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The Interface of Myth and Practice in Law

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> Many who have an idea of their possibilities and needs nevertheless accept the prevailing order in the way they act, and thereby strengthen and confirm it absolutely.[1]
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> —opening English title of film *Effi Briest*
>
> Ah, but a man's reach should
> exceed his grasp,
> Or what's a heaven for?[2]
>
> —Robert Browning

Few professors of beginning law students are unfamiliar with the frustration engendered when, following a classroom exploration of a multifaceted legal issue, a student poses the question: "So what is the answer—what is the law?"[3] No matter how comprehensive the discussion of the issue may have been, the student remains unsatisfied because he has come seeking the holy grail—knowledge grounded in truth and certainty, or the syllogism that discovers such knowledge.[4]

The student is articulating a common perception of law as a set of rules. This view perceives the legal process as achieving con-

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† Four friends, scholars, and teachers have had an obvious impact upon me and, consequently, upon this Article. My thanks and appreciation go to Professors Jan Deutsch, Myers McDougal, W. Michael Reisman, and Walter Weyrauch.

1. Film, EFFI BRIEST (based on novel by Theodore Fontane) opening English title (R. Fasbinder dir. 1974).

2. Browning, *Andrea del Sarto* (1855), *reprinted in* THE NORTON ANTHOLOGY OF POETRY 796 (rev. ed. 1975).

3. Prosser, in his classic article *Lighthouse No Good*, 1 J. OF LEGAL EDUC. 257 (1948), beautifully portrays the frustration of teaching and learning the law in his story of a West Coast Indian sitting on a rock, looking out to sea and saying, "Lighthouse, him no good for fog. Lighthouse, him whistle, him blow, him ring bell, him flash light, him raise hell; but fog come in just the same." *Id.*

4. Jerome Frank has suggested that this desire to achieve certainty reflects an unconscious wish to find a substitute for the firmness, certainty, and infallibility ascribed in childhood to the parent. J. FRANK, LAW AND THE MODERN MIND 14-23 (1963). This demand for certainty in law is compared to a similar demand in religion. *See* text accompanying notes 8-10 *infra;* notes 31 & 80 *infra.*

flict resolution by imposing these fixed and preexisting rules upon disputes. The experiences of legal decisionmakers, when analyzed critically, however, belie this perspective. Law in fact is enmeshed in uncertainty and permeated with discretion, yet the myth of law as the application of fixed, logically derived rules survives.

The purpose of this Article is to explore this myth, including its apparent inaccuracies, and to explain its persistence by recognizing the valid societal function that it fulfills. Part I will focus on this myth or religion of law—a law of rules—and attempt to explain its attractiveness to the nascent and practicing legal decisionmaker. Part II will explore the role of the lawyer within a process of decisionmaking that is actually imbued with ambiguity. Finally, Part III will consider the remaining significance of "the law" as a very real factor that limits and controls the legal decisionmaker.

I. THE MYTH AND ITS INACCURACIES

A. The Search for Authority

The unique role that lawyers play in American democracy has long been recognized.[5] Americans are culturally conditioned to seek and trust lawyers to answer questions, settle disputes, and determine the law in contexts perceived as legal in nature.[6] The lawyer is to know what to do; he is to know the answer.[7] How is the lawyer expected to have such knowledge?

1. The Religion of Law

American legal rhetoric portrays this nation as one of law and not of men. Such a statement depicts law as preexistent to and untainted by man.[8] This view invites the analogy of law to ortho-

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5. *See* A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (Doubleday's Anchor Books 1969).

6. The contemporary lawyer has been described as a "specialist in advising, making or appraising social choices or decisions." Reisman, *A Theory About Law from the Policy Perspective*, in LAW AND POLICY 75 (D. Weisstub ed. 1976). There are, of course, a plethora of decisionmakers in addition to lawyers that take part in the process of decisionmaking described in this Article. Lawyers are an appropriate focus, however, because in our society they constitute a disproportionate share of the significant actors in the decisional process that determines the structure of society. Moreover, the training of the lawyer brings him face-to-face with the myth, its necessity, and its limitations.

7. The doctor, for example, increasingly consults the lawyer to determine how best to interact with his patients. The lawyer virtually never consults the doctor about his interaction with clients.

8. Aristotle also perceived law as the application of set rules. For him the best law left

dox, although secular, religion, in which the practitioner assumes the role of the clergy in learning, discovering, and applying rules that emanate from some source superior to that of mankind. Decisions of the clergy are deemed authoritative only when those who are affected believe that the decisions are made simply by the application of known rules to a specific situation.[9] "Legalism" is the label given to the view that human conflict can be settled by the imposition of established rules in a legal proceeding.[10] This perception requires that the law contain a preexisting solution for every conceivable case. Consequently, the law is complete, consistent, and determinate. When the legal process fails to sustain these expectations, the imperfection is attributed to the applier's inadequate power of discernment rather than the fallibility of the law.[11] "Legalism," therefore, does not tolerate a recognition of a decisionmaker's ability to "make law" by choosing among plausible alternatives.[12]

Another more refined (or reformed) view of law in this religious motif perceives law not as a preexisting and known set of rules, but rather as a group of rules that is discoverable through a syllogistic process of reasoning.[13] Law is revealed by a process of inexorable, logical analysis that is neutral, disinterested, and unbiased.[14] The rules are either to be value-free—part of a legal system made watertight against all normative intrusions—or based upon

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the least to the discretion of lawyers. H. CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 217 (1949). Other more valid interpretations can be given to the saying found in the text. *See* text accompanying notes 131-33 *infra*. For a discussion of the principle of legality, see Ingher, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861, 927-30 (1975).

9. This belief is illustrated by litigants who consider themselves entitled to have judges apply some previously existing law to their dispute rather than have "new law" made. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 972 (1977).

10. J. SHKLAR, LEGALISM 1 (1964). Judith Shklar defines "legalism" as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." *Id.*

11. Arguably, as our society increasingly rejects orthodox religions, becoming agnostic or even atheistic, the secular religion of law is turned to more fervently as one of the few remaining moral anchors.

12. *See* Hart, *supra* note 9, at 983.

13. Gray, *The Nature and Sources of the Law*, in READINGS IN JURISPRUDENCE 404, 404-05 (J. Hall ed. 1972). This syllogistic process of reasoning is often referred to as "thinking like a lawyer." Consequently, only those who are insiders, who think like lawyers, may see the "rightness" of the legal decision. Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1244-45 (1977).

14. O'Brien, *The Seduction of the Judiciary: Social Science and the Courts*, 64 JUD. 8, 17 (1980).

some previously existing and accepted value—some *Grundnorm.*[15] In the American legal system, that normative foundation is articulated in terms of the Constitution,[16] the Founding Fathers,[17] or precedent,[18] among others.[19]

For both "legalism" and the more refined version of law as rules, authority exists prior to the process of decision. Prescription and application are separated. The legal clergyman is granted the right to apply the rules in the process of decision only because he already knows or can discover the existing commandments of the law or the disembodied sovereign.[20] He who deviates from or obscures the law is scorned, while the law itself continues to be perceived as deserving adulation. Consequently, the lay public responds ambivalently to the lawyer/clergyman. The lawyer is respected for his training in and knowledge of the rules. He also, however, is held in cynical disdain because of "a belief that the lawyers complicate the law, and complicate it wantonly and unnecessarily, [in] that, if the legal profession did not interpose its craftiness and guile, the law could be clear, exact and certain."[21]

2. The Impact of the Myth

From clerical robes to the use of incantations and rituals, the legal system has taken on many of the trappings of institutionalized religion. Like religion, law also

> establishes standards of "rationality," channels behavior, and permits prediction of the future. A body of principles is formulated which is of great practical importance, largely governed by precedents, invoked in an archaic and cryptic language, and hostile to empirical observation and checks. These principles establish a system of power relations which can be used for purposes of social control, and toward this end imposition of sanctions is threatened.[22]

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15. *See generally* H. KELSEN, ESSAYS IN LEGAL AND MORAL PHILOSOPHY (1973).

16. *E.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

17. *E.g.*, Katz v. United States, 389 U.S. 347 (1967); Adamson v. California, 332 U.S. 46 (1947) (Black, J., dissenting); Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring).

18. *E.g., In re* Boggs-Rice Co., 66 F.2d 855 (4th Cir. 1933); The Madrid, 40 F. 677 (E.D. La. 1899); State *ex rel.* La Prade v. Cox, 43 Ariz. 174, 30 P.2d 825 (1934).

19. *See* text accompanying notes 57-74 *infra.*

20. Blackstone defines law precisely as the commands of such a "supreme power." 1 W. BLACKSTONE, COMMENTARIES *43.

21. J. FRANK, *supra* note 4, at 5.

22. Weyrauch, Book Review, 25 STAN. L. REV. 782, 798 (1973). While Weyrauch is comparing law to magic rather than religion, his description of law also fits well into the

Lawyers, as beneficiaries of the aura of these religious trappings, tend to participate in legal rituals and present the law with a certain flair of righteousness and superior knowledge. A decision-making elite is formed in which only those legally trained are deemed capable of understanding or dealing with the complexity of the decisional process.[23]

Such an elite should be anathematized in a political system permeated with democratic rhetoric. While the democratic system ostensibly rejects rule by wealth or artistocracy, it appears to have accepted rule by lawyers, for their knowledge and skill of "the law" allows them to be both of and above the masses.[24] The lawyer elite has developed a temper, as do all elites, that is conservative and antidemocratic even though it owes its political power to the popular acceptance of a democratic, nonelitist government.[25]

This potential conflict is avoided because of the pervasive belief in law as rules. The belief serves two functions. First, as in religion, faith that the preexisting rules emanate from some higher source obscures the perception of a system based on decisionmaking by an elite.[26] Thus, the legal decision appears as a product not of the legal decisionmaker but of "the law,"[27] thus enhancing the

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religious motif.

23. The lawyer protects the elite status by developing a language interpretable only by others trained in the law. *See* Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 18 (1975).

24. Such a status is important for those lawyers who argue for minority rights. Assume, for example, a situation in which a majority wants certain behavior outlawed while a minority wants it to remain legal. The state must choose whether to criminalize, and thus support the majority, or to refuse to criminalize, giving the minority a veto over majority will. Supporters of a minority veto must justify their position by stating that the majority is, in some sense, wrong in its desire to criminalize. The majority, however, does not believe itself wrong. Consequently, the majority must be doubly wrong—first in wanting to criminalize the behavior, and second, in thinking it understands the difference between right and wrong. Minority rights thus depend for their existence upon support of an elite whose determination of right must rule over the opinion of the masses. Concern over such an elite is the essence of the rejection by Lord Devlin of the patrician ideology of John Stuart Mill. *See* P. DEVLIN, THE ENFORCEMENT OF MORALS (1959).

25. A. DE TOCQUEVILLE, *supra* note 5, at 264-65.

26. The sense of stability and certainty attributable to the perception of rules contributes immeasurably to the public acceptance of law. "Unless there are rules, there will be no certainty in the [legal] process; they are an assurance that human affairs will follow a general pattern and will not be at the mercy of ignorant and improperly influenced officials." H. CAIRNS, *supra* note 8, at 219.

27. Dostoevsky's description of institutionalized religion compares interestingly. Upon the return of Christ during the Spanish Inquisition, the Grand Inquisitor confronts Him:

> Canst Thou have simply come to the elect and for the elect? But if so, it is a mystery and we cannot understand it. And if it is a mystery, we too have a right to preach a mystery, and to teach them that it's not the free judgment of their hearts, not love that

decision's acceptability with both parties and critics. A decision-making system cannot claim to be a system of law if compliance can be attained only by an exercise of power.[28]

Second, the perception of law as rules serves to protect the lawyer's psyche. A decisionmaker who recognizes that his decisions have significant impact on the lives of others and are, in essence, his "personal" responsibility may be overwhelmed by his burden.[29] Viewing the decision as an outcome mandated by "the law" allows the decisionmaker to disown his responsibility for its effect.[30] The belief in law as rules, thus, both gives authority to the elites to decide and insulates them from responsibility for the effects of their decisions.[31]

This image of law gives great support to the lawyer elite. The individual who chooses to enter the legal profession may have a personality structure that needs and seeks certainty, truth, and order.[32] His perception of law as rules or as a process of rule discovery promises to fulfill this need. He thus expects legal education to

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matters, but a mystery which they must follow blindly, even against their conscience. So we have done. We have corrected Thy work and have founded it upon *miracle, mystery* and *authority.*

F. DOSTOEVSKY, *The Grand Inquisitor*, in THE BROTHERS KARAMAZOV Book V, Chapter V, at 264 (MacMillan & Co. 1948) (emphasis in original).

28. *See* McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 403 (1967).

29. Kierkegaard noted that nothing is more fearful for man than to realize how much he is capable of. 1 S. KIERKEGAARD, JOURNAL AND PAPERS 440 (H. & E. Hong eds. 1964).

The lawyer's role is that of a decisionmaker, whether he is judge or advocate. The judge articulates the final outcome of the dispute and is a clearly exposed decisionmaker. His "decision," however, is often predicated upon the arguments made by the advocates before him. Since the arguments selected and presented by the advocate often determine the resolution of the conflict, the advocate exists at the center of the decisionmaking process. Even in those situations that seemingly deal with a "cut-and-dried" question of law, it is the lawyer who determines the proper response to the statute and acts upon it. Many rules that appear "clear" have fallen to arguments of unconstitutionality. When the attorney chooses to follow the law in the "clear" situation, his decision ratifies that law and carries as much responsibility as when he chooses to attack it. *See* note 75 *infra.*

30. Jurors frequently remain uninformed of their power to nullify the law in criminal prosecutions so that they too may be protected from the burdensome knowledge of their impact on others. *See* United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).

31. The Grand Inquisitor, speaking of and to the deity-figure of another religion, revealed the same process.

[The masses] will marvel at us and look on us as gods, because we are ready to endure the freedom which they have found so dreadful and to rule over them—so awful it will seem to them to be free. But we shall tell them that we are Thy servants and rule them in Thy name. . . . That deception will be our suffering, for we shall be forced to lie.

F. DOSTOEVSKY, *supra* note 27, at 260.

32. The portrait of beginning law students described in this Article is a kind of profile or social character and is not an empirical construct.

supply rules that will answer the problems he will confront as a lawyer. This seductiveness of the myth is, of course, not restricted to law students, but the following reference to their experience illustrates the disillusionment that they perceive when the expectations stimulated by the myth are violated.

