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# Rejecting the Fruits of Action: The Regeneration of the Waste Land's Legal System

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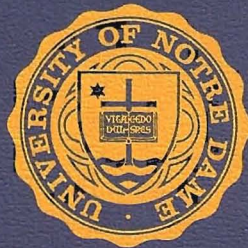
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Rejecting the Fruits of Action:  
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# Rejecting the Fruits of Action: The Regeneration of the Waste Land's Legal System

Phillip J. Closius\*

Modern America is frequently depicted as a society which lacks moral direction and rewards selfishness and materialism.<sup>1</sup> The United States has become a country in which affluence is assumed and the primacy of personal gain is expected. Prior to the development of contemporary America and its economic and cultural dominance, societies were based on a hierarchy of values which emphasized the communal good and condemned selfish gratification.<sup>2</sup> This traditional structure established religious values as the preeminent focus of the group and its members, followed by communal and familial virtues and, lastly, the goals of economic gain and personal prosperity.<sup>3</sup>

For a variety of reasons, America has inverted this historic value structure and prioritized the values of economic advancement, individual acquisition, and immediacy.<sup>4</sup> The United States has, at its base, accepted a relentless pursuit of economic efficiencies and a related glorification of individualism in order to attain and sustain its material wealth.<sup>5</sup> The distortion of values inherent in this single-minded drive for material dominance has been largely ignored or justified by the financial success which these efficiencies have produced. This distortion has created an America which has embraced a philosophy of result orientation, an evaluation of all actions based on the success of their results—with success being increasingly defined as the attainment of wealth.<sup>6</sup> In an America increasingly dominated by this perspective, a culture has been established which deifies the

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1 See E.F. SCHUMACHER, *SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED* 14-15 (1973); David Schuman, *Beyond The Waste Land: Law Practice in the 1990s*, 42 *HASTINGS L.J.* 1, 6-7 (1990).

2 See ROWLAND BERTHOFF, *AN UNSETTLED PEOPLE: SOCIAL ORDER AND DISORDER IN AMERICAN HISTORY* 67-68 (1971).

3 *Id.* at xii-xiv.

4 *Id.* at 377-78; ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 13-15 (1921).

5 RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 12-16 (4th ed. 1992) (defining the concepts of economic efficiency); *id.* at 255-56 (explaining that the common law in the nineteenth century, especially in America, consciously favored business growth and economic efficiencies); SCHUMACHER, *supra* note 1, at 22 (quoting Lord Keynes as consciously advocating greed and self-interest as dominant motivations for a temporary period of time).

6 James B. White, *Economics and Law: Two Cultures In Tension*, 54 *TENN. L. REV.* 161, 167-68 (1986); see also Oliver W. Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 478 (1897) (warning against the trend to define legal satisfaction in terms of the money made).

individual and the importance of achievement—who won, what university did you get into, how much money did you earn. In such an environment, traditional values of morality and the communal good are necessarily sacrificed to principles inherent in a societal obsession with business and economics—winning, self-interest, and materialism.<sup>7</sup>

In his greatest work, *The Waste Land*,<sup>8</sup> T. S. Eliot presents a picture of twentieth century Western civilization as a culture which has lost its essential values and has come undone from its historical moorings. Material wealth has become the focal point of society and its inhabitants. In such a value distorted context, human relationships are devoid of meaning.<sup>9</sup> Honest communication and a meaningful life for the soul and intellect are lost in a dehumanizing daily grind. Religious, communal, and even familial values are subverted to a culturally encouraged drive for personal gain. In this respect, modern Western civilization in general, and America in particular, embodies the world of *The Waste Land* even more than the Europe and America of 1922 with which Eliot was familiar.<sup>10</sup>

Eliot's masterpiece, however, does not simply describe vividly the details of a meaningless life; the poem also provides an answer, a solution for the devalued societies which comprise contemporary Western civilization. In the poem's final section, Eliot suggests that Europe and America can regain their societal values and re-establish the best aspects of their own history by drawing lessons from ancient philosophy, the Indo-Aryan roots of society, to reaffirm meaning in existence.<sup>11</sup>

Ancient Indo-Aryan philosophy, as embodied in *The Upanishads*<sup>12</sup> and *The Bhagavad-Gita*,<sup>13</sup> rejects result orientation. These two sacred texts are firmly grounded in "rejecting the fruits of action" and focusing instead on the action itself and the motives or values which underlie doing or not doing a particular activity.<sup>14</sup> In such thought, the result matters much less than the doing. These teachings de-emphasize the outward focus of attain-

7 See POUND, *supra* note 4, at 14-15, 37; White, *supra* note 6, at 163-64. Assuming that there are older philosophies which support these notions, they begin their implementation in the law during the latter half of the nineteenth century, especially in America. See POSNER, *supra* note 5, at 255-56.

8 T.S. ELIOT, *The Waste Land*, in THE COMPLETE POEMS AND PLAYS, 1909-1950, at 37-55 (1971). For the reader's convenience, *The Waste Land* is reproduced in the Article's appendix. See *infra* app. at 157. All further citations are to the original work.

9 See *infra* notes 45-59 and accompanying text.

10 See Schuman, *supra* note 1, at 3 (claiming that modern lawyers and their practice particularly embody the characteristics of the Waste Land).

11 See *infra* notes 65-71 and accompanying text.

12 THE UPANISHADS, BREATH OF THE ETERNAL (Swami Prabhavananda & Frederick Manchester trans., 1975) (selecting and translating principal texts from the original Sanskrit).

13 THE BHAGAVAD-GITA: KRISHNA'S COUNSEL IN TIME OF WAR (Barbara S. Miller trans., 1986) (translated from the original Sanskrit).

14 See *infra* notes 72-99 and accompanying text. Actions that have incredible meaning for practitioners of Indo-Aryan philosophy—contemplation of an object for hours—seem pointless to members of Western civilization because such action produces no discernable result or achievement. In such a value system, meditation has no place or, in some modern variants, is perceived as a method of "recharging your batteries" in order to be more efficient upon reentry into the world of achievement. Susan Zartow, *Reader-Tested Home Remedies; Part 4, PREVENTION*, Mar. 1992, at 59 (explaining that "[a]thletes and business executives have been using [visualization] to improve performance for years"); Janice Turner, *Executive Meditation*, TORONTO STAR, May 24, 1993, at B1 (explaining that many executives use transcendental meditation to "boost their performance and alleviate stress").

ment and prioritize the inward focus of satisfaction. However, this philosophy also emphasizes that worldly actions should be motivated by charity to others, compassion for the plight of fellow humans, and control of the selfish instincts of human nature.<sup>15</sup> The values inherent in these three motivations enhance inner satisfaction, give life its meaning, and provide society with its proper orientation. These virtues of Eliot and Indo-Aryan philosophy form the core of the religious, communal, and familial values which traditionally structured societies. The contemporary emphasis on result orientation and material wealth, combined with its related glorification of individualism, has disassociated modern American culture from its historical moorings and diminished the significance of these values and their broader religious or communal perspective in both cultural awareness and daily life.<sup>16</sup>

The systemic acceptance of result orientation and the consequent predominance of economic efficiencies and material wealth have not only corrupted society in general, but have also devalued modern concepts of the law in particular. Law in today's America is dominated by excessive litigation and a general disbelief that justice is evenly dispensed.<sup>17</sup> The contemporary legal system has also become alienated from the historically based values which both created it and gave it meaning.<sup>18</sup> Judges, lawyers, and the law itself have been adversely affected by this evolving devaluation. The pernicious influence of result orientation manifests itself in the modern American legal system through its influence on the judiciary in at least two significant ways: (1) legal theories which influence the intellectual climate within which judges operate<sup>19</sup> and (2) the manner by which society instructs judges to resolve cases—precedent or *stare decisis*.<sup>20</sup> Both areas can be significantly reformed by the rejection of result orientation and its goal of material wealth and by the acceptance of a motivational process dedicated to the values of charity, compassion, and self-denial.

Various legal theories have influenced the development of American jurisprudential thought. Natural lawyers, legal positivists, legal realists, legal process scholars, and critical legal studies adherents have created different perspectives on the law and justice, positions which, at times, have violently clashed with each other.<sup>21</sup> However, all of these theories have essentially accepted the premise that result orientation is needed to run

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In this sense, modern America has reduced the primal values of Indo-Aryan philosophy to the equivalent of "a weekend at the Metropole." ELIOT, *supra* note 8, at line 214.

15 See *infra* notes 77-83 and accompanying text.

16 POUND, *supra* note 4, at 81 (noting that individualism was clearly subservient to community values under the old English common law); WHITE, *supra* note 6, at 191-93. These three virtues are part of the accepted tenets of the religions of the world.

17 See Allan C. Hutchinson & Patrick Monahan, *Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 202 (1984).

18 See *infra* notes 153-58 and accompanying text.

19 See *infra* notes 118-63 and accompanying text.

20 See *infra* notes 164-79 and accompanying text.

21 See *infra* notes 118-45 and accompanying text; see also Hutchinson & Monahan, *supra* note 17, at 200. Limiting discussion in this Article to the theories mentioned is not meant to demean or ignore the contributions or value of other schools of thought or analysis, whether established or emerging (e.g., feminist jurisprudence or critical race theory), to the development of the American legal system.

effectively the American legal system. This fundamentally flawed assumption has prevented any of these schools of thought from providing meaningful solutions to the devaluation of the modern American judicial system. By adopting result orientation, these legal philosophies have been the indirect vehicles for the doctrines of capitalism, materialism, or economic efficiency to delineate the conception of American justice. The rejection of result orientation will reestablish the old English common law notion that the law is a commitment to a communal morality; cases and statutes are merely tools to evidence the underlying values on which society is premised.

Precedent, in its modern interpretation, reflects the result orientation which drives contemporary Western civilization. The modern *stare decisis* system is designed to produce a consistency of result and a similar outcome in fact patterns that are identical or nearly so.<sup>22</sup> This perspective is an integral part of the economic efficiencies which dominate life in America. Results become predictable, business can operate in a climate of certainty, and the system produces a clear delineation between winners and losers.<sup>23</sup> In such an environment, the primary focus of lawyers, and the law schools which train them, becomes acquiring the skills needed to demonstrate either the similarities or dissimilarities between the immediate fact pattern and the fact pattern of available precedent, depending on whether the *stare decisis* results appeal to your client.<sup>24</sup>

Contemporary legal theories and the modern concept of precedent present a new problem of formalism. When business or economic considerations significantly influence the law, the drive for profit or efficiency will demand that the law be predictable and certain.<sup>25</sup> Reliance on these goals will reduce the law to a rigid structuralism which is unresponsive to either social problems or human needs.<sup>26</sup>

When the old English common law encountered this type of formalism, the establishment of the Courts of Chancery and eventually the system of equity restored values to the law.<sup>27</sup> In the period from the 1880's to the early 1930's, the demands of capitalism and the need to establish an expanded modern economy and exploit natural resources mandated a legal predictability and certainty which essentially co-opted natural law theorists.<sup>28</sup> During this period, a variant of natural law theory, eventually labeled "Lochnerism," and a nascent form of legal positivism, later referred to as formalism, combined to provide the theoretical justification for a legal system that embodied the value of certainty, defended a politically conservative social agenda, and mandated an analytical and intellectual ri-

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22 See *infra* notes 164-67 and accompanying text.

23 See DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* 34 (1983); Schuman, *supra* note 1, at 4; *infra* text accompanying notes 168-71.

24 See KENNEDY, *supra* note 23, at 15-16; *infra* note 166 and accompanying text.

25 See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 32-33 (1983).

26 See Steven M. Quevedo, Comment, *Formalism and Instrumentalist Legal Reason and Legal Theory*, 73 CAL. L. REV. 119 (1985); see also MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 11 (1987).

27 See POUND, *supra* note 4, at 215.

28 See POSNER, *supra* note 5, at 255-56.

gidity in practice and application.<sup>29</sup> The reaction to this doctrinal inflexibility was the theory of legal realism, the dominant legal theory from the late 1920s until the 1940s.<sup>30</sup> Although this response produced significant social and economic reform and discredited Lochnerism and formalism, legal realism continued the devaluation of American legal thought by accepting result orientation and insisting that all values were subjective and must be divorced from the law.<sup>31</sup>

In the post-World War II era, doctrines of economic efficiency have again dominated the law as America has created the world's greatest economy. The dominant legal theory of the 1950s and 1960s, the concepts of legal process, correspondingly emphasized predictability and certainty.<sup>32</sup> The current school of law and economics also echoes the importance of these characteristics.<sup>33</sup> The influence of these post-World War II schools of legal thought has produced a vision of the law and an understanding of precedent which has devalued the modern legal order and exacerbated all of the deleterious effects suffered by society in its earlier confrontations with formalism.

