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AMERICAN JURISPRUDENCE AFTER THE WAR: "REASON CALLED LAW"*

William M. Wiecek**

Morton Horwitz has had an immeasurable influence on the writing and teaching of American Legal History. Laura Kalman has traced the outlines of that influence in the quarter-century since the publication of *The Transformation of American Law, 1780-1860* ("*Transformation I*").[1] I would like to illustrate her idea that the book and its successor, *The Transformation of American Law, 1870-1960* ("*Transformation II*"), "fired imaginations."[2] I do so by offering here a fragment of my own work-in-progress to demonstrate how that influence has worked for one legal historian.

In the autumn of 1994, I was offered the splendid opportunity of writing the Holmes Devise History of the Supreme Court of the United States volume covering the period 1941-1953, the Chief Justiceships of Harlan Fiske Stone and Fred M. Vinson. When I thought about the large themes and significance of that period, it became obvious that one of the most important challenges for the mid-century Court was to find some jurisprudential approach to their work that would replace the outlook abandoned after 1937 that Horwitz has called "classical legal thought" and "legal orthodoxy."[3] I was stimulated by Horwitz's twenty pages in *Transformation II* on "The Structure of Classical Legal Thought, 1870-1905,"[4] and I thought I would simply follow in his footsteps, recapitulating his ideas as an introduction to my larger and subsequent topic.

But because Horwitz's writings have that extraordinary stimulus quality noted by Kalman, I was soon "interrogating" his ideas, kicking them around back-and-forth, like two boys playing soccer. As I developed, affirmed, challenged, expanded, and critiqued the ideas in what was to have been a short introductory

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* The title of this paper echoes Edward A. Purcell's seminal article, *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 Am. Historical Rev. 424 (1969). The quoted phrase is from Felix Frankfurter, *Chief Justices I Have Known*, in *Of Law and Men: Papers and Addresses of Felix Frankfurter, 1939-1956*, at 138 (Philip Elman ed., Archon Books 1956).

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1. Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Harv. U. Press 1977).
2. Laura Kalman, *Transformations*, 37 Tulsa L. Rev. 849, 851 (2002).
3. Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford U. Press 1992).
4. *Id.* at 9-31.

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sketch, I found myself in the position of Jacob wrestling with the stranger through the night.[5] Ideas expanded, split, pricked, annoyed, and went off in new directions, to the point where I was bewildered by the play of thought that Horwitz's brief sketch had started. The result a year later was that I had written a book responding to ideas that Horwitz had suggested for development, which was published in 1998 as *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937*.[6]

I thought then that I was done with Horwitz's thinking and could get on with the Holmes Devise volume. But as I wrote, I kept recurring to his books and articles, constantly stimulated, irritated, challenged, informed, and enlightened. One example of that is the material that appears below, a chapter from the Holmes Devise manuscript that discusses the peculiar phenomenon in American legal thought known as Legal Process. Horwitz's chapter in *Transformation II* covering that topic, "Post-War Legal Thought, 1945-1960,"[7] plus his contribution to the Harvard Law School "Bridge" project on that subject,[8] again established my starting point. And again I wrestled through the night with the stranger, until I had written what follows. I offer it as a tribute to Horwitz's evocative and inspiring scholarship. It will be obvious throughout to anyone who knows the subject as to how indebted I am to his thinking.

I.

In the decade between 1937 and Fred Vinson's confirmation as Chief Justice of the Supreme Court, no substitute for classical legal thought had emerged. The war itself may have been something of a distraction, deflecting the Court's attention to war-related issues. But by 1946, the Court still carried on with its work without benefit of an underlying theory or ideology that justified its authority. The Justices could scarcely be expected to suspend operations while they worked out a new jurisprudential explanation of their role and function. But something was missing, and that lack vexed their work. Others sought to supply the missing rationale.

The jurisprudential agenda of American law after 1946 was set by two issues that had emerged in the previous decade. First, was the problem of objectivity: was objective justice possible in the post-Realist world? Was it possible to exclude or neutralize the judges' subjective value preferences so as to ensure impartial judging?[9] Second, was the reaction against Realist-endorsed positivism. To some

5. Gen. 32:24-29 (King James).

6. For another account of the interplay I have just described in this paragraph, *see* William Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937*, at vii-viii (Oxford U. Press 1998).

7. Horwitz, *supra* n. 3, at 247-69.

8. Morton J. Horwitz et al., *The Bridge*, <http://web.lexis.com/xchange/Content/Bridge/LegalProcess/essay1.htm> (accessed Jan. 8, 2002).

9. Recent work suggests that this is inherently impossible. Linda G. Mills, *A Penchant for Prejudice: Unraveling Bias in Judicial Decision Making* 17 (U. Mich. Press 2000). Mills's study, however, involved low-level administrative law judges (Social Security examiners). Perhaps different criteria apply to appellate judges on the nation's highest Courts.

critics, Realism and positivism "violated a basic sense of legal integrity which needed to be restored."[10]

The first philosophical challenge confronting postwar lawyers was to demonstrate that law and legal outcomes could be objectively just. That characteristic was essential to the rule of law.[11] Legal Realism had shaken classicists' confident faith in "an objective basis for legal decision-making" that they hoped somehow inhered in the law itself.[12] Classical thought had held out the promise that law was determinate and objective; its norms and principles were not dependent on the political demands of shifting majorities.[13] It insisted that law's foundations were set in impartial reason and not arbitrary will, which validated law's claims to obedience.[14] Law's objectivity was linked to "impersonality," the characteristic that raised it above parochial interest-group maneuvering.[15]

But those strengths were also sources of weakness. Classicism's vaunted objectivity proved to be hollow and spurious. Its claims to objectivity masked the potential, fully realized in classical thought, that law's purportedly universal authority served nothing more than the self-interest of the ruling elites.[16] The classical enterprise failed and was abandoned in part because it proved unable to deliver on the promise that it would produce determinate results. This realization had an unsettling effect. It seemed to wash away the law's foundations in certitude, truth, stability, permanence, and, above all, impartiality. In the middle of the twentieth century, the Supreme Court, instead of treading on firm, mapped ground, seemed to be dog-paddling in an uncharted sea.

In 1948, a young Yale Law School teacher, George Braden, posed the objectivity challenge in uncompromising terms. He defined objectivity in a legal context, as being the "quality of a rule of law which enables it to be applied to similar situations with similar results regardless of the identity of the judges who apply it." Having framed the issue, Braden then offered a bleak resolution, stating that "there is no objectivity in constitutional law because there are no absolutes." All constitutional adjudication inescapably requires weighing incommensurable values.[17]

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10. Neil Duxbury, *Patterns of American Jurisprudence* 159 (Clarendon Press 1995).

11. For a modern and abstract treatment of this problem, *see* Kent Greenawalt, *Law and Objectivity* (Oxford U. Press 1992).

12. James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. Pa. L. Rev. 685, 703 (1985).

13. I have elaborated this argument in a previous book, which I wrote as a launch platform for the Holmes Devise study, and specifically for this jurisprudential chapter. *See* Wiecek, *supra* n. 6, at 200. This article continues the thread of discussion that I dropped at the end of the page.

14. For philosophical aspects of these issues, *see* Richard J. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* 8-16 (U. Pa. Press 1983); Brian Leiter, *Objectivity in Law and Morals* 1-143 (Cambridge U. Press 2001); Paul K. Moser, *Philosophy after Objectivity: Making Sense in Perspective* 165 (Oxford U. Press 1993); Nicholas Rescher, *Objectivity: The Obligations of Impersonal Reason* 151-71 (U. Notre Dame Press 1997). The echoes of *Marbury v. Madison*, 5 U.S. 137 (1803), were unmistakable.

