

University of Michigan Law School

University of Michigan Law School Scholarship Repository

Book Chapters

Faculty Scholarship

1986

Styles of Law and the Attainment of Social Justice

Richard O. Lempert

University of Michigan Law School, rlempert@umich.edu

Joseph Sanders

Available at: https://repository.law.umich.edu/book_chapters/367

Follow this and additional works at: https://repository.law.umich.edu/book_chapters



Part of the [Law and Society Commons](#), [Legal Profession Commons](#), and the [Legislation Commons](#)

Publication Information & Recommended Citation

Lempert, Richard O. and Joseph Sanders. "Styles of Law and the Attainment of Social Justice" in *An Invitation to Law and Social Science: Desert, Disputes, and Distribution*. New York: Longman. 1986.

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Book Chapters by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

AN INVITATION TO LAW AND SOCIAL SCIENCE

Desert, Disputes, and Distribution

Richard Lempert and Joseph Sanders



Longman
New York & London

Contents

Preface xi

Chapter 1	Introduction	1
	Law and Social Science	1
	The Heritage of Weber	2
	Law	4
	Desert	5
	Dispute Settlement	6
	Distribution	7
	Appendix: Max Weber and the Rationality of Law	9

PART I **Desert** **13**

Chapter 2	Human Action and Responsibility Rules	15
	Action and Responsibility	15
	Rule Logics	27
	The Ethics of Responsibility	35

Chapter 3	The Answering Process	42
	Typification	43
	Working a Case: The Openness of Adjudication	58

Chapter 4	Case Logics: Some Determinants and Consequences	60
	Case Logics	60
	Toward Deeper Case Logics: Observer Knowledge and Adjudication Structure	66
	Toward Shallower Adjudication: Repetitive Decisions and Future Orientations	75
	Two Consequences of Case Logics: Fairness and Efficiency	83
Chapter 5	Case Logics, Rule Logics, and Legal Change: The End of Negligence	89
	From Negligence to Strict Liability: Lord Abinger's Legacy	89
	The Process of Change: Organization of Adjustment	99
	From Negligence to Strict Liability: The Politics of Legislative Change	114
	Rule Logics, Case Logics, and the Morality of the Law	123
	The Dilemma of Responsibility	130
PART II	Disputes	133
Chapter 6	Conflicts and Settlements: The Logic and Fairness of Bargains in a Game Theory Perspective	137
	The Nature of Legal Conflict	138
	The Fairness of Settlements	166
	The Limits of Modeling	173
	Appendix: Conflict of Interest and the NLRA	179
Chapter 7	Alternative Styles of Dispute Processing	196
	The Double Institutionalization of Law	196
	Settlement Techniques in Other Cultures	201
	Types of Legal Decision Making	207
	Why Different Techniques?	210
	Formalism and Legal Realism	215
	Tensions in Issue Decision Systems	217
	Institutional Integration	235
Chapter 8	Creating New Systems: The Limits of Double Institutionalization	242
	Introduction	242
	The Small Claims Court	245
	The Juvenile Court	258
	The Limits of Double Institutionalization	274

PART III	Distribution	279
Chapter 9	The Ends of Social Justice: John Rawls and the Distribution of Welfare	283
	Justice as Rules and Institutions	284
	The Nature of Appropriate Institutions	298
	Appendix: The Contract Theory Perspective and the Decision Rule in Uncertainty	299
Chapter 10	Corporate Actors and Social Justice: Business Corporations, Labor Unions, and the Problems of Collective Action	306
	Organizations	308
	The Problem of Collective Action	309
	Corporations and Unions as Responses to the Problems of Collective Action	317
	Corporations, Unions, and the Competing Ends of Social Justice	324
	The Business Corporation	324
	Labor Unions	339
Chapter 11	Pursuing Equality: Law as a Force for Social Change	352
	Equal Liberty—The Right to Vote	354
	Education—Desegregating Public Schools	362
	Employment Discrimination—The Key Issue	373
	Voting, Schools, and Jobs: The Law and Inequality	390
	Equal Opportunity and Equal Results	399
Chapter 12	Law Application and the Possibility of Autonomy	401
	Legal Autonomy	402
	Law as an Autonomous Force in Society	405
	Other Aspects of Autonomy	419
Chapter 13	Styles of Law and the Attainment of Social Justice	428
	The Possibility of Legislative Autonomy	429
	Law Creation	430
	Legislative Endowments	430
	Reasons for Status Neutrality	438
	Law Application	440
	The Quality of Applied Law	449
	Mixed Justice	461
	The Prospects for Change: Risks and Gains	463
	Legal Arrangements: Law and the Ends of Justice	463

Chapter 14 The Seamless Web: The Legal Order and Modern Society 476

The Ascription of Responsibility	477
Dispute Settlement	478
Distribution	479
Two Challenges	481
A Threat to Legitimacy	483
Dilemmas of Justice	484
Epilogue: An Invitation to Law and Social Science	486

Bibliography 487

List of Cases 506

Acknowledgments 511

Index 513

Styles of Law and the Attainment of Social Justice

In the last chapter we focused on the meaning of legal autonomy and on the constituent elements of the ideal type. We noted two requisites for the autonomous application of law: judicial formalism and equal competence. But we also argued that the autonomous application of law does not guarantee that the law as applied will not perpetuate or advance socioeconomic differences. For applied law to be autonomous in this further sense, legal norms, in addition, must be status neutral, and the distribution of welfare in society must be such that the neutral norms do not disproportionately benefit some people. These latter requisites mean, in practice, that there must be substantial equality in the political, social, and economic structures external to the legal system. If there is not, the advantaged are likely to be able to use law to maintain or better their positions. The norms of property law, for example, will perpetuate existing class distinctions, and through contract law disparities associated with unequal bargaining power will penetrate the legal system.