The problems inherent in result orientation and its consequent formalism are legion and serious. As precedent has evolved in modern America, judges do not sufficiently focus on the values needed for a meaningful dispensation of justice and instead are satisfied if the result produced is, in some arguable way, consistent with prior decisions. This attitude is epitomized by the famous Oliver W. Holmes quotation, "Great cases like hard cases make bad law."<sup>34</sup> The law is only "bad" because the proper result for the parties does not fit conveniently into the result oriented system dictated by the established precedent. Sympathetic fact patterns are perceived as a judicial nightmare because of the clash between the "human" values of the culture and the now higher priority of consistency of result.<sup>35</sup> In addition, the premise of this precedential system is flawed in that fact patterns are easily manipulated as daily life and its at-

29 See John Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 833-35 (1931); Oliver W. Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). See generally Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054 (1995).

30 See *infra* notes 127-31 and accompanying text.

31 See *infra* notes 130-31 and accompanying text.

32 See HERBERT WECHSLER, *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 13-21 (1961).

33 See POSNER, *supra* note 5, at 261-64.

34 Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgement. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

35 For evidence of the influence of this thinking in a variety of legal subjects, see David B. Gaebler, *Negligence, Economic Loss and the U.C.C.*, 61 IND. L.J. 593, 596 (1986); Rudolph J. Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285, 324-36 (1989); Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust and Deconstruction*, 73 GEO. L.J. 89, 107 n.109 (1984); Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses under ERISA*, 76 IOWA L. REV. 431, 434 (1991). Other writers are direct in stating that precedent and predictability demand a certain amount of injustice in the system. See, e.g., Grey, *supra* note 25, at 13-15.

tendant legal problems become more complicated. By the second year of law school, even an average student can make logical and plausible arguments either analogizing or distinguishing one fact pattern from another. This reliance on precedent devalues judges and lawyers by permitting them to ignore the systemic values which should be part of any meaningful legal system and instead manipulate the precedential results.<sup>36</sup>

The lesson to be derived from Indo-Aryan philosophy is to reject this result-oriented system in favor of a value-directed structure which emphasizes the motivations for judicial decisions rather than the results themselves. Judges should be encouraged to decide cases with a consistency of motive rather than a consistency of result. To that end, judicial decisions should be made on the basis of being charitable, being compassionate, and being able to control selfish appetites and desires.<sup>37</sup> Judges will obviously differ in their assessments of how these values should be applied, but at least the judicial inquiry will be properly focused on the values from which law derives its authority. Even if the parties disagree with the outcome of any particular dispute, their perceptions of how the judicial system treated them would be favorably affected if they believed that the judge tried to assess the human interests at stake and simply disagreed with one of the parties. Such an experience would be markedly different from the distrust and debasement that many people feel today when they encounter the legal system.<sup>38</sup> That modern reaction is, to some significant extent, attributable to the belief that real human interests are never addressed and that "the law" is a set of technical distinctions that are difficult for the average person to understand but which can be easily manipulated by avaricious lawyers and result-oriented judges.<sup>39</sup> Such a shift in emphasis would restore precedent to its proper role, envisioned historically, not as an end or goal in itself, but as a tool to reflect or discover the traditional values—charity, compassion, and self-denial—which lie at the heart of the legal structure and society itself.<sup>40</sup>

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<sup>36</sup> See KELMAN, *supra* note 26, at 12; KENNEDY, *supra* note 23, at 6-7. This interpretation of precedent is also a factor in the litigation explosion which characterizes the modern American legal system. If a client brings a frivolous case into a lawyer's office, the attorney's focus is not on assessing the individual and societal harm in conducting frivolous lawsuits, but rather is centered on whether the frivolous fact pattern can be arguably analogized to a prior fact pattern which produced a victory. If there is a plausible similarity, file the papers regardless of the costs and harm involved. This attitude is further encouraged by a body of thought in modern legal education that no argument can validly be labelled outrageous or ridiculous. See Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250 (1989) (presenting opposing views about the meaning of the constitutional age requirement for U.S. President).

<sup>37</sup> See *infra* notes 153-63 and accompanying text.

<sup>38</sup> Henry Weinstein, *Judge Assails High Court Again*, L.A. TIMES, May 17, 1992, at A3 (stating that "the growing distrust of the legal system has clear practical consequences"); *CNN & Company* (CNN television broadcast, Sept. 2, 1993), available in LEXIS, News Library, Transcript File (Laurie Levenson, former L.A. prosecutor, talking about citizen distrust of the U.S. legal system).

<sup>39</sup> For evidence of an early expression of this feeling, see WILLIAM SHAKESPEARE, *HAMLET* act 5, sc. I, lines 106-21, in *THE LIVING SHAKESPEARE* 751, 802 (Oscar J. Campbell ed., 1958). See also KENNEDY, *supra* note 23, at 16; Judith Colp, *The Trials of Fred Graham; In the Wake of the King Case Court TV's Anchor Defends Jury System*, WASH. TIMES, May 18, 1992, at D1 (explaining how Court TV helps the average person, the nonlawyer to understand the "daunting" and "alienating" courtroom process).

<sup>40</sup> See *infra* notes 172-79 and accompanying text.



This process may provide less certainty in producing given results, but it will ultimately produce a judiciary that speaks with some legitimate moral authority and a system which, through its people, will ultimately reflect the motivations needed in any society which truly respects its members.

### I. *THE WASTE LAND*

Much of the poem's message is embodied in the short preface which, in fact, begins *The Waste Land*.<sup>41</sup> This quotation from the *Satyricon* of Petronius focuses on the frustration and unhappiness that results from expectations turning sour.<sup>42</sup> The passage centers on the Sybil at Cumae, one of the prophetic women of Greek mythology, who asked the gods for eternal life—a goal all too commonplace in a materialistic society which dreads death and doubts the possibility of an afterlife—but forgot to include a request for eternal youth. She therefore could never die, but was trapped for eternity in a decrepit and painful body. Her despair was so great that her only desire became what she feared most—death.<sup>43</sup>

The quotation is ripe with meaning for Western civilization in the twentieth century. The quotations in Latin and Greek convey the images of the roots of Western civilization. However, what the culture thought it wanted—materialistic success—has instead turned into a daily nightmare for its members. Existence in Western civilization, like the life of the Sybil, has been devalued because the society has gotten what it thought it wanted—wealth. However, Eliot perceives that affluence, like eternal life, was a trap and its attainment has divorced modern Western civilization from its roots and values, leaving in its wake only a desire to die.<sup>44</sup>

In the first three parts of *The Waste Land*, T.S. Eliot eloquently decries the harsh effects that Western civilization's pursuit of wealth has wrought on its human inhabitants.<sup>45</sup> Despite the achievement of material success, most of the individuals depicted in the poem are leading meaningless lives, devoid of any real values or sense of community.<sup>46</sup> The poem emphasizes its concern with all of Western civilization, not just Great Britain or America, through frequent references in the various languages of Europe.<sup>47</sup> The poem depicts the society of 1922 as being increasingly divorced from its past, a history which at one time may have possessed

41 Nam Sibyllam quidem Cumis ego ipse oculis meis vidi in ampulla pendere, et cum illi pueri dicerent: Σίβυλλα τί θέλεις; respondebat illa: ἀποθανεῖν θέλω.

ELIOT, *supra* note 8, at 37

42 With my very own eyes I saw the Sybil suspended in a glass case at Cumae, and when the boys said: "Sybil, what is the matter?", she would always reply: "I yearn to die."

PETRONIUS, *THE SATYRICON* 101 (J. M. Mitchell trans., 1923).

43 ELIOT, *supra* note 8, at 37.

44 *Id.*

45 See *id.* at lines 77-311; Schuman, *supra* note 1, at 1-2 (describing the characters in *The Waste Land* as cut off from passion, piety, reverence, and tradition, the attributes that give life meaning).

46 See ELIOT, *supra* note 8 at lines 39-41, 60-76, 110-38, 139-72 & 215-56 (describing respectively the poetic treatment of the rich Lithuanians, the Londoners, the couple, the people at the bar, and the typist).

47 The languages of Western civilization referenced in *The Waste Land* are English, Latin, Greek (preface), German, French, and Italian.

vibrancy and meaning but also sowed the seeds for the creation of the modern waste land.<sup>48</sup> This point is highlighted by the stark contrast between the despair depicted in the daily lives of twentieth century Europeans and the heroic aspirations contained in the art and literature of the past.<sup>49</sup>

The civilization depicted in *The Waste Land* is not a society that is poor or lacking in material wealth, but rather a community that has lost its direction amidst jobs and plenty.<sup>50</sup> References to violence and dysfunctional sexuality convey the despair which permeates the culture. Through historical associations, Eliot suggests that aggression and violence have become an integral part of Western civilization.<sup>51</sup> This militaristic viewpoint has assisted Western civilization in its accumulation of wealth and resources, but at the cost of sacrificing the values which would otherwise give meaning to individual lives.<sup>52</sup> The hopelessness which consumes the inhabitants of the Waste Land reflects itself through the sexual activities depicted in the poem.<sup>53</sup> Sex itself is no longer an expression of love between two committed individuals, but rather a meaningless exercise between distracted participants.<sup>54</sup> Eliot's sense, conveyed through the character of Tiresias,<sup>55</sup> is that sexual activity devoid of any vitality is hauntingly predictable given the distortion of values present in the culture.<sup>56</sup>

48 *The Waste Land* is replete with historical references including Jesus Christ, ancient Phoenician sailors, the myth of Philomel, Tiresias, Elizabeth and Leicester, St. Augustine, and medieval knights searching for the Holy Grail.

49 This point is especially telling in the contrasts between (1) the ancient Phoenician sailors and Mr. Eugenides; (2) the typist, Elizabeth, and Leicester; and (3) Madame Sosortris and Tiresias.

50 See ELIOT, *supra* note 8, at lines 8-18, 77-100, 208-14, 261-65 & 279-85 (referencing respectively resorts and royalty, the bedroom, Mr. Eugenides, Magnus Martyr, and Elizabeth and Leicester).

51 *Id.* at lines 60-76.

52 *Id.* at lines 396-434.

53 *Id.* at lines 37-42, 111-38, 139-73, 207-44 & 215-56 (containing respectively the poem's images of sexuality in the description of the hyacinth girl, the couple in the bedroom, the women talking in the pub, Mr. Eugenides, and the typist and the clerk.)

54 The time is now propitious, as he guesses,  
The meal is ended, she is bored and tired,  
Endeavors to engage her in caresses,  
Which still are unreproved, if undesired.  
Flushed and decided, he assaults at once;  
Exploring hands encounter no defence;  
His vanity requires no response,  
And makes a welcome of indifference.

*Id.* at lines 235-42.

55 I Tiresias, old man with wrinkled dugs  
Perceived the scene, and foretold the rest—  
I too awaited the expected guest.

*Id.* at lines 228-29.

Tiresias, a blind prophet, was a man who was changed into a woman for seven years. He was later blinded and given the gift of prophecy. PIERRE GRIMAL, *THE PENGUIN DICTIONARY OF CLASSICAL MYTHOLOGY* 439-40 (Stephen Kershaw ed. & A. R. Maxwell-Hyslop trans., Penguin Books 1991) (1986).

56 What are the roots that clutch, what branches grow  
Out of this stony rubbish? Son of man,  
You cannot say, or guess, for you know only  
A heap of broken images, where the sun beats,  
And the dead tree gives no shelter, the cricket no relief,  
And the dry stone no sound of water. Only  
There is shadow under this red rock,

The explicit image of the devaluation of love making also contains a deeper, implicit problem for the residents of the Waste Land—a lack of any meaningful communications between individuals, even husband and wife.<sup>57</sup> The poem conveys the sense of frustration inherent in humans when no one appears to be listening to their cares and concerns. The Waste Land is so dominated by individualism and self-interest that its inhabitants are incapable of any real intimacy or dialogue with others. The lack of communication accentuates the selfishness which dominates the inhabitants of Western civilization—a satisfaction of immediate personal needs to the exclusion of other concerns, especially consideration of someone else or the denial of self-interest.<sup>58</sup> In a culture streamlined to maximize material gain and to delineate winners and losers, this devaluing of human dignity seems inevitable.<sup>59</sup>

However, *The Waste Land* is, in some ways, a triumph of the human spirit. The poem consistently conveys an image that there is a deeper soul to the inhabitants of the culture, a part of them that cannot be suffocated by the ravages of Western civilization. The most frequently occurring word and image in the first three parts is the idea of “nothing.”<sup>60</sup> This language reflects the void at the core of the culture, the lack of meaning and values in human life even when surrounded by objects of physical beauty.<sup>61</sup> However, the image also reflects that humans are not happy with that void, and are searching for some deeper meaning in their lives or in their culture.<sup>62</sup> Admittedly, the poem seems to indicate that such a search will end in frustration and despair if its ambit is defined by Western civilization;<sup>63</sup> however, the fact that the search exists is, in some sense, a triumph of the

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(Come in under the shadow of this red rock),  
And I will show you something different from either  
Your shadow at morning striding behind you  
Or your shadow at evening rising to meet you;  
I will show you fear in a handful of dust.

ELIOT, *supra* note 8, at lines 19-30.