B. Violated Expectations

1. The Limitations of Rules and Precedent

The student's image of law as rules becomes problematic from the beginning of his training. Rather than the expected certainty, he finds himself overwhelmed by ambiguity. The conventional understanding of how rules operate assumes that they exist and that there is knowledge of them prior to the process of decision.[33] Within this conventional framework, conclusions are formed by a process of deductive reasoning.[34] In reality, however, "legal" rules are made during the process of decision. Each new decision redefines and reconsiders the meaning, parameters, and significance of former decisions.[35] Rules purportedly derived from precedent are merely attempted summarizations of past decisions that have tackled similar problems. These rules are induced by an examination of the facts and the results of relevant cases;[36] thus, they are tentative.

Such "summary rules" are open to analysis and criticism on

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33. This concept of rules is what Rawls refers to as rules of a practice. Rawls, *Two Concepts of Rules*, 64 PHILOSOPHICAL REV. 3, 18-19 (1955). Prior command is also Blackstone's view of law. *See* W. BLACKSTONE, *supra* note 20, at *43.

34. Justice Black, in his search for constitutional absolutes, also sought to authorize legal decisions by use of a deductive process reminiscent of that suggested by Kelsen. *See* Griswold v. Connecticut, 381 U.S. 479, 507-26 (1965) (Black, J., dissenting). *See also* H. KELSEN, *supra* note 15.

35. Levi, *An Introduction to Legal Reasoning*, in JURISPRUDENCE 961, 964 (G. Christie ed. 1973). The novelist Robert Penn Warren aptly describes this process through the dialogue of the character Willie Stark.

> [Law is] like a single-bed blanket on a double bed and three folks in the bed and a cold night. There ain't never enough blanket to cover the case, no matter how much pulling and hauling, and somebody is always going to nigh catch pneumonia. Hell, the law is like the pants you bought last year for a growing boy, but it is always this year, and the seams are popped and the shankbone's to the breeze. The law is always too short and too tight for growing mankind. The best you can do is do something and then make up some law to fit. . . .

R. WARREN, ALL THE KING'S MEN 145 (1st ed. 1946).

36. Rule-skeptics insist that the plethora of cases available for review allow the most contradictory positions to simultaneously claim consistency with the *relevant* cases. H. JOLOWICZ, LECTURES ON JURISPRUDENCE 257 (1963); D. WIGDOR, ROSCOE POUND 257 (1974).

multiple levels. The innumerable environmental factors[37] that may have influenced the outcome of the cases from which the "rule" was derived need to be nnderstood if its scope and significance are to be evaluated. The relevant questions, however, include not only what led to this rule, and why *this* outcome given this rule, but why *this* rule, and from whence does it gain its authority? If the sole answer forthcoming is "precedent," there is only infinite regression rather than an understanding of the process of legal decisionmaking. Consequently,

> [e]ach person is in principle always entitled to reconsider the correctness of a rule and to question whether or not it is proper to follow it in a particular case. As rules are guides and aids, one may ask whether in past decisions there might not have been a mistake in applying [general moral] principle[s] to get the rule in question, and wonder whether or not it is best in this case.[38]

Therefore, precedents and the "rules" derived therefrom become guides rather than proscriptions.[39] Precedent cannot be understood as serving as logical axioms that, when mechanically applied, formulate a "correct" conclusion; rather, precedent is an accumulation of wisdom against which the validity of new conclusions can be assessed. Thus, a consideration of precedent does not terminate the decisional process, it merely supplies reference material. Many provocative questions remain: was the past wisdom really ever wise;[40] was it wise when made, but changed conditions have altered its wisdom; even if past wisdom is still wise, is the present problem different enough to elude the contours of the past decision?[41]

Since most decisions required of the legal system involve resolution of the conflict between arguments for change and those for

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37. Environmental factors include considerations of economics, psychology, history, and the like that might consciously or unconsciously influence decisionmakers.

38. Rawls, *supra* noto 33, at 23.

39. The determination of decisions through the application of precedent, consequently, cannot be understood by the frequently offered metaphor of building blocks mechanically imposing an inevitable result. Rather, the process is more consistent with that of the scientific method that consults and evaluates past wisdom prior to taking each new decisional step. *See* Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 232 (1968).

40. This perception of rules as displaceable presumptions or working hypotheses, to be modified or rejected if the predictable consequences of their application in a shifting social context prove unsatisfactory, was the pragmatic core of legal realism. *See* Hart, *supra* note 9, at 976.

41. In every case there must be a decision as to "which of the circumstances of the alleged precedent [are] relevant to the decision," and "whether the circnmstances of [the case at hand] are in their essentials similar." H. JOLOWICZ, *supra* note 36, at 257.

stability,[42] the effect of precedent must be limited. To remain viable, law must allow for change while guaranteeing a degree of stability. Consequently, law develops and functions in a constant state of tension. In such a state, the value of "rules" is sorely limited.

Summary rules are not "valueless," however, for they lend efficiency to the process of decision. A case is more quickly resolved by application of rules derived from similar past decisions than by an entirely new process of decision. Furthermore, if an accepted rule is used to resolve the legal issue, the decisionmaker need not constantly repeat the wrenching process of decision and, consequently, can conserve his emotional and intellectual energy. Thus, "rules" allow resources to be directed into more productive realms. Precedential rules also serve as guides and reminders to intellectually and morally fallible decisionmakers, therefore reducing the likelihood of the waste of resources that occurs when an inferior decision is made.[43]

Rules may also serve to promote social order. They accomplish this goal by creating expectations about the legal significance of one's behavior. Without moderately secure expectations, an individual could not structure his actions in a manner most likely to effectuate his desires to contract, alienate property, or the like.[44] Without some certainty, all behavior would present the risk of litigation and sanction. It follows, then, that any deviation from pre-

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42. While the process being discussed is most clearly descriptive of the common-law and constitutional processes of decisionmaking, it is also pertinent to law created by legislation and administrative rulemaking. Legislation and rulemaking are also decisional processes that attempt to resolve value conflicts, which in their cases are predicted future conflicts. Thus, they should be subject to the same thorough critique as all other decisionmaking. The forum for effectuating such criticism likely is the legislature or administrative proceedings rather than the courtroom. Furthermore, since the language of the rule or statute must be broad enough to cover a category of potential conflicts, the determination of the parameters of its coverage is an incremental interpretive process closely analogous to common-law development.

43. Professor Lawrence Alexander has suggested that while correct moral principles are those that would be applied by an omniscient decisionmaker, in the hands of fallible humans such tools may be less likely to produce desirable outcomes than are more mechanical rules that are easier to apply and whose application is easier to monitor and predict. L. Alexander, Modern Equal Protection Theories: A Metatheoretical Taxanomy and Critique 14 (manuscript to be published in 42 OHIO ST. L.J. (1981)).

44. The importance of predictability has been amply discussed in American jurisprudence. *See, e.g.*, L. FULLER, THE MORALITY OF LAW 37 (1969) ("A law that changes every day is worse than no law at all."); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (the effectiveness of law depends upon the "bad man's" prediction of punishment for wrongdoing).

cedent precipitates a degree of societal insecurity. Consequently, the burden of proof must always fall upon the one seeking such change.[45]

System efficiency and social order, however, as valuable as they are, are insufficient justifications for mechanical application of precedential rules. Efficiency and order are only significant interests when they lead to the fulfillment of valued societal goals or encourage evolution in such directions.[46] Precedent thus essentially serves only as a guide worthy of some deference by decisionmakers. These decisionmakers, however, must still assess when and how far the guide is to be followed in an effort to accomplish the desired purpose.[47] Law—whether tort, criminal, or contract—is not a tangible item but a decisional process by which goals may be accomplished and/or values articulated and supported. Ideology,[48] therefore, is at the core of all legal decisions.[49]

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45. The burden is greater in those areas of the law in which the wish is to encourage parties to orient their behavior to conform with "the law." Contract negotiations among parties, for example, depend on a good deal of stability in the law. In torts, however, the parties are likely to have had no contact prior to injury, thus reducing the likelihood of any pre-injury negotiations to allocate risk. The goal of ever reducing accident costs minimizes the persuasiveness of demands for concrete and clearly designated standards of care.

46. For example, the rule of *caveat emptor* broke down as society became more solicitous of an uninformed consumer class that was unable to protect itself.

47. How, for example, is one to know when a tort has taken place? Traditionally, a tort has been described as a civil wrong other than breach of contract for which the law gives a remedy. *See, e.g.*, Coleman v. California Yearly Meeting of Friends Church, 27 Cal. App. 2d 579, 582, 81 P.2d 469, 470 (1938); Diver v. Miller, 34 Del. 207, 213, 148 A. 291, 293 (1929). *See generally* W. PROSSER, LAW OF TORTS § 1 (4th ed. 1971). This definition, tautological like all definitions, fails to describe the types of wrongs for which law will give a remedy. To determine if a tort has taken place, one must first designate what the law should accomplish and then determine whether a tort designation in the specific case would help to accomplish such a goal.

48. "Ideology" of a given individual (at a given time) is understood to mean the amalgam of criteria by which he determines value, status, and worth. All decisions made by an individual are determined with reference to those criteria.

49. Some illustrations may be in order:

(1) In the case of Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948), plaintiff was harmed by a shot from one of two negligent hunters. The court refused to burden plaintiff with the responsibility of proving which of the two hunters had actually caused the injury, but allowed him to receive a judgment against both. Apparently the court believed that plaintiff should be compensated and that neither defendant should benefit from the fact that the other defendant was also negligent. Yet if a plaintiff in a paternity suit could not designate which of two defendants had actually fathered her child, would the court allow successful suits against both men? Although the two cases are scientifically similar, the ideological impact of formally recognizing multiple fathers as well as the potential of disapproval for the "promiscuous" plaintiff negate the precedential effect of *Summers* in this situation.

(2) An individual who wrongly injures another is likely to be held causally responsible in a civil suit for any further injury, including death, due to medical malpractice associated

2. The Ideology of Law

A recurring myth of law is neutrality as symbolized by blindfolded justice. One manifestation of this myth is the repeated dream that the legal process be nonideological.[50] The scholarly debate over legal neutrality is a concern of Professor Herbert Wechsler.[51] Wechsler insists that legal decisions, especially constitutional decisions, must be principled. A principled decision, says Wechsler, "is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and neutrality transcend any immediate result that is involved."[52] If "neutral criteria" for decisions must be value-free, however, no such criteria exist. Value preferences inescapably intrude to guide decisions among competing alternatives.[53] At best, Wechsler must mean neutral applications of general, although value-laden, criteria.[54]

The requirement of generality cannot be total, for such a demand would require a coherent value system in which principles never conflicted in flesh and blood cases. A principle is applied neutrally when it is applied to a sufficiently large number of diverse fact situations as to appear to be neither ad hoc nor lacking in appreciation of contextual differences. The application need be only "adequately general."[55]

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with the treatment of the initial injury. The same injuror, however, will likely not be held causally responsible for the death in a criminal proceeding. While the decisionmaker is willing to place the burden of proving malpractice upon the first tortfeasor (who can sue the malpracticing doctor for indemnification) rather than upon the injured party, he likely will be reluctant to impose the stigma of a homicide conviction upon the injuror. Yet in any scientific sense the initial injury is as much the cause of death in one suit as in the other. Causation thus proves less scientific than ideological and varies from one context and consequence to another.

50. M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 26 (1964). This dream can take one of two forms. Either law itself is seen as ideologically neutral, or the ideology admitted to exist in the law is seen as being neutrally discovered and applied by the decisionmaker.

51. H. WECHSLER, *Toward Neutral Principles of Constitutional Law,* in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 3 (1961).

52. *Id.* at 27-28.

53. *Compare* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication,* 27 U. CHI. L. REV. 661 (1960), *with* Mueller & Schwartz, *The Principle of Neutral Principles,* 7 U.C.L.A. L. REV. 571 (1960).

54. *See* Deutsch, *supra* note 39, at 188-90. Justice Black's insistence upon absolutes in constitutional adjudication, *see* note 34 *supra,* is problematic for it demands just such a totally coherent, nonconflicting value system. If judicial review was only justified when based on such a system, little review would take place.

55. Deutsch, *supra* note 39, at 188. Adequate generality is "that degree of generality perceived as adequate by the very society that imposes the requirement of adequate generality to begin with . . . ." *Id.* at 195. An illustration may add clarity. When Congress passed

The adequacy of application of a principle is a function of the degree of generality in its formulation—the degree to which competing values are taken into account in the derivation of the principle. Thus the content of the principle, its evaluation of competing values, must also be considered. While a neutrally applied, adequately general principle may be a delight to see, the authority of the principle itself may still be questioned.

Although law itself may not be value neutral, the ideology of law still may be authoritative, under the myth of neutrality, if the ideology may be neutrally discovered. Clear lines thus theoretically can be drawn between the values of "the law" and the overreaching of a decisionmaker imposing his own value idiosyncracies upon the legal process.[56] Sources of ideology frequently noted include reason and logic, natural law, community consensus, tradition, and the Constitution. Each "source" is deficient.

(a) Reason and Logic

Like neutral principles, logic and reason do not themselves justify an ideological position. They cannot supply perspective. At best they may have little more usefulness for analytical purposes than to indicate consistency within a given system of belief.[57] Once values are chosen, reason and logic may be effective tools in developing a process of value fulfillment.[58] Ultimate choices among values, however, must precede any process of rationality.[59]

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legislation forbidding discrimination in employment on the basis of race, sex, religion, and national origin, Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(i) (Supp. III 1979), cries were heard that the legislation had violated the property rights of employers. Nonetheless, such legislation has been judicially upheld as a furtherance of equality. United Steel Workers v. Weber, 443 U.S. 193 (1979); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In a totally coherent value system, such decisions would seem to represent the principle that equality interests are superior to property interests. Yet a statute that required citizens to place all their property in a common pool to be distributed equally among all would clearly be an unconstitutional violation of property rights. Obviously, equality interests are not always recognized as superior to property interests. The principles articulated in the employment discrimination cases are adequately general, however, if their nonapplication in other situations, such as in the property distribution case above, can be justified by reference to competing principles.

56. Jurists often voice their rejection of any legal perspective that acknowledges a role for individual idiosyncracies. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) ("In determining what rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions.").

57. Weyrauch, *supra* note 22, at 800.

58. Logic itself is a comparatively recent source of legal discourse. *See generally* T. VIEHWEG, TOPIK UND JURISPRUDENZ (5th ed. 1974).