15. R. W. Newell, *Objectivity, Empiricism, and Truth* 17 (Routledge, Kegan & Paul 1986).

16. Robin L. West, *Book Review*, 99 Yale L.J. 1473 (1990) (reviewing *Relativism, Objectivity, and Law*).

17. George Braden, *The Search for Objectivity in Constitutional Law*, 57 Yale L.J. 571, 572, 594

Contemporary thinkers attempted to prove him wrong. Walter Lippmann, who was not a lawyer, voiced the postwar yearning for lost certainties. In *The Public Philosophy*, he tried to call up "a valid law" that was "transcendent... not something decided upon by certain men and then proclaimed by them. ... It is there objectively, not subjectively.... It can be discovered.... It has to be obeyed."[18] In confessional anguish, Karl Llewellyn, backing away from implications of his earlier Realist writings, bespoke the bar's anxiety brought on by the crisis of objectivity, which eroded confidence in the integrity of appellate courts. "[T]he man at the bar," wrote Llewellyn in 1946, "must have *confidence* on pain of feeling his own sustaining faith in his craft, in his craftsmanship, in his very office and utility as a lawyer,... ooze and seep away from him until he stands naked and hollow, helpless and worthless, a nithing [sic] ...."[19]

A revulsion against positivism identified the second goal of postwar legal thought, which was to demonstrate that law had an authentic moral foundation, and at the same time, was completely compatible with democracy. Experience of fascist and communist tyrannies from 1935 through 1945, with their supposedly positivist bases in the will of the supreme dictator, or party, drove lawyers in the United States to prove that Americans' laws and legal order, especially their public law, had an objective basis and was therefore able to attain impartial justice.[20] Neither Legal Realism nor its philosophical matrix, Pragmatism, could be expunged. Most judges had absorbed John Dewey's insight that truth and justice are a function of consequences, not antecedents. Lawyers' method, Dewey maintained, "must be a logic *relative to consequences rather than to antecedents*, a logic of prediction of probabilities rather than one of deduction of certainties."[21] But at the same time, lawyers needed to repudiate the less appealing features of positivism and Holmesian predictivism.

Legal thinkers had to demonstrate law's compatibility with democracy; law must be, directly or remotely, a product of the democratic process, and conformable to it. Law must promote American social ideals such as justice, individual freedom, and limited government. Yet, at the same time lawyers had to believe that law transcended the legislatively decreed will of political majorities. Law had to be more than just a positivist means of social control; it had to be "a system... for promoting and maintaining the social values of a liberal democracy."[22] In 1947, Eugene V. Rostow of the Yale Law School identified this postwar task: "[t]he pressing issue for the New Court [was] to help articulate the public law of a free society, competent to fulfill its democratic dream in the

(1948).

18. Walter Lippmann, *Essays in The Public Philosophy* 174-75 (Little, Brown & Co. 1955).

19. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 4 (Little, Brown & Co. 1960).

20. Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 Yale L.J. 423 (1996).

21. John Dewey, *Logical Method and Law*, 10 Cornell L.Q. 17, 26 (1924) (emphasis in original).

22. Duxbury, *supra* n. 10, at 162.

turbulent second half of the twentieth century."[23]

But this troubling problem intruded: could the heterogeneous society of the United States reach any consensus on the substantive content of those values? Lawyers and judges tended to assume that *their* values—roughly, Lockean liberalism—were the values of the American people. Their complementary assumption, driven by Cold War anxieties, was that American institutions already embodied those values almost perfectly.

This tendency in law was complemented by a comparable trend in political theory and political science.[24] Seeking to restore a moral component to political thought, political theorists were determined to adapt the old ideal of the rule of law to the conditions of the modern state. Eminent scholars, such as Friedrich von Hayek, Louis Hartz, and Seymour M. Lipset, extolled the virtues of constitutionalism, defining it as a commitment to the rule of law.[25] That core characteristic of the liberal state included limited government, protection for individual rights, and a role for the judiciary under such protection.

In contrast, the relativism and positivism that supposedly infused Legal Realism risked an "anything goes" approach to legitimacy. Realism and its antecedent, Pragmatism, implicitly assumed a relativity of values, knowledge, and truth. Legal relativism could not convincingly identify any grounds for law's binding authority. It provided nothing better than a "view from nowhere."[26] The void created by classicism's passing must not set bench and bar adrift in an amoral ethical relativism. That would have been repugnant to lawyers across the entire ideological spectrum. They could not readily abandon their belief that an idea could be objectively true, or a legal outcome objectively just. These anxieties prodded systematic legal thinkers on and off the bench to search for a replacement for classical thought that could reseat the rule of law on its throne.

Classical legal thought had been repudiated; that much was settled. But nothing positive had taken its place. Some lawyers, among them Justice Felix Frankfurter, seemed to think that because the Court had made bad value choices in the classical era, it was wrong for the Court to ever make substantive value choices of any kind. The experience of classicism taught that the Supreme Court must somehow be restrained, lest it lapse again into the errors of the *Lochner* era. At the same time, the Court must preserve some role, probably a significant one, for judicial review.

After World War II, two principal responses to these various challenges emerged from American legal academics. First came a jurisprudential assault on positivism, which led its leading light, Lon Fuller, to the position that some have

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23. Eugene V. Rostow, *Review*, 56 Yale L.J. 1469, 1472 (1947) (reviewing the *New Supreme Court*).

24. Herman Belz, *Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War*, 59 J. Am. History 640 (1972).

25. Seymour M. Lipset, *The First New Nation: The United States in Historical and Comparative Perspective* (Basic Books 1963); Friedrich A. von Hayek, *The Constitution of Liberty* (U. Chi. Press 1960).

26. *See* Thomas Nagel, *The View from Nowhere* (Oxford U. Press 1986) (referring to epistemological self-contradictions in the relativist view).

described as "secular natural law"—a notion that others deride as an oxymoron.[27] However, the short-lived movement known as Legal Process was more influential.

The Harvard Law School was home to much of the systematic legal thinking that dominated the postwar era.[28] This jurisprudential evolution took place in an intellectual environment contaminated by the moral pollutant of McCarthyism, where even Dean Erwin Griswold and the faculty bent before pressures to eliminate all remnants of radicalism from the faculty and student body, and to conform the curriculum to the traditional Langdellian mold. Felix Frankfurter's influence was felt at Harvard long after he left for Washington. Peter Edelman claims, with only a little exaggeration, that "[a]t the Harvard Law School . . . in the late 1950s, Felix Frankfurter was God."[29] It was at Harvard that Frankfurter's friends, former colleagues, former students, and former clerks evolved process jurisprudence in the template of his thought. Professor Albert M. Sacks, who clerked for Frankfurter in the 1949 term, could have been speaking for all of Frankfurter's intellectual progeny when he enthused to his mentor: "my thinking along these lines has been largely the result of your teaching, and I would be surprised to find you in serious disagreement."[30] "Our Felix," as he was supposedly called, was for them the "shining light of Western jurisprudence." "He excelled in those areas where judicial creativity was called for, but understood fully the necessity of deferring to democratic institutions when value-laden decisions were at issue."[31]

Frankfurter's successors on the Harvard faculty, in particular Lon Fuller and Henry Hart, transmuted his emphasis on procedural regularity and judicial circumspection into structures of ideas that dominated legal thinking in the 1950s. Besides those two, others who were associated with Harvard at the time as faculty members, visitors, or students sought to dispel the difficulties posed by the objectivity/relativism problem. These included Paul A. Freund, Louis Jaffe, Albert Sacks, Herbert Wechsler, Alexander Bickel, Harry Wellington, and Ronald Dworkin.[32]

Lon Fuller's jurisprudential outlook bucked American legal tradition, which

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27. Robert S. Summers, *Lon L. Fuller* 151 (Stanford U. Press).