57 *Id.* at lines 111-38.

58 *See id.* at lines 111-38, 139-72, 207-14 & 215-56 (describing respectively the conversation between the couple, the talk among the ladies in the pub, Mr. Eugenides, and the clerk and the typist).

59 Phlebas the Phoenician, a fortnight dead,  
Forgot the cry of gulls, and the deep sea swell  
And the profit and loss.

A current under sea  
Picked his bones in whispers. As he rose and fell  
He passed the stages of his age and youth  
Entering the whirlpool.

Gentile or Jew  
O you who turn the wheel and look to windward,  
Consider Phlebas, who was once handsome and tall as you.

*Id.* at lines 312-21.

60 *See, e.g., id.* at lines 40, 120-27 & 302-05.

61 *Id.* at lines 35-40, 77-120 & 279-302 (using respectively the word “nothing” after the flower imagery associated with the hyacinth girl, after the description of the bedroom, and after the depiction of Elizabeth’s barge).

62 The word “nothing” frequently appears within thought after dialogue.

63 The references to Greek mythology, the life of Jesus Christ, the Fisher King, and the knights searching for the Holy Grail do not provide an answer for those unhappy with “nothing” and searching for meaning in life.

human spirit and the resiliency of a part of each human life that craves value and meaning.<sup>64</sup> This desire cannot be extinguished even by the destructive enticements inherent in the distorted values of Western civilization.

The fifth part of the poem presents Eliot's message of salvation for the Waste Land. The section begins with references to the story of Christ in the New Testament.<sup>65</sup> Those images are combined with a search for water, the traditional sign of life-giving and renewal.<sup>66</sup> The first section to this part ends by referencing the approach to the Chapel Perilous by knights searching for the Holy Grail.<sup>67</sup> The scene then dramatically shifts to India and its sacred river, the Ganges,<sup>68</sup> where rain and redemption are to be found. The message of life is given in three Sanskrit words derived from the Upanishads—Datta, Dayadhvam and Damyata, which mean give, sympathize, and control, respectively.<sup>69</sup> In order to achieve real meaning in life, Eliot reminds his readers of the values at the core of Western religion by quoting the religious convictions of Indo-Aryan tradition. The pursuit of results, the attainment of wealth, and the achievement of being a "winner" instead of a "loser" are, in the long run, as devoid of real meaning as the Sybil's request for eternal life. True immortality is contained within the teachings of *The Upanishads*, *The Bhagavad-Gita* and the religious principles which pre-date Christianity—give truly of yourself to others, sympathize with the plight of others because of our human commonality, and control the base instincts which exist within each person.<sup>70</sup> Do this, and an individual can possess the goal described in *The Upanishads* and quoted in *The Waste Land*—in Sanskrit, "shantih, shantih, shantih"; in English, "The Peace which passeth understanding."<sup>71</sup>

## II. *THE UPANISHADS AND THE BHAGAVAD-GITA*

*The Waste Land's* conclusion directs the reader to *The Upanishads* and, by implication, the thought of ancient Indo-Aryan culture represented by those works. The Upanishads are part of the oldest scriptures of India and

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64 For a similar thought in a different Eliot work, see T.S. ELIOT, *Preludes*, in *THE COMPLETE POEMS AND PLAYS*, 1909-50, at 12-13 (1971):

I am moved by fancies that are curled  
Around these images, and cling:  
The notion of some infinitely gentle  
Infinitely suffering thing.

*Id.* at 13, lines 10-13.

65 ELIOT, *supra* note 8, at lines 322-28 & 360-66.

66 *Id.* at lines 331-59.

67 *Id.* at lines 386-94.

68 *Id.* at lines 396-99.

69 *Id.* at lines 402, 412 & 419 (Datta, Dayadhvam, and Damyata respectively); see *id.* at 54 n.402 (describing Eliot's translation of these Sanskrit words from *The Waste Land*).

70 Unfortunately, *The Waste Land* also indicates Eliot's belief that Western Civilization will never accept these lessons from Indo-Aryan thought and will, instead, merely consider those who proclaim such a message to be insane:

These fragments I have shored against my ruins  
Why then Ile fit you. Hieronymo's mad againe.

*Id.* at lines 431-32.

71 *Id.* at line 434 (concluding line); see *id.* at 55 n.434 (describing Eliot's translation of these Sanskrit words from *The Waste Land*).

are concerned with knowledge of Brahman, the Supreme Being, and the basic theology of what became the Hindu religion.<sup>72</sup> The text itself is actually a collection of many different stories.<sup>73</sup> These narratives provide different perspectives on life and knowledge of Brahman. One Upanishad, *Isha*, conveys directly one of the base truths of the work:

Well may he be content to live a hundred years who acts without attachment—who works his work with earnestness, but without desire, not yearning for its fruits—he, and he alone.<sup>74</sup>

The secret of life is therefore found by working, but without attachment to the products of the labor. A life at one with Brahman is to be found in the earnest effort with which one works, not in the results which spring from such activity. However, *Isha* clearly states that true meaning in life can only be discovered by work in this world:

To darkness are they doomed who devote themselves only to life in the world, and to a greater darkness they who devote themselves only to meditation . . . .

They who devote themselves both to life in the world and to meditation, by life in the world overcome death, and by meditation achieve immortality.

To darkness are they doomed who worship only the body, and to greater darkness they who worship only the spirit.<sup>75</sup>

A different Upanishad, *Mundaka*, clearly indicates that life in the world is not meant to be the observance of religious rituals or even the performance of charitable acts.<sup>76</sup>

*Brihadaranyaka* is The Upanishad directly referenced by Eliot in *The Waste Land*.<sup>77</sup> Most of that teaching is a dialogue in which wise men are instructing kings on the nature of Brahman and the transcendence of good and evil.<sup>78</sup> At the end of *Brihadaranyaka*, the scene shifts to three different groups of people—gods, men, and asuras—asking Prajapati, their wise ancestor, for instruction.<sup>79</sup> The gods ask Prajapati to teach them and he answers “Da” which they understand as “Damayata” or be self-controlled.<sup>80</sup> The men ask Prajapati to teach them and he answers “Da” which they understand as “Datta” or be charitable.<sup>81</sup> The asuras then ask Prajapati to teach them and he answers “Da” which they understand as “Dayadhivam”

72 THE UPANISHADS, BREATH OF THE ETERNAL, *supra* note 12, at ix.

73 *Id.*

74 *Isha*, in THE UPANISHADS, BREATH OF THE ETERNAL, *supra* note 12, at 27.

75 *Id.* at 27-28.

76 “Considering religion to be observance of rituals and performance of acts of charity, the deluded remain ignorant of the highest good.” *Mundaka*, in THE UPANISHADS, BREATH OF THE ETERNAL, *supra* note 12, at 44.

77 ELIOT, *supra* note 8, at 54 n.402.

78 *Brihadaranyaka*, in THE UPANISHADS, BREATH OF THE ETERNAL, *supra* note 12, at 80-112.

79 *Id.* at 112.

80 *Id.*

81 *Id.*

or be compassionate.<sup>82</sup> Then the storm cloud thunders three times to repeat all three directives.<sup>83</sup>

Another basic text of the Indo-Aryan tradition is *The Bhagavad-Gita*, a poetic tale set before a major battle for political supremacy in ancient India.<sup>84</sup> The battle is a civil war, with friends and kinsmen on each side.<sup>85</sup> The main characters are the warrior, Arjuna, and his charioteer, who is, in fact, the god Krishna.<sup>86</sup> On the eve of the battle, Arjuna is distraught that so many friends and relatives will be killed.<sup>87</sup> He thinks he should withdraw from the battle and preserve the lives of all involved.<sup>88</sup>

*The Bhagavad-Gita* is a dialogue between Krishna and Arjuna regarding the meaning of life.<sup>89</sup> Krishna clearly tells Arjuna that life must be comprised of actions, that people must do things in the world:

A man cannot escape the force  
of action by abstaining from actions;  
he does not attain success  
just by renunciation.  
No one exists for even an instant  
without performing action;  
however unwilling, every being is forced  
to act by the qualities of nature.<sup>90</sup>

The manner by which action is performed is the path to understanding life. Krishna reveals that the true spirit detaches himself from the consequences which action may possess:

Be intent on action,  
not on the fruits of action;  
avoid attraction to the fruits  
and attachment to inaction!  
Perform actions, firm in discipline,  
relinquishing attachment;  
be impartial to failure and success—  
this equanimity is called discipline.  
Arjuna, action is far inferior  
to the discipline of understanding;  
so seek refuge in understanding—pitiful  
are men drawn by fruits of action.<sup>91</sup>

Krishna later repeats this core message of *The Bhagavad-Gita*:

82 *Id.*

83 *Id.*

84 THE BHAGAVAD-GITA: KRISHNA'S COUNSEL IN TIME OF WAR, *supra* note 13, at 4-6 (Introduction).

85 *Id.* at 21-23 (the first teaching, "Arjuna's Dejection").

86 *Id.* at 7 (Introduction).

87 *Id.* at 24-27 (the first teaching, "Arjuna's Dejection").

88 *Id.* at 29-31 (the second teaching, "Philosophy and Spiritual Discipline").

89 *Id.* at 143 (the eighteenth teaching, "The Wondrous Dialogue Concludes").

90 *Id.* at 41 (the third teaching, "Discipline of Action").

91 *Id.* at 36 (the second teaching, "Philosophy and Spiritual Discipline").

Abandoning attachment to fruits  
of action, always content, independent,  
he does nothing at all  
even when he engages in action.

• • • •

Content with whatever comes by chance,  
beyond dualities, free from envy,  
impartial to failure and success,  
he is not bound even when he acts.<sup>92</sup>

Krishna reemphasizes this divine insight towards the end of the dialogue:

If you are powerless to do  
even this, rely on my discipline,  
be self-controlled,  
and reject all fruit of action.  
Knowledge is better than practice,  
meditation better than knowledge,  
rejecting fruits of action  
is better still—it brings peace.

• • • •

Impartial to foe and friend,  
honor and contempt,  
cold and heat, joy and suffering,  
he is free from attachment.  
Neutral to blame and praise,  
silent, content with his fate,  
unsheltered, firm in thought,  
the man of devotion is dear to me.<sup>93</sup>

Krishna therefore advises Arjuna to join the battle because his duty dictates that he act in furtherance of a just cause.<sup>94</sup> Having given the message of meaning in life and the attainment of eternal bliss, Krishna also describes the attributes of men who forsake this road and instead become demonic:

They say that the world  
has no truth, no basis, no god,  
that no power of mutual dependence  
is its cause, but only desire.  
Mired in this view, lost to themselves  
with their meager understanding,  
these fiends contrive terrible acts  
to destroy the world.

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92 *Id.* at 52 (the fourth teaching, "Knowledge").

93 *Id.* at 112-13 (the twelfth teaching, "Devotion").

94 *Id.* at 150-51 (the eighteenth teaching, "The Wonderous Dialogue Concludes").

Subject to insatiable desire,  
 drunk with hypocrisy and pride,  
 holding false notions from delusion,  
 they act with impure vows.  
 In their certainty that life  
 consists in sating their desires,  
 they suffer immeasurable anxiety  
 that ends only with death.<sup>95</sup>

Both of these ancient works therefore seem to possess consistent themes. Human beings are called on to perform actions in the world during their lives. Meditation alone or any form of inaction is condemned as not leading to the path of understanding.<sup>96</sup> However, actions must be done without reference to their results. In this perspective, action is performed without regard to its product, including whether the result is labelled good or evil.<sup>97</sup> The truly demonic aspect of human existence is to perform actions only for the benefits they can provide for you, only to satiate your desires.<sup>98</sup> The devotion to results and self-interest correspondingly emphasizes certainty as a value of existence. These demonic beliefs prevent humans from understanding the real meaning of existence and from attaining true happiness. True meaning in life is found by performing actions informed by the core values of charity, compassion, and self-denial—three virtues which are themselves unconcerned with outcome, but focused rather on motivation.<sup>99</sup> The actions that should be performed are therefore those that are grounded in giving to others, sympathizing with the plight of all human beings and controlling selfish wants and desires.

### III. CULTURAL IMPLICATIONS OF *THE WASTE LAND*

Modern America, in many ways the pinnacle of success for Western civilization, suffers more from the afflictions described in the first three sections of *The Waste Land* than the Europe of 1922 observed by Eliot. Added to the ravages of violence, dysfunctional sexuality, and miscommunication are the modern realizations of the social devaluation caused by racism and sexism.<sup>100</sup> Many of these disorders can be attributable to the culture's dogged obsession with economic efficiencies and the attainment of mate-

95 *Id.* at 134 (the sixteenth teaching, "The Divine and Demonic in Man").

96 *Id.* at 41 (the third teaching, "Discipline of Action"); *Isha*, in *THE UPANISHADS, BREATH OF THE ETERNAL*, *supra* note 12, at 27-28.