59. Either reason is an empty source for the determination of value or it is camouflage

(b) Natural Law

The deficiency in using natural law as a value source is the inability to test its content. Attempts to build an ideology upon universal law are trapped in a dilemma. Either the alleged universal ends are too few and abstract to aid in deciding specific conflicts, or they are too numerous and concrete to be truly universal.[60] Consequently, the content of natural law consists of whatever the individual ascribing to it desires to advocate. Supporters of both the status quo and radical change[61] have repeatedly invoked it to reach opposite results. Essentially, natural law serves as a debater's bludgeon used to support and defend one's own position while battering those of one's opponents.[62]

(c) Community Consensus

In a nation spanning close to five million square miles and including over two hundred million people, consensus is hard to find. Conventional moral culture is likely to vary significantly from place to place as well as among different groups within the same community. To ascertain consensus in a nonhomogeneous society is nigh impossible; decisionmakers invoking it are likely to be referring only to the views of the community with which they interact and identify. Assuming consensus could be found, a value system based on it would lack stability[63] and represent law by popular flat.[64] Consensus, consequently, is either nonexistent, sporadic, or

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concealing flagrantly elitist value preferences. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 38 (1978). *See* Tushnet, ". . . *And Only Wealth Will Buy You Justice*"—*Some Notes On the Supreme Court 1972 Term*, 1974 WIS. L. REV. 177, 177.

60. R. UNGER, KNOWLEDGE AND POLITICS 24 (1975).

61. Idealist versions of natural law are invoked as a source of criticism of the existing social order. Lacking a present authority source, supporters of change frequently appeal to a higher order of directives. *See* J. STONE, HUMAN LAW AND HUMAN JUSTICE 38 (1965).

62. Holmes compared natural law with the rules of English chivalry. "It is not enough for the knight of romance that you agree that his lady is a very nice girl—if you do not admit that she is the best that God ever made, you must fight . . . ." Holmes, *Natural Law*, in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 557, 558 (F. Cohen & M. Cohen eds. 1979).

63. Consensus would not lack stability if it were based on some accepted transcendental value, but in such circumstances the source of ideology would not be consensus but something akin to natural law. If the sole source of ideology is community consensus, the system would fluctuate with every emotional wind that swept through the community. Any new trend or demagogue could alter consensus, at least momentarily.

64. Such a system would be antithetical to a valid conception of a lawyer's role. *See* note 24 and text accompanying notes 23-25 *supra*. Elimination of mob-rule and protection of minority interests lie at the very foundation of a system of law. *See* Ingber, *supra* note 8, at 863-67; note 24 *supra*. *See also* Ingber, *Ideological Boundaries of Criminal Responsibil-*

dictatorial.

(d) Tradition

As considered in the discussion of precedent, tradition too deserves some deference because of the expectations that it may encourage. Tradition, however, as was also true of precedent, may only be a guide to past wisdom rather than a prescription for future behavior. Otherwise law would never grow and change but would be straitjacketed by past judgments.[65] Tradition deserves respect but not blind adulation. Hence, the source of authority for any ideology may not, on bottom, rest on tradition.

(e) The Constitution

The Constitution often is treated with the reverence of a holy parchment. Values emanating from it would be infused with the authority that is sought. As was also true for natural law, however, the document's most siguificant clauses, such as the due process and equal protection clauses, are too general or open-ended to require any specific result in specific cases. This recognition has led one commentator to conclude that "there is simply no way for courts to review legislation in terms of the Constitution without repeatedly making difficult substantive choices among competing values, and among inevitably controverted political, social and moral conceptions."[66]

Other jurists[67] and scholars[68] have rejected the perception that decisionmakers should inject substantive—that is, ideological—life into constitutional provisions. Professor Jolın Hart Ely presents a process-based theory of constitutional adjudication.[69] According to

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ity, 27 U.C.L.A. L. REV. 816, 842 (1980).

65. Justice Werner of the New York Court of Appeals so limited the development of the law when, in Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911), he held workman's compensation to be unconstitutional. "Under our form of government," he argued, "courts must regard all economic, philosophical and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the letter or spirit of our written constitution." *Id.* at 287, 94 N.E. at 437. Since workman's compensation did not demand any finding of fault on the part of the employer, and since fault had traditionally been required in suits by employees against their employers, the statute was found to violate due process.

66. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 452 (1978).

67. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 511-12 (1965) (Black, J., dissenting).

68. *See* J. ELY, DEMOCRACY AND DISTRUST 44-48 (1980). *See generally* R. BERGER, GOVERNMENT BY JUDICIARY (1977).

69. J. ELY, *supra* note 68.

Ely, courts may overturn legislative determinations only when necessary to correct imperfections of process that block the proper functioning of the democratic process.[70] He limits invocation of the equal protection clause, for example, to those situations in which "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[71]

Professor Ely's position, however, fails to insulate the equal protection clause from the demand for ideology. Only equals need to be treated equally; the allocation of justified status (non-equality) is clearly an ideological decision.[72] Yet the document is silent concerning which distinctions are acceptable. The conclusion that a legislative classification is invalid springs from an ideological disagreement with the judgment of status that lies behind the classification.[73] The Constitution does not and cannot remove from the decisionmaker the need personally to resolve ideological conflicts.[74]

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70. *Id.* at 101-04.

71. *Id.* at 76. Professor Ely is referring to Justice Stone's famous footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

72. A professor at a state university may get a key to the faculty library while students do not. That discrimination is not deemed violative of the equal protection clause although key allocation on the basis of race or sex likely would be. The appropriateness of his receiving the key is arguably based on an accepted distinction of merit. Yet "merit" is only entangled components that imply social value. The desiguation is made in a discretionary manner that is probably influenced by the degree of identification between those authorized to designate and those to be considered. Yet merit as a basis of unequal treatment is likely to be viewed as a rational distinction. Weyrauch, *Governance Within Institutions,* 22 STAN. L. REV. 141, 151 (1969).

73. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories,* 89 YALE L.J. 1063, 1075 (1980). Children, although persons for equal protection purposes, are often denied the right to purchase alcohol or to sigu binding contracts. This distinction is acceptable because children are stereotyped as being immature, impulsive, and irrational—essentially in need of supervision. *E.g.,* Prince v. Massachusetts, 321 U.S. 158 (1944) (state's authority over children's activities broader than over adults); Lobrano v. Nelligan, 76 U.S. 295 (1869) (legislature possesses power to determine how to preserve infant's estates). Not long ago, however, women were treated differently from men based on precisely the same justifications. *E.g.,* Hoyt v. Florida, 368 U.S. 57 (1961) (statute exempting women from jury duty not unconstitutional); Goesaert v. Cleary, 335 U.S. 464 (1949) (state may deny women opportunity for bartending). The present unease witb gender discrimination is not due to any change in the constitutional document, but to a change of ideology. The impact of such change is clear in constitutional adjudication because a single institution, the United States Supreme Court, is respousible for most change and therefore is carefully studied. Ideology is equally siguificant in all law, such as tort and contract, but the lack of a centrally significant institution to he studied often masks that reality.

74. Ely's process position itself appears to contain a subliminal ideology. While the lack of representation of some groups in the political process may free the courts from any responsibility to defer to legislative judgment, it gives no perspective on what the group would have been entitled to in a properly functioning democratic system. "Even if the legis-

C. Two Decisionmaking Hurdles

If inextricable rules do not preexist decisions and the process of decisionmaking requires an ideological core that also lacks clear prior authority, the fledgling legal decisionmaker's quest for *the* truth, *the* answer—the holy grail—must be unsuccessful.[75] He is confronted by moral and ethical judgments that are not true or false in any empirical sense.[76] His first trauma comes when he is forced to relinquish the icon of rules and certainty and is left facing a morass of ambiguity.[77] Many problems affecting individuals with hopes, dreams, and ambitions must be resolved, but no clear solutions exist.

Recognition of the multiple levels at which the question "why" may be asked ends the decisionmaker's trust in syllogism. It presents, however, a second and greater hurdle. Unlike the philosopher who can explore a problem, marvel at its intricacies, and leave it for another day, the lawyer must decide within and in spite of all ambiguity.[78] He must work within a decisional dialectic that

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lative resolution is not entitled to a presumption of correctness there is no reason to assume that the opposite resolution would prevail . . . ." Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9 (1979). How then, once free to be nondeferential, are jurists to decide specific cases?

75. It would be erroneous to contend that if legislation exactly on point is found, there is certainty. Codification and administrative rulemaking involve essentially the same value-conflict settlement process found in the common law, but they are directed at future conflict. There is no guarantee that the statute or rule developed was ever wise or that it is wisely or properly applied to any particular case. Those problems are for the lawyer to consider just as in noncodified common-law situations. Even if the statute is "clear," the attorney still must ask "why this statute?"—and accept the responsibility for his answer. *See* note 29 *supra*.

76. Moral judgments are persuasive expressions of attitudes and not statements of fact capable of being proved true or false. Ayers, *On the Analysis of Moral Judgments*, in LAW, LANGUAGE AND ETHICS 557 (W. Bishin & C. Stone eds. 1972).

77. The trauma of this confrontation with ambiguity is strikingly portrayed in *All the King's Men*, *see* R. WARREN, *supra* note 35, when the realist, Willie Stark, confronts the idealist, Dr. Adam Stanton:

> "You got to make [goodness], Doc. If you want it. And you got to make it out of badness. Badness. And you know why, Doc? . . . Because there isn't anything else to make it out of . . . ."
>
> Adam wet his lips and said, "There is one question I should like to ask you. It is this. If, as you say, there is only the bad to start with, and the good must be made from the bad, then how do you ever recognize the good? . . ."
>
> "Easy, Doc, easy." [Willie] said.
>
> "Well answer it."
>
> "You just make it up as you go along."

Id. at 257.

78. Philosophical thinking is directed toward clarifying problems. Legal thinking, on the contrary, is directed toward the solution of problems. Clients and courts ask questions.

contains thesis and antithesis but lacks synthesis. There is nothing but tension and the need to decide.

Deciding within ambiguity is a tortuous task. It requires that one accept personal responsibility[79] for one's decisions and their impacts and affords no assurance that the decisions are not "wrong."[80] There is only the uncertainty whether one is acting as a good Samaritan or abusing a missionary fervor.

In the secular religion of law, the lay community may, debatably, need to believe in some sort of a deity. When the clergy also believe, however, there is great danger, because then no one need take responsibility for the decisions made. The necessity to accept personal responsibility for one's decisions may be the hardest principle for the budding attorney to accept.[81]

II. THE LAWYER AS DECISIONMAKER

A. *Approaching Legal Problems*

Part I presented law as a process by which lawyers make decisions that are accepted as authoritative and legitimate.[82] As par-

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The lawyer must present answers. C. MORRIS, HOW LAWYERS THINK 3 (1938). While the philosopher may be a scholar/observer, the lawyer must also be a participant. He must focus on outcomes rather than on simple aesthetics. Even in his role as advocate, the lawyer must accept responsibility for his decisions and their ramifications. For discussion of the decisionmaking role of practitioners, see note 29 *supra*, notes 84 & 104 *infra*, and text accompanying notes 82-104 *infra*.

79. The burden of personal responsibility can be awesome. Sartre, *Existentialism and Humanism*, in LAW, LANGUAGE AND ETHICS, *supra* note 76, at 67.

80. *See* 1 S. KIERKEGAARD, *supra* note 29, at 440; Fiss, *supra* note 74, at 49. The more the attorney understands his pivotal role in legal decisionmaking, the more difficult it is for him to function. The lawyer who accepts the myth of law as rules may find his task easy. Pierce that myth for him, instill in him a sense of personal responsibility for the impact of his actions, and decisions once easily made will become significantly more complex and excrutiating. The Grand Inquisitor emphasized this hurden of decision in his discourse with Christ:

> Didst Thou forget that man prefers peace, and even death, to freedom of choice in the knowledge of good and evil? Nothing is more seductive for man than his freedom of conscience, but nothing is a greater cause of suffering. And behold, instead of giving a firm foundation for setting the conscience of man at rest for ever, Thou didst choose all that is exceptional, vague and enigmatic; Thou didst choose what was utterly beyond the strength of men, acting as though Thou didst not love them at all . . . .

F. DOSTOEVSKY, *supra* note 27, at 261-62.

81. "And all will be happy, all the millions of creatures except the hundred thousand who rule over them. For only we, we who guard the mystery, shall be unhappy." F. DOSTOEVSKY, *supra* note 27, at 267.

82. The perspective on law presented is based on law as a process of authoritative decisionmaking and personal responsibility rather than law as a discoverable truth. This view may not be the only valid perspective of law, yet it is an essential one, for it helps to expose many of the frustrations and tensions inherent in legal education and practice.

ticipants in this decisional process, lawyers must recognize that it is the composite of their behavior that gives direction and content to the law.[83] Their decisions inevitably injure some interests and support others. When the factual context of a decision presents a strong conflict between two highly prized interests—such as the values of free speech and fair trials[84] or the interests in pleasant environmental surroundings and low-income housing[85]—the process can be agonizing for the decisionmaker.[86] Even if one party, when narrowly viewed, espouses interests deemed by some as undeserving of support, viewing the party's position more broadly often exposes valued interests at stake.[87] "The whole body of the . . . law is made up of compromises of conflicting individual interests in which we turn to some social interest, frequently under the name of public policy, to determine the limits of a reasonable adjustment."[88]

Claude Monet painted multiple portraits of the Cathedral at Rouen believing only the multiple perspectives of the Cathedral would give the art appreciator a full understanding of the beauty of the building. *See* G. HAMILTON, CLAUDE MONET'S PAINTING OF ROUEN CATHEDRAL 4-5, 19-20, 27 (1967). By itself, the legal perspective presented in this Article would be deficient in revealing the edifice of law. Without it, however, other perspectives are also unable to capture the essence of the legal process.

83. The practitioner, therefore, may not see his role simply as that of a hired gun. He needs to concern himself with where to direct the law, what impact to cause, and why. The "hired gun" perspective is a necessary view of law, however, for it is central to a "meaningful coarchical and pluralistic society and a dialectical conception of truth." Reisman, *supra* note 6, at 79.

84. *E.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Irvin v. Down, 366 U.S. 717 (1961).

85. *E.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979).

86. One of the greatest social dilemmas is the determination of when and whether to sacrifice the sanctity of the individual in order to attain other societally valued goals. The legal system often provides the forum in which this difficult choice is made. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (conflict between university's need for a racially diverse student body and individual's interest in being judged solely on his merits); Stump v. Sparkman, 435 U.S. 349 (1978) (conflict between societal interest in a judiciary free from threat of suit and individual's due process rights). *See generally* Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785 (1979).

87. In N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), for example, defendants successfully prevented the unionization, under the National Labor Relations Act, of lay faculty members at two groups of Catholic high schools. On face value, the schools appear to be attempting to keep their lay employees unorganized and, thus, in poor negotiating positions. Parochial schools, however, have heen severely strapped economically for more than a decade. Keeping their workers unorganized also may be necessary to keep parochial education economically viable. From this perspective both plaintiff and defendant are representing important societal values.

88. Pound, *A Theory of Social Interests*, in READINGS IN JURISPRUDENCE, *supra* note

Given this perspective on law, the individual is participating in the process by which law is developed from the moment he enters the dialogue of law school. He is expected to think through and evaluate varying positions upon a problem, recognize and accept the responsibility for the impacts of his chosen position, communicate his decision to others, and attempt to convince them of its preferability.[89] If successful, his classmates may later go forward and attempt to convince others—lawyers, judges, legislators, and the like. And so law is "made."

