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Jurisprudence: The "New Haven School" and Emergence of Secondary Authority--Is Number Two Trying Harder?

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NOTE

JURISPRUDENCE: THE "NEW HAVEN SCHOOL" AND THE EMERGENCE OF SECONDARY AUTHORITY — IS NUMBER TWO TRYING HARDER?* **

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I. INTRODUCTION

In *Beech Aircraft Corp. v. Rainey* the United States Supreme Court resolved a longstanding conflict between the federal circuits. The controversy stemmed from the federal circuits' varying interpretations of Federal Rule of Evidence 803(8)(C).[2] The Fifth and Eleventh Circuits directly conflicted with the other federal circuits as to the admissibility of opinions and conclusions contained in official investigative reports.[3] The other federal circuits considered such opinions and conclusions admissible as factual findings under certain circumstances.[4] The Fifth and Eleventh Circuits, however, did not admit such opinions and conclusions under any circumstances.[5]

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1. 109 S. Ct. 439 (1988).
2. *Id.* at 446. Rule 803(8)(C) provides,

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .
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> (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED. R. EVID. 803(8)(C).

3. *See, e.g.*, Smith v. Ithaca Corp., 612 F.2d 215, 222 (5th Cir. 1980) (opinions and conclusions not admissible); Melville v. American Home Assurance Co., 584 F.2d 1306, 1316 (3d Cir. 1978) (opinions and conclusions from FAA airworthiness directives admissible); *see also* Bonner v. City of Prichard, 661 F.2d 1206, 1212 (11th Cir. 1981) (newly established Eleventh Circuit adopts present Fifth Circuit decisions). *See generally* Brooks, *Evidence: Federal Rule of Evidence 803(8)(C): Opinions and Conclusions Are In, and That's a Fact!*, 28 BRIEFS, Aug. 1989, at 4.
4. *Rainey*, 109 S. Ct. at 446; *see also* Perrin v. Anderson, 784 F.2d 1040, 1046-47 (10th Cir. 1986); Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613, 618 (8th Cir. 1983).
5. *Rainey*, 109 S. Ct. at 446; *Smith*, 612 F.2d at 222.

The *Rainey* Court was presented with a problem that many courts face: resolving a dispute under conflicting precedent. Indeed, courts face decisionmaking difficulties not only when they are confronted with conflicting precedents but also when they are compelled to overrule the single "on point" precedent.[6] In *Rainey* the Court resolved the conflict between the circuits by interpreting legislative intent and following the current trend to admit rather than exclude such evidence.[7] The *Rainey* decision raises the question as to what extent a court may look beyond existing precedent to arrive at a decision without making its "judicial interpretation"[8] appear absurd.

This note suggests that courts can, and routinely do, look beyond precedent in decisionmaking. In fact, courts do not bind themselves by precedent to the extent as generally may be believed.[9] When courts depart from the applicable precedent in decisionmaking, "judicial interpretation" provides them the "leeways of choice"[10] to do so.

Courts frequently rely on extra-precedential sources of authority, often labeled "secondary authority."[11] I use the term "secondary authority" to mean any source of authority other than case law, statutes, and constitutions. Secondary authority actually can be "law" depending on the manner in which a court relies on it.[12]

While not wholly ignored by the courts,[13] precedent cannot always provide the basis for a court's decision.[14] Part II of this note illustrates

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6. Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (general federal common law does not displace state common law in diversity cases), effectively overruled Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (general federal common law governs unless state has statutory law on point). Overruling a one-hundred-year-old precedent significantly weakens the doctrine of stare decisis. *See* R. FIELD, B. KAPLAN & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 205 (5th ed. 1984).

7. *Rainey*, 109 S. Ct. at 450.

8. Using the tool of "judicial interpretation" courts define how prior precedent will be applied to instant facts. For an example of judicial interpretation in the context of statutory construction, see Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

9. J. STONE, PRECEDENT AND LAW 34 (1985) ("[t]he bindingness of precedent may be a gross oversimplification").

10. *Id.* at 13. Professor Stone stated that judges almost always have some degree of choice. *Id.* at 84.

11. For a discussion of the impact of secondary authority in the field of antitrust litigation, see *infra* text accompanying notes 98-104.

12. Monahan, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 493 (1986).

13. *See* J. STONE, *supra* note 9, at 83.

14. *Id.* Professor Stone suggested that disregarding precedent in favor of "choicemaking" is not the preferred method of arriving at a judicial decision; however, a lack of precedent often forces courts to make choices. *Id.*

the inadequacy of precedent in particular circumstances. Precedent is most inadequate when applicable precedent does not exist. In that instance, a court must make a decision by analogy or without precedential guidance altogether.[15] The most common ailment is conflicting precedents,[16] such as the conflict that existed in *Rainey*. Conflicting precedents leave courts without absolute binding guidance. The court may have to choose one precedent to the exclusion of another.[17] Another difficulty occurs when a court attempts to apply a seemingly applicable precedent that the precedent court failed to explain. Without the precedent court's *ratio decidendi*, a subsequent court only can guess if the precedent court's reasoning applies to the subsequent court's case.[18] Finally, courts can and do overrule precedent when the reasons to do so are more compelling than the reasons to adhere blindly to stare decisis.[19]

Precedent alone does not adequately serve judicial decisionmaking. Although courts and commentators in the past have looked upon secondary authority with great disfavor,[20] modern courts are citing secondary authority with greater frequency in their opinions.[21] For example, in 1900 the Supreme Court cited secondary authority in only 24.1% of its cases.[22] However, by 1978 Supreme Court citation of secondary authority increased to 75.2% of all cases.[23] Increased frequency of secondary authority citation increases the chances that courts may use secondary authority as a primary basis for decision.[24]

In addition to citing secondary authority more frequently, the Supreme Court also has used secondary authority to overrule existing precedent.[25] Part III of this note will show that courts are relying on

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15. *See infra* text accompanying notes 42-48.

16. J. STONE, *supra* note 9, at 63. The notion of conflicting precedents is consistent with the inadequacy of precedent, or "complimentarities," described by Myres McDougal. McDougal described complementarities as instances in which precedents or rules come in pairs that are directly opposed to each other. *See infra* text accompanying notes 49-54.

17. *See infra* text accompanying notes 49-58.

18. *See infra* text accompanying notes 59-72.

19. *See infra* text accompanying notes 73-82.

20. Lile, *The Exaltation of Secondary Authority*, 14 BENCH & BAR 53, 55 (1919) ("The large majority of these volumes [of secondary authority] are but inaccurate and inexhaustive digests.").

21. Daniels, *Far Beyond the Law Reports: Secondary Source Citations in United States Supreme Court Opinions: October Terms 1900, 1940, and 1978*, 76 LAW LIBR. J. 1 (1983).

22. *Id.* at 5.

23. *Id.*

24. Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613, 616 (1954).

25. *See infra* text accompanying notes 98-104.

secondary authority in varying degrees.[26] In some cases secondary authority has little or no influence.[27] In other cases courts consider secondary authority persuasive and sufficiently compelling to overrule precedent.[28] A jurisprudential paradigm that is sophisticated enough to explain the past and that provides a pragmatic model for increasing the success of future prediction of judicial decisionmaking would be helpful in this area.

The jurisprudential paradigms of natural law, positivism, and legal realism are inadequate to explain courts' reliance on secondary authority in the judicial decisionmaking process. Part IV of this note briefly examines these paradigms and their shortcomings.[29] For example, despite the contributions of legal realism to discrediting precedent as the sole basis for judicial decisionmaking, legal realism deconstructs law without providing a replacement.[30]

To replace the shortcomings of other jurisprudential paradigms, part IV of this note suggests applying a jurisprudence that can explain courts' reliance on secondary authority in the judicial decisionmaking process.[31] In the early 1940s[32] Professors Harold Lasswell and Myres McDougal developed a configurative jurisprudence based on a policy-oriented jurisprudential paradigm, which today is referred to as the "New Haven School."[33] In its simplest form the New Haven School (NHS) examines law from an observer's standpoint and asks who says what, through what channel, to whom, with what result, and with what effects.[34] This "communications theory,"[35] when expanded to a complete paradigm, is sufficiently comprehensive to provide an analysis of the impact and effect of secondary authority on the judicial decisionmaking process.

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26. *See infra* notes 83-109.

27. *See* Harrison, *Trends and Traces: A Preliminary Evaluation of Economic Analysis in Contract Law*, 1988 ANNUAL SURVEY AM. L. 73 (1988).

28. *Id.*

29. *See infra* text accompanying notes 113-28.

30. Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1075 n.19 (1986) ("[The realists] led them into the Wilderness and left them there.").

31. *See infra* notes 129-207.

32. Byse, *supra* note 30, at 1075.

33. *See* L. CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW at ix (1989) ("New Haven School" undoubtedly refers to the paradigm Lasswell and McDougal developed during their association with the Yale Law School in New Haven, Connecticut).