97 *THE BHAGAVAD-GITA: KRISHNA'S COUNSEL IN TIME OF WAR*, *supra* note 13, at 124 (the fourteenth teaching, "The Triad of Nature's Qualities"); *Brihadaranyaka*, in *THE UPANISHADS, BREATH OF THE ETERNAL*, *supra* note 12, at 111.

98 *THE BHAGAVAD-GITA: KRISHNA'S COUNSEL IN TIME OF WAR*, *supra* note 13, at 134-35 (the sixteenth teaching, "The Divine and the Demonic in Man"); *Brihadaranyaka*, in *THE UPANISHADS, BREATH OF THE ETERNAL*, *supra* note 12, at 94.

99 *THE BHAGAVAD-GITA: KRISHNA'S COUNSEL IN TIME OF WAR*, *supra* note 13, at 143-46 (the eighteenth teaching, "The Wondrous Dialogue Concludes"); *Brihadaranyaka*, in *THE UPANISHADS, BREATH OF THE ETERNAL*, *supra* note 12, at 81.

100 See Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 *HARV. L. REV.* 985, 1011 (1990).



rial wealth.<sup>101</sup> America's achievement of affluence has necessarily degraded its individual citizens and devalued its people because of the distorted emphasis on results and achievements needed to make economic efficiencies possible and the concomitant denial of the three traditional religious and communal values highlighted by Indo-Aryan thought. However, *The Waste Land's* solution also contains the seeds for producing a regeneration of values and meaning in the America of the twenty-first century.

Eliot's clear poetic message is that Western civilization can only rekindle value and meaning in its existence by reexamining Indo-Aryan thought and philosophy.<sup>102</sup> The broader, cultural message of such an investigation is to implement the values of charity, compassion, and self-denial by rejecting the fruits of action.<sup>103</sup> As a society, this interpretation would include a shift in emphasis from results or achievements onto motivation and good faith effort. A meaningful life would therefore be judged by the reasons why an individual acted as he did rather than the amount of possessions he was able to acquire. Such a shift would also restore the primacy of the religious or communal perspective historically believed to provide life with meaning. The distorted emphasis on the importance of the individual and the fulfillment of selfish wants and desires would be eliminated.

Inherent in the abnegation of result orientation is a rejection of the value of certainty.<sup>104</sup> The defense of economic efficiencies frequently includes a stirring recitation of the benefits of certainty.<sup>105</sup> Since certainty and predictability produce a better business climate, their virtues are spread across the culture and held as an ideal for all fields of thought and endeavor.<sup>106</sup> In fact, pursuit of certainty is the largest illusion that humans impose on reality.<sup>107</sup> Life is constant change and adaptation. One better understands life when one accepts that all life is change and that nothing is constant, nothing is certain.<sup>108</sup> A pursuit of certainty will produce some short term benefits, but will ultimately create a culture disassociated from its roots and out of rhythm with the natural order.<sup>109</sup> In such a society, human life may well be meaningless as individuals pursue the attributes of

101 See Reginald L. Robinson, *The Impact of Hobbes's Empirical Natural Law on Title VII's Effectiveness: A Hegelian Critique*, 25 CONN. L. REV. 607, 611, 615-16 (1993) (identifying liberalism and utilitarianism in the nineteenth century, the legal doctrines devoted to business expansion, as prime causes of modern racism and sexism); Lawrence B. Solum, *Pluralism and Modernity*, 66 CHI.-KENT L. REV. 93 (1990).

102 ELIOT, *supra* note 8, at lines 396-434. The object of the searching in Part V, reinforced as the solution to all the problems in the poem by its positioning at the conclusion of the entire work itself, is to be found in the land of the Ganges, in Sanskrit.

103 See *supra* notes 65-99 and accompanying text; Lynn N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987) (defining empathy similarly to this Article's use of sympathy and arguing for its inclusion within the law).

104 See *supra* note 95 and accompanying text. Certainty is associated with the demonic.

105 See POUND, *supra* note 4, at 12; David M. Trubek, *Max Weber on Law and The Rise of Capitalism*, 1972 WIS. L. REV. 720, 742-43.

106 See Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 235 (1971); Grey, *supra* note 25, at 32-33; Trubek, *supra* note 105, at 740-41.

107 See Holmes, *supra* note 6, at 465-67.

108 See JOHN S. DUNNE, *THE WAY OF ALL THE EARTH* 42-44 (1972).

109 An institutional pursuit of certainty is rarely successful in the long term. The modern American legal system, based in many ways on principles of certainty and predictability, abounds with uncertainty and delay. See *infra* note 162 and accompanying text.

wealth and resist the inevitability of change.<sup>110</sup> The Indo-Aryan emphasis on motivation carries with it an implicit rejection of certainty and an acceptance of change.<sup>111</sup> Such a perspective is much more likely to bring an individual personal contentment and a harmony with the universe.

Whatever an individual's interpretation of Datta, Dayadhvam, and Damyata, its implications for assessing a meaningful motivation are clear.<sup>112</sup> Western culture will not regain its values simply by rejecting results and accepting motivations. The most meaningful form of motivation is one grounded in a recognition of the primacy of the interests of people, not things, and an acceptance of the commonality of the human experience. This insight is the core to the thunder's message of charity, compassion, and self-denial. These virtues provide society with an orientation broader than the immediate satisfaction of selfish wants and desires. Any moral society must be based on a religious or communal perspective which emphasizes something greater than individualism. These three humanistic values provide that viewpoint and, in fact, underlie the legal language chosen as the cornerstones of American justice—the equality of all people;<sup>113</sup> the inalienable right to life, liberty, and the pursuit of happiness;<sup>114</sup> the freedom of speech;<sup>115</sup> and the entitlement to due process.<sup>116</sup> This broader religious or communal perspective was always present in Western civilization and achieved a clear expression within the American legal system. However, as those humanistic motivations and the ideal of the common good collided with the goals of economic efficiency, the attainment of material wealth has predominated.<sup>117</sup>

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110 He, the young man carbuncular, arrives,  
A small house agent's clerk, with one bold stare,  
One of the low on whom assurance sits  
As a silk hat on a Bradford millionaire.

ELIOT, *supra* note 8, at lines 231-234.

His soul stretched tight across the skies  
That fade behind a city block,  
Or trampled by insistent feet  
At four and five and six o'clock;  
And short square fingers stuffing pipes,  
And evening newspapers, and eyes  
Assured of certain certainties,  
The conscience of a blackened street  
Impatient to assume the world.

ELIOT, *supra* note 64 at 13, lines 1-9.

111 See DUNNE, *supra* note 108, at 76-84.

If there is a lesson in the history of religious experience in modern times, it is that the quest for certainty is self-defeating. The more earnestly a man seeks for certainty, the more uncertain he becomes; the more strenuously he tries to remove all doubt, the more doubt he experiences.

JOHN S. DUNNE, *A SEARCH FOR GOD IN TIME AND MEMORY* 217 (1977).

112 ELIOT, *supra* note 8, at lines 424-34; see also Leslie Bender, *Feminist (Re) Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 875 (arguing for the values of compassion, empathy, and caring to be an active part of the law).

113 U.S. CONST. amend. XIV, § 1; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

114 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

115 U.S. CONST. amend. I.

116 *Id.* at amend. V & XIV; POUND, *supra* note 4, at 81 (noting that individualism was clearly subservient to community values under the old English common law).

117 See Trubek, *supra* note 105, at 744-45 (capitalism, in order to be successful, needed to destroy all other constraints on, and motivations for, conduct—especially religious and commu-

## IV. THE JUDICIARY

Although the insights garnered from *The Waste Land* have application for a variety of legal settings, this Article examines the application of that thought for legal theory and the value of precedent. These subject matters are of vital importance to the actual dispensation of American justice. In each topic, the result orientation of Western civilization has had a dramatic, although often unnoticed, influence in shaping the American legal system as it exists today.

A. *Legal Theory*

Various movements in American jurisprudence have examined the nature of the law, morality, and directly or indirectly, the meaning of precedent. The oldest of these is the theory of the natural law. These concepts influenced English common law and the basic documents of American democracy, the Declaration of Independence and the Constitution.<sup>118</sup> This theory is premised on a preexisting rule of law that derives its authority from God (in its earliest version) or rational deduction from man in the state of nature.<sup>119</sup> As applied in the old English common law, natural law dictated that judges never made law, they simply discovered or declared the previously unstated aspects of the preexisting law as required by immediate fact patterns.<sup>120</sup> In this perspective, a king, a legislature, or a democratic majority was not subordinate to a judge, but was subject to the law.<sup>121</sup> Social compacts may create governments and prescribe structures and relationships in primal constitutions or documents, but these understandings could never fully capture the entirety of the preexisting law and they remain subordinate to it.<sup>122</sup> If the natural law truly informed the actual decisions of judges and legislators, virtue and morality would be part of communal values and individual lives would be filled with happiness.<sup>123</sup>

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nal values); see also President Clinton's "Politics of Meaning" (Larry King Live television broadcast, June 14, 1993), available in Westlaw, LarryKing database, Transcript #848 (describing the "politics of meaning" as requiring "a transformation of this world from selfishness to caring" and a "politics that encourages rather than discourages moral behavior").

118 For an explanation regarding the effect of natural justice in the formation of English common law, see PAUL JACKSON, *NATURAL JUSTICE* 13-22 (1979). See also ALESSANDRO P. D'ENTRÈVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 122 (1970) (describing the impact of natural law on the Declaration of Independence and the United States Constitution); H. H. MARSHALL, *NATURAL JUSTICE* 7-11 (1959).

119 Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 Wis. L. Rev. 1431, 1540-41 (identifying Thomas Aquinas as the leading source of the natural law derived from God and John Locke as the leading source of the natural law as rationally derived from the natural state of man).

120 See 1 WILLIAM BLACKSTONE, *COMMENTARIES* 61 (photo. reprint 1979) (1765); POUND, *supra* note 4, at 11; Robin L. West, *Adjudication Is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 205 (1987).

121 POUND, *supra* note 4, at 60-61, 64 (attributing the initial formulation of the concept to Sir Edward Coke).

122 *Id.* at 75-76 (attributing the beginning of individualism in the law to the emergence of these doctrines in the eighteenth century).

123 STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME* 68-69, 145 (1991) (explaining that actions which harmonize with the law of nature are not only respectable but also contribute to a person's happiness); Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 799 (1993) (characterizing the common form of natural law as "maintaining

Certain natural law theorists believed that the preexisting law also dictated certain inalienable rights essential to the pursuit of happiness by free people.<sup>124</sup> These rights existed regardless of their inclusion within written constitutions or other documents.<sup>125</sup> Natural law and its variants dominated legal jurisprudence until the twentieth century and, in differing aspects, retain vitality in modern legal thought.<sup>126</sup>

In response to the natural law, legal positivism emerged as an influential legal theory in the nineteenth century.<sup>127</sup> The positivists believed that law was the expression of the will of the sovereign (king, legislature, or democratic majority) and the law therefore consisted of the writings, documents, and decisions created by the sovereign or his representatives.<sup>128</sup> An early version of positivism, legal formalism, perceived law as a science of certainty and logical deduction, a complete and closed system in which judges and lawyers were mere automata to record the sovereign's will.<sup>129</sup> In contrast to the natural law's belief in a common, discoverable understanding of law and morality and formalism's prescribed logical deductions from a priori legal principles, the social reforming legal realism movement of the 1920s and 1930s contended that morality and justice were subjective since the law was either made or interpreted by individual human beings.<sup>130</sup> The law rarely provided a specific answer to a particular fact pat-

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that law itself . . . is derived from fundamental conceptions of morality"). For a good analysis of Joseph Story's interpretation of natural law see Christopher L. Eisgruber, *Justice Story, Slavery and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 300-14 (1988). "[T]he key to Story's natural law science is its description of the particular relationship among the ideas of happiness, virtue, and 'ultimate (or permanent) happiness.'" *Id.* at 300.

124 While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own consciences, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

125 Hamilton rationalized in *The Federalist* that "to attempt to make a list of human rights and include it in the proposed constitution would be 'not only unnecessary . . . but would even be dangerous.'" CORNELIA G. LE BOUTILLER, *AMERICAN DEMOCRACY AND NATURAL LAW* 110 (1950).

126 See generally LEO STRAUSS, *NATURAL RIGHT AND HISTORY* (1953). For a demonstration of the revival of interest in natural law in the twentieth century see MICHAEL B. CROWE, *THE CHANGING PROFILE OF THE NATURAL LAW* 246-90 (1977). See also Schauer, *supra* note 123, at 808 (describing Justice Thomas' reference to natural law during the confirmation proceedings as being two tiered: (1) natural rights and (2) identification and enforcement of those rights by the judiciary).

127 See Siegel, *supra* note 119, at 1435 n.10 (tracing the roots of positivism to the writings of Thomas Hobbes, Jeremy Bentham, and John Austin).