The decisionmaker, be it student or lawyer, must, therefore, candidly admit that he is taking part in a process of goal and value clarification.[90] To reject this admission is not to avoid participating in the process but to do it blindly.[91] Both student and lawyer must perceive themselves as participants in the designing of law rather than merely mechanics working on an already designed chassis.[92] They must be trained accordingly.

Recognition of the role of lawyer as decisionmaker demands that the training and interests of lawyers be more inclusive than just a concern with the formal output of legal processes, namely cases, legislation, and administrative decisions. Understanding the informational input necessary to make such decisions should be stressed equally.[93]

A lawyer must gather all relevant information and be aware of all perspectives that influence the resolution of legal issues if he is to make decisions that are most consistent with his desired values. He must, therefore, be trained in philosophy, history, political sci-

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13, at 238-39.

89. In this sense the legal process is a mechanism by which members of the community may participate in a process for resolving ambiguity within a forum established for the discussion of policy in the gap of ambiguity. Levi, *supra* note 35, at 963.

90. Reisman, *supra* note 6, at 98. The quest for truth, rather than the recognition of choice, must be unsuccessful. "Truth happens to an idea. It becomes true, is made true by events." James, *Pragmatism—A New Name for Some Old Ways of Thinking*, in READINGS IN JURISPRUDENCE, *supra* note 13, at 228.

91. *See* Holmes, *supra* note 44, at 467; Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY, *supra* note 62, at 259.

92. *See* Holmes, *supra* note 44, at 477. Codified law does appear somewhat like a "designed chassis." The statute itself, however, is subject to criticism and reevaluation both in the legislative halls and in the courts (where it may be constitutionally attacked). In addition, the meaning, coverage, and impact of a statute are often unclear, allowing lawyers to press their views as the "proper" interpretations. *See* notes 42 & 75 *supra*.

93. Cook, *Legal Thinking and the Process of Deciding a New Case*, in LEGAL METHOD AND LEGAL SYSTEM 455 (W. Fryer & H. Orentlicher eds. 1967).

ence, economics, psychology, and ethics.[94] In essence all disciplines become part of the legal discipline when they are relevant to legal decisionmaking. Time and efficiency constraints, however, make it impossible for all relevant information and perspectives to be assimilated prior to each decision. Consequently, one of the greatest frustrations and anxieties lawyers encounter is the realization that the assimilative task is never really completed before the decision itself must be made.[95]

The lawyer is continually involved in a process of legal evaluation, reconsideration, and reform. For him to participate in such a process wisely, theories and the models derived from such theories are essential,[96] because, without them, the "law that is" cannot be contrasted with "the law that ought to be." Models play three crucial roles in evaluating a legal system. First, a model that is descriptive of the present state of the system can further analysis of the institutional relationships within the system. Each institution, be it the legislature, the court, the jury, administrative agencies, or the lawyer himself, places pressures and counterpressures both on other institutions and on the system as a whole. Any attempt to identify strengths or weaknesses without recognizing systemic interaction will invite myopic, palliative measures of reform. Second, designing a model forces its advocate to enunciate and clarify the goals and purposes that the system is intended to fullfill.[97] The model can then be used to evaluate the system in light of these goals, thus making it possible to construct an "ideal" or desired system. Political, economic, or other pressures external to the legal system, however, are likely to prevent the realization of this preferred state. Herein lies the third role of the model. By clarifying the ideal, it allows a consideration of the ramifications of alternative compromises from the ideal. Greater use of theory and models would enhance significantly the lawyer's ability to predict, plan for,

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94. F. COHEN, THE LEGAL CONSCIENCE 69 (1960). *See* O. HOLMES, THE COMMON LAW 1 (1881). The rationality of law is not that of logic or of geometry but of economic calculations—"all things considered and weighing costs against advantage, x is better than y." L. FULLER, ANATOMY OF THE LAW 184 (1968).

95. Thus, the decisionmaker faces the risk that the effect of his decision may be quite removed from what was intended, or an intended result may be achieved but with unexpected and undesired consequences.

96. "Theory," insisted Holmes, "is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house." Holmes, *supra* note 44, at 477.

97. *See* text accompanying notes 90-92 *supra*.

and evaluate the ramifications of his position.[98]

B. *The Skill of Persuasion*

Once a lawyer has made a decision, his next task is implementation. If he is not in a position to implement his decision alone, he will need to resort to persuasion. He will attempt to articulate his position in such a way as to convince others of its preferability.[99] This characteristic skill of persuasion is often viewed negatively by the layman.[100] The lawyer's linguistic talents are perceived as manipulative controls on the behavior of others. To the public, legal thinking often appears to begin with conclusions rather than premises, and the lawyer appears to undertake the search for relevant principles only as a final, ritualistic gesture.[101]

The negative perception of persuasion is deserved only when the decisionmaker has not resolved the problem himself and accepted personal responsibility for his resolution before attempting to influence others. If this process has taken place, persuasion is both honorable and respectful. The persuader does not demand that those he seeks to influence accept his personal values and perspectives. Rather, he attempts to convince them of the efficacy of his position within their own ideological system.[102] It must be emphasized, however, that the skill of persuasion is ethically justifia-

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98. Realists have long argued that judges should not seek to bootleg silently into the law their own conceptions of the law's aims or of justice or social policy or other "extra-legal" elements required for decision, but should openly identify and discuss these considerations. Hart, *supra* note 9, at 978. *But see* text accompanying notes 220-30 *infra*.

99. Dworkin appears to be emphasizing this skill when he insists that an attorney must seek a legal result that can be articulated and defended as "right." Dworkin, *supra* note 13, at 1244-45.

100. Lawyers are best known for this skill, and the training within law schools tends to accentuate it. Consider the common scenario in which the student is required to argue for both plaintiff and defendant using the same precedent. The plethora of precedents as well as the varying methods of interpreting them have led rule-skeptics to conclude that the most contradictory of decisions can be justified by precedent. D. WIGDOR, *supra* note 36, at 257.

101. The realists insist such is precisely the process of legal reasoning. *Id.* at 258-59. Some decisionmakers have agreed. *See* Hutcheson, *supra* note 91, at 262.

102. Just as a French attorney would be remiss in using his own language rather than English before an American judge, so must all decisionmakers translate their arguments into the language of those to be convinced. Thus, if the judge before whom an attorney speaks appreciates Founding Father arguments, the attorney should present such arguments whether or not they are the basis by which he comes to his own position. Such an approach is respectful, not demeaning, of the honor of the judge. Of course, the descriptive aspects of the arguments presented must be empirically true; the Founding Fathers must have, in fact, made such statements.

ble[103] only when the artisan has first chosen his desired outcome and accepted moral responsibility for its impact.[104]

C. *The Danger of the Task of Lawyering*

The task of lawyering, as it has been argued, includes participation in a process of responsible decisionmaking and ethical persuasion. This perception, however, may lead the individuals who once believed in rules—and certainty in the law—to become cynical.[105] Law may appear to be based on nothing but a flip of the coin or the idiosyncrasies of the individual decisionmaker.

Such cynicism may inhibit an understanding of the significance of law:[106] the uniqueness of its decisionmaking process and its ability to limit or control potential abuses by the decisionmaking elite.[107] Enlightenment can weaken the mysteries that bestow legitimacy upon institutions such as the law that are, at least partially, based on faith.[108] Thus, once the process of law is revealed to be rule by elites, the formerly faithful are likely to become cynical unless the process' legitimacy can be reestablished by the discovery of acceptable limitations on the rights and abilities of the legal clergy to rule and affect others.[109]

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103. The persuader must be wary of the many ethical dangers of his actions. For example, the decisionmaker who frankly conveys the limitations and uncertainty of the position that he is taking may find that others are more willing to follow the demagogue who professes to offer certainty and truth. *See, e.g.*, W. GOLDING, LORD OF THE FLIES (1954). One may he tempted, therefore, to overstate the strength of one's position in order to be effective.

104. The advocate should not be able to shirk his moral responsibility simply by affiliating himself totally with the interests of his "client." Just as an attorney can refuse to serve a client who is unwilling to pay his demanded fee, so he may also refuse a "client" whose interests conflict with those the attorney feels are ethically and morally justifiable. The advocate, consequently, also is responsible for the impact of his behavior. Lest too narrow a view be taken of what can be ethically justified, however, the criminal defense attorney may ethically choose to defend a guilty client in order to protect and ensure the legal system's integrity.

105. This attitude is the danger of the legal realist position.

106. An observer may distinguish, in any social process, a *myth system* that clearly expresses all the rules and prohibitions and an *operational code* that tells "operators"—the elite—when, by whom, and how things are and can be done. W. REISMAN, FOLDED LIES 1 (1979). Knowledge of the code often leads to disillusionment with the myth system.

107. Law must serve such a function unless a legal system made up of decisionmakers who simply "grind whatever political ax [they] prefer on a particular day" is acceptable. Ely, *supra* note 59, at 5.

108. Similarly, it may be asked whether "the saying of the Mass in the vernacular [forebode] the beginning, or the end, of the relevance of that sacrament to the lives of the believers." Deutsch, *supra* note 39, at 261.

109. "May we not suggest to the pragmatic jurist the importance of taking on board . . . protections against the hurricane of social wants and demand some instrumentali-

The key to avoiding such cynicism lies in the source of legitimate authority. The etiology of legitimate authority affects the range of the clergy's authority and the extent of an individual's political and moral obligation to obey the clerically made law.[110] Cynicism can be avoided if the process of legitimizing a decision is seen as a means of controlling the controllers.[111]

III. The Role of Law

Possessing the power to make decisions affecting others is distinct from possessing the authority that imparts legitimacy upon such decisions.[112] Decisions made and implemented solely on the basis of power do not inspire the acceptance that assures compliance and finality. Power can confront power in a never-ending cycle of escalating controversy. Law without authority and legitimacy is no law at all,[113] for it cannot fulfill the multiple roles of peace keeper,[114] conflict settler, value articulator,[115] or societal educator.[116]

Even in a society that embraces the rhetoric of democracy, law created by the decisional elite plays precisely such roles. The acceptance of law is so great that nonelected jurists are given the right to make ultimate decisions; their interpretations of constitutional provisions are given a right to demand compliance superior to that given any legislative action.[117] The question thus arises of how these decisions, if made by legal elites and neither ideologically neutral nor neutrally derivable by processes of reason and logic, have gained such acceptance. Why are they not perceived as

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ties—in the shape of permanent constitutional principles and natural rights—before we engage passage with him." Kennedy, *Pragmatism as a Philosophy of Law,* in Readings in Jurisprudence, *supra* note 13, at 250. The fear of judges intentionally or unwittingly enacting into law their own preferences in the name of having discovered the true meaning of equality or liberty is precisely the risk that has served to justify a process-based theory of constitutional adjudication. Fiss, *supra* note 74, at 11.

110. R. Dworkin, Taking Rights Seriously 5 (1977).

111. On controlling the controllers, *see generally* Ingber, *supra* note 8.

112. The gun-toting robber may oblige me to act as he wishes, but I feel no moral obligation to cooperate.

113. *See* text accompanying note 28 *supra.*

114. *See* Weyrauch, *Law as Mask—Legal Ritual and Relevance,* 66 Calif. L. Rev. 699, 718-19 (1978).

115. Fiss, *supra* note 74, at 9.

116. *See* Rostow, *The Democratic Character of Judicial Review,* 66 Harv. L. Rev. 193, 208 (1952).

117. Many critics, uncomfortable with this arrangement, have tried to limit its impact. *See, e.g.,* J. Ely, *supra* note 68. Others feel that it is inevitable if the Court is to function properly. L. Tribe, *supra* note 66, at 452.

manipulation by an elite, whether benevolent or otherwise?[118]

A. *Law As Mask*

1. Masking Ideology

Often the ideological basis or significance of a decision is concealed.[119] The legal process frequently succeeds in refocusing the conflict among values away from the intense ideological plane to the less impassioned levels of process[120]—that of procedure,[121] ceremony,[122] and rhetoric.[123] This shift in focus clouds the ideological basis of a decision while giving the parties to any conflict between change and stability and their supporters the impression that an avenue is open for obtaining both resolution of their conflict[124] and

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118. Some individuals, radicals and otherwise, have viewed law in this manner. *See* E. CLEAVER, SOUL ON ICE, 128-37 (1968). Judge Learned Hand also rejected the authority of a decisional elite. "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." L. HAND, THE BILL OF RIGHTS 73 (1958).

119. *See* Smith, *Sequel to Workmen's Compensation Acts* (pt. 2), 27 HARV. L. REV. 344, 366 (1914). For a more detailed consideration of this phenomenon, *see generally* Ingber, *Procedure, Ceremony and Rhetoric: The Minimization of Ideological Conflict in Deviance Control*, 56 B.U. L. REV. 266 (1976).

120. As Judge Learned Hand observed,

> Judges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislator's solution is too strong for the judicial stomach. On the contrary they wrap up their veto in a protective veil of adjectives such as "arbitrary," "artificial," "normal," "reasonable," "inherent," "fundamental," or "essential," whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision. . . .

L. HAND, *supra* note 118, at 70.

121. "Procedure" as used herein includes the rules that dictate the particular way in which institutions are required to function internally in their effort to fulfill their appropriate purposes.

122. "Ceremony" as used herein refers to a set of acts prescribed by ritual, protocol, or convention that, although often performed with great formality, have little practical significance.

123. "Rhetoric" as used herein means the use of language, sometimes unsupported by deeds, that creates an impression of the normative position and intensity of commitment of the writer or speaker.

124. A literary example of the use of procedure as a method of conflict settlement masking problems of ideology is Shirley Jackson's short story, *The Lottery*, in THE LOTTERY 291 (1949). The society Jackson describes in *The Lottery* has no predilection against individual sacrifice for collective goals. In fact, it prefers such an arrangement. The stery describes a communal ceremony wherein lots are drawn to determine who will be stoned to death for some unspecified community need. Although the eventual winner of the lottery objects, the objection is couched in terms of procedure—that the lots were drawn too quickly—and not directed at the substance of the activity. *Id.* at 299.

official support of their positions.[125]

Conflicts over the justification and content of summary rules (over ideology) are transformed when decisions are articulated in terms of conformity with rules of a practice[126]—the rules of the game.[127] Accomplishment of this transformation depends on process success being perceived as true success; parties to the controversy must be satiated by a process victory or mollified by suffering only a process defeat.[128]

The use of procedure, ceremony, or rhetoric, however, rarely leads to truly value-free decisions. Rather, the decisions, although couched in process terms, may have considerable ideological impact. This impact may take one of two forms. First, resort to considerations of process can shift the focus of conflict to nonideological levels, allowing a resolution that masks the continuation of the

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125. The struggle for official support of a position often causes the idea of right and wrong, the ethical-juridical conception, to be overshadowed by emphasis upon which groups "win" and which "lose," the purely agonistic conception. *See* J. HUIZINGA, HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE 78 (1950). In Greenland, for example, an Eskimo who has a complaint against another challenges him to a drumming contest. *Id.* at 85. The agonistic nature of this form of conflict resolution is readily apparent. Eskimo society, being in a less "advanced" phase of cultural development, has not developed the subtleties by which more developed societies conceal the battle element of conflict resolution.