34. Nagan, *Law and Post-Apartheid South Africa*, 12 FORDHAM INT'L L.J. 399, 417 (1989) (citing Reisman, *International Lawmaking: A Process of Communication*, in AM. SOC'Y OF INT'L L.: PROCEEDINGS OF THE 75TH ANNUAL MEETING 101 (1981)).

35. *Id.* The process of the questions considered provides a basis for examining law as communication, thus considering the type of interplay that only communication can describe. *Id.*

II. THE INADEQUACY OF PRECEDENT AS THE SOLE BASIS OF JUDICIAL DECISIONMAKING

Prior to the first judicial mention of the word "precedent" in 1557,[36] courts considered cases to be "merely illustrations of legal principles,"[37] not binding authority. By the late nineteenth century courts began to follow the doctrine of stare decisis, which required that the issuing court or courts inferior to the issuing court be bound by prior decisions.[38] Yet, even as the binding nature of precedent grew, stare decisis never became absolute. By developing many exceptions to stare decisis, courts failed to adhere to precedent and thus weakened the very stability of law that the doctrine attempted to provide.[39]

Scholars have commented that a judge may make any decision and find "an array of cases to support it."[40] Additionally, the academic community has noted a recent decline in adherence to precedent.[41] This decline results from the inherent inadequacies of strict application of precedent.

A. *Instances in Which No Precedent Exists*

A case of "first impression" requires a court to reach a decision without the aid of precedent.[42] A court in this instance does not follow precedent, it creates it. In *Illinois Brick Co. v. Illinois*,[43] the Supreme

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36. *See* H. BERMAN & W. GREINER, THE NATURE AND FUNCTIONS OF LAW 492 (1966).

37. *Id.*

38. *Id.* at 493.

39. Hanna, *The Role of Precedent in Judicial Decision*, 2 VILL. L. REV. 367 (1957). Hanna summarized the American approach to stare decisis:

> The general American doctrine [of stare decisis] as applied to courts of last resort is that a court is not inexorably bound by its own precedents but will follow the rules of law which it has established in earlier cases, unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.

Id. at 368.

40. 1 J. WIGMORE, EVIDENCE at xv (2d ed. 1923) ("A judge may decide almost any question any way, and still be supported by an array of cases."). Justice Jackson stated, "I know that in this great mass of opinions by men of different temperaments and qualifications and viewpoints, writing at different times and under varying local influences, some printed judicial word may be found to support almost any plausible proposition." Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334 (1944); *see also* Merryman, *supra* note 24, at 619.

41. Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 293 (1976).

42. A case of "first impression" is one that presents a court a novel question of law, as yet undecided. BLACK'S LAW DICTIONARY 572 (5th ed. 1979).

43. 431 U.S. 720 (1977).

Court considered whether an indirect purchaser has standing to sue for antitrust violations under section four of the Clayton Act.[44] No precedent for this decision existed.[45] In creating precedent, the Court relied on its previous denial of the "pass on theory." In a prior case[46] the Court had held that an antitrust defendant could not argue that a direct purchaser plaintiff was not injured simply because the plaintiff had "passed on" its increased costs to its consumers.[47] Having previously rejected this defensive use of the "pass on theory," the court in *Illinois Brick* also refused to allow the offensive use of the "pass on theory" and denied standing to the indirect purchaser plaintiffs.[48]

Although guided by the equities and economic considerations of analogous precedent, the *Illinois Brick* Court nevertheless reached an unprecedented decision. When precedent is nonexistent, as in *Illinois Brick*, courts cannot rely on stare decisis to provide an answer to all judicial decisionmaking questions. Under these circumstances, a court must use other sources of authority for its decisionmaking.

B. *Conflicting Precedents: "Complementarities"*

A court also must use other sources of authority when two or more competing precedents exists. Competing, or conflicting, precedents exist in many areas of the law. Professor McDougal termed these paired opposites "complementarities."[49] For example, *pacta sunt servanda* (agreements must be honored) is a complementarity of *rebus sic stantibus* (but not if conditions change).[50] Similarly, one can use force in self-defense, but not unless the use of such force is reasonably necessary.[51] "Freedom of the seas" is a complementarity of "contiguous zones."[52] The Court in *Beech Aircraft Corp. v. Rainey*,[53] confronted

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44. *Id.* at 726.

45. *Id.*

46. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

47. *See id.* at 488-89.

48. *Illinois Brick*, 431 U.S. at 735. The Court held by analogy that, since a defensive use of the "pass on" theory was unavailable to a defendant, plaintiff's attempted offensive use also was unavailable. *Id.*

49. McDougal, *Law as a Process of Decision: A Policy Oriented Approach to Legal Study*, 1 NATURAL L. FORUM 53, 61 (1956).

50. *See* Sherwood v. Walker, 66 Mich. 568, 572, 33 N.W. 919, 923 (1887) (parties to an agreement "may avoid [the contract] . . . upon the mistake of a material fact").

51. Fraguglia v. Sala, 17 Cal. App. 2d 738, 62 P.2d 783 (Ct. App. 1936).

52. M. MCDOUGAL & M. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 586 (1981). For other examples of "complementarities," see McDougal, *supra* note 49, at 61-62.

53. 109 S. Ct. 439 (1988).

complementarities in precedent. Before *Rainey*, "opinions and conclusions could be admitted into evidence" was the paired opposite of "opinions and conclusions could not be so admitted."[54] Which paired opposite applied depended upon which federal circuit heard the controversy.

When a court must decide between competing precedents, it can disguise choice by utilizing, as in *Rainey*, the interpretative function.[55] It cannot, however, escape choice.[56] When two competing applicable precedents exist, precedent is not determinative. Therefore, the court does not reach its decision by a "mechanical jurisprudence"[57] because the court must decide *which* precedent applies. Inevitably, the decision will determine "whose ox is going to be gored."[58] When a court decides which of the competing precedents it will choose, the court utilizes a decisionmaking process that includes sources of authority other than precedent.

C. *Unexplained Precedents*

Another example of the inadequacy of precedent emerges when a court must decide if the precedent court's reasoning, or *ratio decidendi*, makes the precedent applicable to the present court's issue.[59]

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54. *See supra* note 4 and accompanying text.

55. *See supra* note 8 and accompanying text.

56. L. CHEN, *supra* note 33, at 12 ("Decisions (choices) cannot be made by neutral decisionmakers (neutral human beings) neutrally applying neutral rules that are neutrally derived. Rules simply do not decide cases, people decide, and rules may provide only minimal guidance in decisionmaking.").

57. Dean Roscoe Pound characterized "mechanical jurisprudence" as a system which denigrates into technicality, in which principles are no longer used to make rules fit cases, and in which decisions are made by "the purely mechanical task of counting and determining the numerical preponderance of authority." Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 607 (1908).

58. The author borrows this phrase from Professor Winston P. Nagan, professor of law at the University of Florida College of Law, who used the phrase on numerable occasions to describe the basis of judicial decisionmaking: the courts must decide which conflicting interest is more compelling and should prevail. Professor Lücke adopted Heck's more formal statement of the maxim:

> [The] fundamental truth from which we must proceed is that each command of the law determines a conflict of interests; it originates from a struggle between opposing interests, and represents as it were the resultant of the opposing forces. It operates in a world full of competing interests, and, therefore, always works at the expense of some interests."

Lücke, *The Common Law: Judicial Impartiality and Judge-Made Law*, 98 L.Q. REV. 29, 50-51 (1982).

59. J. STONE, *supra* note 9, at 123

Each of the two widely accepted methods of determining the *ratio decidendi* of a case creates potential leeway for courts.[60] The first method seeks to establish the reason for the holding based on the "material facts."[61] Under this method a court determines the rationale of the precedent opinion from facts "material" to the circumstances that make the former decision applicable.[62] The second method is the "rule-propounded" method. Under the "rule-propounded" method, a subsequent court relies on the precedent court's expressly stated rationale for its holding.[63]

The "material facts" method is inadequate when the precedent opinion fails to assert which facts are indeed "material." In *Barnett Bank v. Hooper*,[64] the Florida Supreme Court ruled that a fiduciary relationship can exist in the borrower-lender relationship of the banking industry.[65] While the court provided many facts that indicated the bank had engaged in fraudulent activities and thus justified the court's imposition of a fiduciary relationship between the bank and the borrower,[66] the court stated that the relationship also could be established under other "special circumstances."[67] The court failed, however, to provide the factual bases that would be sufficient to establish these "special circumstances."[68] The *Barnett* decision provides precedent when fraud is at issue, but the decision has little precedential value in other cases because the court failed to explain which facts in *Barnett* created "special circumstances."

The infamous doctrine of *Rylands v. Fletcher*,[69] which established the strict-liability dangerous instrumentality rule,[70] illustrates how the "rule-propounded" method also is inadequate. As Professor Roscoe Pound noted, the *Rylands* court provided a rule that courts often have held inapplicable because of their "manifest inclination to discover

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60. *Id.* For a thorough discussion of determining the *ratio decidendi* of a case, see Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930), *reprinted in* A. GOODHART, ESSAYS IN JURISPRUDENCE (1931).