128 See LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 55-56, 105-06 (1940). Fuller distinguishes natural law from legal positivism by noting that the natural law, by definition, adheres to a unity between the law that is and the law that ought to be, while the positivists insist upon a sharp distinction between the two. Natural law derives the "ought to be" from various sources (the nature of things, man, and/or God) while legal positivism insists that all formulations of the "ought to be" are purely personal predilections. *Id.* at 5-6.

129 See SEBOK, *supra* note 29, at 2068.

130 For an overview of legal realist philosophy, see WILFRID E. RUMBLE, *AMERICAN LEGAL REALISM* (1968) and WILLIAM L. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1985). Some commentators perceive legal realism as related to, or as a part of, legal positivism. See FULLER, *supra* note 128, at 51-52; SEBOK, *supra* note 29, at 2068; Ruth Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1617, 1643 (1988)

tern and, in applying legal principles to the interstices or ambiguities of any particular case, the background of the judge and his personal concept of justice were crucial to the manner in which the judge made the law and the outcome produced in court.<sup>131</sup> Therefore, in preparing to argue a case before a legal tribunal, the legal realists advised attorneys to understand the individual background and values of the appropriate judges rather than to search for arguments which were consistent with a natural or universally accepted understanding of law or which were logically deduced from the sovereign's will.

In response to the arguments of legal realists, legal process scholars, working in the post-World War II era, emphasized precepts of objective justice.<sup>132</sup> These writings, epitomized by the thought of Herbert Wechsler, contended that judges possessed a duty to suppress any subjective and personal impulses and to apply neutral principles in order to resolve cases.<sup>133</sup> This view differed from the natural law view by deemphasizing a search for principles of justice commonly understood and accepted by every human being and instead highlighting the virtues of consistency. Wechsler argued that judges must decide cases in a manner that produced consistent results and therefore allowed for predictability in the system—even if justice was not natural, consistency would at least provide notice as to what was legally right or wrong.<sup>134</sup> Legal realism was characterized as a doctrine of anarchy, a world of relativism which provided no system or guidance for the resolution of future cases.<sup>135</sup> The implementation of consistent neutral principles would remove subjectivity from the system as precedent would provide a record which would define the law and guide conduct.<sup>136</sup>

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(legal positivists and legal realists see the law as simply descriptive; natural law theorists perceive the law as both descriptive and normative). Others describe realism as an independent, theoretical movement, distinct from, and opposed to, positivism. See SEBOK, *supra* note 29, at 2059.

131 Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution"*, 72 IOWA L. REV. 1177, 1184 (1987) (describing legal realism as "focus[ing] on the personal elements of the judicial role" and the judge "as an active participant in the law-making process"); see also LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960* at 37-38 (1986):

The realists preached that law should be studied as part of society; they concentrated their attention on facts rather than concepts; they spent their time studying law's operations and showing that judges made law rather than formulating ethical legal rules or arguing that a higher law guided judges; they believed in objectivity and sometimes in reform as well; and they all sought to make the subject of their work relevant to contemporary practitioners.

*Id.*

132 WECHSLER, *supra* note 32, at xiii-xiv. Wechsler's point regarding neutral principles is "that a value and its measure [should] be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group, or person may assert the claim." *Id.*; see also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) [hereinafter *Neutral Principles*]. A group of modern writers seems to blend some aspects of the natural law theory of natural rights with the neutral principles concepts of legal process scholars. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978). These scholars are included within the legal process theorists. See KELMAN, *supra* note 26, at 202.

133 *Neutral Principles*, *supra* note 132, at 9-10. "Only the maintenance [of] . . . standards [framed in neutral terms] and . . . their faithful application can . . . protect the Court against the danger of the imputation of bias favoring claims of one kind or another." *Id.* at 10.

134 *Id.* at 13-20.

135 ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 81-83 (1970).

136 *Neutral Principles*, *supra* note 132, at 24-25.

Modern adherents of the various branches of critical legal studies ("CLS") agree with the analysis of the legal realists that the law is subjective in nature, but change the focus of the inquiry by concentrating not on the views of any particular individual, but on the relentless drive of the empowered hierarchy to perpetuate and justify itself.<sup>137</sup> CLS states, in effect, that law and language are themselves indeterminate and will be manipulated by the established status quo to define roles and relationships and suppress individual growth and self-realization.<sup>138</sup> In other words, whether any one particular judge is liberal or conservative, black or white, is significantly less relevant than the fact that those persons who become judges have been co-opted by the system in order to achieve that status. In the CLS view, in order to attain success, prestige, or power in America, an individual must accept the hierarchical structure inherent within the system itself. He must become conservative in the sense that he will not disrupt the hierarchy which has provided him with his status and delineates his power and control.<sup>139</sup> This rigid structuralism, protected by a manipulation of language and concepts which have no objective meaning in themselves, stifles meaningful interaction among individuals and destroys personal self-realization, especially within the established lower class.<sup>140</sup> Applying this analysis to the law, CLS scholars conclude that people who become judges or successful attorneys will therefore be unwilling to implement significant changes in the hierarchical structure of the American legal system even if a traditional sense of justice would indicate that extreme alterations in the distribution of benefits or rights are appropriate.<sup>141</sup>

In response to this unwillingness, the CLS movement aims to expose the true nature of hierarchical perpetuation through, among other devices, the law; to reject concepts of neutral principles; and to become goal-oriented towards results that will fundamentally change the accepted hierarchy rather than preserve the status quo.<sup>142</sup> CLS therefore rejects any loyalty to an "objective" application of the law. Instead, it perceives the law as a tool to be employed in the redefinition of hierarchical structures and, at

137 See Cook, *supra* note 100, at 985 ("By demonstrating the contingent and subjective nature of the legal system [critical legal theorists] have hoped to liberate people to conceive of and create more just communities."); see also KENNEDY, *supra* note 23; Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983) (analyzing modern contract law from the perspective of critical legal studies).

138 KELMAN, *supra* note 26, at 59-62 (explaining that a less rule-bound, more standard-oriented legal order would be less oppressively individualistic and more humanitarian).

139 Stephen Brainerd, *The Groundless Assault: A Wittgensteinian Look at Language, Structuralism, and Critical Legal Theory*, 34 AM. U. L. REV. 1231, 1231-33 (1985); see also Cass R. Sunstein, *Where Politics Ends*, NEW REPUBLIC, Aug. 3, 1992, at 38 (reviewing MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1992)) (stating that one of CLS's "principal claims is . . . that 'law is politics'"); Kim I. Eisler, *Attack of the Law Schools*, WASHINGTONIAN, Jan. 1994, at 31 (describing CLS as "a controversial approach to law-school teaching that views the legal system as inherently biased in favor of the establishment").

140 See KELMAN, *supra* note 26, at 9-10; KENNEDY, *supra* note 23, at 36, 81.

141 See KENNEDY, *supra* note 23, at 39.

142 See KELMAN, *supra* note 26 (outlining CLS criticisms of liberal legal thought); KENNEDY, *supra* note 23; ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986) (describing CLS doctrine); see also Mark Hager, *Against Liberal Ideology: A Guide to Critical Legal Studies*, By Mark Kelman, 37 AM. U. L. REV. 1051, 1054 (1988) (book review) ("CLS seeks to replace ['liberalism'] . . . the all-pervasive public philosophy of democracy within capitalism, and the social system it mythologies by something better.").

least in most CLS writings, a neo-Marxist or similar left-wing empowerment of the currently defined underprivileged.<sup>143</sup> In short, the CLS program characterizes neutral principles as a fraud, another device whereby the structure implements its goals and avoids significant alterations in the established manner of distributing rights and benefits.<sup>144</sup> Since the system is result oriented for the conservative purpose of maintaining the accepted hierarchy, left-wing judges and lawmakers should also be result oriented to radicalize the law, disrupt the defined status quo, and effectuate meaningful social change.<sup>145</sup>

The CLS movement is correct in accepting the conclusion of legal realism that any law created and interpreted by human beings would, by definition, be subjective and reflective of the particular backgrounds and values of the individuals involved in the legal process. CLS scholars are also correct in revealing the conservative pressure within the American legal system itself towards reenforcing the established hierarchical structure. However, CLS ultimately fails to provide a meaningful remedy for the condition it has identified. By accepting result orientation in its solution, CLS simply produces an alternative end-product rather than a significant response. This perspective only produces struggle and strife—CLS adherents trying to implement their goals by radicalizing society's distribution of benefits, and their opponents striving to preserve the status quo by defending the current definition of have and have-nots as just.<sup>146</sup> Having correctly identified the system as result oriented, the CLS movement accepts the validity of result orientation as a value and merely tries to implement differ-

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143 See MICHAEL ALBERT & ROBIN HAHNEL, *SOCIALISM TODAY AND TOMORROW* (1981) (exploring whether democratic economic planning is inherently unfeasible); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985) (examining the relationship of CLS with legal realism, linguistic theory, and Marxist thought); see also Eisler, *supra* note 139 (explaining that CLS "urges students to use their legal training in a class struggle on behalf of the less fortunate"). For a good analysis of Marxist theory from a critical legal theorist's perspective, see Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 968-87 (1985). Some CLS writers do not propose any detailed alternative to the existing hierarchical structure aside from constantly redefining the hierarchy to produce continued equality. In that perspective, simply exposing the pernicious nature of the current system achieves the goal—it is enough just to know what you are against. See KENNEDY, *supra* note 23, at 93. This position has been criticized as nihilistic. Other CLS writings have advocated an empowerment of the currently underprivileged consistent with neo-Marxist and other leftwing thought. See KELMAN, *supra* note 26, at 1, 9-10.

144 KELMAN, *supra* note 26, at 2-3; John Moon, *The Freedom of Information Act: A Fundamental Contradiction*, 34 AM. U. L. REV. 1157 (1985) (discussing the impossibility of constructing a system of neutral legal interpretation); Alice December, *Harvard Law Ends Bias Suit By Agreeing on Institute*, BOSTON GLOBE, Sept. 22, 1993, at Metro/Region 1 ("Adherents of critical studies maintain that the legal system is not neutral, as it claims, but is biased in favor of the wealthy and powerful.").

145 See, e.g., KENNEDY, *supra* note 23, at 98-120; Hager, *supra* note 142, at 1074 (concluding that "CLS aims to show, in short, that our natural sympathies for a world of better justice are truer than ideologies of the current order"); Reginald Lewis Promotes Diversity at Harvard Law, INST. INVESTOR, Sept. 1992, at 16 (stating that CLS "advocates studying the law in all its nitty gritty reality and appointing more women and minority professors"); Michael Isikoff, *2 Withdraw Justice Dept. Candidacies; Rights, Environment Choices Step Aside*, WASH. POST, Dec. 18, 1993, at A1 (explaining that the CLS movement is "an academic school that seeks to expose class and racial prejudices behind traditional legal doctrines").

146 See Alvin B. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307 (1987) (discrediting CLS by showing that appeals judges generally decide cases on the basis of outcome-controlling doctrine).

ent goals—results more compatible with their individual sense of justice. This acceptance of result orientation makes CLS more confrontational than meaningful. Such a CLS posture simply divides judges and lawmakers into different camps of goalseekers—some trying to achieve “radical” results, others trying to produce “conservative” decisions. The adoption of this CLS solution is simply a commitment to the endless struggle inherent in the dialectical analysis of Hegel and other Continental philosophers—both sides fighting each other forever in an attempt to produce more results consistent with their viewpoint.<sup>147</sup> The CLS position is additionally undercut by the notion that implementation of its system would still produce advantaged and disadvantaged classes—only their identities would change. Result orientation produces a constant struggle in the dialectical sense—a fight which, even if won by the radicals, would only produce another hierarchy and, in time, would become conservative by enforcing results that enhance its hierarchical structure.<sup>148</sup>

In this sense, legal process scholars are correct to emphasize, at least in theory, process over results.<sup>149</sup> However, their analysis provides the basis for the eventual devaluation of the system because they evaluate process in comparison to “objective” standards of neutral principles. This perspective pretends that the legal system is something which it is not—a government of laws, not of men.<sup>150</sup> By so doing, legal process theory tries to divorce human beings from the law entirely. This analysis can produce a predictable legal system, but often at the cost of imposing a legal formalism which fails to accurately account for the human interests present in any particular case or issue.<sup>151</sup> Such a devotion to objectivity empowers the perspective of result orientation and the priorities of business and economics, which, in turn, produce a system whereby the rules protect the established hierarchy and, more importantly, permits a process which ignores human interests because a formalistic concept of the law dictates that some other value be

<sup>147</sup> See generally GEORG W. HEGEL, *HEGEL: THE ESSENTIAL WRITINGS* (Frederick G. Weiss ed., 1974).

<sup>148</sup> This conclusion is the result of trying to organize result orientation into a system of goals. Systems are rarely responsive to the needs of human beings. Systems of goals, whether radical or conservative, typically produce a ruling elite and disadvantaged classes—in short, a status quo structure. See Hutchinson & Monahan, *supra* note 17, at 229, 234-35 (suggesting that some CLS scholars prefer only to criticize the existing system because of an awareness that any proposed structure will become a new hierarchy); see also, David Horowitz, *Socialism By Any Other Name: Demise of Marxism in the Former Soviet Union and Around the World*, NAT'L REV., Apr. 13, 1992, at 30.