126. *See* discussion on rules at note 33 and text accompanying notes 33-42 *supra.*

127. Such rules, or what may be labeled as "lawyer's law," include such considerations as standing, ripeness, vagueness, and improper delegation. Even equal protection arguments often serve as rules of a practice that conceal ideological determinations. While presented as if only demanding precision of "fit" between legislative classifications and purposes, such arguments camouflage their resolution of the ethical command that only equals need be treated equally, a command that requires an ideological conclusion. *See* text accompanying notes 71-74 *supra.*

128. *See* Weyrauch, *supra* note 114, at 717-19.

Of course, some parties may not succumb to procedural machinations. The resultant ideological tension of refusal to accept a procedural decision as a valid conflict resolution is cleverly illustrated hy the protest of Alice hefore the King in *Alice's Adventures in Wonderland:*

> At this moment the King, who had been for some time busily writing in his note-book, called out "Silence!" and read out from his book, "Rule Forty-two. *All persons more than a mile high to leave the court.*"
> Everyhody looked at Alice.
> "*I'm* not a mile high," said Alice.
> "You are," said the King.
> "Nearly two miles high," added the Queen.
> "Well, I shan't go, at any rate," said Alice; "hesides, that's not a regular rule: you invented it just now."
> "It's the oldest rule in the book," said the King.
> "Then it ought to be Number One," said Alice.
> The King turned pale, and shut his notebook hastily. "Consider your verdict," he said to the jury, in a low trembling voice.

L. CARROLL, THE ANNOTATED ALICE 156 (M. Gardner ed. 1960) (emphasis in original).

challenged ideological position.[129] Second, by requiring excessively complicated or expensive procedures or ceremonies for the fulfillment of the goals of the recognized victor, behavior patterns supportive of a different ideology may be encouraged without a direct challenge to the "victor's" ideology.[130] In both cases the ideological impact of the decisions may not be readily apparent, thus reducing any difficulty in gaining their acceptance.

2. Masking Humanity

More than ideology may be masked by law. Considered earlier was the maxim that this is a nation of law and not men, and the interpretation suggesting that law was somehow untainted by man was rejected.[131] Ideological decisions are inherent in legal decisionmaking. This fact does not mean that the maxim is meaningless, but only that its meaning is more subtle. It connotes a system in which value decisions are to be made at a high level of generality, in order to deal with classes of behavior and individuals, rather than a system allowing ad hoc determinations in individual cases. Whether law develops by legislation or through the common-law mechanism of case-by-case adjudication, the individual case must act as an instrument for carving out the policy to be used by the institutions confronting human problems. By insisting on "the rule of law" or "the principle of legality," the controllers can be controlled and the subjectivity inherent in the exercise of discretion—decisionmaking rendered in the absence of rules—can be limited. The crucial consideration is not whether discretion enters the system, but whether its entrance takes place at a sufficiently

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129. In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court, through use of rhetoric and an addition of ceremony, placated the black, the indigent, and the liberal and academic communities by giving them a taste of success and formal support for their claims of right. Their triumph, however, was symbolic only; the waiver provision allowed by *Miranda* gives the decision minimal limiting impact upon police conduct. The ideology of "law and order"—the efficient detection and prosecution of those individuals who threaten the social order—remains secure. *See* Ingber, *supra* note 119, at 273-95.

130. The right to treatment for those civilly committed has significantly reduced the use of such commitment while ostensibly accepting the justification of commitment. Ingber, *supra* note 119, at 307-21. The ideology supporting the death penalty may also now be suffering from the same erosion. *See, e.g.*, Adams v. Texas, 448 U.S. _, 100 S. Ct. 2521 (1980) (juror may not be challenged for cause because of views about capital punishment unless views prevent performance of duties); Beck v. Alabama, 447 U.S. _, 100 S. Ct. 2382 (1980) (jury must be instructed as to all lesser included offenses); Bell v. Ohio, 438 U.S. 637 (1978) (statute may not limit factors to be considered as mitigating circumstances); Gardner v. Florida, 430 U.S. 349 (1977) (total presentencing report must be disclosed to defendant or his counsel).

131. *See* text accompanying note 8 *supra*.

general level of abstraction to avoid particularization of law as the "rule of men."[132] Justice becomes a concept of consistency of treatment that appears unbiased on a personal/contextual level.[133]

As also argued earlier, however, rules made in the process of their application cannot be totally general; adequate generality is all that can be demanded. The proper degree and extent of categorization, the determination of which differences are and which are not significant, is always subject to disagreement and debate.[134] The need for categorization at some level, however, is clear.

Yet the process of categorization must, by definition, conceal much of that which makes a given conflict unique—masking the very humanity of the problem. Because the study of law emphasizes concepts and rules, it inevitably trains students in the use of masks to conceal the problem of humanity. Professor John Noonan has bitterly attacked these masks of law that serve to "[classify] individual human beings so that their humanity is hidden and disavowed."[135] Focusing on the function of law to channel and to teach,[136] he insists that the articulation of law "affect[s] attitude and conduct as communications from persons to persons."[137] He stresses the manner in which the language of "property" or "chat-

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132. The due process requirement of notice can be explained from this perspective. In a system that insists that ignorance of the law is no defense, *see* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 356 (1972), the concept of fair notice is a fiction unless citizens are expected to read and interpret all statutes enacted and all decisions rendered. While such an expectation is unrealistic, controllers (lawyers, judges, police, etc.) properly could be required to be so aware. Decisions made at higher levels of abstraction can limit controller behavior in specific cases. *See* Ingber, *supra* note 8, at 863-68.

133. Justice defined at least partially as the appearance of consistency explains the tendency to federalize (or unify) the rules of criminal procedure. *E.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Malloy v. Hogan, 378 U.S. 1 (1964). While state and federal courts work under very different conditions and tensions that might influence legitimately their rules of procedure, the difficulty in explaining and justifying disparate due process rights in institutions that appear so similar militates against separate development of state and federal rights.

134. Adequate generality in criminal law appears to demand a much higher level of abstraction than that demanded in tort law. Criminal law has thus moved toward a system of codified law, abandoning the use of common-law crimes. Torts, on the contrary, reserves to the jury the determination of the proper behavior within the context of the case. This discrepancy may be explained by a fundamental difference of purpose between the two systems of allocating responsibility. Criminal law, in order to make violation a moral issue, unifies legal and moral guilt. Thus, articulated and knowable standards are required. Tort law, concerned with reducing accidents and injury, avoids setting standards that once attained would cease to apply pressure for improvement.

135. J. NOONAN, PERSONS AND MASKS OF THE LAW 19 (1976).

136. *Id.* at 12.

137. *Id.* at 4.

tel" was used to mask the inhumanity of slavery.[138]

Ethnologists studying the relation of language to culture have long concurred that language constitutes an influence on both perception and conception.[139] Edward Sapir, an early leader in ethnology, has written:

> The relation between language and experience is often misunderstood. Language is not merely a more or less systematic inventory of the various items of experience which seem relevant to the individual, as is so often naively assumed, but is also a self-contained, creative symbolic organization, which not only refers to experience largely acquired without its help but actually defines experience for us by reason of its formal completedness and because of our unconscious projection of its implicit expectation into the field of experience.[140]

While one can deplore the extent to which the language of law can limit the perception of its impact and reality, one may ask, as does Professor Walter Weyrauch, whether the masking of uniqueness is not inherent as a concept of relevance in any form of reasoning.[141] The principle of legality *requires* inattentiveness to most of what makes cases human; such attentiveness would lead to ad hoc, uncontrolled decisions.[142] Thus, the process of categorization focuses the task of the decisionmaker, but this very process of focusing removes from view the uniqueness of the conflicts and the individuals within the category. The issue, therefore, becomes one of properly defining the scope of the category—that is, adequate generality.[143]

If masks are inevitably related to categories or abstractions

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138. *Id.* at 29-64. While categorization must conceal what is unique about a given conflict, creation of the category itself may be motivated by humanitarian interests. The development of a category of "fundamental rights" that warrant heightened judicial protection is such a case.

139. *See, e.g.*, R. BROWN, I. COPI, D. DULANEY, W. FRANKENA, P. HENLE & C. STEVENSON, LANGUAGE, THOUGHT AND CULTURE 1-24 (1958); Sapir, *Language*, in SELECTED WRITINGS OF EDWARD SAPIR IN LANGUAGE, CULTURE AND PERSONALITY 7-32 (D. Mendelbaum ed. 1949); Whorf, *The Relation of Habitual Thought and Behavior to Language*, in LANGUAGE, CULTURE AND PERSONALITY: ESSAYS IN MEMORY OF EDWARD SAPIR 75 (L. Spier, A. Hollowell & S. Newman eds. 1941).

140. Sapir, *Conceptual Categories in Primitive Languages*, in LANGUAGE IN CULTURE AND SOCIETY 128 (D. Hymes ed. 1964).

141. Weyrauch, *supra* note 114, at 708.

142. Compared with appellate proceedings, trials allow a great deal of humanity to enter the legal process. Yet even at trial, evidentiary and procedural restrictions bar introduction of many of the human aspects of the factual situation. These exclusions are all attempts to limit the ad hoc nature of and create a degree of uniformity in trial outcomes.

143. So viewed, the essence of Noonan's position appears not to be that such a concept as "property" should be rejected, but that humans should never be perceived within its ambits.

and if categories and abstractions, in turn, are an inextricable part of legal analysis, the appropriateness of a particular mask in a particular context must be assessed. Masks function in three ways. First, a category may exclude overt consideration of a factor that is actually influencing decisions. Such a mask allows the legal system to conceal its actions through intellectual dishonesty.[144] Second, a mask may exclude consideration of factors that some individuals believe should be considered. In essence, the critics of the category are rejecting its underlying values.[145] Finally, categories serve to exclude that which their supporters insist should be excluded—factors that are viewed as irrelevant, such as bias and favoritism. This third category, like the second, demands an ideological determination of the contours of relevancy. The debate between Weyrauch and Noonan stems from Noonan's normative use of the term "mask" to signify a disfavored process, thus encompassing only the first two functional types listed above. Weyrauch, however, uses the term descriptively and thus includes all three types within its definition.

Weyrauch, unlike Noonan, focuses on law as peacekeeper.[146] Categorization, thus, serves not only to control controllers but also to make decisional outcomes more acceptable. Parties are not confronted by a decisional system determining their personal stature. Party conflicts are merely the forces that initiate the process of articulation of societal values.[147] "Legal masks, like physical masks in ancient societies," observes Weyrauch, "satisfy the quasi-religious faith of people in the righteousness and neutrality of adjudication. As a result, the masks of objectivity, neutrality, and fairness give the legal process an independent power so that it is not merely the tool of dominant social forces."[148]

While those who emphasize law as educator may differ with

144. State v. Johnson, 84 S.C. 45, 65 S.E. 1023 (1909) is a blatant example of this function of masks. The black defendant, finding a white woman be had known for many years sitting despondently on the porch of her home, approached her, placed his bands on her shoulders, and asked if she wished to go inside and speak to bim about what was troubling her. He was convicted of assault. While the court discussed at length the necessary "mens rea" of the crime, the conviction of assault for such innocuous behavior can really be understood only on the basis of the social taboos concerning race tbat existed in South Carolina at the time.

145. Noonan's slavery example served predominantly this function.

146. Weyrauch, *supra* note 114, at 715, 718-19.

147. Such is Owen Fiss' view of the judicial requirement of case and controversy. Fiss, *supra* note 74, at 29-30.

148. Weyrauch, *supra* note 114, at 718. *See also* T. ARNOLD, THE SYMBOLS OF GOVERNMENT 34 (1935).

those who emphasize its peacekeeping role in their evaluation of a particular mask's use, both would likely recognize the role that "levels of generality" play in limiting the discretion of decisionmakers and increasing the acceptability of resulting decisions. Both the principle of legality (or levels of generality) and the roles of procedure, ceremony, and rhetoric may reduce the appearance of, or the negative response to, elite ideological decisionmaking. Nevertheless, when critically analyzed, these decisions have significant ideological impact. The question of their legitimacy thus remains.

B. The Legitimation of Law: The Relationship Between Process and Substance as a Limitation of Law

H.L.A. Hart describes the legal process as the union of primary and secondary rules.[149] Primary rules are the outputs of the process—the "thou shalts" and "thou shalt nots" that the legal system directs at the public-at-large. Secondary rules are precepts concerning the workings of the process by which primary rules are derived.[150]

For Hart, the process of validation, or legitimacy, focuses on his secondary rule of recognition. The secondary rule of recognition is the ultimate rule of a system, for its fulfillment transforms law as a command based on threat to law as a valid obligation based on acceptance and legitimacy. Those primary rules that are derived by processes identified by the secondary rule of recognition are deemed by the public as authorized. The content of the rule of recognition is a function of culture and socialization:[151]

> The use of unstated rules of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal [or socialized] point of view. Those who use them in this way thereby manifest their own acceptance of them as guiding rules . . . . We can indeed simply say that

149. Hart, *Law as the Union of Primary and Secondary Rules*, in THE NATURE OF LAW 144 (M. Golding ed. 1966).

150. According to Hart, the defects of primitive legal systems are their uncertainty, inefficiency, and static nature. Mature legal systems have secondary rules of recognition, adjudication, and change to deal with these corresponding defects. *Id.* at 144-52.

151. Socialization, according to Lon Fuller, "is the process whereby a person comes to perceive, respect, and participate in the creation of the reciprocal expectations that arise out of human interaction." Fuller, *Some Presuppositions Shaping the Concept of "Socialization"*, in LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY 37 (J. Tapp & F. Levine eds. 1977). Reference to symbols of stability and authority such as language deducible from the constitutional document often serve in our culture to increase the appearance of validity. Use of such references are expected and, therefore, are encompassed within the socialized rule of recognition.

the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.[152]

Hart essentially insists that fulfillment of process rules gives legitimacy to substantive results of the process. He fails, however, to explain the mechanism by which the process gains acceptance. A system or process that spews out an overall acceptable stream of primary rules is likely itself to be imbued with legitimacy. Substance, thus, may also support process. This interplay must be exposed in order to view clearly the relationship hetween process and substance. A useful illustration of this phenomenon is provided by an analogy to a bank account.