28. On the school of that era, *see* Laura Kalman, *Legal Realism at Yale, 1927-1960*, at 207-08 (U. N.C. Press 1986); Joel Seligman, *The High Citadel: The Influence of Harvard Law School* 68-92 (Houghton Mifflin Co. 1978); the filiopietistic effort of Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967*, at 300-348 (Belknap Press of Harv. U. Press 1967). By way of an admission of interest, I should note that I was a student at the Harvard Law School from 1959 to 1962, when Legal Process still reigned there. Lon Fuller was my Contracts professor, but I did not take Henry Hart's Legal Process course.

29. Peter B. Edelman, *Justice Scalia's Jurisprudence of the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s*, 12 Cardozo L. Rev. 1799 (1991). Dean Edelman graduated from the Harvard Law School in 1961.

30. Albert M. Sacks, *Carbon copy writing to Frankfurter* (Jan. 7, 1954) (unpublished John M. Harlan Papers) (copy on file with Seeley Mudd Library, Box 532, Princeton U.).

31. L. A. Powe, *Justice Douglas After Fifty Years: The First Amendment, McCarthyism and Rights*, 6 Const. Commentary 268, 278 (1989). Powe accordingly refers to Legal Process as "the Harvard jurisprudence."

32. *See* Bruce A. Ackerman, *Law and the Modern Mind by Jerome Frank*, 103 Daedalus 119, 123, 128 n. 26 (1974) (retrospective essay review of Jerome Frank's book of that title).

had long ago given up the project of incorporating natural law. In *Calder v. Bull*,[33] Justice James Iredell, rebutting Samuel Chase, had warned that natural law could not serve as a workable source of law for American courts:

> [If] the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject[.]

Lawyers conceded natural law only a precatory role, as in Jefferson's Declaration of Independence.

A related problem was the disjunction between morality and law. Except for a brief and aberrant movement in the late nineteenth century that sought to declare Christianity the foundation of American law,[34] lawyers and judges maintained the distinction between law on the one hand and morality or the precepts of Christianity on the other. Classical lawyers did, of course, believe with unshaken assurance in the existence of universal principles of correct human behavior. They also thought that positive law could regulate some specific moral issues, including prostitution, lotteries, and liquor.[35] But they assigned different areas of responsibility to law and to ethical precepts. This built-in disconnect between law and morality left law vulnerable to the charge that it was amoral, lacking moorings in the moral order. Positivist approaches to judging, such as Holmes's, antagonized those who were already disturbed that law seemingly lacked a moral foundation.

The positivist strain in the thought of Holmes and the Realists' drew the fire of philosophers, such as Morris Cohen, who tried to identify a normative content of law on a scientific basis.[36] Cohen was joined by a bevy of far less impressive Catholic and conservative critics, who equated Holmes's positivism with an ethical relativism that led to moral decay and that in turn produced fascism or other forms of totalitarianism.[37] But their neo-Thomist natural law project was an intellectual dead-end, attracting no adherents outside Catholic circles. A non-theistic natural law, however, had the potential for a wider appeal, specifically in the postwar climate, with its revulsion against relativism and positivism. The leading exponent of such an approach to judging was Lon Fuller.

For Fuller, as for others, the totalitarian experience required some kind of resolution to the relativism problem. If all values were determined solely by social

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33. 3 U.S. 386, 399 (1798). I discuss Chase's opinion in Wiecek, *supra* n. 6, at ch. 1.

34. *See* Jon C. Teaford, *Toward a Christian Nation: Religion, Law and Justice Strong*, 54 J. Presbyterian Hist. 422 (1976).

35. Herbert Hovenkamp, *Law and Morals in Classical Legal Thought*, 82 Iowa L. Rev. 1427 (1997).

36. *E.g.* Morris R. Cohen, *Jus Naturale Redivivum*, 25 Phil. Rev. 761 (1916); Morris R. Cohen, *Philosophy and Legal Science*, 32 Colum. L. Rev. 1103 (1932); David A. Hollinger, *Morris R. Cohen and the Scientific Ideal* 166-91 (MIT Press 1975).

37. *See e.g.* Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 Geo. L.J. 493 (1942). *See* Edward A. Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* 164-72 (U. Ky. Press 1973).

context, then it would be logically impossible to demonstrate the superiority of liberal democracy over despotism. He and others of the postwar generation sought to demonstrate that democracy and Enlightenment values were innately superior to absolutism and totalitarianism, including fascism, National Socialism, and communism, specifically in its Stalinist version.

Fuller took up his life's work as a critic of positivism and its separation of the "is" from the "ought" and its distinction between law and morals.[38] Is and ought were "inseparably mixed" in the law, he thought.[39] This required lawyers to acknowledge the moral or ethical component of law, refuting Legal Realism, which in its more extreme moments seemed to deny that law had any ethical content at all. Fuller saw Nazism as positivism carried to a horrific extreme. He hoped to identify a democratic alternative to what he feared would be positivism's inevitable slide into tyranny.

Though Fuller was an early critic of the realists, he respected their insights[40] and incorporated them into his 1947 casebook, *Basic Contract Law*.[41] Nevertheless, he was a firm opponent of an amoral positivism and of exclusively positivist conceptions of law. He insisted that purpose and morality must inform law. This led to a "revival" of natural law, but one discovered by reason, not imposed by divine fiat. Reason provided the natural-law element of law, and human will provided the positivist component.[42] Fuller offered a tentative resolution of the objectivity problem: "there are external criteria, found in the conditions required for successful living, that furnish some standard against which the rightness of [a judge's] decisions should be measured."[43] Reason should be the dominant method of law.

Fuller identified the jurisprudential conflicts of the postwar world in his influential 1949 article, *The Case of the Speluncean Explorers*.[44] Fuller did not present his fictional judges as exemplars of particular "schools" of jurisprudence, but it is possible to identify real-life prototypes peeking out from behind the masks. Truepenny and Keen were positivists, the latter adding strict statutory

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38. Charles Covell locates Fuller in the Western philosophical tradition. Charles Covell, *The Defence of Natural Law: A Study of the Ideas of Law and Justice in the Writings of Lon L. Fuller, Michael Oakeshot [sic], F. A. Hayek, Ronald Dworkin, and John Finnis* 1-70 (St. Martin's Press 1992).

39. Lon L. Fuller, *The Law in Quest of Itself: Being a Series of Three Lectures Provided by the Julius Rosenthal Foundation for General Law, and Delivered at the Law School of Northwestern University of Chicago in April, 1940*, at 64 (AMS Press 1940), which constituted Fuller's debut as a new member of the Harvard Law School faculty.

40. *See* Lon L. Fuller, *American Legal Realism*, 82 U. Pa. L. Rev. 429 (1934).