<sup>149</sup> See generally *Neutral Principles*, *supra* note 132.

<sup>150</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (Chief Justice Marshall stating that our government “has been emphatically termed a government of laws, and not of men.”).

<sup>151</sup> Incorporating experiential understanding of persons or groups into an ideological system based on a reductionist concept of reason, a system that at times seems to have a fetish for predictability and control under the Rule of Law, raises terrifying specters of destabilization, chaos, and anarchy. Accordingly, the emotional, physical, and experiential aspects of being human have by and large been banished from the better legal neighborhoods and from explicit recognition in legal discourse (although they sometimes get smuggled in as “facts” in briefs and opinions). Ironically, while emotion may generate laws via “politics,” once those laws meet whatever criteria are necessary to constitute legitimacy in a system, they are cleansed of emotion under this vision of the Rule of Law. The law becomes not merely a human institution affecting real people, but rather The Law.



served. The desire for consistency and predictability produces a formalism which converts "the law" into its own thing—an entity which becomes a normative principle or an end unto itself, divorced from the societal values it was originally created to serve.<sup>152</sup>

A legal system possesses legitimacy only if its rules and systems reflect and implement the foundational values of the society which created it.<sup>153</sup> To that extent, the law forfeits its credibility as its processes and decisions become increasingly disassociated from the historical values which give it life. The acceptance of result orientation advances this process because it encourages an emphasis on individualism and self-interest and discourages the broader religious or communal priority needed to establish the common good. In order to command the respect needed for obedience and allegiance from each individual member of society, the process of the law must constantly reference the values of charity, compassion, and self-denial. In this perspective, the structures of the American legal system will constantly be judged and assessed by the manner in which they in fact implement these values. This concept of process is consistent with historical beliefs, embodied in the old common law, that the law was a commitment to the broader perspective of communal good and human dignity and that the cases and articulated principles (e.g. statutes, constitutions) were simply illustrations or examples of how to implement the underlying values of the law.<sup>154</sup> In modern America's legal system, the decisions and statutes have become the law and are now coldly interpreted with no reference to the humanistic values that are the true essence of the law.<sup>155</sup> Such a system ignores its historical foundation and rewards the cynical manipulation of fact pattern distinctions. These results are completely predictable in a culture which deemphasizes shared values and exalts self-interest. If the legal realists and CLS scholars are correct and all law is either subjective or indeterminate, then the language and the context of legal discussions dictate,

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152 Legal systems which rely excessively on precedent set fairness as their highest goal. Fairness emphasizes an equality of treatment for similar individuals. To that extent, a system of precedent has been a useful tool to a modern American legal system which has emphasized notions of equal protection. The use of the Equal Protection Clause began in the post-World War II years and blended perfectly with (1) legal process concepts of neutrality and consistency and (2) the efficiencies of predictability needed to establish the economic superiority of the world's superpower.

Fairness, while a laudable goal, cannot be the ultimate value of the legal system. Charity, compassion, and self-denial need to be the major focus of societal motivations. While fairness is an element in these virtues, its dominance fosters result orientation and inspires an interpretation of other constitutional protections (especially due process) that is procedurally narrow in scope. Excessive doctrinal reliance on fairness has combined with the economic-driven emphasis on legal predictability and certainty to create a new system of formalism, as devoid from real social and human needs as its predecessor. See *supra* notes 25-33 and accompanying text.

153 An understanding of these foundational values can be found in an appreciation for the social and legal history which created modern law. Earlier legal systems acknowledged a reliance on history. See BLACKSTONE, *supra* note 120, at 67-68; SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 3-11 (1628); Holmes, *supra* note 6, at 469; Siegel, *supra* note 119, at 1540-47. This historical sense provides the law with its "implicit morality." Lon L. Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644-45 (1958).

154 See POUND, *supra* note 4, at 76, 96; Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 947-49 (1990).

155 See Schuman, *supra* note 1, at 9 (expressing the notion that the Constitution cannot be conceived as a "free-for-all process of interest bargaining"); White, *supra* note 6, at 191-93 (the language of self and self-interest devalues community and shared values).

to a certain extent, the normative reality. A legal system which prioritizes values and directs its judges to decide cases with reference to, and in the language of, charity, compassion, and self-denial is more likely to produce a community in which individual conduct is informed by those virtues.<sup>156</sup>

Therefore, instead of focusing on the results produced by the system, a better alternative is to focus on the values of the process: evaluate the rule, procedure, or decision not in terms of whether the result it is producing is socialist or fascist, but in terms of whether the particular process itself makes sense in reference to the message of *The Waste Land* and *The Upanishads*—the values of charity, compassion, and self-denial. This perspective is, in some respects, a reaffirmation of historic common law concepts. English common law, influenced by notions of natural law, was comfortable with less certainty and a more amorphous concept of rights and values.<sup>157</sup> When the common law reached a point at which its rules and procedures had taken on a normative life of their own—the rigidity of the forms of action—Courts of Chancery were created to enable judges to implement again the foundational values of society.<sup>158</sup> A change from result orientation to a process of values would mirror the common law “revolution” which created courts of equity by restoring the primal importance of values in the law. Such a transformation would produce a modern American legal system consistent with its history and traditions and deserving of the respect of all members of society.

The abnegation of certainty would necessitate a rejection of many perspectives of America in the 1990s. The modern legal system must acknowledge and then disavow the primal influence which capitalism, business, and economics have exerted upon it. Business and the economy can still flourish in a legal system which rejects result orientation and certainty.<sup>159</sup>

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156 The judge in deciding cases is not merely laying down a system of minimum restraints designed to keep the bad man in check, but is in fact helping to create a body of common morality which will define the good man. When he sees his office in this light, the judge will realize, I think, how significantly creative his work is, and how sinister is the temptation to evade his responsibilities to the future by adopting a passive and positivistic attitude toward “the existing law.”

LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 137-38 (1940); see also Ruth Gavison, *Natural Law, Positivism, and the Limits of Jurisprudence: A Modern Round*, 91 *YALE L.J.* 1250, 1280 (1982) (reviewing JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS IN LAW AND MORALITY* (1979) and JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980)) (“[o]ther things equal, knowing what one’s duty is can only strengthen the tendency to do the morally right thing.”).

157 See MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 157-59 (1988).

158 See POUND, *supra* note 4, at 72-73.

159 For a view on how a hypothetical economy informed by such values might operate, see SCHUMACHER, *supra* note 1, at 51-54:

The Buddhist point of view takes the function of work to be at least threefold: to give a man a chance to utilize and develop his faculties; to enable him to overcome his egocenteredness by joining with other people in a common task; and to bring forth the goods and services needed for a becoming existence. Again, the consequences that flow from this view are endless. To organize work in such a manner that it becomes meaningless, boring, stultifying, or nerve racking for the worker would be little short of criminal; it would indicate a greater concern with goods than with people, an evil lack of compassion and a soul-destroying degree of attachment to the most primitive side of this worldly existence. Equally, to strive for leisure as an alternative to work would be considered a complete misunderstanding of one of the basic truths of human existence, namely that work and leisure are complementary parts of the same living process and cannot be separated without destroying the joy of work and the bliss of leisure.

However, the economic priorities of individualism and self-interest will be subordinated to the communal morality inherent in compassion, sympathy and self-control. The subjectivity of particular judges will influence their interpretation of these values and vary their application from court to court, but in a system informed by rejecting the fruits of action, society should only expect from a judge or a lawmaker a good faith commitment to employ the process to effectuate these tripartite virtues.<sup>160</sup> This doctrinal transformation would restore discussions of legal principles to their appropriate context—the application of communal values to actual human interests and daily problems. Such a commitment recalls the duty placed upon judges dispensing equity when the Courts of Chancery were first created.<sup>161</sup> If that is being done, any particular result should be immaterial. The adoption of a process motivation rather than a result orientation will naturally produce a body of law which appears less certain in content and

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. . . It is clear, therefore, that Buddhist economics must be very different from the economics of modern materialism, since the Buddhist sees the essence of civilization not in a multiplication of wants but in the purification of human character. Character, at the same time, is formed primarily by a man's work. And work, properly conducted in conditions of human dignity and freedom, blesses those who do it and equally their products. . . .

From a Buddhist point of view, this is standing the truth on its head by considering goods as more important than people and consumption as more important than creative activity. It means shifting the emphasis from the worker to the product of work, that is, from the human to the subhuman, a surrender to the forces of evil. The very start of Buddhist economic planning would be a planning for full employment, and the primary purpose of this would in fact be employment for everyone who needs an 'outside' job: it would not be the maximization of employment nor the maximization of production. . . .

While the materialist is mainly interested in goods, the Buddhist is mainly interested in liberation. But Buddhism is 'The Middle Way' and therefore in no way antagonistic to physical well-being. It is not wealth that stands in the way of liberation but the attachment to wealth; not the enjoyment of pleasurable things but the craving for them. The keynote of Buddhist economics, therefore, is simplicity and non-violence. From an economist's point of view, the marvel of the Buddhist way of life is the utter rationality of its pattern—amazingly small means leading to extraordinarily satisfactory results.

*Id.*; see also White, *supra* note 6, at 193-94.

<sup>160</sup> The thesis of this Article can be criticized by theorists who worry that a focus on motivation may produce great evils because some judges may interpret giving or sympathizing as consistent with racism or genocide. The first response to such criticism is that result-oriented justice only provides false security against such ills as formalism while efficiency-driven systems are more likely to produce such evils. The more significant response centers on the belief that individuals have more difficulty being immoral when the legal focus is affixed on the proper inquiry. See Henderson, *supra* note 151, at 1651 (noting that any particular judge may misread empathy, but at least the issue is properly framed). Moreover, if a judge were prone to be immoral, such a result would be far easier to justify under any formalistic, result-oriented system.

[L]et us suppose a judge bent on realizing through his decisions an objective that most ordinary citizens would regard as mistaken or evil. Would such a judge be likely to suspend the letter of the statute by openly invoking a "higher law"? Or would he be more likely to take refuge behind the maxim that "law is law" and explain his decision in such a way that it would appear to be demanded by the law itself?

. . . .

If we felt that the law itself was our safest refuge, would it not be because even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances, and inhumanities into law? And is it not clear that this hesitancy itself derives, not from a separation of law and morals, but precisely from an identification of law with those demands of morality that are the most urgent and the most obviously justifiable, which no man need be ashamed to profess?

Fuller, *supra* note 153, at 636-38.

<sup>161</sup> See POUND, *supra* note 4, at 215.

less consistent in result.<sup>162</sup> However, certainty is not an attribute of justice, it is a characteristic of administration.<sup>163</sup> Consistent with Indo-Aryan religious thought, Westerners overrate certainty. Since life itself is by definition uncertain, the primacy of predictability is ultimately fruitless as a value system. The certainty of the system should be found in the dedication of each of its constituents to the shared values of charity, compassion, and self-denial.

### B. *The Value of Precedent*

Precedent, as perceived by judges and as taught in American law schools, has become the epitome of the result orientation process.<sup>164</sup> The results of one case must be consistent with the results of another, if the facts are perceived as roughly similar. Judges are taught that this adherence to stare decisis is the societal yardstick by which they will be measured.<sup>165</sup> To best prepare lawyers for success in this environment, legal education focuses on the ability to analogize or distinguish fact patterns.<sup>166</sup> If the prior results favor your client's interests, he will win if the attorney can persuade the judge that the current case is similar to the fact patterns of the earlier decisions. If the precedent disfavors your client's interests, he will win if the attorney can convince the judge that the instant controversy is distinguishable from the facts of the antecedent cases. Discussions

162 There is, however, considerably less certainty and consistency in the current result-oriented system than advertised. See KENNEDY, *supra* note 23, at 25. In addition, legal tools such as "reason, argument and justification are [still] compatible with uncertainty and indeterminacy." Christopher L. Kutz, Note, *Just Disagreement: Indeterminacy and Rationality in the Rule of the Law*, 103 YALE L.J. 997, 1029 (1994). CLS accepts a greater degree of uncertainty than other existing legal theories through its concepts of indeterminacy. The modern Supreme Court still expresses its fidelity to certainty ("Liberty finds no refuge in a jurisprudence of doubt") while noting the lack of consistency in abortion decisions. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2803 (1992).

163 If a legal issue is truly administrative, then results, certainty, and predictability matter more and are more legitimate goals. For example, the rules regarding how and where to file financing statements for security interests are purely a matter of administrative regulation. Any number of filing systems would probably work, but one must be chosen to provide consistency in administration. At this level, certainty and predictability have a value. As decisions become less administrative, the legal focus must shift from result orientation to motivation.

