutional guarantees to flow to public employees as well as to others. The position is summed up by Mr. Justice Clark in Wieman v. Undergraff, 344 U.S. 183 (1952).

> We are referred to our statement in *Adler* that persons seeking employment in the New York public school: have no right to work for the State in the school system on their own terms. . . . They may work for the school system upon the reasonable terms laid down by the proper authorities in New York . . . To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue, for, in *United Public Workers,* though we held that the federal government through the Hatch Act could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work. . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary.

Id. at 191-92. Again in Garrity v. New Jersey, 385 U.S. 493 (1967), the Court reaffirmed its position that there is constitutional protection for public employees, when Mr. Justice Douglas, speaking for the majority said:

> We conclude that policemen like teachers and lawyers are not relegated to a watered down version of constitutional rights. There are rights of constitutional stature whose exercise a state may not condition by the exaction of a price.

Id. at 500. Couple these quotes with the language of the Court in *Keyishian* reaffirming the constitutional nature of academic freedom, and it becomes clear that there is sufficient authority to support judicial scrutiny of academic freedom violations.

101. Pound, *Mechanical Jurisprudence,* 8 COLUM. L. REV. 605 (1908).

102. 38 N.J. 65, 183 A.2d 25 (1962).

Although the New Jersey Supreme Court denied his claim, they struggled with the problem.

> As a general proposition, powers vested in local government must be exercised reasonably and the judiciary will review local action for arbitrariness. . . . The question is whether probationary employees are beyond that proposition.
>
> The legislature intended wide latitude in the employing authority to determine fitness for permanent employment. It is clear that public employment may not be refused upon a basis which would violate any express statutory or constitutional policy. A simple example would be discrimination for race or religion. But I am not sure such specific limitations are the only restraints. If the employing agency, for an absurd example, thought blondes were intrinsically too frivolous for permanent employment, a court would find it difficult to withhold its hand.
>
> But if we may inquire into "unreasonableness," it would seem to follow that there must be a "reason," *i.e.* "cause" for refusal to continue the teacher into a tenure status. That course has its difficulties. It would not mean that the court would not recognize a wide range of "reasons" or would lightly disagree with the employer's finding that the "reason" in fact existed. But it would follow that upon demand the teacher would be entitled to a statement of the grounds, with the right to a hearing and to review as to whether the grounds are arbitrary in nature or devoid of factual support. . . .[103]

Does this mean that the state court and the United States Supreme Court will or will not consider questions of a constitutional nature when these questions arise in an academic setting? The question involves more than a formalistic approach to legal obligations.[104] The very nature of the modern "multiversity" with its ponderous bureaucracy tends to confuse the issue and compound the complexity of the fact situations in alleged academic freedom violations.[105] It is no longer sufficient for the Court to bind up the wounds of those hurt by the injustices of the community.

To ask that the Court continue to expand upon a creative course of

---

103. *Id.* at 79-80, 183 A.2d at 33 (Weintraub, C.J., concurring).

104. *See* L. FULLER, THE MORALITY OF LAW 122-133 (1964). *Cf.* H.L.A. HART, THE CONCEPT OF LAW (1961).

105. *See, e.g.,* Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1960); Woody v. Burns, 188 So.2d 56 (1st D.C.A. 1966) and Levine, *Private Government on the Campus-Judicial Review of University Expulsions,* 72 YALE L.J. 1362 (1963). *Cf., e.g.,* Slochower v. Bd. of Educ., 350 U.S. 551 (1961).

action is not asking that the Court assume a new or dangerous role. Professor McDougal again:

> The suggestion is sometimes made that deliberately creative efforts by judges and other authoritative decision-makers to relate their choices to fundamental public order goals introduces arbitrariness and uncertainty into decision. Exactly the opposite would appear to be the case. Every experienced lawyer knows that the rationality to allegedly 'neutral' or 'autonomous' rules are in fact largely illusory. The discipline required in systematically relating specific choices in public order goals by explicity stated intellectual procedures might indeed both offer decision-makers a better guarantee that their choices are appropriately compatible with the goal values to which they are committed and afford the members of the general community greater assurance that their genuine expectations and common interests are realistically and consistently taken into account.[106]

The Court in *Sheldon v. Tucker*[107] considered the broader community interests. In *Sheldon* the Court struck down an Arkansas statute requiring public school teachers to submit a list of all organizations to which they belonged. The statute was attacked by a teacher in the Little Rock Public School System. The evidence showed that he was not a communist—the statute's prime interest—but that he was a member of the National Association for the Advancement of Colored People. In the course of the opinion the Court said:

> Such interference with personal freedom is conspicuously accepted when the teacher serves at the absolute will of those to whom the disclosure must be made—those who any year can terminate the teacher's employment without bringing charges, without notice, without hearing, without affording an opportunity to explain.[108]

No one in the Little Rock School System or the Arkansas government admitted that they would have fired Sheldon for his NAACP membership. But the Court took specific notice of the precarious position of the non-tenured teacher. It undoubtedly took note of the atmopshere surrounding the Little Rock Public Schools in 1960 (having decided several cases concerning integration problems at those schools). It also

106. McDougal, *supra* note 97, at 19.
107. 364 U.S. 479 (1960).
108. *Id.* at 486.

had to take note of the fact that few administrators were likely to admit that they would knowingly violate constitutional rights.