41. Lon L. Fuller, *Basic Contract Law* (1st ed., West 1947) (opening with *Hawkins v. McGee*, 146 A. 641 (N.H. 1929), and the issue of remedies, suggesting that remedies precede rights). *See* Karl Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 N.Y.U. L. Rev. 876 (1979); Alfred S. Konefsky, Elizabeth B. Mensch & John Henry Schlegel, *In Memoriam: The Intellectual Legacy of Lon Fuller*, 30 Buff. L. Rev. 263 (1981). Their memorial tribute was not to Fuller but to his casebook: they saw its fourth edition as abandoning Fuller's realist-derived remedies-define-rights insight in favor of a formalist conceptualism that assumed the validity of market dominance of all economic relationships.

42. Lon L. Fuller, *Reason and Fiat in Case Law*, 59 Harv. L. Rev. 376, 379 (1946).

43. This provided some jurisprudential grounding for Felix Frankfurter's decisions in that era, though that was not Fuller's objective.

44. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949).

interpretation. Handy personified Legal Realism and Pragmatism. Foster spoke for a pure natural law approach and, alternately, one relying on flexible statutory interpretation. The modern reader will notice that, intentionally or not, Fuller's fictional characters reflected images of contemporary jurisprudence. In Truepenny's opinion, there are unmistakable influences of Legal Process, especially its idea of institutional competence, discussed below. Handy is a cartoonish caricature of the Realists. Truepenny and Keen, relying in different ways on executive clemency, echo Frankfurter's position in the Willie Francis case.[45]

An emphasis on natural law today has an implicit bias toward conservatism, a result that Fuller did not intend, but that inheres in most twentieth-century urges toward natural law. He avoided that trap by diverting natural law in the direction of process. He and his Harvard colleagues developed an appreciation for process in law, a "processual theory" focusing on law's means rather than its ends.[46] Like Frankfurter, Fuller was a proceduralist, one that emphasizes law's processes rather than its substantive content and outcomes.[47] Later in his career, he explained that there was

> a procedural, as distinguished from a substantive natural law. What I have called the internal morality of law is in this sense a procedural version of natural law . . . we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered. . . .[48]

Fuller thought that an understanding of law's processes could lead to discovery of the natural laws of the social order. Collective action in a democratic society furnished objective and external criteria to guide the judge's work. Seeking to identify "a body of common morality" that underlies law, Fuller called for creation of a secularized natural law that placed law in the service of a moral and democratic political order.[49] He sought to identify a moral basis for democracy and to establish the primacy of reason in legal discourse. The unnatural separation of fact and value in positivism caused by an overemphasis on empiricism or on theory led to the contemporary disjunction of values and purposes from law. By discovering "the natural principles underlying group life" through reasoned debate, Fuller hoped that people would be able to reconstruct a

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45. William M. Wiecek, *Felix Frankfurter, Incorporation, and the Willie Francis Case*, 26 J. Sup. Ct. Hist 53 (2001).

46. This unfortunate neologism is the contribution of Robert Summer's valuable and admiring survey. Robert Summer, *Lon L. Fuller* 74 (Stan. U. Press 1984).

47. Lon L. Fuller & William Perdue, *The Reliance Interest in Contract Damages*, 46 Yale L.J. 373 (1936-37). A fascinating though irrelevant bit of trivia: Richard M. Nixon almost served as Fuller's research assistant on this piece instead of Perdue while both were at the Duke Law School in 1935. Fuller and Nixon maintained a lifelong mutual admiration, Fuller serving as head of "Scholars for Nixon" in 1960. As one who was there at the time, I can testify that it took a great deal of fortitude to admire Nixon at Harvard in 1960. Fuller must have *really* admired Nixon.

48. Lon L. Fuller, *The Morality of Law* 96-97 (rev. ed., Yale U. Press 1969).

49. Fuller, *supra* n. 39, at 139.

humane social order based on reason rather than the sovereign's power.[50] This impelled his lifelong quest for what he termed in his *summa, The Morality of Law*,[51] which scorned Holmes's merely predictive function of law, Fuller reasserted its normative end. Law is not only policy, as Holmes perceived; it must be *good* policy as well.

Fuller was not the first to search for a normative foundation of the law, or to emphasize process in the quest. Since the late nineteenth century, some academics and an occasional judge sought a determinate grounding for law's morality in reason and process. John Chipman Gray, Roscoe Pound, Benjamin Cardozo, and Robert M. Hutchins successively tried to nudge law in that direction. Cardozo's dissection of *Riggs v. Palmer*, the murderous heir case, in *The Nature of the Judicial Process*, demonstrated that such a resort to principles imparted a normative dimension to judging.[52] These thinkers emphasized reason, as distinct from logic or precedent, the juridical equivalent of revelation. They assigned law-making and law-applying roles functionally, and in doing so, they stressed institutional constraints on the judicial role. Reason and principle, they hoped, would discover objective criteria for judging, thereby refurbishing law's tattered claim to legitimacy. So, Fuller's work was not egregious; if he was in the vanguard rather than the mainstream, he had company.

Fuller's work was paralleled by that of a Harvard colleague, Henry M. Hart,[53] whose scholarship produced two monuments of Legal Process thought: the *Legal Process* casebook itself, which he compiled with Albert Sacks,[54] and the Hart and Wechsler *Federal Courts* casebook, the single most influential casebook in American legal education.[55] Both Hart and Sacks were prominent Frankfurter disciples.[56] Fuller, Hart, and Sacks worked out the foundational ideas of Legal Process.[57] Together they achieved "the last great attempt at a grand synthesis of

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50. Fuller, *supra* n. 42, at 378.

51. Fuller, *supra* n. 48.

52. *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889) (Gray & Danforth, JJ., dissenting); Benjamin N. Cardozo, *The Nature of the Judicial Process* 40-41 (Yale U. Press 1921).

53. *See* Edward A. Purcell, *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* 229-57 (Yale U. Press 2000).

54. Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (tentative mimeographed edition, 1958, finally published in hardcover through the editorial efforts of William N. Eskridge and Philip P. Frickey in 1994) (all page citations below are to the hardcover 1994 edition).

55. Henry M. Hart & Herbert Wechsler, *The Federal Courts and the Federal System* (Foundation Press 1953). Updated by editions published in 1973, 1988, and 1996, "Hart and Wechsler," as it is universally known, continues to dominate the field of Federal Courts. The first edition was dedicated, significantly, to Felix Frankfurter.

56. Sacks clerked for Frankfurter during the 1949 Term. Though lacking that institutional connection, Hart's relationship with Frankfurter was just as close.

57. Legal Process is admirably surveyed in the following secondary sources. *See* William Eskridge & Phillip Frickey, *An Historical and Critical Introduction to the Legal Process*, in Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of* Law, li-cxxxvi (William Eskridge, Jr., & Phillip Frickey eds., Foundation Press 1994); Duxbury, *supra* n. 10, at ch. 4; G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, in G. Edward White, *Patterns of American Legal Thought* 136 (Bobbs-Merrill Co., Inc. 1978); Laura Kalman, *The Strange Career of Legal Liberalism* 22-42 (Yale U. Press 1996); Horwitz, *supra* n. 3,

law in all its institutional manifestations."[58]

In its early evolution, culminating with "publication" of the 1958 tentative edition of *Legal Process* in a mimeographed format, this jurisprudential outlook identified the goals and methods of postwar adjudication. Legal Process constituted American law's major collective effort after 1945 to refute the challenges of Legal Realism and to provide a new foundation for American law, one that would replace the discredited faith of classicism. It sought reason immanent in law's processes. The Vinson Court and its successor might have adapted the principles offered by Legal Process to provide a jurisprudential foundation for their work. The Court, however, let this opportunity pass, extending the ideological vacuum that had prevailed since 1937.