1. The Substantive Bank Account of Legitimacy

General public knowledge of legal decisions focuses primarily on the impact of those decisions rather than on the form that they take or the process by which they are derived.[153] Decisional outcomes that are supportive of the public's values and perspectives serve to increase or confirm the public's acceptance of the system making such decision. The more those affected by legal decisions identify with or are sympathetic to the values supported by such decisions, the more the system itself is perceived as a surrogate of self-discipline and, thus, as acceptable.[154]

Rhetoric supportive of representative democracy is based upon predictions that outcomes of such a governmental process are likely to be consistent with popularly embraced values. When such decisions are made, the legal system may be thought of as putting a deposit into its "legitimacy account." When the decision is inconsistent, a withdrawal takes place. While every withdrawal may

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152. Hart, *supra* note 149, at 153.

153. Deutsch, *supra* note 39, at 216. Questions of form and derivation are more the concerns of the elite themselves as participants in the decisional process or as members of a community of expert critics.

154. Isaiah Berlin has theorized two concepts of liberty. Negative liberty is defined as the extent to which the individual is left unregulated or unrestricted by the state. Positive liberty is the extent to which the individual identifies with the source of the regulations and thereby perceives them to be legitimate. I. BERLIN, TWO CONCEPTS OF LIBERTY (1958). The tradition of American democracy emphasizes the rhetoric of positive liberty. *See* J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT (1946). This statement is not meant to suggest, however, that American jurisprudence is based only upon positive liberty. The importance of the Bill of Rights, representing negative liberty in the American system of government, is clear and is a focns of legal activity. It is suggested only that the rhetoric used to give the American system legitimacy is more that of positive liberty, and that this rhetoric affects our perceptions of governmental activities. A government "by, for, and of the people" cannot easily be deemed unauthorized when making regulations for the welfare of the people.

cause some public criticism, only at the point where withdrawals exceed deposits does the system lose its legitimacy and become ineffectual. A system with extensive deposits in its legitimacy account is valuable and worthy of support whether or not it occasionally makes decisions of which one disapproves. If legitimacy[155] is recognized as the essence of authority, law cannot be merely decisions of the elite. The elite may retain their positions only by accepting the constraints imposed by the public over whom they "rule." When account withdrawals, because of frequency or intensity, outstrip deposits for any individual or group, such individuals or groups no longer have reason to support the system. The controllers, therefore, have a legitimacy limitation upon their power and discretion.

2. Legitimacy Withdrawals

The heterogeneity of American society makes it impossible to expect any given decision to increase the legal system's legitimacy account for all. Such a reaction would presuppose unanimous acceptance of a single, totally general system of value. As has already been argued, however, within specific contexts there are often irreconcilable tensions between honored values.[156] Every decision, by necessity, will result in withdrawals by some.

More importantly, however, no decisional institution can afford, like hoarders of money, to concern itself only with increasing its capital. The legitimacy that allows institutions to be effective is siguificant only if, at appropriate times, withdrawals are made. It is at these times that law serves to educate and direct society rather than conform to and follow it.[157] A system of law must contribute something beyond what could be accomplished by a system of popular fiat.[158]

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155. Legitimacy in this sense is a comparatively unrefined concept. Such legitimacy is not dependent upon popular approval of any given institution's performance and even less so upon such approval of the processes through which that performance is rendered. It is the legitimacy of the decisional system as a whole that depends on the people's approval. Fiss, *supra* note 74, at 8. For a discussion of the integrity of specific legal institutions, see text accompanying notes 179-210 *infra*.

156. Consider the tension between racial equality and individual merit exemplified by such cases as Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), and United Steelworkers v. Weber, 443 U.S. 193 (1979).

157. Wechsler, for example, while attacking as unprincipled the segregation cases such as Brown v. Board of Educ., 347 U.S. 483 (1954), also recognized that these cases "have the best chance of making an enduring contrihution to the quality of our society of any that I know in recent years." H. WECHSLER, *supra* note 51, at 37.

158. Many significant constitutional cases are also those that were attacked most stri-

This view provides an answer for the perennial question of whether law leads or follows social change. It does both. Judges, legislators, and lawyers, being socialized by society and given positions of authority through the retained legitimacy of the legal system, would not and cannot for long make decisions that are not in conformity with the dominant cultures of society. On those rare occasions of sufficiently significant moment, however, decisionmakers may feel ethically and morally compelled to lead and redirect society. A withdrawal of capital is made.

Withdrawals are risky, however. A too extensive withdrawal may not only limit the acceptance of a given decision, but may decrease the efficacy of an institution to handle other such decisions in the future.[159] Consequently, when legal institutions anticipate that a decision may cause such withdrawals, they often leave a safety-valve open to enable them to gauge and, if necessary, to reduce the negative impact of their decisions upon their legitimacy.

Consider, for example, the risk taken by the Supreme Court in *Griswold v. Connecticut*[160] when it first enunciated a constitutionally protected right of privacy encompassing a married couple's right to use contraceptives. Lacking any specific constitutional langnage referring to either privacy or procreation, the varied opinions striking down the state's century-old ban on contraceptives smacked of the then unpopular doctrine of substantive due process—despite protestations to the contrary.[161] The development of

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dently. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH 183-98 (1962) (criticizing Baker v. Carr, 369 U.S. 186 (1962)); H. WECHSLER, *supra* note 51, at 36-48 (criticizing Brown v. Board of Educ., 347 U.S. 438 (1954)); Baldwin & Nagan, Board of Regents v. Bakke: *An All-American Dilemma Revisited*, 30 U. FLA. L. REV. 843 (1979) (criticizing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)). Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) (criticizing Roe v. Wade, 410 U.S. 113 (1973)); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) (criticizing Mapp v. Ohio, 367 U.S. 643 (1961)). Of course, at those times when law educates and leads society, it is most open to the accusation of elitism.

159. In considering the Supreme Court's invalidation of federal statutes aimed at ameliorating the depression of the 1930s, Professor Ira Lupu contends that the court, by 1937, "had exhausted its interventionist capital, and had thoroughly discredited itself as a sensitive and responsible institution of government." Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 989 (1979). The continued authority of the institution itself was in jeopardy.

160. 381 U.S. 479 (1965).

161. "Substantive due process" had become a cue for the discredited interventionist stance struck by the Court while invalidating New Deal legislation in the 1930s. The premise of the Court's decisions at that time was that government inaction would allow the marketplace to arrive undisturbed at the optimal point of efficiency. *See* Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905). Economists have

a new legal doctrine of privacy in the highly impassioned context of birth-control could reasonably have been expected to cost the institution dearly.

The Court acted assertively and found the Connecticut statute unconstitutional. Justice Douglas, however, made a fascinating statement in the course of his majority opinion. He described the statute as one that "in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon [the marital] relationship."[162]

The statute apparently was most objectionable because it forbade the use rather than the manufacture, distribution, or sale of contraceptive devices. Yet the ability of a married couple to practice birth-control would clearly be limited, if not terminated, by a ban that ended the availability of commercially produced contraceptive devices. Why, then, the curious distinction between use on the one hand, and manufacture and sale on the other?

Griswold, at the time it was decided, could have been viewed simply as a case concerning methods of statutory enforcement. Investigating violations of a "use" statute would require physical invasion of the intimacy of the marital chamber. The image of police searching the bedroom for clues or interrogating married couples about their sexual behavior is considerably more troubling within our culture than the investigation of commercial centers, as would be involved in a ban on manufacture, distribution, or sale. The invalidation of a use statute on such grounds thus may be acceptable to most people (even to many opposed to contraceptives), especially if a commercial activity ban might still be possible.

Thus, while a commercial ban was not explicitly rejected, an anticontraceptive statute enacted in a different era[163] by a constituency long since past was struck from the books. A contemporary

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since rejected this premise, recognizing that when law is indifferent to detrimental social and economic inequalities, those conditions become frozen and self-perpetuating. American constitutional law rejected laissez-faire economics after the early 1930s, allowing legislatures rather than courts to have prominence in determining the economic well-being of the community. In *Griswold,* however, the Court refused to allow legislatures to determine society's moral well-being as well. It was difficult, however, for the court to distinguish between *Lochner,* with all its alleged flaws, and *Griswold. Compare* 381 U.S. at 481-82 (Douglas, J., distinguishing *Griswold* from *Lochner*) *with* 381 U.S. at 510-18 (Black, J., extolling the similarity between *Griswold* and *Lochner*).

162. 381 U.S. at 485.

163. Connecticut first enacted a statute forbidding the use of contraceptives in 1879. *Id.* at 527.

Connecticut constituency might not demand such a statute, and yet the legislature might feel unable to repeal it, for the symbolic effect of repealing a law is far greater than that of not passing one.[164] While not enacting a law may be interpreted as societal ignorance or indifference, the act of repeal is perceived as sanctioning that which was formerly outlawed. The legislative behavior seems more a reversal of the earlier statutory communication that the act was objectionable, and less a return to noninvolvement by the state.[165] Laws, hence, might not be repealed even though they remain largely unenforced. Court action deprived Connecticut legislators of the ability both to have an anticontraceptives statute on the books and remain uninvolved with the issue.

Implicit in the *Griswold* decision was the presumption that autonomy in procreation decisions (at least for married couples) was a sufficiently significant value to require constitutional support; but in case the reaction to the decision was too severe—too widespread or intense—a safety-valve was left open. Legislators had not been foreclosed from passing a commercial ban on contraceptives, thus reducing any legitimacy withdrawal caused by *Griswold*.[166] In this case, the safety-valve was not used; it appears that no state has passed such a statute. This reaction-gauging device is often used to evaluate and deflate potentially negative reactions to decisions through which quantum (rather than incremental) changes in law take place.[167]

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164. *See* A. BICKEL, *supra* note 158, at 143-56.

165. Reitman v. Mulkey, 387 U.S. 369 (1967), is a case on point. The California Constitution had been amended so as to repeal all state open housing legislation. The state contended that there was no more state action supporting private racial discrimination in repealing such statutes than there would have been had no statute been enacted in the first place. The Supreme Court disagreed, viewing the repeal as having the effect of official approval and encouragement of such discrimination.

166. This point is not to suggest that such legislation would have been found constitutional. By leaving the issue unresolved, however, the Court softened the response to *Griswold* and provided a mechanism by which the states could communicate their rejection of the Court's position.

167. The Court also resorted to the safety-valve mechanism in the death penalty cases. Most death penalty statutes, like the ban on contraceptive devices, were originally passed in a different era. In Furman v. Georgia, 408 U.S. 238 (1972), the Court found such statutes unconstitutional, not because the death penalty was intrinsically a cruel and unusual punishment, but because their utilization was arbitrary and erratic. As it had done in *Griswold*, the Court ended the effect of potentially dated statutes while leaving the public an opportunity to "nullify" its ban on executions by enacting new death penalty systems not subject to such procedural abuses. In the case of capital punishment, 35 states, responsive to a public outery against the *Furman* decision, redrafted their death penalty statutes. In Gregg v. Georgia, 428 U.S. 153 (1976), the Court, confronted by this fact, found the death penalty constitutional. The Justices were unprepared to accept too great a withdrawal from their

Essentially, law can lead social change only as far as society is willing to allow.[168] The universe of alternative decisions accepted as possible by the dominant culture, including both preferred and unpreferred alternatives, has been labeled as the "community agenda of alternatives."[169] Although the legal system may not make decisions outside of that agenda, it may symbolically support an unpreferred alternative within the agenda. The law can thus lead society as long as it does not do so too frequently, thus depleting its legitimacy reserves.[170]

Institutions need not just passively accept the limitations of the agenda. Language, or rhetoric, may be used as a tool to influence the contents of the agenda.[171] Rhetoric may pave the way for change by slowly acclimating the public to new values. Rhetoric, for example, played a role in the development of the legal response to racial segregation. When in 1896 the Supreme Court in *Plessy v.*

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legitimacy account. The focus of the death penalty conflict now has turned from questions of ideology to questions of process. *See also* the discussion on masks of ideology at text accompanying notes 119-30 *supra*.

168. Yehezhel Dror, in his study of law as social reformer in Turkey, concluded that aspects of social action of a mainly instrumental character, such as commercial activities, were significantly influenced hy new law. Those aspects of social action involving expressive activities and basic beliefs and institutions, such as family life and marriage habits, were very little changed despite explicit laws trying to shape them. Dror, *Law and Social Change*, in SOCIOLOGY OF LAW 96-97 (V. Aubert ed. 1969).

169. Deutsch, *supra* note 39, at 254. Nelson Polsby has observed that the community agenda of alternatives accounts for the empirically observable phenomenon that "[s]ome, perhaps most, *possible* alternatives are never considered in community decisionmaking." N. POLSBY, COMMUNITY POWER AND POLITICAL THEORY 133 (1963). Of course, the agendas for national and local communities may not coincide. Consequently, federal courts may find it easier to overturn state and local laws rather than enactments of Congress.

170. *See* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). A contemporary example of this phenomenon is the movement for equal treatment of the sexes. At one time the community feeling about women was that they did not need to be accorded the equal protection of the law guaranteed by the fourteenth amendment because they were different from men, being weaker, less self-sufficient, and less mature. Only after the ideology and, accordingly, the community agenda of alternatives changed did a small core of individuals begin fighting for equality for women. Once women's equality was demonstrated by the actions of this social core to be acceptable as a possible, although not preferred, alternative, those involved in legal institutions could begin to move law in an attempt to lead society. For a discussion of the crucial question of how an alternative initially beyond the community agenda comes to be accepted into it, see Ingber, *supra* note 8, at 886-89.

171. For law's role as educator, see C. BLACK, THE PEOPLE AND THE COURT 56-86 (1960); Rostow, *supra* note 116, at 208. A comparison can be made to the use of cloud chambers in physics to trace the paths of sub-microscopic atomic particles. A box is filled with gas that ionizes when brought in contact with a particle. A vapor path is thus created. Scientists cannot determine, however, whether the presence of the gas causes the particle being investigated to deviate from its normal path. So, too, the language of the law may not only trace the path of society, it may also affect the direction that society takes.

Ferguson[172] developed the principle of "separate but equal," no state, not even those in the South, complained because there seemed to be no threat to segregation. For the first time, however, the rhetoric of equality in public facilities began to percolate through the legal system.[173] Soon the language of separate but equal in education led to demands for actual equality in such tangible factors as buildings, curricula, teacher qualifications, and salaries.[174] As the language of Freudian psychology entered American society, the existence of intangible factors made separate but equal a virtual impossibility. Although a statement of total and immediate equality of the races at the time of *Plessy* conceivably could have led to a second civil war, the acceptance of the language of equality at the turn of the century led to *Brown v. Board of Education*,[175] which outlawed segregation in public schools, nearly sixty years after *Plessy*. Acceptance of the fiction of equality by the states after *Plessy* as a means of preserving the policy of segregation ultimately allowed public acceptance of the policy's official downfall in *Brown*.[176] The societal limitation upon legal decisions obviously is not itself immune from the influence of such decisions.