The Court was saying, in effect, that if the petitioner were to have a meaningful associational freedom, it would have to draw certain implications from the state's unusual interest in the petitioner's organizational ties. It drew those inferences and acted upon them, despite the state's rationalization that it wanted to know how much time its employees spent involved in organizational activities.

The task of the Court in *Sheldon* was to construe constitutional provisions[109] so as to preserve as fully as possible both the public power and the private right. But such is not always the case; the Court avoids some rather delicate constitutional questions[110] in favor of the broader, more overt, violations of an individual's civil liberties. Thus in *Bates v. City of Little Rock*[111] the Court held that an ordinance presumably aimed at regulating organizations operating within the City of Little Rock for tax purposes, although valid on its face, seriously hampered the First Amendment freedoms of members of the NAACP and therefore was unconstitutional. Yet in *Barsky v. Board of Regents*[112] a New York physician lost his license to practice his chosen profession because he failed to produce a financial statement of the Joint Anti-Fascist Refugee Committee for a Congressional committee. Here the public interest was claimed to outweigh the right to pursue a lawful calling, even though the relationship between this public interest and the practice of medicine was very rarified.[113] It would seem that in *Barsky* the Court was "looking over its shoulder."

When government fails to accord to a citizen his rights to function as a citizen, then as a last resort the Court must step in.[114] Unfortunately there is a conceptual as well as an ideological problem with the interpretation of the word "function." To function in a democratic society is to vote, to worship, to assemble, to work, to achieve one's maximum potential without undue restraints by the government as a result of governmental inaction. However, all of these terms are meaningless unless the complete facts surrounding an alleged infringement are considered. There

109. A parallel can be seen by examining the German system of judicial review. McWhinney, *Judicial Restraint and the West German Constitutional Court*, 75 HARV. L. REV. 5, 18 (1961).

110. For example, the refusal of the Court to hear such a case as Painter v. Bannister, 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966).

111. 361 U.S. 516 (1960).

112. 347 U.S. 442 (1954).

113. *Id.*

114. *See* Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952); Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533 (1951).

are, of necessity, certain defined limitations, but they cannot hamper liberties implicit in the federal system. The National Association for the Advancement of Colored People was not permitted to *function*; there was no meaningful correlation between the purpose of the ordinance and its *application* to the Association. *Barsky,* on the other hand, did not go to the heart of the fundamental rights concept, but instead addressed itself more to the regulation and discipline within a particular profession. That there was no violation of fundamental rights in *Barksy* did not entirely satisfy the dissenters. The point is that the fundamental rights versus the state police power concept does not address itself to adequate definition or rigid limitation.[115]

Barsky demonstrates a fundamental dilemma that has thus developed in the age of technology. Can traditional jurisprudential concepts of judicial review prevail, or must there be a gutting of the old, with a fresh reshaping and rethinking of effective avenues of review to effectively meet, counter, and control the positive state?[116] The community can and does regulate individuals and groups from birth to death. Certainly the Black man has been subjected to its whims and fancies from the time he is born, in many cases in a segregated ward of the hospital, to his death and burial, in many instances in a segregated corner of the graveyard. If he is able to make a few gains through legislation he loses much through positive and negative economic deprivation that is intermingled with governmental largess and the positive state. The right of the Black man to live where he wants, to secure the job of his choice, to join an association of his professional counterparts, or to be educated without subtle economic reprisals is in a very real sense intricately intertwined in the entire issue of judicial abstention and possible lack of judicial creativity. As in the other aspects of civil liberty infringement, where the Court refuses to interfere in the more complex manifestations of a violation, it unwillingly is reenforcing an *unfair* community life style.[117]

---

115. *See, e.g., In re* Anastaple, 36 U.S. 82 (1961) and Uphaus v. Wyman, 360 U.S. 72 (1959).

116. *Compare e.g.,* R. ENGLER, THE POLITICS OF OIL (1961) *with* Ferry, *Must We Rewrite the Constitution to Control Technology?,* SAT. REV., Mar. 2, 1968, at 50.

117. It is clear that the equal protection clause imposes a positive duty upon the states to protect all persons in the enjoyment of their rights. The fourteenth amendment's obligation of equality extends not only to those "rights" which a state is federally compelled to give to all of its citizens, but also to benefits the state may choose to give to any class of citizens, however gratuitously. The state cannot circumvent this requirement by enacting legislation with a face value of equality that can be applied unequally. The equality of legislation, as well as the equality of its administration, must come within the purview of the equal protection clause. Yet the subtle encouragement of some states reenforces the discrimination against the Negro. In sentencing the black man is likely to receive a stricter sentence for the same, or similar, crime than his white counterpart. In the South it has been argued that southern juries will usually give the

CONCLUSION

If demands for a judicial "slowdown" are realized, then the description and identification of community notions of *fairness* will become the exclusive domain of the political and quasi-political leaders. The focus may or may not incorporate the idea of mutual compensation. If past activity of the political and economic community is an example, questions of *fairness* will not receive a high priority. Attempts to dilute the role of the Court where questions of fairness are concerned are analogous to approaching a mirror masked. The raucous voices of the post-modern youth and the Black militants can no longer be dismissed. The voices demand reflection and confrontation with the naked world.