That, however, was no loss. Process theory was essentially conservative and formalist. Had the Court attempted to incorporate it as a jurisprudential guide, it would have replicated half the faults of classical thought. Why this would have been the case is disclosed by a survey of Legal Process in the 1950s.

Henry M. Hart has been esteemed by one scholar-alumnus as "the post-World War II intellectual leader of the Harvard Law School... with an extraordinary gift for systematizing solutions to complex legal questions."[59] He began teaching at Harvard in 1932, and with the exception of six years of government service during the war, he taught there until his death in 1969.[60]

Hart's academic career opened with an impressive debut when he joined Felix Frankfurter as co-author of the influential annual "Business of the Supreme Court" reviews.[61] In this series appeared themes that dominated the subsequent careers of both men: the law-politics distinction, the notion of institutional competence, judicial self-restraint, and the difference between policy and principle. This fruitful collaboration foretold Frankfurter's determination to impose judicial self-restraint once he ascended to the Court, and it identified fundamental ideas that Hart would elaborate after the war. Most importantly, it cemented the linkages between the two men and their thought, which remained intact after Frankfurter left Cambridge. Dean Erwin Griswold's 1962 encomium to Frankfurter described the common origins of judicial restraint and its

at ch. 9; Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage* 123 (Oxford U. Press 2000) (stating Legal Process "justified America during the Cold War"); Horwitz et al., *supra* n. 8.

58. Gary Peller, *Neutral Principles in the 1950's*, 21 U. Mich. J.L. Reform 561, 568 (1988).

59. Seligman, *supra* n. 28, at 82.

60. Hart: A.B. 1926, LL.B. 1930, S.J.D. 1931, all at Harvard; Assistant Professor of Law 1932, Professor 1937, Dane Professor 1960. Office of Solicitor General, 1937-38; Office of U.S. Attorney General 1940-41; Office of Price Administration, 1942-45; General Counsel, Office of Economic Stabilization, 1945-46. *Sutherland*, supra n. 28, at 376.

61. Felix Frankfurter & Henry M. Hart, *The Business of the Supreme Court at October Term, 1932*, 47 Harv. L. Rev. 245 (1933); Felix Frankfurter & Henry M. Hart, *The Business of the Supreme Court at October Term, 1933*, 48 Harv. L. Rev. 238 (1934); Felix Frankfurter & Henry M. Hart, *The Business of the Supreme Court at October Term, 1934*, 49 Harv. L. Rev. 68 (1935). In this role, he replaced James M. Landis, who had inaugurated the series with Frankfurter in 1928. After a wartime hiatus, the series resumed in 1949 as *The Supreme Court 1948 Term*, in which form it served as the vehicle for the Forewords noted below, beginning in 1951.

intellectual litter-mate, Legal Process: Frankfurter as "Teacher of the Law" emphasized "the integrity of the judicial process, of the essential importance of sound procedure, of judicial self-restraint, and of the intellectual humility of the judge."[62]

The men who expounded Legal Process ideas saw the legal system as being both a collection of substantive rules and as "a structure of decision-making processes."[63] Substantive rules, such as those that impose liability for actions in tort or contract, rest ultimately on conflicting values best reconciled by the political branches, not the courts. The *processes* of law, on the other hand, are the lawyer's domain, where legal expertise is both most needed and most readily justified. A focus on process rather than substance would enable lawyers to do their work without having to choose among the conflicting values of a heterogeneous society. Legal Process was, as Lon Fuller so aptly termed it, a movement "toward legality and away from purpose."[64] In philosophical terms, the Process theorists sought to move legal inquiry from a quest for "metaphysical objectivity" to "epistemic objectivity."[65]

Thus, legal institutions such as courts and administrative agencies by their very existence and quotidian workings produce justice in what might otherwise be only a struggle where dominant political interests triumphed. In this way, Legal Process claimed to justify law's place in American society.

Fuller's thought was as fruitful for Hart's development as was Frankfurter's influence. Though not colleagues at Harvard until after the war, the two men moved toward each other's ideas.[66] In its matured form, Fuller's emphasis on principle in law-making and judging led him toward both Frankfurter and Hart: "adjudication is a form of social ordering institutionally committed to 'rational' decision." Though the day of Legal Process had passed by the time Fuller penned those thoughts, it left behind an enduring residue that he embraced. Judging had to be the resultant of principle, institutional competence, and reason. In the autumn of his career, Fuller wrote, "Adjudication is institutionally committed to a 'reasoned' decision, to a decision based on 'principle.'"[67] Frankfurter in turn adopted the Fuller/Hart emphasis on principle and worked it into the edifice of American public law. In 1959, Frankfurter argued, "Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society".[68] "The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it

62. Erwin N. Griswold, *Felix Frankfurter—Teacher of the Law*, 76 Harv. L. Rev. 7, 11 (1962).

63. Todd Rakoff & Abram Chayes, *The Legal Process School: Introduction*, Morton J. Horwitz et al., *The Bridge: Legal Process* <http://web.lexis.com/exchange/Content/Bridge/Legal Process/essay1.htm.> (accessed Jan. 2, 2002).

64. Lon L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. Leg. Ed. 457, 464 (1954).

65. Leiter, *supra* n. 14, at 3.

66. Eskridge & Frickey, *supra* n. 57, at lxxxiii.

67. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 372, 380, (1978) (published posthumously). Hart and Sacks included an excerpt from an early draft of this article in *Legal Process*. Hart & Sacks, *supra* n. 54, at 397-403.

68. *Bartkus v. Ill.*, 359 U.S. 121, 127 (1959).

may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment."[69] Such tight, mutually-reinforcing linkages bound the jurist and the academic lawyers in a jurisprudential coterie.

In the decade-long evolution of Legal Process as course, casebook, and legal thought—roughly 1946 through 1958—Hart returned to issues raised in classicism's apogee in the 1930s, and worked out comprehensive solutions for them. He began with a more spacious view of law and its institutions than the classicists and Realists had entertained, siting legal development in a matrix of institutions, all of which made or enforced law.

The central tenet of Legal Process was "the principle of institutional settlement," which "expresses the judgment that decisions which are the duly arrived-at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed."[70] In this dictum, Hart and Sacks identified some of the key elements of Legal Process. An interdependent human society evolves institutions that enable its members to satisfy their wants, maximize their satisfactions, and promote their interests. This entails deciding which institutions perform which functions best. This became the theme of "institutional competence" that was at the heart of Legal Process. Frankfurter had originally identified institutional competence as a value in his 1930s courses on public utilities and federal courts.[71]

The general concept of "process" defined this allocation of function. Hart and Sacks viewed society as consisting of innumerable processes for resolving disputes, beginning with self-help, extending to mediating social institutions, such as churches and unions, and culminating in the structures of government. The *Legal Process* casebook, organized as a succession of problems, challenged the student to decide which institutions best solved which social problems.

Given these assumptions about process and institutions, when Hart and Sacks turned to the role of courts, they stressed the principle of "reasoned elaboration." It was "the technique of reasoned elaboration which courts pursue or ought to pursue in the effort to arrive at decisions according to law."[72] As refined in contemporary law review articles,[73] this technique required that judges articulate reasons for their decisions. Where there was no controlling precedent that would dispose of the case on the basis of its authority alone, judges had to articulate reasons for the result they reached, and lay out that reasoning in a coherent manner. This was designed to avoid arbitrary and irrational bases of judging, such as the judge's hostility towards a party's counsel. Where precedent did not dictate a result, judicial reasoning had to strive to articulate grounds for

69. *Id.* at 128.