In summary, not only does fulfillment of accepted process legitimize substance, as Professor Hart claimed,[177] but the opposite is true as well. Decisionmakers are constrained by the legitimacy account created by the popular acceptability of their substantive

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172. 163 U.S. 537 (1896).

173. The discussion of *Plessy* should not be construed as approval of the rationale or the result of that case. The decision, however, did insert the language of equality into the national judicial process. While the Civil War amendments do include equality language, they were hardly accepted by the Southern states, which felt extorted into ratifying the amendments as a condition for reentering the Union. These very states embraced enthusiastically the language of equality in *Plessy* and, thus, began writing the epitaph of segregation.

174. *See, e.g.*, McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950) (separate but equal requires that once a black is admitted to a state-supported graduate school, he must receive the same treatment by the state as students of other races); Sweatt v. Painter, 339 U.S. 629 (1950) (separate but equal requires actual equality of black and white law schools or, alternatively, integration of white law schools); Sipuel v. Board of Regents of the Univ. of Okla., 332 U.S. 631 (1948) (equal protection requires integration of the only state-supported law school); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (separate but equal requires equal opportunities for higher education for both blacks and whites within the state).

175. 347 U.S. 483 (1954).

176. Jerome Frank explored the power of rhetoric in the development of a legal concept from a fiction to an hypothesis, then to dogma, next to law, and finally to fact. J. FRANK, FATE AND FREEDOM: A PHILOSOPHY FOR FREE AMERICANS 184-87 (1945). For a further discussion of the role of craft skills such as rhetoric, see text accompanying notes 224-27 *infra*.

177. *See* text accompanying notes 150-54 *supra*.

decisions.[178] Process gains acceptance, over time, by creating an overall acceptable stream of primary rules. Consequently, in the short-run, observance of secondary rules of recognition (process) legitimates individual primary rules (substantive outcomes of the process). If, however, the primary rules prescribed by any process consistently or aggrievedly violate popular desires, the process itself will lose its legitimacy.

C. *Limitations of Institutional Integrity*

In addition to system legitimacy as a constraint on legal decisionmakers, institutional integrity serves as a limitation on abuse of discretion.[179] The decisions emanating from any institution must reflect the need to accommodate and be responsive to rival governmental agencies and critics.[180] No institution may encroach on the domain of others or violate expectations of "appropriate behavior" without endangering its own integrity[181]—its ability to influence effectively the legal system as a whole.

The United States Supreme Court, for example, has frequently been depicted as a nondemocratic institution in an allegedly democratic political system.[182] One response by the institution to this portrayal is to develop concepts of lawyer's law—concepts of standing, ripeness, political questions, and the like—as a method of marking off its own appropriate territory of "cases and controversies." While these doctrines appear as merely self-articulated restrictions on institutional power, they are based on a sense of the boundaries of judicial authority that may not be crossed too often without causing other institutions to respond unsupportively,

178. According to Randy Barnett, Lon Fuller found the limitation of the positivists to be their inability "to distinguish between the power of the State and the law and in their failure to see that the [decisionmaker] is constrained by his own rules imposed from below by the expectations of the citizenry." Barnett, *Fuller, Law, And Anarchism,* LIBERTARIAN F., Feb. 1976, at 6.

179. The prior discussion of the bank account of legitimacy focused on acceptance of a legal system as a whole. The consideration of institutional integrity concentrates on the perceived "appropriateness" of behavior emanating from specific legal institutions.

180. *See, e.g.,* Stone v. Powell, 428 U.S. 465, 493-94 (1976) (federal courts must respect the integrity of state court findings in fourth amendment contexts).

181. For example, Martin Shapiro described the institutional integrity concern of the Supreme Court as the dilemma of "pursu[ing] its policy goals without violating those popular and professional expectations of 'neutrality' which are an important factor in our legal tradition and principle source of the Supreme Court's prestige." M. SHAPIRO, *supra* note 50, at 31.

182. *See* J. ELY, *supra* note 68, at 1-9; L. HAND, *supra* note 118, at 3-48. *But see* C. BLACK, *supra* note 171, at 1-33; Rostow, *supra* note 116.

producing an externally imposed limit on the Court's authority and, thus, its ability to function.[183]

Lack of access to the executive sword and legislative purse has often been cited as a limitation upon judicial abuse.[184] Early in the Court's history such factors may very well have served as a severe constraint upon its behavior.[185] Given the present majesty of the Supreme Court, however, few of those with access to purse or sword would be wise to overtly disregard or reject Court rulings. The threat of overt interposition is no longer credible.[186]

Another apparent limitation upon the Court is Congress' constitutional power to deprive federal courts of jurisdiction to consider specific issues.[187] Although throughout its history the Court has been told that it had better stick to its knitting or risk destruction, somehow "[t]he possibility of judicial emasculation by way of popular reaction against constitutional review by the courts has not in fact materialized in more than [two centuries] of American experience."[188] This fact may be due either to the Court's now being too powerful (or rather, legitimate) to be so limited, or to the Court tailoring its decisions precisely to avoid such a popular or Congressional response.[189] The Court may function as does a cha-

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183. In other words, although many jurists and critics dismiss the merits of judicial craftsmanship, they would do well to consider the symbolic importance of "principled" judicial decisionmaking for minimizing political conflict and enhancing the prospects for compliance with their decisions.

184. *See, e.g.*, THE FEDERALIST No. 78 (A. Hamilton).

185. Even Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), may have been little more than a bluff by a weak judiciary attempting to assert its ability to mandate executive behavior, specifically the bestowing of a judicial commission upon Marbury. Although the Court strongly asserted its authority to review executive action, lack of jurisdiction prevented the issuance of a writ of mandamus. The rhetoric of judicial authority had entered American jurisprudence without giving the President an order to test through disobedience. Thirty-five years passed before the Court actually compelled performance of any act by an executive officer, *see* Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), and 170 years passed before the President himself was so instructed, *see* United States v. Nixon, 418 U.S. 683 (1974). In each case the language of *Marbury* was cited as precedent for the Court's holding. The rhetoric of early years had been popularly accepted, thus giving the Court authority to confront one of the world's most powerful individuals—the President of the United States.

186. Consider President Nixon's compliance with the Court's decision in United States v. Nixon, 418 U.S. 683 (1974), although his resignation would then be compelled. *See also* Cooper v. Aaron, 358 U.S. 1 (1958).

187. U.S. CONST. art. III, §§ 1 & 2.

188. E. ROSTOW, THE SOVEREIGN PREROGATIVE 165 (1962). In the one case in which Congress did attempt to limit judicial behavior, during and after the Civil War, the Court was able to emasculate the effort. *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1868).

189. Carl Friedrich first described this latter possibility as the "rule of anticipated

meleon and change its color to conform to its environment.

In spite of the skepticism expressed above toward some of the traditionally discussed limits on judicial behavior, the law is at times formed and limited by the concepts of judicial role and judicial integrity. Consider the reapportionment cases beginning with *Baker v. Carr*[190] in the early 1960s.

By the time *Baker* was decided by the Supreme Court, Tennessee had not reapportioned its legislature in over sixty years. During that time great changes in the distribution of the population had occurred, producing extreme disparities in the number of voters in different districts.[191] Nevertheless, it was obvious that political intransigence made it unlikely that the Tennessee legislature would call for apportionment reevaluation.[192] Justice Clark believed that a Supreme Court refusal to act in a case of such flagrant injustice and inequity would lead to a massive withdrawal of institutional legitimacy.[193] If the Court was to retain the national respect necessary to foster its own legitimacy, it needed to act. As Professor Jan Deutsch has explained, "public acceptance of the Court does not rest solely on perceptions of adequately general decisions. That acceptance rests also, to a very considerable degree, on a view of the Court as the guardian of our constitutional rights."[194] *Baker* presented a question of institutional credibility.

Yet judicial action was not without costs. For years the Court had refused to involve itself in legislative reapportionment, perceiving it as a nonjusticiable "political question."[195] In *Baker*, the Court held for the first time that reapportionment was justiciable and remanded the case for trial on the equal protection issue. Interestingly, Justice Frankfurter, writing in dissent, also spoke of

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reactions." C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND POLITICS: NATURE AND DEVELOPMENT 16-18 (1937). *See* Deutsch, *supra* note 39, at 251-53.

190. 369 U.S. 186 (1962).

191. Neal, Baker v. Carr: *Politics in Search of Law*, 1962 SUP. CT. REV. 252, 254. For example, Moore County with 2,340 voters elected one representative while Shelby County with over 300,000 voters elected only seven. *Id.*

192. 369 U.S. at 258-59 (Clark, J., concurring).

193. Justice Clark, concurring, expressed this concern: "It is well for this court to practice self-restraint and discipline in constitutional adjudication," he insisted,

> but never in its history have those principles received sanction where the natural rights of so many have been so clearly infringed for so long a time. National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuge.

Id. at 262.

194. Deutsch, *supra* note 39, at 216.

195. *See* South v. Peters, 339 U.S. 276 (1950); MacDougall v. Green, 335 U.S. 281 (1948); Colegrove v. Green, 328 U.S. 549 (1946).

the need to protect national support of the institution. "The Court's authority," argued Frankfurter, "ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."[196]

According to Frankfurter, such political entanglement was inevitable once the Court accepted jurisdiction in such cases. First, he contended, talk of dilution of the vote required a standard of proper vote worth as a reference. The Court, therefore, was being asked to choose among competing bases of representation—ultimately among competing theories of political philosophy.[197] Second, even after the theoretical question was resolved, he viewed reapportionment as involving such an extraordinary complex of factors as to be seemingly beyond judicial competence.[198]

Clark was arguing that public institutional acceptance required judicial action; Frankfurter claimed such action would destroy public support. In *Baker,* Clark's view held the majority, but Frankfurter's concerns had to be confronted. In 1964 the Supreme Court decided the case of *Reynolds v. Sims,*[199] a challenge to the alleged malapportionment of the Alabama legislature, in which the Court adopted a "one man, one vote" standard for constitutional apportionment. Many of the critics that had heralded the Court's opinion in *Baker* blasted the *Reynolds* decision, which allowed for only majority rule elections, as bad political theory.[200] "Madisonian

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196. 369 U.S. at 267. Justice Frankfurter was afraid that lower courts would be embarrassed by such remands because, in his view, the *Baker* decision "convey[ed] no intimation what relief, if any, a District Court is capable of affording that would not invite legislators to play ducks and drakes with the judiciary." *Id.* at 268. To avoid such legislative evasion, the courts would have to accept responsibility for what Professor Owen Fiss has termed "structural suits"—suits in which a judge, confronting a state bureaucracy over values of constitutional dimension, must undertake to restructure the organization to eliminate a threat to those values posed by the present institutional arrangement. Fiss, *supra* note 74, at 2. Such suits would extend beyond the expectations of traditional judicial behavior.

197. 369 U.S. at 300.

198. The myriad factors cited by Frankfurter included:

> considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others.

Id. at 323.

199. 377 U.S. 533 (1964).

200. Martin Shapiro, for example, a supporter of *Baker,* attacked the Court's decision

democracy,"[201] unlike majoritarian democracy, they argued, was to be based on interest politics—the complex politics of group bargaining that considered the measure of intensity surrounding an issue,[202] the lobbying ability of various groups, the effect of political party loyalties, and the rights of minority groups. Justice Stewart, who had been in the majority in *Baker,* dissented in a companion case to *Reynolds.*[203] "Appropriate legislative apportionment," he insisted, "should ideally be designed to ensure effective representation in the State's legislature, in cooperation with other organs of political power, of the various groups and interests making up the electorate."[204] Inequality of voting strength might contribute by balancing out other factors of electorate power—the power of a well-financed and organized lobby, for example—to the overall equality of all participants in the political process as a whole.[205]

The problem that the Court confronted in *Reynolds* was precisely that which Justice Frankfurter had presented in *Baker.* If the Court were to accept Stewart's position, how could it determine whether a given voting plan led to greater or lesser equality of representation in the legislative process? To consider adequately the factors that Frankfurter felt were significant,[206] the Court would have to examine intimately the distribution of political

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in *Reynolds.* He contended that

> [t]he Court's failure to grapple with the complex philosophical and theoretical issues that lie behind the notion of constitutional democracy [had] led it away from the delicate and tentative adjustments that our peculiar form of democracy requires and into the formulation of appealing slogans. The "one man, one vote" slogan in equating the whole of democracy with majority rule elections represents naive political philosophy, bad political theory, and no political science.

M. SHAPIRO, *supra* note 50, at 250.

201. THE FEDERALIST No. 10 (J. Madison).

202. Populistic democracy counts heads without calculating the intensity of any given position. Consider a situation in which a new irrigation system is being proposed. A majority of taxpayers wishing to avoid even the minor increase in taxes necessary for the new system may, if forced to take a stand one way or another, vote against such a proposal. For a minority, however, who happen to be farmers, the new system may mean the difference between commercial life and death. If votes were discounted by intensity of position, the irrigation system would be enacted.

203. Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 749 (1964).

204. *Id.* at 749.

205. This very argument is necessary to assure that the sixth amendment decision of the Court in Gideon v. Wainwright, 372 U.S. 335 (1963), does not constitute a violation of the equal protection clause. While the indigent gets a service—an appointed, free attorney—that the nonindigent defendant does not receive, this inequality is defended as a method of equalizing the representation that both defendants will receive at trial. So, too, it is argued, inequality in voting may create greater equality among individuals attempting te influence legislation.

206. *See* note 198 *supra.*

power within the state: the existence of voting blocs, the degree of party control over various classes of voters and officials, the influence of mass media, and the financial resources behind various factions.[207] The record resulting from such an investigation would he totally inconsistent with society's expectation of how the representative process should work. The symbolic role of the political system would be seriously compromised, as would that of the judiciary that caused such a debacle.[208]

Consequently, in *Reynolds* the Court's institutional integrity severely limited its ability to involve itself sensitively in voter apportionment. As Justice Clark had insisted,[209] however, some cases cried out for judicial attention. If the Court was to fulfill its role as defender of the faith and address an obvious violation of an articulated democratic value, while avoiding the political morass that concerned Frankfurter, it had to choose a simple head-counting procedure that required nothing beyond a cold statistical record.[210]

In conclusion, the need for institutional cooperation among components of the legal process and the need for fulfillment of culturally perceived institutional roles act as long-term limitations on the options available to decisional elites. These limitations, however, shape decisional contours only over extended periods of time;

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207. As Professor Jan Deutsch questioned,

> Even assuming that the evidence was available and would be forthcoming, is it likely that our society could accept, as a steady diet, the spectacle of the judiciary solemnly ruling on the accuracy of a political boss's testimony concerning the sources of his power over voters and the degree of control that he exercised over elected officials?