164 See, e.g., ARTHUR J. GOLDBERG, *EQUAL JUSTICE* 75 (1971) (suggesting that fidelity to precedent "foster[s] public confidence in the judiciary and public acceptance of individual decisions by giving the appearance of impersonal, consistent, and reasoned opinion[s]"); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-602 (1987) (arguing for the development of "a rule of precedent" because respect for precedents strengthens judicial decision making, increases social stability, and ensures fairness by treating like cases alike). The apparent lack of respect for precedent demonstrated by the United States Supreme Court on certain subjects appears to be more related to the political nature of modern Supreme Court appointments and is not indicative of a different theory of precedent than that expressed in this Article. See DWORKIN, *supra* note 132, at 131. The Court has summarized the relevant considerations in a decision to overrule established precedent. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-09 (1992).

165 Geoffrey Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 70 (1988) ("If a justice disrespects the judgments of those who preceded him, he invites the very same treatment from those who succeed him. A justice who wants to preserve the value of his own coin must not devalue the coin of his predecessors."); see, e.g., Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 403-06 (1988) (suggesting that the Warren Court's lack of respect for precedents was a product of its preference to do the convenient rather than the principled thing).

166 See generally Curtis E. Karnow, *Paying the Price of The Burden of Proof*, RECORDER, Oct. 31, 1991, at 6; Robert R. Salman, *Improving Appellate Advocacy*, NAT'L L.J., Mar. 12, 1990, at 15.

of morality and values are either subordinated to, or discussed within the confines of, fact pattern distinctions or the assimilation of black letter law.<sup>167</sup>

These are the systemic goals which Eliot correctly predicted would rob the system of its value and meaning.<sup>168</sup> This concept of precedent prioritizes the efficiencies needed to designate winners and losers and ignores the communal values which truly bind the members of a society. This perspective also provides the legal certainty believed necessary for an environment favorable for business growth.<sup>169</sup> Modern precedent thereby becomes the vehicle by which the individualism and self-interest essential to an economics-based society impose themselves on the legal system. This orientation produces a system that is permeated with formalism and divorced from its values and the humanistic principles it was originally created to serve. Justice becomes an interest subordinated to efficiency and certainty.<sup>170</sup> The process can be easily manipulated by lawyers who understand the forces driving it. The system will also favor monied clients who can afford to maneuver their way through its intricacies, controlling expediency or delay as it benefits their individual or selfish desires.<sup>171</sup>

This result-oriented definition of precedent needs to be replaced by an emphasis on the humanistic motivations of decision makers. Judges need to be evaluated not on the results of their decisions but on their motivations for reaching those conclusions. Consistency of result will then be replaced by consistency of motivation. The differences in individuals will produce divergent interpretations of charity, compassion, and self-denial, but the consequent potential for some uncertainty is insignificant compared to the restored primacy of shared morality and communal good over individualism and self-interest. Many of the "great" decisions of modern American constitutional law reflect the importance of values over result orientation. *Brown v. Board of Education*,<sup>172</sup> *New York Times Co. v. Sullivan*,<sup>173</sup> *Cohen v. California*,<sup>174</sup> and *Roe v. Wade*<sup>175</sup> are all difficult, if not impossible, to justify on the basis of precedent available at the time of their decision. Their significance lies in the ability of those respective Supreme Courts to ignore the dictates of result orientation and implement the humanistic values needed to make American society more charitable and compassionate.<sup>176</sup> Those opinions, regardless of their particular results,

167 See KENNEDY, *supra* note 23, at 6-7.

168 See *supra* notes 41-64 and accompanying text.

169 See Schuman, *supra* note 1, at 4.

170 See KENNEDY, *supra* note 23, at 12.

171 *Id.* at 22-23; *New Jersey Supreme Court Task Force on Minority Concerns, Final Report*, in N.J. L.J., Aug. 10, 1992, at 1 (Supp.) (explaining that "there is distrust in terms of the judicial system . . . because . . . clients see that money makes a difference on a number of levels" and that "[p]eople with money to hire lawyers are always heard first").

172 347 U.S. 483 (1954).

173 376 U.S. 254 (1964).

174 403 U.S. 15 (1971).

175 410 U.S. 113 (1973).

176 See Henderson, *supra* note 103, at 1593-1609 (arguing that *Brown* was based on empathy); *id.* at 1620-21, 1649 (arguing that *Roe* raised empathy issues on both sides, but the opinion failed to articulate fully empathy for women with unwanted pregnancies). Wechsler and the legal process scholars were critical of civil rights cases generally because of their perceived lack of neutrality and failure to follow precedent. See SEBOK, *supra* note 29, at 2114.

epitomize judicial decision making which prioritizes historical values over precedent and the common good over individual desires.

Precedent should retain some vitality as a tool for judges to inform, and be informed by, other judges' visions of charity, compassion, and self-denial. Consistent with centuries of English common law practice, precedent would then not be the law, but rather would be merely an expression or application of the communal values which truly give law meaning.<sup>177</sup> In this sense, precedent would need to be discovered, not created.<sup>178</sup> When precedent is divorced from foundational values and defined by certainty and the similarity or dissimilarity of fact patterns, the formalistic legal system inevitably produced is more easily subject to the cynical manipulation of results and the fulfillment of selfish needs and desires. This utilization of precedent, broadly accepted in modern America, produces the legal system of the Waste Land. In order to avoid this conclusion, precedent must be divorced from formalism, individualism and self-interest and reunited with the foundational values of society and the broader communal perspective. In such a system, the materialism inherent in a business or economics perspective loses its social primacy and is appropriately subordinated to the essential morality contained within the Indo-Aryan truths. Precedent's true role is therefore in helping to establish a common understanding of the meaning of charity, compassion, and self-denial—a living record of the shared values which constitute the fabric of the American community.<sup>179</sup>

## V. CONCLUSION

*The Waste Land* depicts Western civilization as a culture which has deified materialism and individualism and devalued human dignity and individual worth. Contemporary American society, through its pursuit of the world's highest standard of living, embodies the cultural priorities depicted and criticized by Eliot in his poem. The desire for wealth has produced a country which is increasingly result oriented—judging all activity by the achievement which it produces. As society influences law and law influences society, the corresponding American legal system has accepted this result orientation and the concomitant precepts of capitalism and economics—individualism, self-interest, and certainty. As such, the law has ceased to be a device which builds community and applies historically accepted societal values to the resolution of daily problems. In order to restore legitimacy to the law, the system must reject result orientation and its materialistic priorities and accept Eliot's regenerative solution from Indo-Aryan tradition—the virtues of charity, compassion, and self-denial. By restoring these values to their historic primacy, the law will subordinate individualism and economics to the shared values essential for any society which is truly a community. Judges and other officials would then be evaluated on

177 See *supra* note 154 and accompanying text.

178 See *supra* notes 120-22 and accompanying text.

179 To a certain extent, this interpretation mirrors older natural law concepts of precedent. See Grey, *supra* note 25, at 28. However, the disavowal of result orientation will prevent precedent from being reduced to formalism and will instead allow precedent to reflect the changes and evolutions desired by the legal realists. See *id.* at 29-30.

their commitment to, and implementation of, charity, compassion, and self-denial.<sup>180</sup> Such a radical change in perspective is required to eliminate the arid formalism which dominates the current legal system and restore precedent and legal theory to the vibrancy they historically possessed. Although an evaluation of judicial motivation rather than results may produce less systemic predictability, the law will be infused with a moral authority which empowers the communal good and engenders individual respect. Such a legal system will produce a society whose vision extends beyond the illusionary pursuit of certainty and self-interest and encompasses the creation of a community which truly nurtures individual self-fulfillment.

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180 Result orientation and its sterile conception of precedent has also distorted the manner in which federal judges, especially Supreme Court Justices, have been selected. The media, government officials, and various lobby groups analyze and evaluate candidates on the basis of their projected votes on subjects of interest. This type of scrutiny has produced a bizarre politicalization of the appointment process. See Bruce Fien, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 687 (1989); Douglas W. Kmiec, *Judicial Selection and the Pursuit of Justice: The Unsettled Relationship Between Law and Morality*, 39 CATH. U. L. REV. 1, 1-18 (1989). The obsession with results, and the aggressive by-products of that infatuation, would disappear if the investigatory focus concentrated on the motivations behind a particular jurist's decisions. Assuming subjective differences in the interpretation of charity, compassion, and self-denial, the appointment process would be directed towards the proper inquiry and successful candidates would be more likely to be humanely qualified rather than topically politicized. See generally Gavison, *supra* note 129, at 1620-21.





## APPENDIX

### THE WASTE LAND\* 1922

“Nam Sibyllam quidem Cumis ego ipse oculis meis vidi in ampulla  
pendere, et cum illi pueri dicerent: Σίβυλλα τί θέλεις;  
respondebat illa: ἀποθανεῖν θέλω.”

For Ezra Pound  
*il miglior fabbro.*

#### I. THE BURIAL OF THE DEAD

April is the cruellest month, breeding  
Lilacs out of the dead land, mixing  
Memory and desire, stirring  
Dull roots with spring rain.  
Winter kept us warm, covering  
Earth in forgetful snow, feeding  
A little life with dried tubers.  
Summer surprised us, coming over the Starnbergersee  
With a shower of rain; we stopped in the colonnade,  
And went on in sunlight, into the Hofgarten, 10  
And drank coffee, and talked for an hour.  
Bin gar keine Russin, stamm' aus Litauen, echt deutsch.  
And when we were children, staying at the archduke's,  
My cousin's, he took me out on a sled,  
And I was frightened. He said, Marie,  
Marie, hold on tight. And down we went.  
In the mountains, there you feel free.  
I read, much of the night, and go south in the winter.  
What are the roots that clutch, what branches grow  
Out of this stony rubbish? Son of man, 20  
You cannot say, or guess, for you know only  
A heap of broken images, where the sun beats,  
And the dead tree gives no shelter, the cricket no relief,  
And the dry stone no sound of water. Only  
There is shadow under this red rock,  
(Come in under the shadow of this red rock),  
And I will show you something different from either 30  
Your shadow at morning striding behind you

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\* "The Waste Land" from COLLECTED POEMS 1909-1950 by T.S. Eliot, copyright 1936 by Harcourt Brace & Company, copyright © 1964, 1963 by T.S. Eliot, reprinted by permission of publisher.

Or your shadow at evening rising to meet you;  
I will show you fear in a handful of dust.

*Frisch weht der Wind*

*Der Heimat zu.*

*Mein Irisch Kind,*

*Wo weilest du?*

"You gave me hyacinths first a year ago;

"They called me the hyacinth girl."

—Yet when we came back, late, from the Hyacinth garden,

40

Your arms full, and your hair wet, I could not

Speak, and my eyes failed, I was neither

Living nor dead, and I knew nothing,

Looking into the heart of light, the silence.

*Oed' und leer das Meer.*

Madame Sosostriis, famous clairvoyante,

Had a bad cold, nevertheless

Is known to be the wisest woman in Europe,

With a wicked pack of cards. Here, said she,

Is your card, the drowned Phoenician Sailor,

50

(Those are pearls that were his eyes. Look!)

Here is Belladonna, the Lady of the Rocks,

The lady of situations.

Here is the man with three staves, and here the Wheel,

And here is the one-eyed merchant, and this card,

Which is blank, is something he carries on his back,

Which I am forbidden to see. I do not find

The Hanged Man. Fear death by water.

I see crowds of people, walking round in a ring.

Thank you. If you see dear Mrs. Equitone,

60

Tell her I bring the horoscope myself:

One must be so careful these days.

Unreal City,

Under the brown fog of a winter dawn,

A crowd flowed over London Bridge, so many,

I had not thought death had undone so many.

Sighs, short and infrequent, were exhaled,

And each man fixed his eyes before his feet.

Flowed up the hill and down King William Street,

To where Saint Mary Woolnoth kept the hours

70

With a dead sound on the final stroke of nine.

There I saw one I knew, and stopped him, crying: "Stetson!

"You who were with me in the ships at Mylae!

"That corpse you planted last year in your garden,

"Has it begun to sprout? Will it bloom this year?

"Or has the sudden frost disturbed its bed?

"Oh keep the Dog far hence, that's friend to men,

"Or with his nails he'll dig it up again!

"You! hypocrite lecteur!—mon semblable,—mon frère!"

## II. A GAME OF CHESS

The Chair she sat in, like a burnished throne,  
 Glowed on the marble, where the glass  
 Held up by standards wrought with fruited vines  
 From which a golden Cupidon peeped out 80  
 (Another hid his eyes behind his wing)  
 Doubled the flames of sevenbranched candelabra  
 Reflecting light upon the table as  
 The glitter of her jewels rose to meet it,  
 From satin cases poured in rich profusion;  
 In vials of ivory and coloured glass  
 Unstoppered, lurked her strange synthetic perfumes,  
 Unguent, powdered, or liquid—troubled, confused  
 And drowned the sense in odours; stirred by the air 90  
 That freshened from the window, these ascended  
 In fattening the prolonged candle-flames,  
 Flung their smoke into the laquearia,  
 Stirring the pattern on the coffered ceiling.  
 Huge sea-wood fed with copper  
 Burned green and orange, framed by the coloured stone,  
 In which sad light a carved dolphin swam.  
 Above the antique mantel was displayed  
 As though a window gave upon the sylvan scene  
 The change of Philomel, by the barbarous king  
 So rudely forced; yet there the nightingale 100  
 Filled all the desert with inviolable voice  
 And still she cried, and still the world pursues,  
 “Jug Jug” to dirty ears.  
 And other withered stumps of time  
 Were told upon the walls; staring forms  
 Leaned out, leaning, hushing the room enclosed.  
 Footsteps shuffled on the stair.  
 Under the firelight, under the brush, her hair  
 Spread out in fiery points  
 Glowed into words, then would be savagely still. 110  
 “My nerves are bad to-night. Yes, bad. Stay with me.  
 “Speak to me. Why do you never speak. Speak.  
 “What are you thinking of? What thinking? What?  
 “I never know what you are thinking. Think.”