70. Hart & Sacks, *supra* n. 54, at 4.

71. Eskridge & Frickey, *supra* n. 57, at lx.

72. Hart & Sacks, *supra* n. 54, at 146.

73. Henry M. Hart, *The Supreme Court, 1959 Term—Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84 (1959); Albert M. Sacks, *Foreword to The Supreme Court, 1953 Term*, 68 Harv. L. Rev. 96 (1954); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1 (1957).

decisions derived from "maturing collective thought," that is, the values of American society. Judicial "reasoning must probe more deeply to the basic postulates of the social order—to the rational implications of the 'shared purposes' of society."[74] Finally, adjudication in a democratic society requires that "decision is to be arrived at by reference to impersonal criteria of decision applicable in the same fashion to any similar case."[75]

Directing his generalizations to the Supreme Court, Hart demanded that their opinions display

> the underpinning of principle which is necessary . . . to discharge the function [of] the highest judicial tribunal of a nation dedicated to exemplifying the rule of law not only to itself but to the whole world. Only opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do. . . . [The Court is] charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law.

Repudiating Holmes's dictum about the life of the law being experience, Hart provocatively insisted that "reason is the life of the law."[76]

Legal Process might have provided some of the jurisprudential grounding for the work of the Court that classical legal thought had. As articulated by Hart and Sacks up to 1958, Process thought offered a subtle and persuasive rationale for the power of courts in a democratic society, and specifically for judicial review. At the same time, and proceeding out of that rationale, it identified constraints on judicial power that provided at least some criteria for its legitimate exercise.

Legal Process was powerful as an explanatory paradigm because it began with a realistic assumption about human society in the modern world—social interdependence—and built a legal theory on that. It acknowledged law's relationship to other bodies of thought, discarding classicism's hermetic assumptions about law's autonomy. It foreclosed nothing, leaving doors open for lawyers operating within its paradigm to promote legal development in ways that could meet society's unanticipated needs and inevitable growth.

Legal Process affirmed the separation of powers, while providing the rationale that had eluded the Fuller and Taft Courts for the place of administrative agencies in what was originally a tripartite structure of government. One of the great strengths of Legal Process was its persuasive explanation for the authority of administrative agencies, coupled with its potential for enriching theories of statutory interpretation. So useful was this last function, that it has survived the body of thought from which it grew, and remains influential today, not only in legislation courses in law schools, but in the work of courts when they interpret statutes.[77] On the other hand, Justice Frankfurter was concurrently

74. Hart & Sacks, *supra* n. 54, at 647 (quoting Fuller's early draft of *The Forms and Limits of Adjudication*, *supra* n. 67).

75. *Id.* at 643.

76. Henry M. Hart, Jr., *Foreward: The Time Chart of the Justices*, 73 Harv. L. Rev. 99, 125 (1959).

77. *See* Eskridge & Frickey, *supra* n. 57.

growing disenchanted about his pre-war enthusiasm for administrative expertise, insisting on a heightened judicial supervision of administrative discretion.[78]

Frankfurter applauded Legal Process, extolling its emphasis for the constraints it placed on judges, which were derived from evolving social values, institutional practices, and professional culture. Jurisdictional and procedural limits reinforced these constraints and confirmed allocation of decisional power on the basis of institutional competence. But no one else on the Vinson Court shared Frankfurter's enthusiasms. The Truman appointees and Justice Reed showed no interest in jurisprudential matters; Justices Black and Douglas were indifferent, if not hostile to the assumptions of Process; and Justice Jackson had not long to live.

Process was a hothouse growth in jurisprudence, and quickly withered at the peak of its influence around 1958.[79] To understand why the Hart/Fuller Process thought failed to realize its limited potential, it is necessary to trace developments in the decade after 1953. Momentous developments were afoot at that time in the world of jurisprudence, and a glance at them sheds light on Legal Process as the jurisprudential moment of the 1950s.[80]

In 1951, the Harvard Law Review inaugurated its renowned series of "Foreword" articles.[81] Throughout the 1950s, Harvard faculty used these "Forewords" to lay down a barrage of criticism of the Supreme Court, insisting that the decisions of the Vinson and Warren Courts lacked grounding in principle, failed to provide persuasive reasoning to support their results, and reflected sloppy judicial workmanship. The list of authors is a compendium of Harvard Process scholars: Louis Jaffe, Paul Freund, Albert Sacks, Alexander Bickel, Harry Wellington, Henry M. Hart, and Philip B. Kurland.[82] Frankfurter abetted such attacks.[83] At first, it might seem odd that he should encourage assaults on the institution that he proclaimed dearest to himself; his attitude seems spiteful or treacherous. But by the mid-1950s, he was alienated from half his brethren, anxious about the trends he saw emerging on the Warren Court, and determined to vindicate his views at any cost, which to him necessarily meant refuting the inconsistent views of others, specifically Black. He thus saw no impropriety in

78. *SEC v. Chenery Corp.*, 332 U.S. 194, 216 (1947) (Frankfurter & Jackson, JJ., dissenting). *See* Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration* in *Total War and the Law* (Daniel Ernst & Victor Jew eds., 2001).

79. *Contra* William N. Eskridge & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 26, 27-28 (1994) (Who claim that Legal Process enjoyed a renaissance on the Court in the 1990s, where a majority are adherents. *Dubitatur*, as Frankfurter might have said.).

80. *See generally* Peller, *supra* n. 58.

81. Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 Const. Commentary 463 (1994).

82. The series began with Louis L. Jaffe, *Foreword*, 65 Harv. L. Rev. 107 (1951), included the pieces noted in *supra* n. 73, and culminated with Philip B. Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government*, 78 Harv. L. Rev. 143 (1964). To these should be added Bickel's 1969 Holmes Lectures, published in 1970. Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (Harper & Row 1970).

83. Felix Frankfurter, *Writing to Henry M. Hart* (June 29, 1956) (unpublished Henry M. Hart Papers) (copy on file at Box 3 with Harvard Law School). He persisted in that behavior to his last days. Felix Frankfurter, *Writing to Alexander M. Bickel* (Mar. 18, 1963) (unpublished Frankfurter Papers) (copy on file at Part III, reel 33 with Harvard Law School).

besmirching his Court through proxies.

Three things characterized this extraordinary line of academic critique. First, its quality and influence were exceptionally high, providing some of the finest and most influential law review writing of the era. Second, all of the contributors had been associated, more or less, intimately with Justice Frankfurter. It is thus mildly ironic, though justified, that one scholar refers to the Legal Process academics as "the new Langdellians."[84] And third, the writing echoed the premises of Legal Process. The law of unintended consequences thereby prevailed once again; Hart's and Sacks's thoughtful effort to accommodate legal growth to post-New Deal social reality produced relentless criticism of the Court and its major decisions of the 1950-1965 period.