Deutsch, *supra* note 39, at 247.

208. *Id.* Consider in this light Justice Harlan's separate opinion in Whitcomb v. Chavis, 403 U.S. 124 (1971). The Court's "inexplicit mandate," he contended,

> is at least subject to the interpretation that the court below is to inquire into such matters as the "actual influence of Marion County's delegation in the Indiana legislature," and the possibility of "recurring poor performance by Marion County's delegation with respect to [the ghetto]." . . . If there are less appropriate subjects for federal judicial inquiry, they do not come readily to mind.

Id. at 169-70.

209. *See* note 193 *supra.*

210. Even later cases allowing some flexibility in districting did so by setting an arbitrary percentage limit upon district size discrepancies. *E.g.*, Mahan v. Howell, 410 U.S. 315 (1973) (reappointment variations of about ten percent do not violate the equal protection clause). Arbitrary number determinations were more acceptable (less ideological) than any subtle considerations of political power. For the role of random choice as a legal decision, see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1230-35 (1970). Consider also the increased acceptance of the draft during the Vietnam War following the initiation of the draft lottery. *E.g.*, N.Y. Times, Feb. 28, 1968, § 18, at 7. (Council of Graduate Schools urges Congress to abolish all deferments and to use random lottery).

they do not constrain sufficiently the day-to-day behavior of decisional elites. It is to that problem that this Article must finally turn.

D. Socialization, Hypocrisy, and Guilt

1. The Discrepancy Between Myth Systems and Operational Codes

The earlier discussion of the content and role of myth in law critiqued the belief that preexisting rules, rather than the ideology of individual decisionmakers, act as the foundation for decisions. It is, however, the public acceptance of this "myth system" that imparts legitimacy and authority to legal decision.[211]

The decisional process actually employed by elites, the "operational code," was also introduced.[212] An obvious discrepancy exists between the myth system and the operational code. If the public was informed of such a discrepancy, its belief in the legitimizing myth might be destroyed. Consequently, knowledge of the operational code is restricted to the elite who function within it.[213] In the context of the legal system, knowledge of the operational code is generally restricted to lawyers.

Others, however, become aware of or intuitively sense the discrepancy. Consequently, those who act by the code but legitimize their behavior by reference to the myth often are perceived as intellectually dishonest, corrupt, or manipulative. This perception of the legal elite is not totally accurate because strict adherence to the myth, as earlier demonstrated,[214] is humanly impossible. Furthermore, the discrepancy between myth and code is not an intentional construction of elites, but rather an inevitable by-product of social complexity. As the number and difficulty of the problems presented to the legal decisionmaker increases, the discrepancy likely will widen.[215]

The standards of behavior articulated in the myth systems are

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211. H. CAIRNS, *supra* note 8, at 219; M. SHAPIRO, *supra* note 50, at 31.

212. The concepts of "myth systems" and "operational codes" have been borrowed from Professor W. Michael Reisman. *See* W. REISMAN, *supra* note 106, at 1.

213. *Id.* at 21. *See* Wasserstrom, *supra* note 23, at 18. One outcome of the discrepancy between myth system and operational code, therefore, is the sharpening of distinctions between the elite and the rank and file and the increased identification between elites. W. REISMAN, *supra* note 106, at 29.

214. *See* text accompanying notes 33-74 *supra*.

215. The discrepancy widens in times of rapid social change, the very times when legal decisionmakers are most in demand. W. REISMAN, *supra* note 106, at 20.

not attainable. They are, rather, components of a national morality play[216] that presents ideal prescriptions for behavior. For example, rhetoric critical of the political process frequently is expressed in the language of the myth systems. The observation that a legislator's performance involved "nothing but party politics" is a rebuke. Knowledgeable critics of the political process, however, know that "party politics" are an integral part of the legislative process. The language of the rebuke implicitly refers to the ideal of statesmanship that, in myth, always is to overshadow party affiliations. The same observation can be made when a Justice insists that constitutional rights are not affected by available resources,[217] or that those in disagreement with him are "amending" rather than interpreting[218] the Constitution. Such a Justice is fully aware that avail-

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216. This metaphor was dramatically developed by Bayless Manning in his discussion of the American political system. Manning, *The Purity Potlatch: An Essay on Conflicts of Interest, American Government, and Moral Escalation*, 24 FED. B.J. 239 (1964). Manning wrote:

> To the extent that our politics partake of the nature of a Morality Play, they have inevitably required, and generated, a set of theatrical conventions as arbitrary, and as acceptable, as those of any dramatic form. The vocabulary of our politics conforms to its role as a national Morality drama. That vocabulary is formal, dogmatic, simplified, symbolic, repetitive, and goal-setting. . . . And the actors in the political drama must, as in epic drama, appear as more than life-size, establishing, declaring, and appearing to live in accordance with, standards that are not of this world. We therefore demand ultimate moral pronouncements from our parties and our officials. We beautify or apotheosize our former [leaders], feeling the need for unifying national moral norms and having no national established church to do the job or to produce national saints.

Id. at 243.

217. In Mayer v. Chicago, 404 U.S. 189 (1971), the Supreme Court upheld an indigent's right to receive a free trial record for appeal purposes even for crimes punishable only by fine. Justice Breunan, writing for the Court, insisted that

> *Griffin [v. Illinois]* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way . . . . The State's fiscal interest is, therefore, irrelevant.

Id. at 196-97. In a society more and more conscious that resources are finite, decisionmakers (judges and others) are more likely to recognize rights when resources are readily available to effectuate them without bankrupting other societal goals and projects. Few judges have been as candid as Judge Clement Haynesworth who, in Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973), *rev'd*, 417 U.S. 600 (1974), supported a right to appointed counsel for permissive appellate review by arguing that "[w]hat is requisite today may not have been constitutionally requisite ten years ago, or even a few years ago. As our legal resources grow, there is a correlative growth in our ability to implement basic notions of fairness." *Id.* at 655.

218. Even if a justice wished only to interpret the Constitution, the essence of such a task is unclear. As Professor Lawrence Alexander asserts,

> Not a single theorist has presented anything like a full-blown theory of what "interpretation" really is and whether "interpretation" of a legal document is an ethically neutral technique or is at least partially ethically freighted. We are still lacking even a rudimentary theory of legal and particularly constitutional hermeneutics.

able resources influence legal development and that any judicial interpretation of a constitutional provision "amends" the Constitution. The Justice is merely referring to the myths of constitutional continuity and stability in hopes of bolstering his own position even though he is aware that the myth is unattainable.[219]

The inevitable discrepancy between myth system and operational code may explain why dissenting opinions in Supreme Court decisions often surpass the opinion of the Court in logic and clarity. The dissenter need not function within the operational code since he need not accommodate his brethren to obtain a majority or worry about the impact of his opinion were it to represent enforceable law. He can write for the purpose of ventilation or to influence posterity. The majority, on the other hand, must carefully consider whether its decision will receive the public support necessary to bestow legitimacy and avoid disruptive conflict. While the discrepancy between myth and operation explains many observable phenomena of the legal system, the intrinsic value of the myth remains subject to challenge. When the myth is unattainable and makes the more realistic operational code seem improper, why should myth not be synchronized with reality?

2. The Value of the Discrepancy

Decisionmakers are also members of the larger community that embraces the myth of law. In childhood they were nurtured by the myth; in adulthood, they are surrounded by its rituals. This immersion within the myth frequently explains the beginning law student's resistance to legal education[220]—the training of a discrepant operational code. It is this personal mooring within the myth, explains Reisman, that "drives the individual who may behave according to an operational code discrepant from the myth system nonetheless to defend with extraordinary passion the myth system itself."[221]

The gulf between myth and practice creates a tension for the legal decisionmaker between a sense of how the legal system *should* act and how it *must* act. The tension results in his having a

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Alexander, *supra* note 43, at 3.

219. *See* Deutsch, *supra* note 39, at 237. Unlike Britain and its queen, our symbol of continuity among past, present, and future is not a monarchical dynasty but a constitutional document.

220. The myth may, in fact, have been what attracted the student to the law in the first place. *See* text accompanying note 32 *supra*.

221. W. REISMAN, *supra* note 106, at 25.

sense of the system's hypocrisy and a feeling of guilt for participating in or perpetuating such hypocrisy.[222] An internal friction is created, and at its core is an uncomfortable sense of the breach of trust.[223]

To reduce the outward appearance of participating in this breach, craft skills are used. Decisionmakers must take pains to explain or justify their decisions, to base them on something other than institutional power and idiosyncratic belief.[224] Such demands of craft place limitations on the options—and abuses—of these decisions.[225] For example, resource limitations are generally unacceptable as articulated grounds for constitutional determinations.[226] Such limitations are too contextual and transitory to justify decisions "interpreting" a document having an aura that symbolizes consistency, continuity, and stability.[227]

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222. Owen Fiss describes the tension for the jurist involved in constitutional adjudication. As Fiss observes,

> The judge might be seen as forever straddling two worlds, the world of the ideal and the world of subjective preference, the world of the Constitution and the world of politics. He derives his legitimacy from only one, but necessarily finds himself in the other. He among all the agencies of government is in the best position to discover the true meaning of our constitutional values, but, at the same time, he is deeply constrained, indeed sometimes even compromised, by his desire—his wholly admirable desire—to give that meaning a reality.

Fiss, *supra* note 74, at 58. Even Fiss is entrenched in the myth, for the judge is to "discover the true meaning of our constitutional values . . . ."

223. The decisionmaker may even crave candor and be revolted by what he is doing, yet he may feel himself "trapped by 'the facts of life,' the unyielding realities from which many are sheltered but which [his] elite position now permits, indeed forces [him] to confront." W. REISMAN, *supra* note 106, at 28.

224. Craft may be viewed as a two edged sword, both preventing abuse by limiting the independence of decisionmakers and enhancing that independence by allowing them to point to "reason" and "logic" as a justification for resisting popular pressures. *See* K. LLEWELLYN, THE BRAMBLE BUSH 74 (1960).

225. The realists, observed Edward White, "failed to grant due respect to the fact that a judge's use of these [craft] devices was itself constrained by the expectations of others." White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, in THE JUDICIAL PROCESS 627 (R. Aldisert ed. 1976). A judge who consistently failed to give reasons for his decisions would not have met his obligation to allow the public to evaluate the manner in which he was performing his office. *But see* Tusbnet, *Darkness on the Edge of Town: The Contribution of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1040 (1980).

226. *See* text accompanying notes 217-19 *supra*.

227. Even such highly revered symbols, at times, must be tainted. The Supreme Court, for example, on a number of occasions has refused to apply retroactively a newly articulated constitutional right of criminal defendants. *See* Desist v. United States, 394 U.S. 244 (1969); Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. United States, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618 (1965). Yet prospective-only application of constitutional rulings overturning well-established precedent is not compatible with the Blackstonian proposition that courts do not "pronounce a new law, but . . . maintain and

More than any concern for outward appearance, however, a decisionmaker who has been well socialized into the myth before entering the elite will find a need to reduce the internal tension of inconsistency. Fulfillment of this need by the decisionmaker can cause an uncanny striving to uphold the myth, to deviate from it no further than is necessary to function effectively.[228] Consequently, a hypocritical legal system or society may only be one that has set its ideals too high for attainment; the reach has exceeded the grasp.[229] To that extent, the hypocritical legal system may be a highly desirable and ethical one.

The senses of guilt and responsibility as well as the need to fill role expectations may be the most significant constraints on potential abuse or breach of trust by decisionmakers. The essence of the morality play is the threat of the breach of trust; the undesirability of that threat is itself the greatest limitation on its danger. Remove the myth—make the operational code the desired as well as the recognized reality—and the greatest protection against a dictatorial elite of lawyer decisionmakers will have been lost.[230]

IV. CONCLUSION

This Article has analyzed and critiqued the myth of law as rules and contrasted it with a view of law as a process of responsi-

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expound the old one." W. FRIEDMANN, LEGAL THEORY 507 (1967). Since the constitutional document itself has not changed, and if judicial authority flows from the Constitution, must not the earlier, now overruled, interpretation of the Constitution have been "wrong"? The myth system, apparently, is hard pressed to defend prospective-only overruling. Yet to give cases such as Mapp v. Ohio, 367 U.S. 643 (1961), applying the exclusionary rule of the fourth amendment to states, retroactive application could easily have caused wholesale releases from state correctional institutions. The nonretroactivity decisions, thus, lose the appearance of constitutional imperatives (or of adequate generality) but avoid confronting society with wholesale institutional displacement (causing a loss of institutional support and credibility). The only alternative available that allowed retention of the constitutional imperative was for the Court to avoid creating (interpreting) new rights in the first place. Such a cost likely would have been higher than that expended by the institutional exposure caused by prospective-only rulings.

228. An example would be an attempt to limit the impact that resource limitations have on legal right development, and a willingness to question the role of bias and prejudice in one's own decisions.

229. *See* text accompanying note 12 *supra*. For a fuller discussion of the relationship between hypocrisy and high moral ideals, see G. RADBRUCH, DER GEIST DES ENGLISCHEN RECHTS 12-13 (3d ed. 1956).

230. Lawrence Tribe, in rejecting Ely's attempt to assimilate judicial review into democratic theory, warns: "Might not the care and humility that we are entitled to expect of judges be *undermined* if judges were indeed persuaded that much judicial activism is simply a corollary of democracy?" Tribe, *supra* note 73, at 1080 (emphasis in original). For Tribe, too, judges must live on the precipice.

ble decisionmaking. The operational code of this process requires that the lawyer recognize his role as decisionmaker and the necessary ramifications of personal choice and responsibility inherent in that role. Yet the individual who resists embracing the code, and who seeks instead the holy grail, may only be clamoring for fulfillment of the myth system. If his commitment to the significance of the myth does not impede his education as decisionmaker or his willingness to accept responsibility for the impact of the decisions he makes, a continuing appreciation of the myth may create in him a healthy unease. The unease may cause him to question the justification of an elite making decisions affecting others, as well as his own qualifications to participate within such an elite. He also may question the wisdom, justice, authority, and necessity of the specific decisional output of such an elite—"the law."

Consequently, while most lawyers will experience moments of happiness due to their professional ability, those who become content with the state of "the law" may no longer be aware of the impact of what they are doing. When the lawyer becomes content, he has consciously rejected, or is inherently incapable of recognizing, the personal responsibility necessary to justify ethically the operational code, and the essence of striving inherent in the myth system—the morality play—has been lost upon him.