I think we are in rats' alley  
 Where the dead men lost their bones.

“What is that noise?”  
 The wind under the door.  
 “What is that noise now? What is the wind doing?”  
 Nothing again nothing. 120  
 “Do

"You know nothing? Do you see nothing? Do you remember  
"Nothing?"

I remember

Those are pearls that were his eyes.

"Are you alive, or not? Is there nothing in your head?"

But

O O O O that Shakespeherian Rag—

It's so elegant

So intelligent

130

"What shall I do now? What shall I do?"

"I shall rush out as I am, and walk the street

"With my hair down, so. What shall we do to-morrow?

"What shall we ever do?"

The hot water at ten.

And if it rains, a closed car at four.

And we shall play a game of chess,

Pressing lidless eyes and waiting for a knock upon the door.

When Lil's husband got demobbed, I said—

I didn't mince my words, I said to her myself,

140

HURRY UP PLEASE ITS TIME

Now Albert's coming back, make yourself a bit smart.

He'll want to know what you done with that money he gave you

To get yourself some teeth. He did, I was there.

You have them all out, Lil, and get a nice set,

He said, I swear, I can't bear to look at you.

And no more can't I, I said, and think of poor Albert,

He's been in the army four years, he wants a good time,

And if you don't give it him, there's others will, I said.

Oh is there, she said. Something o' that, I said.

150

Then I'll know who to thank, she said, and give me a straight look.

Hurry up please its time

If you don't like it you can get on with it, I said.

Others can pick and choose if you can't.

But if Albert makes off, it won't be for lack of telling.

You ought to be ashamed, I said, to look so antique.

(And her only thirty-one.)

I can't help it, she said, pulling a long face,

It's them pills I took, to bring if off, she said.

(She's had five already, and nearly died of young George.)

160

The chemist said it would be all right, but I've never been the same.

You are a proper fool, I said.

Well, if Albert won't leave you alone, there it is, I said,

What you get married for if you don't want children?

HURRY UP PLEASE ITS TIME

Well, that Sunday Albert was home, they had a hot gammon,

And they asked me in to dinner, to get the beauty of it hot—

HURRY UP PLEASE ITS TIME

HURRY UP PLEASE ITS TIME

Goonight Bill. Goonight Lou. Goonight May. Goonight. 170  
 Ta ta. Goonight. Goonight.  
 Good night, ladies, good night, sweet ladies, good night, good night.

### III. THE FIRE SERMON

The river's tent is broken: the last fingers of leaf  
 Clutch and sink into the wet bank. The wind  
 Crosses the brown land, unheard. The nymphs are departed.  
 Sweet Thames, run softly, till I end my song.  
 The river bears no empty bottles, sandwich papers,  
 Silk handkerchiefs, cardboard boxes, cigarette ends  
 Or other testimony of summer nights. The nymphs are departed.  
 And their friends, the loitering heirs of city directors; 180  
 Departed, have left no addresses.  
 By the waters of Lemman I sat down and wept . . .  
 Sweet Thames, run softly till I end my song,  
 Sweet Thames, run softly, for I speak not loud or long.  
 But at my back in a cold blast I hear  
 The rattle of the bones, and chuckle spread from ear to ear.  
 A rat crept softly through the vegetation  
 Dragging its slimy belly on the bank  
 While I was fishing in the dull canal  
 On a winter evening round behind the gashouse 190  
 Musing upon the king my brother's wreck  
 And on the king my father's death before him.  
 White bodies naked on the low damp ground  
 And bones cast in a little low dry garret,  
 Rattled by the rat's foot only, year to year.  
 But at my back from time to time I hear  
 The sound of horns and motors, which shall bring  
 Sweeney to Mrs. Porter in the spring.  
 O the moon shone bright on Mrs. Porter  
 And on her daughter 200  
 They wash their feet in soda water  
*Et O ces voix d'enfants, chantant dans la coupole!*

Twit twit twit  
 Jug jug jug jug jug jug  
 So rudely forc'd.  
 Tereu

#### Unreal City

Under the brown fog of a winter noon  
 Mr. Eugenides, the Smyrna merchant  
 Unshaven, with a pocket full of currants 210  
 C.i.f. London: documents at sight,  
 Asked me in demotic French  
 To luncheon at the Cannon Street Hotel  
 Followed by a weekend at the Metropole.

At the violet hour, when the eyes and back  
 Turn upward from the desk, when the human engine waits  
 Like a taxi throbbing waiting,  
 I Tiresias, through blind, throbbing between two lives,  
 Old man with wrinkled female breasts, can see  
 At the violet hour, the evening hour that strives 220  
 Homeward, and brings the sailor home from sea,  
 The typist home at teatime, clears her breakfast, lights  
 Her stove, and lays out food in tins.  
 Out of the window perilously spread  
 Her drying combinations touched by the sun's last rays,  
 On the divan are piled (at night her bed)  
 Stockings, slippers, camisoles, and stays.  
 I Tiresias, old man with wrinkled dugs  
 Perceived the scene, and foretold the rest—  
 I too awaited the expected guest. 230  
 He, the young man carbuncular, arrives,  
 A small house agent's clerk, with one bold stare,  
 One of the low on whom assurance sits  
 As a silk hat on a Bradford millionaire.  
 The time is now propitious, as he guesses,  
 The meal is ended, she is bored and tired,  
 Endeavours to engage her in caresses  
 Which still are unproved, if undesired.  
 Flushed and decided, he assaults at once;  
 Exploring hands encounter no defence; 240  
 His vanity requires no response,  
 And makes a welcome of indifference.  
 (And I Tiresias have foresuffered all  
 Enacted on this same divan or bed;  
 I who have sat by Thebes below the wall  
 And walked among the lowest of the dead.)  
 Bestows one final patronising kiss,  
 And gropes his way, finding the stairs unlit . . .

She turns and looks a moment in the glass,  
 Hardly aware of her departed lover; 250  
 Her brain allows one half-formed thought to pass:  
 "Well now that's done: and I'm glad it's over."  
 When lovely woman stoops to folly and  
 Paces about her room again, alone,  
 She smooths her hair with automatic hand,  
 And puts a record on the gramophone.

"This music crept by me upon the waters"  
 And along the Strand, up Queen Victoria Street.  
 O City city, I can sometimes hear  
 Beside a public bar in Lower Thames Street, 260  
 The pleasant whining of a mandoline  
 And a clatter and chatter from within

Where fishermen lounge at noon: where the walls  
Of Magnus Martyr hold  
Inexplicable splendour of Ionian white and gold.

The river sweats  
Oil and tar  
The barges drift  
With the turning tide  
Red sails  
Wide 270  
To leeward, swing on the heavy spar.  
The barges wash  
Drifting logs  
Down Greenwich reach  
Past the Isle of Dogs.  
Weialala leia  
Wallala leialala

Elizabeth and Leicester 280  
Beating oars  
The stern was formed  
A gilded shell  
Red and gold  
The brisk swell  
Rippled both shores  
Southwest wind  
Carried down stream  
The peal of bells  
White towers  
Weialala leia 290  
Wallala leialala

"Trams and dusty trees.  
Highbury bore me. Richmond and Kew  
Undid me. By Richmond I raised my knees  
Supine on the floor of a narrow canoe."

"My feet are at Moorgate, and my heart  
Under my feet. After the event  
He wept. He promised 'a new start.'  
I made no comment. What should I resent?"

"On Margate Sands. 300  
I can connect  
Nothing with nothing.  
The broken fingernails of dirty hands.  
My people humble people who expect  
Nothing."

la la

To Carthage then I came

Burning burning burning burning  
 O Lord Thou pluckest me out  
 O Lord Thou pluckest  
 burning

310

#### IV. DEATH BY WATER

Phlebas the Phoenician, a fortnight dead,  
 Forgot the cry of gulls, and the deep sea swell  
 And the profit and loss.

A current under sea  
 Picket his bones in whispers. As he rose and fell  
 He passed the stages of his age and youth  
 Entering the whirlpool.

Gentile or Jew  
 O you who turn the wheel and look to windward,  
 Consider Phlebas, who was once handsome and tall as you.

320

#### V. WHAT THE THUNDER SAID

After the torchlight red on sweaty faces  
 After the frosty silence in the gardens  
 After the agony in stony places  
 The shouting and the crying  
 Prison and palace and reverberation  
 Of thunder of spring over distant mountains  
 He who was living is now dead  
 We who were living are now dying  
 With a little patience

330

Here is no water but only rock  
 Rock and no water and the sandy road  
 The road winding above among the mountains  
 Which are mountains of rock without water  
 If there were water we should stop and drink  
 Amongst the rock one cannot stop or think  
 Sweat is dry and feet are in the sand  
 If there were only water amongst the rock  
 Dead mountain mouth of carious teeth that cannot spit  
 Here one can neither stand nor lie nor sit  
 There is not even silence in the mountains  
 But dry sterile thunder without rain  
 There is not even solitude in the mountains  
 But red sullen faces sneer and snarl  
 From doors of mudcracked houses  
 If there were water

340

And no rock  
 If there were rock  
 And also water



And Water 350  
 A spring  
 A pool among the rock  
 If there were the sound of water only  
 Not the cicada  
 And dry grass singing  
 But sound of water over a rock  
 Where the hermit-thrush sings in the pine trees  
 Drip drop drip drop drop drop drop  
 But there is no water

Who is the third who walks always beside you? 360  
 When I count, there are only you and I together  
 But when I look ahead up the white road  
 There is always another one walking beside you  
 Gliding wrapt in a brown mantle, hooded  
 I do not know whether a man or a woman  
 —But who is that on the other side of you?

What is that sound high in the air  
 Murmur of maternal lamentation  
 Who are those hooded hordes swarming  
 Over endless plains, stumbling in cracked earth 370  
 Ringed by the flat horizon only  
 What is the city over the mountains  
 Cracks and reforms and bursts in the violet air  
 Falling towers  
 Jerusalem Athens Alexandria  
 Vienna London  
 Unreal

A woman drew her long black hair out tight  
 And fiddled whisper music on those strings  
 And bats with baby faces in the violet light 380  
 Whistled, and beat their wings  
 And crawled head downward down a blackened wall  
 And upside down in air were towers  
 Tolling reminiscent bells, that kept the hours  
 And voices singing out of empty cisterns and exhausted wells.

In this decayed hole among the mountains  
 In the faint moonlight, the grass is singing  
 Over the tumbled graves, about the chapel  
 There is the empty chapel, only the wind's home.  
 It has no windows, and the door swings, 390  
 Dry bones can harm no one.  
 Only a cock stood on the rooftree  
 Co co rico co co rico  
 In a flash of lightning. Then a damp gust  
 Bringing rain

Ganga was sunken, and the limp leaves  
 Waited for rain, while the black clouds  
 Gathered far distant, over Himavant.  
 The jungle crouched, humped in silence.  
 Then spoke the thunder

400

DA

*Datta:* what have we given?  
 My friend, blood shaking my heart  
 The awful daring of a moment's surrender  
 Which an age of prudence can never retract  
 By this, and this only, we have existed  
 Which is not to be found in our obituaries  
 Or in memories draped by the beneficent spider  
 Or under seals broken by the lean solicitor  
 In our empty rooms

410

DA

*Dayadhvam:* I have heard the key  
 Turn in the door once and turn once only  
 We think of the key, each in his prison  
 Thinking of the key, each confirms a prison  
 Only at nightfall, aethereal rumours  
 Revive for a moment a broken Coriolanus

DA

*Damyata:* The boat responded  
 Gaily, to the hand expert with sail and oar  
 The sea was calm, your heart would have responded  
 Gaily, when invited, beating obedient  
 To controlling hands

420

I sat upon the shore  
 Fishing, with the arid plain behind me  
 Shall I at least set my lands in order?  
 London Bridge is falling down falling down falling down

*Poi s'ascose nel foco che gli affina*

*Quando fiam uti chelidon—O swallow swallow*

*Le Prince d'Aquitaine à la tour abolie*

430

These fragments I have shored against my ruins  
 Why then Ile fit you. Hieronymo's mad againe.  
 Datta. Dayadhvam. Damyata.

Shantih shantih shantih