The 1958 and 1959 Holmes Lectures at the Harvard Law School capped this development. The significance of the lectures proved to be influential because they provided the most explicit criticism of *Brown v. Board of Education*[85] to issue from the contemporary legal elite. In the 1958 lectures, Judge Learned Hand carried skepticism about activism almost to the point of repudiating judicial review itself. Hand was rushed and emotionally agitated at the time he prepared the lecture; he knew it was to be the valedictory of a magnificent life in the law. Felix Frankfurter incited Hand in this assault, reflecting the Justice's view that *Brown* was necessary, but that it had set the Warren Court off on an adventure of activism.[86]

Hand used the occasion to condemn the activist inclinations of the Warren Court, pontificating that "[f]or myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."[87] When a judge considers a question of constitutionality, Hand argued, "if [the statute] is the result of an honest effort to embody that compromise or adjustment that will secure the widest acceptance and most avoid resentment, it is 'Due Process of Law' and conforms to the First Amendment."[88] Under such a standard, no statute would ever be found constitutionally deficient. That was fine as far as Hand was concerned; a judge should aspire to be "the mouthpiece of a public will, conceived as the resultant of many conflicting strains that have come, at least provisionally, to a consensus."[89]

Hand's challenge to the legitimacy of judicial review conceded only that it was necessary, despite its lack of textual support in the Constitution and its incompatibility with the doctrine of separation of powers. He insisted that the Court in *Brown* substituted its own value preferences, which he characterized as

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84. Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* 269 n. 8 (N.Y.U. Press 1995).

85. 347 U.S. 483 (1954).

86. On the circumstances of the Lectures, *see* Gerald Gunther, *Learned Hand: The Man and the Judge* 654-72 (Knopf 1994) (detailing Frankfurter's manipulation of Hand in the interest of evading the miscegenation issue presented in the *Naim* case, noted below).

87. Learned Hand, *The Bill of Rights* 73 (Harv. U. Press 1958).

88. *Id.*

89. *Id.* at 72.

"extreme," for those of the state legislatures. The judges' "personal preferences" are usually "all that in fact lie behind the decision."[90] To be fair to Hand, he was only echoing what Justice Jackson had said from the bench five years earlier:

> [T]he belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices [and thus] that the law knows no fixed principles.[91]

It was that sense that produced Jackson's oft-quoted aphorism, "we are not final because we are infallible, but we are infallible only because we are final."[92] From that perspective, Hand concluded that he could not predict "when the Court will assume the role of a third legislative chamber and when it will limit its authority."[93] In its exercise of judicial review in cases like *Brown*, "I have never been able to understand on what basis it does or can rest except as a *coup de main*."[94]

Hand's assault on *Brown* was shocking to his listeners, all the more so because it seemed to provide legitimation from the most respectable authority for the contemporary "Impeach Earl Warren" campaign being waged on billboards across the South by white citizens councils and the John Birch Society, and for the concurrent effort in Congress to discipline the Court by pruning its jurisdiction in retaliation for the waning of the Justices' support for McCarthyism.

Whatever Hand's views might have been on calmer reflection, the 1958 lectures were a bombshell, and Harvard hastened to invite the eminent constitutional authority Herbert Wechsler to deliver what was anticipated to be, in effect, a rebuttal. Wechsler had been a participant in the "Legal Philosophy Discussion Group" at Harvard in the 1956-57 academic year, a group that also included Fuller, Henry M. Hart, Sacks, Paul Freund, and H. L. A. Hart.[95] This, plus his collaboration with Hart on *The Federal Courts* casebook, made him thoroughly attuned to Legal Process and the ideas that it engendered. He was, in short, the ideal person to elaborate and extend Legal Process ideas and to deploy them in the debate with Hand.

In the 1959 Holmes Lectures, Wechsler carried Legal Process a step forward to enunciate the doctrine of "neutral principles."[96] In a sense, Wechsler's effort was a late exercise in beating the dead horse of Legal Realism yet again. He built on a suggestion in Sacks's 1954 "Foreword" article that, though *Brown* rested on equality, which no more justified the result in that case than separate-but-equal justified segregation. Neither Sacks nor Wechsler claimed a moral equivalency between the two, but both thought that the Court had failed to justify its choice of

90. *Id.* at 70.
91. *Brown v. Allen*, 344 U.S. 443, 535 (1953) (Jackson, J., concurring).
92. *Id.*
93. Hand, *supra* n. 87, at 55.
94. *Id.*
95. Eskridge & Frickey, *supra* n. 57, at c.
96. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15, 19 (1959). For a more positive evaluation of Wechsler's lectures than is presented here, *see* Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 Colum. L. Rev. 982 (1978).

principle. Wechsler, unlike Hand, had no doubt about the legitimacy of judicial review, but he thought that in exercising it, the Court had to be constrained by standards. The Court's exercise of its power of judicial review "must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved." Only grounds of decision "of adequate neutrality and generality," transcending the value preferences of the judges in that particular case, could make a decision "entirely principled." Courts can exercise the power of judicial review only because, and when, the grounds of its decision "are—or are obliged to be—entirely principled."

Wechsler then dropped *his* bombshell; *Brown* failed to meet his requirement for grounding in neutral principles. The principle of equal treatment before the law asserted by the black petitioners did not have any more compelling authority than the countervailing principle of freedom from unwanted association claimed by segregationists. This deeply troubling challenge to *Brown's* legitimacy did not go unchallenged,[97] but it demonstrated that the issue of equality would be the undoing of Legal Process and its derivative doctrine of neutral principles.

The influence of Legal Process was not entirely exhausted by 1960. Alexander Bickel, law clerk and disciple of Felix Frankfurter and his adjutant in researching issues for the *Brown* re-arguments in 1953,[98] extended its logic, but in an increasingly conservative direction.[99] Growing progressively disenchanted with Warren Court activism on Legal Process grounds, Bickel concluded that the tradition of principled adjudicated exemplified by Holmes, Brandeis, and Frankfurter came to an end in 1962, when Frankfurter retired form the Court. Without Frankfurter, the Warren Court was no more than "Hugo Black writ large."[100] And, it might have been justly countered; Legal Process was but Felix Frankfurter writ large.

Legal Process hardly outlived the Vinson era, imploding in the first years of the Warren Court, and disintegrating in the futility of Hand, Bickel, and Frankfurter's dissent in *Baker v. Carr.*[101]

Through its firm strictures on judicial method, Legal Process cultivated an impulse to restrain judicial power. This did not necessarily lead directly to Hand's and Frankfurter's near-absolute posture of restraint, but the spectacular failure of Wechsler to find a persuasive rationale for *Brown*, and Bickel's increasing negativism, suggested that it would have taken a much different vision than Hart's to acclimate Process thought to an activist bench like Warren's.

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97. *See* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960); Louis H. Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1 (1959).

98. Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955).

99. Edward A. Purcell, *Alexander M. Bickel and the Post-Realist Constitution*, 11 Harv. Civ. Rights-Civ. Libs. L. Rev. 521 (1976).

100. Alexander M. Bickel, *The Morality of Consent* 9 (Yale U. Press 1975); Alexander M. Bickel, *Politics and the Warren Court* 162 (Harper & Row 1965).

101. 369 U.S. 186 (1962).

Judicial self-restraint aside, Legal Process displayed other conservative tendencies.[102] In place of the discarded Langdellian logical formalism, it substituted what Horwitz has called an "instrumental formalism,"[103] placing all its bets on the legitimacy of institutions and processes, which it took for granted. This proved fatal to the long-term prospects of Legal Process. Its basic assumption could work only if all governmental institutions were authentically democratic, responsive and responsible, representative, and legitimate. But state legislatures, especially in the South, and to a lesser extent Congress as well, often appeared corrupt, bigoted, controlled by corporate interests, mal-apportioned, and constituted by elections that openly flouted democratic ideals. Staking procedural legitimacy on such bodies was a bad joke. The idea of institutional competence only invited challenge to the right of such legislative bodies to govern at all. And that was not the least of Process's deficits.