61. J. STONE, *supra* note 9, at 123.

62. *Id.* at 124.

63. *Id.*

64. 498 So. 2d 923 (Fla. 1986).

65. *Id.* at 926.

66. *Id.* at 924.

67. *Id.* at 925-26.

68. *Id.*

69. 3 L.R.-E. & I. App. 330 (H.L. 1868).

70. *See* R. POUND, INTERPRETATIONS OF LEGAL HISTORY 110 (1923) (doctrine is "that one who maintains something which if not kept in hand may endanger the general security, must keep it in hand at the risk of responding for resulting injuries if he does not").

something in the facts [of *Rylands*] which [takes] the case out of the rule."[71] Although the *Rylands* court expressly provided reasoning for its rule, other courts have avoided its precedent by distinguishing the case on factual grounds.[72]

Comparing the two methods discloses their similarity. In both methods the applicability of the precedent court's reasoning rests with the instant court's discretion regarding the factual similarity of the two cases. If a court determines that the precedent court's reasoning or lack of reasoning does not coincide with the instant facts, the court can consider extra-precedential factors. In short, courts are guided by *ratio decidendi* to the extent that, in their discretion, they deem themselves bound. All precedent is thus "unexplained" when courts feel a departure is warranted by considerations from other sources.

D. *Overruled Precedents*

Precedent is most vitiated when a court expressly overrules it. When a court overrules precedent, the court must use extra-precedential sources of authority. Logically, the existing precedent cannot be the court's guide because the court is abandoning it. Because the court is overruling precedent, it cannot use precedent as the sole basis for judicial decisionmaking.[73]

Precedent also is inadequate when lower courts do not consider themselves bound by it.[74] For example, in *McCray v. Abrams*,[75] a

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71. *Id.* at 36.

72. *See, e.g.*, Reynolds v. W.H. Hinman Co., 145 Me. 343, 75 A.2d 802 (1950); Gulf Pipe Line Co. v. Sims, 168 Okla. 209, 32 P.2d 902 (1934).

73. Even when courts do not expressly overrule a precedent, the effect can be the same in instances in which "judges who dislike a precedent . . . avoid it by inventing subtle distinctions." Lücke, *supra* note 58, at 71. Holmes noted the absurdity of courts strictly following stare decisis precedent:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

O.W. HOLMES, COLLECTED LEGAL PAPERS 187 (1923).

Yet, some courts have been painfully forthright in overruling a prior decision. In Alferitz v. Borgwardt, 126 Cal. 201, 58 P. 460 (1899), while overruling its prior decision, the court stated that "one of its earlier decisions was so bad that a lawyer who relied on it in advising a client would demonstrate his incompetence." *Id.* at 208, 58 P. at 462; *see also* Merryman, *supra* note 24, at 620-21 n.12.

74. *See generally* Bratz, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 WASH. L. REV. 87 (1984).

75. 576 F. Supp. 1244 (E.D.N.Y. 1983), *aff'd in part, vacated in part*, 750 F.2d 1113 (2d Cir. 1988).

federal district court repudiated an eighteen-year-old United States Supreme Court decision by holding that racially motivated peremptory challenges offend the equal protection clause.[76] *McCray* contradicted *Swain v. Alabama*,[77] in which the Supreme Court had held that such a practice was not violative of the United States Constitution.[78] *McCray* illustrates how extra-precedential sources of authority can affect courts. Although the *McCray* court could have overruled itself as a matter of policy,[79] as a lower court it was bound to "apply the law as last pronounced by superior judicial authority."[80]

Recognizing the necessity of overruling precedent, Holmes stated that "[t]he life of the law has not been logic; it has been experience."[81] Courts do not rely solely on precedent or logical deduction from precedent in their decisionmaking; they also use reason from legal and extra-legal sources.[82] Thus, in certain circumstances, precedent is inadequate to provide the sole basis for judicial decisionmaking. Often, the void left by this inadequacy can be filled by secondary authority.

III. THE ROLE OF SECONDARY AUTHORITY IN THE JUDICIAL DECISIONMAKING PROCESS

Courts have viewed secondary authority, particularly law reviews, as "authoritative" for over a half-century.[83] Judge Learned Hand asserted that lawyers should use law reviews in their briefs, and courts should cite them in their opinions.[84] Justice Cardozo also acclaimed

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76. *Id.* at 1249.

77. 380 U.S. 202 (1965).

78. *Id.* at 221.

79. *See* Bratz, *supra* note 74, at 90 ("the Court [has] stated that *stare decisis* promoted the policies of (1) certainty in the law's application, (2) fairness and efficiency in the administration of justice, and (3) maintenance of public confidence in judges as impersonal decisionmakers") (construing Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (footnotes omitted). When none of the policies are threatened significantly, the Court may overrule precedent. *Id.* at 90-91.

80. Kelman, *The Force of Precedent in the Lower Courts*, 14 WAYNE L. REV. 3, 4 (1967). *But see* Green, *The Development of the Doctrine of Stare Decisis and the Extent to Which it Should Be Applied*, 40 ILL. L. REV. 303, 319 n.73 (1946) ("if the [lower court] is convinced that the former decision should be reconsidered [it] may refuse to follow it so as to give the appellate court the opportunity to reconsider"), *cited in* Bratz, *supra* note 74, at 91 n.18.

81. O.W. HOLMES, THE COMMON LAW 1 (1881).

82. J. STONE, *supra* note 9, at 98-99.

83. Maggs, *Concerning the Extent to Which the Law Review Contributes to the Development of the Law*, 3 S. CAL. L. REV. 181, 187 (1930) (the authoritativeness of law reviews has been recognized to a "sight but increasing extent").

84. *Id.* at 186. Judge Hand stated,

> Much important discussion appears in the law journals, which may be of great assistance to judges in making any comprehensive examination, especially such as

the utility of law reviews in helping him perform his judicial duties.[85] In addition, Justice Cardozo believed that the increase of the courts' reliance on law reviews reflected a shift in the leadership of legal thought from the judicial bench to the professors' chairs.[86] Moreover, although most secondary authority citations are to law reviews, law reviews are but one form of secondary authority upon which courts increasingly have relied. However, courts did not always rely so heavily on secondary authority.

A. *The Historical Disfavor of the Use of Secondary Authority*

In the early 1900s many of the bench and bar believed that judicial decisions were the "sole authoritative evidences of the unwritten law."[87] They viewed secondary authority as a "short-cut" to the law, arrived at by vocation rather than as a result of the serious practitioner eking out a livelihood.[88] Moreover, they believed that secondary authority authors lacked a "love of the law,"[89] which only practitioners could possess, and were motivated solely by compensation.[90] Secondary authority was indeed "secondary" and lacked the integrity and authoritativeness of primary authority.

B. *The Emergence of Secondary Authority*

As the early obstacles to the use of secondary authority eroded over time, the decisionmaking value of secondary authority increased.

> is out of the ordinary field of their researches. It is certainly most desirable that counsel should refer to them in their briefs, and I do not see why credit should not be given where credit is due, when judges come to write their opinions.

Id. at n.11a (quoting Judge Hand's Letter to the Editor).

85. *Id.* (Cardozo "found law review articles of conspicuous utility in the performance of [his] judicial duties. This being so, [he was] unwilling to appropriate the learning of the authors of the articles without making due acknowledgement.") (quoting Chief Judge Cardozo's Letter to the Editor).

86. Douglas, *Law Review and Full Disclosure*, 40 WASH. L. REV. 227 (1965) (citing Cardozo, in SELECTED READINGS ON THE LAW OF CONTRACTS at ix (1931); *see also* Rheinstein, *Law Faculties and Law Schools: A Comparison of Legal Education in the United States and Germany*, 1938 WIS. L. REV. 5, 7 (In the sixth century faculties of law formally attained positions as the "ultimate" appellate court. In that sense, scholarly writings had the impact of precedent.).

87. *See* Lile, *supra* note 20, at 53.

88. *Id.* at 54 (secondary authority "is to the lawyer what translation of the classics are to the student").

89. *Id.*

90. *Id.* at 56; *see also* Douglas, *supra* note 86, at 228-29. Justice Douglas suggested law review authors are not always neutral evaluators. Sometimes they are not mere scholars because they have "axes to grind" or have financial outcomes at stake. These outside influences bias a seemingly neutral article. *Id.*

Even early critics acknowledged that exceptions existed to the inferiority of secondary authority.[91] Similar to the hierarchy of courts, courts and commentators regarded particular authors of secondary authority as more authoritative than others.[92]

Today, periodicals and authors both are quantitatively and qualitatively ranked as to influence and impact.[93] Frequency of citation, although inconclusive, is an effective tool for assessing the value of secondary authority because increased frequency of citation itself gives a work authority.[94] However, the frequency of citation is limited as a gauge for assessing the value of secondary authority because it does not measure qualitative factors.