The voices argue that in order to avoid the destruction of the community from without or from within a reaffirmation of the mutual compensation theory must be forthcoming. The Court could play a vital role in reasserting, *authoritatively,* rights and obligations of the community. This is no utopian plea. The Court is not and cannot be a cure-all. If for no other reason, limited jurisdictional considerations prevent it. This has merely been a suggestion that the community consider the advisability of a truly creative institutional force *within* before more of its members move *outside.* The trouble is that the Court is thought of, and for the most part acts like, a court—a justice of the peace court, a superior court—a law

---

death penalty to Negroes who rape white females. Where they have the option, they will recommend mercy for white men who rape. If true, unequal application of the law would be a form of the most subtle, state action. If the state fixed by statute the penalty for a Negro who raped a white woman at death, and in like manner fixed the sentence of white men found guilty of the same crime at life or a term of years, such action would unquestionably violate the equal protection clause. The statistics were presented in Craig v. State, 179 So. 2d 202 (Fla. 1965) and as accepted by the court showed that in the past twenty-five years (prior to the date of the *Craig* case) in Florida, all sentences of death for the crime of rape with one exception (a double pariah: homosexual who raped a white male child, Davis v. State, 128 So. 2d 703 (Fl. 1960)) have been meted out to Negroes. This cannot be explained by saying that white men did not rape as much as Negroes for the statistics of the same period show that 132 white men (46 per cent of the total) have been convicted of rape of 125 white and 7 Negro females. One hundred and fifty-two Negro men were convicted for the rape of 84 white and 68 Negro females. There was one other conviction, an Indian who raped a white female. No white man has ever been sentenced to death for raping a Negro. No Negro has, as yet, been put to death for raping a Negro female. (Only three have been sentenced to death, two for raping children and only one for raping an adult Negro female. In that instance the case was reversed by the Florida Supreme Court.) Of the 84 Negroes convicted of raping white females, 45 have been sentenced to death. Twenty-nine have already been electrocuted. Twelve are at present awaiting execution. Compare these figures with the fact that while white men have been found guilty of raping 132 females, including 34 children under the age of 14, the juries have failed to recommend mercy *in only six cases.* Three were commuted and two convictions reversed, hence *only one* white man out of 132 rape cases had gone to his death for rape. *See also* Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All White Jury,* 52 VA. L. REV. 1157 (1966).

court. But the Supreme Court is potentially much more. It represents an untapped force that can serve the community as a genuine interpreter whose task,

> is to examine and assess [the] entire flow of prior communication for the closest possible approximation to the genuine shared subjectivities of our present community members as to what their Constitution really provides on basic issues.[118]

As the quote suggests there can be no absolutism in discussing the role of the Court where community fairness has been brought into issue. At best, the Court can hope to serve the catalystic function that the Black revolutionaries seek to achieve *outside* the community limits. The Court can only hope that the branches of governmental and corporate responsibility react in a positive measure.

In considering the future of the Court in the seventies, one must consider the past failure to insist upon judicial creativity as one manner of defining mutual compensation. This failure has caused community and individual alike to seek messiahs with revealed doctrines or oversimplified, glib blue-prints for community reform. If such aversion to significant thought continues, the community can become fair game for the totalitarian thinking that seems to be springing from both camps.

---

118. McDougal, *supra* note 67, at 5.

INDIANA LAW JOURNAL

Volume 45 SUMMER 1970 Number 4

CONTRIBUTORS TO THIS ISSUE

FLETCHER N. BALDWIN, JR.: A.B. 1958, LL.B. 1961, Univ. of Georgia; LL.M. 1962, Univ. of Ill.; Associate Professor of Law, Univ. of Florida College of Law. Presently Fulbright Professor of Law, Makerere University College, Kampala, Uganda.

ROBERT L. BIRMINGHAM: A.B. 1960, LL.B. 1963, Univ. of Pittsburgh; LL.M. 1965, Harvard Univ.; Ph.D. 1967, Univ. of Pittsburgh. Assistant Professor of Law, Indiana Univ.

JOHN D. DONNELL: A.B. 1943, Princeton Univ.; J.D. 1948, Univ. of Iowa; D.B.A. 1966, Harvard Univ.; Chairman, Dept. of Business Law, School of Business, Indiana Univ.

WILLIAM D. POPKIN: A.B. 1958, LL.B. 1961, Harvard Univ.; Assistant Professor of Law, Indiana Univ.

Member: National Conference of Law Reviews