Another source of Legal Processes' failure lay in its insistence on the distinction between principles and policy. While authenticated by John Marshall's *Marbury* law-politics distinction, an ever-more-rigid insistence that judges search only for principle while eschewing policy choices informed by their own moral vision led back to the aridity and incoherence of classicism. Judges came perilously close to the classicists' fatal error of making choices among preferred outcomes by deceiving themselves that they were applying objective principles found outside their personal will. In their misplaced quest for objectivity, Process theorists forgot Oliver Wendell Holmes's admonition that

> logical method and form flatter that longing for certainty and repose which is in every human mind. But certainty generally is illusion.... Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds....[104]

Formalism was the fairy-tale poisoned apple of Legal Process. It seemed to allow its proponents to escape commitment to any particular set of substantive values, something that the experience of classicism and *Lochner* might have taught them was fraught with danger. They thought they had transcended this problem by avoiding commitment to any substantive values at all, assigning that responsibility to the legislature. They exalted process to the status of a value in its own right. This seemed to give them everything—neutrality and objectivity—and at the same time yielded liberal and democratic results. Process avoided *Lochner*, but refuted fascism. Democracy made it unnecessary for Process adherents to engage with the issues of substantive and distributive justice. The legitimacy that derived from following existing procedures enabled the rule of law itself. Biting into the apple had its undeniable pleasures.

But all this came at a cost, hidden at the time from the Process theorists. In the world of jurisprudence as in more practical matters, there is no such thing as a

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102. J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 Harv. L. Rev. 769 (1971).

103. Horwitz, *supra*. n. 3, at 268.

104. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 468 (1897).

free lunch. Legal Process was a fair-weather program. Its premises could work only in a society that was homogenous and that was already just. It had nothing to say to a world where racial discrimination, economic inequality, and flawed political processes were the reality. Legal Process was an otherworldly illusion—an irony in view of the practical and successful men who propounded it. Process assumed the legitimacy not only of democracy in theory, but of the actual institutions of governance that existed in the United States in 1958, and of the social order in which they were embedded.

This, in turn, exposed its Achilles' heel; Legal Process proved incapable of choosing among substantive values, or even identifying them. This might have worked if American society had in reality conformed to the then-prevalent end-of-ideology, social-conformist, consensus, behaviorist assumptions of historians and political scientists in the 1950s.[105] But it did not. Legal Process stood mute in the face of the emerging social conflicts that defined the 1960s. Above all, it had nothing to say about the value of equality and the civil rights movement.

The inability of Legal Process to address the most pressing domestic issue of the time was displayed dramatically in an incident featuring Hart himself. Invited to present the 1963 Holmes Lectures, Hart spent the first two evenings outlining a problem that Process was to resolve:

> Suppose that we were to decide that the commitments in the Constitution mean that every American is entitled . . . to an equal opportunity to develop and to exercise his capacities as a responsible human being who is also a social being; and that the overriding purpose of all actions taken by the authority of society as a whole through the processes of government and law is to make that opportunity as meaningful as possible.

Philip Bobbitt captured the drama of the moment that followed:

> Then Hart paused and when he continued he said he had realized on the very eve of the lecture that he could not offer a general resolution, that he could give no principle by which such values could be justified. He said that his answers were, he now saw, less conclusive than he had hoped. And then, in a hushed and crowded Ames courtroom, he sat down. In this we confront the integrity and the impotence of doctrinal argument.[106]

Process's failure derived from Hart's and Sacks's inability to grasp the full implications of the equality principle. In *Legal Process*, they identified equality in terms of an ambiguous individualism:

> Basic in the American system is the assumption that every normal person counts one in determining the objectives of primary control. This has not always been so. Witness, slaves. Basic, also, in the structure of this system, is the reflection of this

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105. Daniel Bell, *The End of Ideology* (Harv. U. Press 1962); Robert Dahl, *A Preface to Democratic Politics* (U. Chi. Press 1956). On the consensus historiography of the period, *see* John Higham, *Writing American History: Essays on Modern Scholarship* 142-46 (1970); Marian J. Morton, *The Terror of Ideological Politics: Liberal Historians in a Conservative Mood* (Press Case W. U. 1972).

106. Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 56-57 (Oxford U. Press 1982) (including the Hart quote). Hart's lectures were never published.

assumption in the equal distribution of personal capacity to be [the] subject of primary liberties, duties, and powers, and to exercise rights of action and defend actions in vindication of them. This too, has not always been so. Witness, married women.

Given these basic equalities, it follows that every normal member of the society has the same personal capacity to exercise private powers, and thereby to command the backing of society for his own personal arrangements.[107]

The authors identified this as "formal equality before the law" or "equality of general legal capacity." They rested this principle or value on "the simple ethical, or religious, judgment that the moral worth of one normal human is the same as that of any other."[108]

Such a vague formulation might have been stretched to encompass the concept of equality that lay at the core of *Brown*, but its most natural reading sounded distressingly like the impoverished notion of equality known to classical thought. If Legal Process could not break out of that antiquated conception of equality, it could never be anything more than a legal outlook suited to an idea whose time had passed. Legal Process, in a phrase, missed the boat. In its encounter with the equality principle, Process failed to recognize the new value, mistaking it for its nineteenth century predecessor. Legal Process and the equal protection value passed each other, the former on its way to oblivion, the latter to its checkered future.

Symptomatic of this was Wechsler's astonishing failure to see the most obvious feature of segregation, its deliberate debasement by law of an entire race of people. In "Neutral Principles," Wechsler declared that "the question posed by state-enforced segregation is not one of discrimination at all."[109] Any legal outlook that could compel such a myopic conclusion was not only doomed to fail; it deserved to.

Legal Process confirmed the values of its time. In tracing its path from judges reason to social values, Process "sought to impute value to social facts,"[110] compelling the stultifying result that what is, is good. The original impulse was admirable; Fuller and Hart sought to identify objective values in social custom that judges could apply without fearing that they were instilling their personal values and biases. But by discouraging judges from making moral judgments outside those found in existing social arrangements, Process thought disabled their moral faculty. Examples abound: Hand, the outstanding judge of his era, blinded by Process presuppositions, could mistake the underlying moral judgment of *Brown* for the tyranny of Platonic guardians. Wechsler proclaimed the truth of one of *Plessy v. Ferguson's* most repellent dicta: "if 'enforced segregation stamps the colored race with a badge of inferiority' it is solely because its members choose 'to

107. Hart & Sacks, *supra* n. 54, at 284.
108. *Id.* Why "normal"?
109. Wechsler, *supra* n. 96, at 34.
110. Horwitz, *supra* n. 3, at 251.

put that construction upon it.'"[111] Justice Frankfurter in *Naim v. Naim* successfully carried on his obtuse struggle, waged on Process grounds, to avoid confronting the anti-miscegenation statutes, thus sustaining one of the oldest pillars of racial degradation.[112] Many lawyers concluded that if they had to choose between the musings of academic and judicial elites that led to such monstrous conclusions, on the one hand, and the moral vision of *Brown* on the other, it was Legal Process, not the Warren Court, that suffered fatal flaws.

111. Wechsler, *supra* n. 96, at 33 (quoting from *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)). *See* Peller, *supra* n. 58.

112. *Naim v. Naim*, 350 U.S. 891 (1955), discarded in *Loving v. Va.*, 388 U.S. 1 (1967) (holding miscegenation statutes violated the equal protection and due process clauses). *See* Bickel's lame defense of the amoral opportunism of *Naim's* evasion in *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 174 (2d. ed., Yale U. Press 1962). Even Wechsler condemned the *Naim* result as "wholly without basis in the law." Wechsler, *supra* n. 96, at 34.