If increased frequency of citation is sufficiently indicative of the growing influence of secondary authority, the numbers are striking. From 1900 to 1978, the United States Supreme Court's use of secondary authority increased 625%.[95] During the same period secondary authority citation per case increased 1,635%.[96] Remarkably, the secondary authority citation of nonlegal sources rose 1,429%.[97]

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91. Lile, *supra* note 20, at 56.

92. *Id.* at 54. Among the class that Lile considered more authoritative were the following: Blackstone, Kent, Story, Greenleaf, Bishop, Pomeroy, Cooley, and Minor. Lile considered the authority of these authors and a few others equal to primary authority. *Id.*

93. Harrison, *supra* note 27 (listing works by particular authors whose influence on judicial decisionmaking ranges from being noted in a string cite to significantly influencing judicial opinions); Maru, *Measuring the Impact of Legal Periodicals*, 1976 AM. B. FOUND. RES. J. 227 (ranking periodicals based on frequency of citation).

94. Daniels, *supra* note 21, at 27; Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381, 413 (1977) ("the repeated citation of [secondary authority] has some effect on the way law grows"). Even though secondary authority is cited most frequently for convenience, a court, in recognizing secondary authority, gives the particular work credibility. Future courts will then look to this authority. It thus exerts some influence on the way the law grows. *Id.*; *see also* Maru, *supra* note 93, at 230 (because it is objective, counting the frequency of citation is the best way to determine the impact of secondary authority).

95. Daniels, *supra* note 21, at 4 (legal citations to secondary authority rose "from 127 in the 1900 term to 921 in 1978").

96. *Id.* (citation of secondary authority rose "from 0.651 to 7.140 per case").

97. *Id.* (citation of nonlegal secondary authority rose "from 17 in 1900 to 260 in 1978"). Although the numbers for United States Supreme Court citation of secondary authority in 1988 are not as great as those of 1978, they are, nevertheless, impressive. I conducted my own study of United States Supreme Court citation of secondary authority for cases decided in the year 1988. I excluded all primary sources, including the following: constitutions, statutes, court decisions, court rules, administrative regulations and adjudications, executive orders, and attorneys' general opinions. I counted only published sources. In examining the citing cases, I studied only actual cases; therefore, memorandum decisions (e.g., cases granting or denying certiorari) are not included in this study.

C. *Decisions in Which Secondary Authority Has Influenced the Judicial Decisionmaking Process*

The qualitative degree of influence is more difficult to ascertain. Whether competing authorities influenced a court to make one decision at the expense of another may not be reflected conclusively within the text of an opinion. Yet, some decisions inescapably demonstrate that secondary authority was influential in the judicial decisionmaking process. Antitrust litigation since 1977 is an area of law in which secondary authority has influenced courts.

Continental T.V., Inc. v. GTE Sylvania, Inc.[98] was a sharp departure from antitrust precedent.[99] In *Sylvania* the United States Supreme Court overruled *United States v. Arnold, Schwinn & Co.*[100] and held that nonprice vertical restraints were no longer per se antitrust violations.[101] In overruling *Schwinn*, the Court dramatically changed antitrust law and abandoned a rule that had suffered ten years of "nearly uniform scholarly condemnation."[102] The Court noted that the "great weight of scholarly opinion [had] been critical of [*Schwinn*]."[103] While the impact of secondary authority upon the Court

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1988 Secondary Authority Citation

Number of Cases Counted	Number of citations		
	Maj. Opinion	Conc. Opinion	Dissent
158	54	13	25

Cases with at least one citation to secondary authority:	46.8%
Majority opinions with at least one citation to secondary authority:	34.1%

Secondary authority has affected the outcome of Supreme Court decisions. For example, in California v. Carney, 471 U.S. 386 (1985), the Court confronted the question of whether a mobile home was more like a car or a home. Writing for the dissent, Justice Stevens cited three nonlegal publications, TRAILER LIFE, MOTOR HOME, and RV LIFESTYLE MAGAZINE, from which he reasoned, "I believe that society is prepared to recognize that the expectations of privacy within a [motor home] are not unlike the expectations one has in a fixed dwelling." *Id.* at 399-402 (Stevens, J., dissenting); *see also* Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771, 803-805 n.143 (citing *Carney*, 471 U.S. 386 (1985)).

98. 433 U.S. 36 (1977).

99. *Cf.* Note, *Whether to Overrule Statutory Based Civil Rights Precedent: Whose Needs Should Prevail?*, 41 FLA. L. REV. 369, 378 n.54 (1989) (overruled precedent had been the "subject of judicial and scholarly controversy.").

100. 388 U.S. 365 (1967).

101. *Sylvania*, 433 U.S. at 59.

102. E. SULLIVAN & J. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 155, 169 (1988).

103. *Sylvania*, 433 U.S. at 47 n.13. The Court cited the following legal periodicals: Baker, *Vertical Restraints in Times of Change: From* White *to* Schwinn *to Where?*, 44 ANTITRUST

cannot be determined with absolute certainty, "judicial cognizance"[104] of the cited sources appears to have been influential.

Secondary authority has influenced decisions in other areas of the law. For example, scholarly commentary concerning "law and economics" has been persuasive in many contracts cases.[105] Richard Posner's economic theories have influenced judicial decisionmaking in contracts cases in which economic analysis and theory are relevant.[106] Significantly, most consider contracts law to be a well-settled area of the law.[107] That secondary authority is capable of influencing this well-settled area is evidence of the significance courts attribute to secondary authority. When secondary authority influences opinions, it plays a role in the "total legal process which is not greatly different from that played by primary materials."[108]

L.J. 537 (1975); Handler, *The Twentieth Annual Antitrust Review — 1967*, 53 VA. L. REV. 1667 (1967); Louis, *Vertical Distributional Restraints Under* Schwinn *and* Sylvania: *An Argument for the Continuing Use of a Partial Per Se Approach*, 75 MICH. L. REV. 275 (1976); McLaren, *Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal*, 37 ANTITRUST L.J. 137 (1968); Pollock, *Alternative Distribution Methods After* Schwinn, 63 NW. U.L. REV. 595 (1968); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975); Robinson, *Recent Antitrust Developments: 1974*, 75 COLUM. L. REV. 243 (1975); Zimmerman, *Distribution Restrictions After* Sealy *and* Schwinn, 12 ANTITRUST BULL. 1181 (1967); Note, *Vertical Territorial and Customer Restrictions in the Franchising Industry*, 10 COLUM. J.L. & SOC. PROBS. 497 (1974); Note, *Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason?*, 40 GEO. WASH. L. REV. 123 (1971); Note, *Territorial Restrictions and Per Se Rules — A Re-evaluation of the* Schwinn *and* Sealy *Doctrines*, 70 MICH. L. REV. 616 (1972). *See Sylvania*, 433 U.S. at 47-48.

104. *See* Muller v. Oregon, 208 U.S. 412 (1908). In *Muller* then attorney Louis Brandeis wrote an influential brief consisting of social science materials. The Court responded that although the social science materials "may not be, technically speaking, authorities," they would nonetheless receive judicial recognition. *Id.* at 420-21. Any brief which cites extensively to "the domain of social science" is known as a "Brandeis Brief." Klein, *PC's: A Revolution in the Practice of Law*, 14 LEGAL ECON. 44 (1988); *see also* Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986).

105. *See generally* Harrison, *supra* note 27.

106. *See id.* at 111-12. Professor Harrison considered R. POSNER, ECONOMIC ANALYSIS OF THE LAW (3d ed. 1986) to have influenced the judicial opinions of the following cases: A & S Transp. Co. v. Tug Fajardo, 688 F.2d 1, 3 (1st Cir. 1982); Tusch Enters. v. Coffin, 113 Idaho 37, 48, 740 P.2d 1022, 1033 (1987); George v. Veach, 67 N.C. App. 674, 680, 313 S.E.2d 920, 924 (1984); Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 173 (Tex. 1987) (Gonzalez, J., dissenting). Harrison, *supra* note 27, at 111-12.

107. Harrison, *supra* note 27, at 79. Professor Harrison suggested that scholar's theories may more frequently support established rules. Significantly, the influence these theories exert on established rules is more difficult to detect than when theories are used to support "dramatic change" in the law. *Id.*

108. Merryman, *supra* note 24, at 620. Professor Merryman compared the roles that primary and secondary authority play in practice:

The role and influence of secondary authority are dependant upon many factors. The author's views must be recognized as being authoritative. The author's analysis must contain good reasoning and be helpful to his or her audience. The secondary authority itself must be authoritative. Finally, the court considering the proffered secondary authority must be receptive to secondary authority in general. Using the "New Haven School" (NHS), these factors translate comfortably: *who* (author) says *what* (scholarly commentary) through *what channel* (publication) to *whom* (the court) with *what result* and *effects* (the influence observed).[109] Indeed, judicial decisionmaking is hydraulic in the sense that a change in one element of a decision affects other elements either directly or indirectly. A jurisprudential paradigm, to be descriptive as well as prescriptive, must be as hydraulic as the judicial decisionmaking process it examines.

IV. THE JURISPRUDENTIAL EXPLANATION OF INCREASED SECONDARY AUTHORITY CITATION: THE "NEW HAVEN SCHOOL"

Since the time of Socrates, jurisprudence students and scholars have challenged each others' theories about law and justice.[110] Today, disagreement still exists concerning which is the "correct" school of jurisprudential thought.[111] NHS is the most appropriate school for analyzing the impact of secondary authority on the judicial decisionmaking process. Unlike other schools, NHS comprehensively addresses the notion that judges are not neutral in their relation to society.

Any jurisprudential school attempting to explain the judicial decisionmaking process must consider the communication of social values, which often are communicated by secondary authority. Communicating social values permits judges to be both socially responsive and socially

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> This difference is supposed to be sufficiently great to justify classification of secondary authority in such a way as to suggest that is clearly inferior as "law" to statutes and cases. It is obvious, however, that given the judicial practice of citing secondary authorities in opinions these works can and do play a part in the total legal process which is not greatly different from that played by primary materials. It is possible for cases to be decided, rules of law to be stated, lines of decisions begun and perpetuated, solely on the authority of textual treatment having its origins outside the judicial or legislative process.

Id.

109. *See* Nagan, *supra* note 34.

110. *See* Kaye, *The Logic and Antilogic of Secret Rights*, 72 MINN. L. REV. 603, 603 (1988).

111. Mabe, *Toward a Critical Theory of the Role of Values in Judicial Decision Making: Dworkin and Recent Theories of Adjudication*, 18 MEM. ST. U.L. REV. 25, 25-26 (1987).

responsible.[112] Jurisprudential schools other than NHS are too narrow because they fail to consider communication of social values of secondary authority. They also lack the identification and application of intellectual tasks necessary for inquiry. This note briefly will explore the inadequacies of other jurisprudential schools.

A. *The Inadequacy of Other Jurisprudential Paradigms*

Jurisprudential schools employing theological or metaphysical "first principles" as their basis suffer from easily recognized shortcomings in explaining the emergence of secondary authority. For example, if the proper task of the "natural law" jurist is to "put God's plan into practice,"[113] only the Bible or other theological literature would be appropriate secondary authority. Paradoxically, for the natural law jurist, the "word of God" is not secondary authority at all, rather it is the sole primary authority.[114] Occasionally, courts do cite the Bible and other religious texts.[115] However, because courts rarely cite them, the natural law school cannot explain the increased citation of sources the school considers invalid.

Analytical jurisprudence, or positivism, requires that "law be the command of the sovereign."[116] According to the positivist school, coercion is an essential element of law, and government enforces obedience to the law through fear of sanction.[117] At this point the positivist school

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112. MacGuigan, *Sources of Judicial Decision Making and Judicial Activism*, in EQUALITY & JUDICIAL NEUTRALITY 35 (1987). MacGuigan stated that judges

> must be *socially responsive*, or, as many would say, *activist*, in doing their best to bring the law into conformity with social needs. But on the other hand, they must also be *socially responsible*, that is, they must anchor their justifications for change in the law in social reality. They must never look within themselves alone for social values but must always relate them to society.

Id. (emphasis in original); *see also* Gold, *A Principled Approach to Equality Rights: A Preliminary Inquiry*, 4 S.C.L. REV. 131 (1982).

113. Lasswell & McDougal, *Jurisprudence in Policy-Oriented Perspective*, 19 U. FLA. L. REV. 486, 493 (1967). Many variations of "natural law" exist which, for the brief discussion within this note, have been excluded. *Id.* at 494 n.6. For example, the "sociological natural law" model, which focuses on social values, considers law as an "ongoing, interactive process, not a finished product." Note, *supra* note 99, at 381-82; *see also* D. Amato, *Lon Fuller and Substantive Natural Law*, 26 AM. J. JURIS. 202, 212 n.34 (1981).

114. *See* M. REISMAN & A. SCHREIBER, JURISPRUDENCE 174-75 (1987).

115. *See, e.g.*, County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086, 3093-94 (1989) (citing *Luke* 2:1-21; *Matthew* 2:1-11).

116. E. POLLACK, JURISPRUDENCE, PRINCIPLES AND APPLICATIONS 521 (1979).

117. *Id.* at 553.

fails. Obedience to law often is the result of moral and religious motives and not fear of sanction.[118]

More pertinent to this note is how the influence of secondary authority fits into the calculus of the positivist school. For example, if Kelsen's "pure theory" of positivism dictates that law is what the law has "actually laid down, [and] not what it ought to be,"[119] a court could not consider secondary authority that advocated striking down a law or overruling precedent.[120] Similarly, although Professor Hart's "rule of recognition" provides a consideration of "social facts,"[121] his model does not explain why and under what circumstances secondary authority will have an effect on the judicial decisionmaking process.[122] The basic flaw of positivism is that it fails to consider the ability of secondary authority to communicate societal change.[123]

Responding to natural law and positivism, legal realism was virtually antithetical to the precepts of both. The legal realists' skepticism of judges neutrally and mechanically applying the law directly contradicted prior jurisprudential thought.[124] To the realists, the "Harvard-Langdellian" doctrinal approach to law was invalid because law is "too filled with conflict . . . leaves too much open . . . [with] too much to be decided" for it to control completely.[125] Because the realists made direct attacks on the doctrinal approach to law, many scholars viewed realism in a negative, iconoclastic light.[126]

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118. *Id.* Pollack surmised that people obey laws because of moral and religious motives, not simply out of fear of sanction. *See id.*

119. R. DIAS, JURISPRUDENCE 358 (5th ed. 1985).

120. *See id.* at 359 (Kelsen required that a theory of law be free from ethics, politics, and sociology).

121. *See id.* at 355.

122. *Id.* Dworkin provided an additional criticism of the rule of recognition. He noted that "what the law is has to be determined with reference to doctrines, standards and principles, which do not derive their law-quality from a rule of recognition." *Id.* at 354-55.

123. *See* E. POLLACK, *supra* note 116, at 561 ("law cannot be dissociated from life, which gives it content and purpose."); *see also* L. FULLER, LAW IN QUEST OF ITSELF 77-78 (1940); W. SEAGLE, THE HISTORY OF LAW at x (1946); Brown, *Legal Research: The Resource Base and Traditional Approaches*, 7 AM. BEHAV. SCI. 3, 6 (1963).

124. *See* Byse, *supra* note 30, at 1072-73; *see also* Vetter, *Postwar Legal Scholarship on Judicial Decision Making*, 33 J. LEGAL EDUC. 412, 412 (1983) (legal realism questions the positivist view that precedents, statutes, and constitutional provisions can produce reliable outcomes in litigated cases).

125. Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 335 (1988); *see also* Llewellyn, *Some Realism about Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1233-38 (1931).

126. Kronman, *supra* note 125, at 335. Skeptics can be divided into two groups: rule skeptics, who attribute legal uncertainty to the "paper" rules of law, and fact skeptics, who attribute legal uncertainty to the elusiveness of facts used to decide a case. LLOYD OF HAMPSTEAD, INTRODUCTION TO JURISPRUDENCE 456 (4th ed. 1979).

Today, legal realism has few followers. Although successful in deconstructing prior theories about what law is, the realists failed to provide a new theory to replace those they destroyed.[127] Thus, legal realism failed to provide a model for evaluating the influence of secondary authority on the judicial decisionmaking process. Legal realism, however, provided the basis for new theories that considered judges human and "responsive to the variables which typically shape the conduct of all [persons]."[128]

B. *The Configurative or Policy-Oriented Jurisprudential Paradigm: A Map for Decision*

A jurisprudential school attempting to explain the effect of secondary authority on the judicial decisionmaking process must provide a theory of problem solving in the context of community decisionmaking.[129] In this sense, "community" means any socioeconomic, political group in which finite, cherished values are allocated. A policy-oriented approach to jurisprudence that adds the community context into its decisionmaking must have three bases: (1) contextual; (2) problem solving; and (3) multimethod.[130] These three major bases form the foundation of the NHS jurisprudential paradigm.

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127. E. POLLACK, *supra* note 116, at 788 ("American legal realism reached the zenith of its popularity in the first half of the twentieth century. Its supporters included many of the leaders in legal education, the judiciary, and the bar. This popularity, however, declined rapidly, and today the theory is without important representation.").

128. Lasswell & McDougal, *supra* note 113, at 495. The legal realist theory of scientific investigation was inadequate because science is "value free." Judicial decisionmaking, however, requires policy decisions that include value-oriented input. *Id.* Professors Lasswell and McDougal stated,

> [L]egal realist did little service to "science" and scarcely more to law by merely proclaiming the virtues of scientific modes of thought and investigation. It is a disservice to science to exaggerate the contribution which science alone can make to the policy questions that are the distinctive problems by which lawyers are confronted.

Id. The underlying tenet of the New Haven School is that the decisionmaking process, judicial or otherwise, demands the maximization of goal values. *Id.*; *see also* McDougal, *supra* note 49, at 65. *See generally* McDougal, *Legal Bases for Securing the Integrity of the Earth-Space Environment*, 184 ANNALS N.Y. ACAD. SCI. 375, 380 (1971); McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959); Nagan, *Civil Process and Power: Thoughts from a Policy-Oriented Perspective*, 39 U. FLA. L. REV. 453 (1987); Reisman, *A Theory About Law from the Policy Perspective*, in LAW & POLICY 75 (Weisstub ed. 1976).

129. Lasswell & McDougal, *supra* note 113, at 496.

130. *See* L. CHEN, *supra* note 33, at 15.

1. The Contextual Basis

NHS places the law into a dynamic state in which law is viewed in the context of "relevant societal, community and decisional variables."[131] Within this scheme, secondary authority serves as a conduit of communication for scholars. That communication provides comprehensive discussion of the variables that interact and shape law.[132]

2. The Problem-Solving Basis

NHS is problem solving to the extent that law is viewed as an instrument of policy that clarifies present goal values without solely presenting a restatement of the past.[133] Instead of merely reviewing the past, NHS involves identifying past trends, analyzing the factors affecting those trends, and considering the various alternatives.[134] For example, secondary authority, especially in the form of empirical studies, can identify past trends and thus provide helpful guidance to courts. For instance, in *Hovey v. Superior Court*,[135] the California Supreme Court included in their opinion approximately two dozen studies that compared murder conviction rates by jurors who opposed the death penalty to conviction rates by jurors not opposed to the death penalty.[136] Thus, the *Hovey* court's decisionmaking was illuminated by past trends.

Yet, courts cannot consider only past trends. Courts must identify "factors" affecting past trends to give meaning to decisionmaking and to guide the projection of future trends.[137] The United States Supreme Court's use of scholarly commentary to identify the economic factors affecting the trends in antitrust decisions exemplifies the contributions of secondary authority to this aspect of problem solving.[138]

Finally, problem-solving requires courts to consider possible alternative decisions with regard to the various trends and factors.[139] Courts

131. *Id.*

132. *See id.*

133. *See id.*; *see also* Lasswell & McDougal, *supra* note 113, at 500-01.

134. *See* L. CHEN, *supra* note 33, at 15.

135. 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

136. *Id.* at 23, 616 P.2d at 1314, 168 Cal. Rptr. at 141. The court concluded, as a result of the studies, that a juror who was opposed to the death penalty could still decide on guilt but would be removed at the sentencing portion of decision. *Id.* at 68-69, 616 P.2d at 1346-47, 168 Cal. Rptr. at 173-74.

137. McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 197 (1968).

138. *See supra* text accompanying notes 98-104.

139. *See* McDougal, Lasswell & Reisman, *supra* note 137, at 197.

can better maximize goal values by testing alternative solutions. NHS recognizes secondary authority as an appropriate tool to explore the various alternative solutions. The disagreement among scholars and the expression of various opinions and solutions from differing perspectives provide the decisionmaker with a valuable testing ground. Secondary authority need not provide one solution; rather, by exposing many alternatives, secondary authority allows the court to make a comprehensive and effective decision, thereby maximizing goal values.

3. The Multimethod Basis

NHS is a multimethod jurisprudence because it advocates the use of various intellectual problem-solving skills not in a prescribed linear order, but in a "configurative"[140] or matrix-like manner. At first, the "configurative map" may appear too complex to be practical. However, the matrix nature of the map provides NHS with the sophistication needed to explain the complexity of the decisionmaking process.

C. *The New Haven School Configurative Map*

The NHS configurative map is like a mathematical matrix. Its components form an array allowing the components to interact with each other. As a result, a particular linear flow does not exist. The observer, or a person detached from the process under scrutiny,[141] views the entire process as interrelated segments of inquiry. However, while NHS does not require a specific order of inquiry, certain ordered functions are essential. First, the observer must establish an observational standpoint. Second, he or she should formulate problems in terms of the allocation of society's demanded values. Third, the observer must delimit the inquiry's focus. Fourth, the observer must explicitly postulate the public order value goals. Finally, the observer must perform the necessary intellectual tasks.[142]

1. Establishing the Observational Standpoint

During the observation process, the observer examines the flow of the authoritative dicision and value clarification processes.[143] Since individual perspectives and personal experiences can taint the observer's view, the observer, to observe objectively, should disassociate

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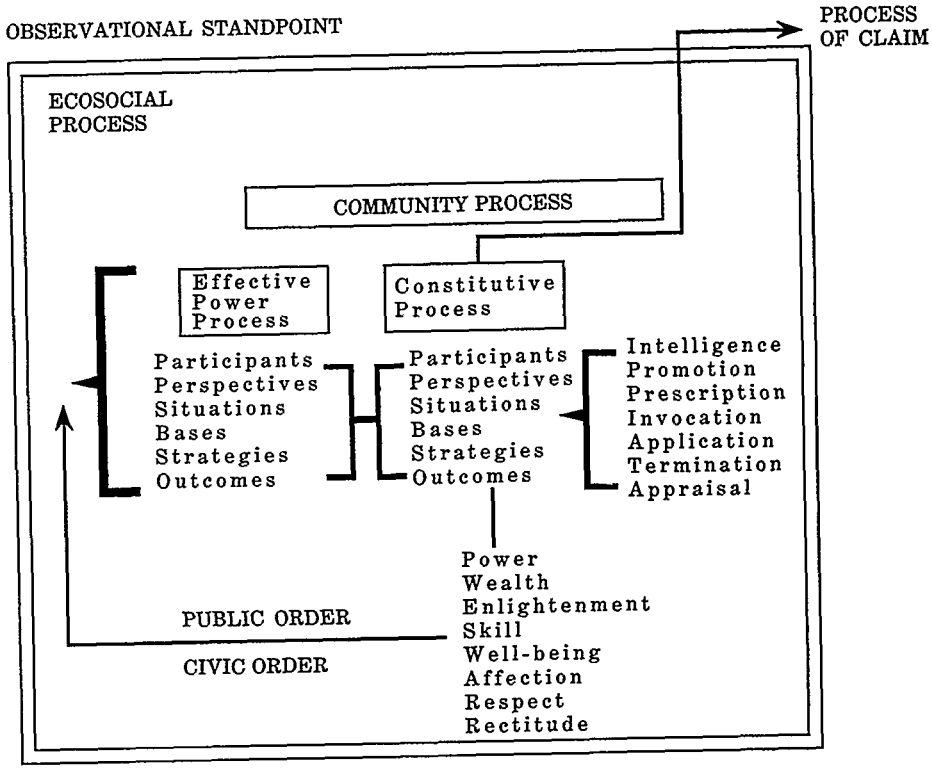
140. L. CHEN, *supra* note 33, at 15.
141. *Id.*
142. *Id.*; McDougal, Lasswell & Reisman, *supra* note 137, at 199.
143. Lasswell & McDougal, *supra* note 113, at 502.

THE NHS CONFIGURATIVE MAP[144]



himself or herself as much as possible from this unique standpoint.[145] Secondary authority, especially law reviews, provides an invaluable aid to observers seeking objectivity. Generally, law review text is objectively written, considers opposing and alternative views, and, as courts indicate, is admired for its excruciating fairness.[146] Using law reviews to seek objectivity allows observers to identify perspectives that cloud the view, and thus observers are able to view more the decisionmaking process accurately.

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144. Reisman, *Myres S. McDougal*, in 18 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 479, 482 (1980).

145. *See id.* For example, Professors McDougal and Lasswell indicate that when the decision-maker makes choices, he or she primarily is interested in power. The observer, on the other hand, is concerned more with enlightenment. *Id.*

146. Fuld, *A Judge Looks at the Law Review*, 28 N.Y.U. L. REV. 915, 918 (1953).

2. Formulating Problems

Problem formulation involves the disparity between what people want, or their demanded values, and what people actually receive, their allocated values.[147] The community process is the process in which demanded values are allocated within a defined community. Decision-making is actually a process of power allocation in a community in which the decisionmaker allocates demanded values to some at the expense of others.[148] In the community process, various institutions communicate value demands interactively and configuratively rather than linearly. Jurisprudential inquiry suffers when it limits itself to a linear analysis. For example, positivism is linear because it describes law as traversing a single line from the leaders to the led without considering factors beyond the linear descent of the law.[149] However, the judicial decisionmaker must add desired values that affect decision-making to the model to make the model complete.

The goal of the NHS paradigm is to model a decisionmaking process that maximizes the allocation of desired values.[150] NHS recognizes eight values, or preferred events, that encompass societal demands:

> *Respect*: Freedom of choice, equality, and recognition;
>
> *Power*: Making and influencing community decisions;
>
> *Enlightenment*: Gathering, processing, and disseminating information and knowledge;
>
> *Well-being*: Safety, health, and comfort;
>
> *Wealth*: Production, distribution, consumption of goods and services, and control of resources;
>
> *Skill*: Acquisition and exercise of capabilities in vocations, professions, and the arts;
>
> *Affection*: Intimacy, friendship, loyalty, and positive sentiments;
>
> *Rectitude*: Participation in forming and applying norms of responsible conduct.[151]

Significant differences exist between choice advocated in NHS and coercion expounded in Austinian positivism. The following chart com-

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147. L. CHEN, *supra* note 33, at 16.
148. *See* Lücke, *supra* note 58 and accompanying text.
149. *See supra* text accompanying notes 117-18.
150. *See* L. CHEN, *supra* note 33, at 16.
151. *Id.* Chen describes the aggregate of the eight values as security. *Id.*

pares NHS choice with positivist coercion with respect to the eight values encompassing societal demands.

VALUE	*CHOICE*	*COERCION*
Respect	Consideration	Obeisance
Power	Negotiation	Submission
Enlightenment	Education	Indoctrination
Well-being	Play	Toil
Wealth	Bargaining	Rationing
Skill	Artistry	Servitude
Affection	Love	Servility
Rectitude	Moral Freedom	Moral subjection[152]

NHS recognizes that all decisionmaking involves choice. Decisionmakers do not make choices maximizing the allocation of values in a sterile vacuum.[153] The communication of value demands to the decisionmaker enhances the objectivity of the decisionmaking process. The desire for the communication of value demands is evident in the judicial decisionmaking process by courts' reliance on and citation to one such communicative vehicle, secondary authority.

3. Delimiting the Focus of Inquiry

Because NHS delimits the focus of inquiry,[154] it is more comprehensive and selective than other jurisprudential schools.[155] Law is more than a collection of rules. Law is a continuous process of authoritative decisionmaking, which includes what people say, do, and expect.[156] Decisions are not law unless they possess both authority and control.[157] Professor McDougal defined authority as "the participation in decision in accordance with community perspectives about who is to make what

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152. Law, Science, and Policy, pt. II, ch. 2, at 32 (1954) (unpublished class materials) (available from the *Florida Law Review*).

153. J. STONE, *supra* note 9, at 61. Professor Stone discussed the "leeways of choice" in which courts do not base their decisions solely on logic, law, or language. *Id.*

154. Professor Chen defined the process of delimiting the focus of inquiry as the following: "In delimiting the focus of inquiry, the policy-oriented approach seeks to be both comprehensive and selective. It establishes a focus on authoritative decisions in their context, placing dual emphasis on the conception of law to be deployed and the larger context to be studied." L. CHEN, *supra* note 33, at 17.

155. *Id.*

156. *Id.*; *see also* Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 374 (1971).

157. *See infra* notes 158-60 and accompanying text.

decisions with what criteria."[158] Control is "effective participation in [decisionmaking] and execution."[159] When decisionmaking combines authority and control, the decisionmaker (the *who*) and the decision (the *what*) are in concert with community expectations.[160] Secondary authority provides the medium through which these expectations are communicated in the judicial decisionmaking process. For example, secondary authority criticizing *Schwinn* influenced the Court when it decided *Sylvania.*[161] In overruling *Schwinn*, the *Sylvania* Court aligned itself with community expectations associated with antitrust philosophy.[162]

A decisionmaking process that is authoritative and controlling employs seven decisionmaking functions.[163] The seven functions include the following:

> *Intelligence*: Gathering, processing, and disseminating information essential to decisionmaking;
>
> *Promoting*: Advocating general policies and urging proposals;
>
> *Prescribing*: Projecting authoritative community policies regarding the shaping and sharing of values;
>
> *Invoking*: Provisionally characterizing events in terms of community prescriptions;
>
> *Applying*: Final characterizing and executing of prescriptions in concrete situations;
>
> *Terminating*: Ending a prescription or arrangement within the scope of a prescription;
>
> *Appraising*: Evaluating performance in decision process in terms of community goals.[164]

Sylvania may be used to illustrate the role of secondary authority in defining decision functions. The intelligence function for the *Sylvania* Court involved gathering of information from several sources.

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158. Lasswell & McDougal, *supra* note 156, at 384.

159. *Id.* Professor McDougal further defined control by stating that "choice in outcome is realized in significant degree in practice." *Id.* "When decisions are authoritative but not controlling, they are not law but pretense; when decisions are controlling but not authoritative, they are not law but naked power." *Id.*

160. *See supra* text accompanying note 109.

161. *See supra* text accompanying notes 98-104.

162. *See id.*

163. *See* McDougal, Lasswell & Reisman, *supra* note 137, at 192.

164. L. CHEN, *supra* note 33, at 18.

The Court obtained information from applicable precedent including *Schwinn*,[165] case law consistent with *Schwinn*,[166] and case law inconsistent with *Schwinn*.[167] Significantly, the Court also obtained persuasive information from scholarly criticism of *Schwinn*.[168]

The promoting function of secondary authority also is equally evident in the Court's reliance on secondary authority that advocated overruling *Schwinn*.[169] The *Sylvania* Court noted that "one commentator has observed, many courts 'have struggled to distinguish or limit *Schwinn* in ways that are a tribute to judicial ingenuity.'"[170] The Court's acknowledgement of this scholarly observation evidences that the promoting function of secondary authority affects even the highest levels of judicial decisionmaking.

The prescribing function of secondary authority in *Sylvania* is unmistakable. Secondary authority communicated community policies regarding the distribution of wealth and power values, the very function of antitrust law. This prescribing function of secondary authority, as well as case law, has shaped antitrust goals.[171]

The invoking function is the process by which prescriptions are communicated to a decisionmaker with the authority to apply the prescription.[172] The invoking function of secondary authority in *Sylvania* required the occurrence of two events. First, the author of the secondary authority commenced the invoking function by articulating the desired prescription. Second, the secondary authority was communicated to the *Sylvania* Court. Both events were required for sec-

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165. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 37 (1977) (citing United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)).

166. *See id.* at 42 (citing Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975); Kaiser v. General Motors Corp., 396 F. Supp. 33 (E.D. Pa. 1975), *aff'd*, 530 F.2d 964 (3d Cir. 1976)).

167. *See id.* at 47 (citing White Motor Co. v. United States, 372 U.S. 253 (1963)). The Sixth Circuit had continued to evaluate territorial restrictions under rule of reason analysis even after *White Motor Co.* had called for *per se* analysis. *See* Sandura Co. v. FTC, 339 F.2d 847, 849 (6th Cir. 1964).

168. *See supra* note 103.

169. Nine sources of secondary authority advocated the overruling of *Schwinn*, while only two such sources recommended that the Court maintain the *Schwinn* precedent. *Sylvania*, 433 U.S. at 47 n.13.

170. *Id.* at 48 n.14 (citing Robinson, *Recent Antitrust Developments: 1974*, 75 COLUM. L. REV. 243, 272 (1975)).

171. *See generally* E. SULLIVAN & J. HARRISON, *supra* note 102, at 1-7. Policy considerations have shifted from protecting the competitor to protecting competition. As Professor Harrison stated, "antitrust laws [have] a certain *de ja vu* [sic] quality." *Id.* at 2.

172. L. CHEN, *supra* note 33, at 370.

ondary authority to mobilize the enactment of the desired prescription.[173]

The applying function is the "culmination of all other functions[174] and the enactment of the desired prescription. Here, the role of secondary authority is minimal. Only the decisionmaker, the *Sylvania* Court, assumes the applying function. At this stage, the role of secondary authority is complete until commentary evaluates the applied prescription. If the prescription of the *Sylvania* Court does not accomplish desired goals, or the goals change, secondary authority then becomes relevant to the terminating function.

The terminating function calls for the end to outmoded prescriptions.[175] Secondary authority considered by the *Sylvania* Court called for an end to the *Schwinn* prescriptions.[176] Because this secondary authority advocated that the *Sylvania* Court adopt prescriptions that replaced the *Schwinn* prescriptions, the invoking and terminating functions were combined in the *Sylvania* case.

The appraisal function evaluates the effectiveness of the entire process to attain desired goals.[177] The appraisal function is one of secondary authority's major contributions to judicial decisionmaking. After a court adopts and applies a particular prescription, secondary authority communicates to the decisionmakers whether the prescription indeed adequately has embodied the community's expectations. For example, secondary authority communicated to the *Sylvania* Court that *Schwinn*'s prescription did not reflect community policy expectations.[178] As a result, the *Sylvania* Court overruled *Schwinn*.[179]

4. Postulating Public Order Goals

NHS posits that decisionmaking cannot avoid policy choices and the consequences of those choices.[180] Policies that maximize the distribution of cherished values are the desired goals of the NHS jurisprudential paradigm.[181] The scholarly discourse found in secondary author-

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173. *See id.*

174. *Id.* at 376.

175. M. McDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 106 (1981).

176. *See supra* text accompanying note 103.

177. L. CHEN, *supra* note 33, at 393.

178. *See supra* note 169 and accompanying text.

179. *See supra* notes 100-01 and accompanying text.

180. L. CHEN, *supra* note 33, at 19.

181. Lasswell & McDougal, *supra* note 156, at 373-74.

ity contributes to this goal by providing in-depth analysis, discussion of competing theories, and prescriptions designed to maximize cherished values. Unlike the biased presentation of the litigants, secondary authority distinguishes itself as being objective, reliable, and fair.[182]

5. Performing Intellectual Tasks

The NHS jurisprudential paradigm presents five intellectual tasks for problem solving. As noted earlier,[183] the five tasks include the following: clarifying goals, describing past trends, analyzing factors affecting decision, projecting future trends, and inventing and evaluating policy alternatives.[184]

> *Goal clarification*: Postulation of goals for empirical observation and analysis in particular social contexts;
>
> *Past trends*: Systematic inquiry of past trends viewed under clarified goals and the constitutive process;
>
> *Factors*: Identification of the factors that interplay and affect prior decision;
>
> *Future trends*: Projecting future probabilities with all available knowledge and information;
>
> *Alternatives*: Creation of alternatives to maximize optimum gains at minimum costs.[185]

The five intellectual tasks are indispensable tools of rationality for the observer. The intellectual tasks allow the observer to project systematically the judicial decisionmaking process and to appraise the importance of secondary authority in that process. Significantly, by using the five intellectual tasks, the observer assumes a scientific point-of-view. Thus, he or she remains detached from the judicial decisionmaking process and can observe objectively and most accurately the conditions and consequences of the process.[186]

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182. *See supra* text accompanying note 145.

183. *See supra* text accompanying notes 133-39.

184. L. CHEN, *supra* note 33, at 20.

185. *Id.* at 21 (it "is crucial that all of these tasks be performed systematically and contextually in relation to specific problems.").

186. Discussion with Professor Winston P. Nagan (Feb. 28, 1990).

D. *Phase Analysis*

The final segment of NHS is "phase analysis," which adds power and policy to the jurisprudential paradigm.[187] Phase analysis occurs when the decisionmaker's choice has allocated desired value goals.[188] Phase analysis requires the decisionmaker to ask seven questions before, during, and after the decisionmaking process.[189] The seven questions include the following: (1) Who were the *participants* of the decision? (2) What were the significant *perspectives* of the participants? (3) What were the *situations* under which the participants interacted? (4) What were the *bases of power* of the participants? (5) With what *strategies* did the participants manipulate their bases of power? (6) What were the *outcomes* as a result of the decision? and (7) What are the *effects* of the outcome and process?[190] This note briefly will examine phase analysis using secondary authority as a participant in the judicial decisionmaking process.

1. Participants

When secondary authority is a participant in the judicial decisionmaking process, the identities of the author and other judicial participants, such as the bench and bar, are important to phase analysis. A comparison of two divergent works of secondary authority illustrates that the author's identity can influence the decision. If two commentaries address the same aspect of international law, but Professor McDougal authors one and a high school junior authors the other, Professor McDougal's commentary reasonably will be more influential.

The influence of secondary authority also will depend upon the identities of the advocates. These judicial participants may or may not decide to use secondary authority.[191] If advocates fail to cite secondary authority in a brief, motion, or memorandum, the court may never realize secondary authority as a participant.[192] Ultimately, the

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187. McDougal, Lasswell & Reisman, *supra* note 137, at 198.

188. *Id.* Professor McDougal described the distribution of value goals as "choices enforced by sanctions and deprivations or indulgence." *Id.*

189. *Id.* The decision may be organized or unorganized. It may be a formal contract, a fight, a vote, or a mandatory command. *Id.*

190. *Id.* In question four, Professor McDougal referred to base "values" rather than bases of "power." He was referring to power, and he later used the term. *See, e.g.*, M. MCDOUGAL & W. REISMAN, *supra* note 175, at 102.

191. Empirical studies have indicated the degree of preference of secondary citation by particular judges. Merryman, *supra* note 18, at 666-67.

192. This analysis presumes that the court is not aware of a particular work and would not otherwise discover it.

decisionmaker must decide whether to use secondary authority and whether actually to cite it as a source of authority.

2. Perspectives

Perspectives are the demands, identifications, and expectations as viewed by the participants.[193] Whether or not participants will use secondary authority is connected intimately to their perspectives. The influence of secondary authority depends upon the position it takes, the perspective of the judge who will decide its influence, and the advocate who will select it.

3. Situations

Sylvania was a situation in which the Court was receptive to recommendations from the "great weight of scholarly opinion."[194] Another situation in which the influence of secondary authority can be great is when the case at bar is one of "first impression."[195] If secondary authority already has discussed the issue exhaustively, and precedent does not exist, then this "first impression" situation is conducive to the influence of secondary authority. Yet, situations do exist in which the influence may be minimal. For example, if an unknown author advocates a position opposing a well-settled doctrine and if the particular court's perspective is not aligned with the author's position, the secondary authority probably will not be influential.

4. Bases of Power

Bases of power may be "described in terms of resources, people, and authority."[196] The base of power of secondary authority is minimal. Although authoritative and well-reasoned, secondary authority will not influence a court if the court is not receptive. Courts are the power brokers in these situations. As Professor McDougal originally noted, however, other "values" may enhance the influence of secondary authority.[197] Although secondary authority lacks power as a participant, it may have enlightenment value. Secondary authority may elucidate an issue for a court, thereby augmenting its base of power and thus its influence.

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193. L. CHEN, *supra* note 33, at 65.
194. *Sylvania*, 433 U.S. at 47.
195. For a definition of "first impression," see *supra* note 42.
196. L. CHEN, *supra* note 33, at 115.
197. *See supra* note 190 and accompanying text.

5. Strategies

Strategies are how the participants manipulate the bases of power to influence the outcome.[198] Secondary authority can effect judicial decisionmaking in a number of ways. Because of its comprehensive treatment of a specific topic,[199] secondary authority can demonstrate that the desired outcome is consistent with a greater depth of scholarly consideration.[200] Further, secondary authority consisting of empirical studies can add weight to the credence of a desired outcome.[201] Finally, judicial participants may cite many secondary authority sources to the court to show a uniform scholarly position consistent with the desired outcome.[202]

6. Outcomes

Observation of outcomes provide the value distribution resulting from decisionmaking.[203] Observing secondary authority in the judicial decisionmaking process is a two-stage process. First, the observer must determine whether the judicial decisionmaker considered and cited the secondary authority. Second, if the judicial decisionmaker considered the secondary authority, the observer must determine its influence on the reallocation of value goals. Under this methodology, viewing the result exposes the effects of the result.

7. Effects

The salient effect of the judicial decisionmaker's receptivity to secondary authority provides a practitioner with a guide for future use with the particular judicial decisionmaker. However, observation of past trends is only one intellectual task involved in problem solving.[204] Projecting the future utility of secondary authority requires utilizing all the intellectual tasks.[205] Observing the influence of secondary authority in judicial decisionmaking does, however, point to the practical relation between increased secondary authority citation and NHS.

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198. McDougal, Lasswell & Reisman, *supra* note 137, at 198.
199. *See supra* note 84 and accompanying text.
200. *See id.*
201. *See supra* text accompanying notes 133-36.
202. *See supra* text accompanying note 194.
203. McDougal, Lasswell & Reisman, *supra* note 137, at 198.
204. *See supra* text accompanying notes 183-86.
205. *See id.*

E. *The New Haven School: Practical Aspects*

NHS provides the observer with a sophisticated jurisprudential paradigm capable of attributing the appropriate degree of influence that secondary authority may exert on judicial decisionmaking. By observing the increased frequency of citation to secondary authority more comprehensively, rather than relying on what Professor Chen calls "an anecdotal treatment of isolated tidbits of doctrine and practice,"[206] the observer is better equipped to project future trends. NHS explains that secondary authority can, and often does, influence decisionmaking. Moreover, NHS provides a method for determining why.

Armed with a jurisprudential paradigm that approximates the complexity of the judicial decisionmaking process itself, practitioners, students, and judges can better evaluate the potential influence, utilization, and impact of secondary authority. Because judicial decisionmakers do not operate in a vacuum, the involution of decisionmaking is reflected in the most common answer to legal questions — "it depends."[207] On *what* it depends demands complex inquiry. NHS provides a paradigm from which the observer adequately may perceive the depth of complexity necessary for this inquiry.

V. CONCLUSION

Despite the binding nature of precedent under the doctrine of stare decisis, decisionmakers face choices. Judicial decisionmaking can require more guidance than precedent is capable of providing. Often, courts rely on secondary authority to provide this guidance. Courts are attracted to secondary authority because it is often comprehensive, informative, objective, and fair. As a result, courts have cited secondary authority with increased frequency in this century.

Jurisprudential schools, such as natural law, positivism, and legal realism, do not elucidate adequately the emergence of secondary authority because they fail to address law as a process. Responding to these inadequacies, the NHS paradigm can help an observer evaluate the impact and influence of secondary authority on the judicial decisionmaking process. Most importantly, the NHS paradigm provides the practical inquiry necessary to explain secondary authority's role in the judicial decisionmaking process.

Joseph E. Brooks

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206. L. CHEN, *supra* note 33, at 20.
207. Feinman & Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 885 (1985).