The discussion of legal norms with which we concluded the previous chapter is a good bridge to this one. Here we are first concerned with the law creation process, the source of legal norms. In discussing law creation, our focus will be on the legislature rather than on the courts or the executive branch, although these latter actors can also make legal norms. We discuss at the outset the possibility of legislative autonomy and suggest that at one level a legislature can be partially autonomous but at another legislatures are inescapably oriented to

the demands of nonlegal political, ethical, or social schemes. We next specify four types of law that vary with social equality and overt attention to status. Once we have specified the types of law, we consider how the law application process interacts with the legislative types to define styles of law that characterize legal relations in society. The basic concepts are developed at the level of ideal types, but approximations to the types can be found in the real world. Throughout this chapter issues of social justice are addressed, and in our conclusion we discuss the implication of this chapter and the preceding one for the realization of liberty and equality, the core components of justice from the Rawlsian perspective.

THE POSSIBILITY OF LEGISLATIVE AUTONOMY

The legislature sits at the intersection of the political and legal spheres. As we saw in Chapter 10, it is open to the influence of wealth as well as to other sources of social and political power and to the vociferous entreaties of those who support private ethical systems. At the same time, the legislature is a crucial legal actor, for it pours norms into the judicial and regulatory systems. It is fair to ask whether a legislature can ever share the partial autonomy we have identified with law. If not, the autonomy of law is likely to be of little import, for the stock of legal forms and concepts that regulate and sanction behavior will soon reflect the interests of powerful extralegal status groups. To note this is to suggest our answer, for we have consistently and intentionally implied that the partial autonomy we see in the legal systems of the capitalist democracies reflects meaningful independence from extralegal sources of authority.

There are several reasons why some degree of legislative autonomy is possible. First, the structure of the legislature contributes to its ability to act autonomously. Interest groups can capture legislators, but it is difficult to generate a coalition to capture the legislature. Thus the ready translation of the interests of social, political, or ethical groups in ways that substantially threaten, rather than simply fail to promote, the interests of others is difficult to achieve. In the United States this difficulty is enhanced by constitutional requirements for super majorities when fundamental liberty interests or the independence of the courts is directly threatened, and by the veto power given to the president.

Second, there are distinctively legal norms about the form, content, and procedure of legislation that legislatures routinely honor. Some norms such as the prohibition in the United States of *ex post facto* laws and bills of attainder are written into a constitution. Others such as the need to respect the separate jurisdictions of the judiciary and executive are implied by one. Still others such as the preference for legislation that fits in as far as possible with the body of existing law and the idea that legislation should be open to public comment are part of the legislative culture. Adherence to such cultural rules not only promotes autonomy in legislation, but is itself an important expression of autonomy.

Third, in the United States by long-standing precedent and in other countries, to differing degrees, the judiciary, the branch of government best insulated from the pressures that threaten autonomy, has authority to void specific legislative enactments.

Three further propositions are also important. First, although particular laws may reflect the influence of identifiable status groups, the body of laws may mix such a variety of concerns that the legal system can be identified with no particular external interests, except possibly at the highest level of generality, such as whites in a segregated society or the propertied in a class-stratified society. Second, not all instances of externally oriented legislative behavior reflect the influence of some *special* interest group. Recall Bohannon (1965). Some norms—like much of the criminal law—are so generally accepted in society that the legislative reinstitutionalization of these norms is not problematic. Third, it is not necessarily the case that an autonomous legislature is likely to promote social justice or that a legislature more accessible to special interests and extralegal ethical systems is likely to decrease it. Often it is just the opposite.

LAW CREATION

But the fact that legislation is insulated to some extent from the pressures of particular extralegal interests and is shaped to some extent by distinctively legal concerns does not mean that legislatures are autonomous in the way courts are. Even at the level of the ideal, there are fundamental differences. The formalist court, as we saw in Chapter 12, takes legal norms as given and in this sense can be entirely *self-regarding*¹ in disposing of cases. But a legislature must ordinarily look beyond existing sources of law in deciding what new legal norms will be. In doing so, it is almost always acting with a substantive end—as valued in some extralegal social, political, or ethical order—in sight. This is true even if that end is, for example, a regime of contract law that does not take into account values other than the desirability of enforcing private agreements. The creation of a status neutral legal order can itself be a substantive goal.

LEGISLATIVE ENDOWMENTS

Laws specify the conditions under which the power of the state will be addressed to certain ends.² These ends will, in practice, always be in some person's or

1. In the term "self-regarding" as we use it in this chapter, the legal system is the "self." Here by self-regarding we mean that only the requirements of the law are attended to in deciding how a dispute should be resolved. The implications of extralegal power and normative orders are not considered.

2. These ends may specify specific goals directly as in laws designed to limit pollution, or they may be more general as in much of tort law which has as its goal protecting people from the economic aspects of harm caused by others, or as in much of contract law, the end of law may be to guarantee arrangements specified by private parties.

group's interest. Thus legislation, or lawmaking, increases the probability that certain ends will be achieved because if they are not realized either the state will enforce the law proactively, or the beneficiary of the legislation may call on the courts, on the police, or on some other administrative agency to enforce the law. In this sense law is said to "guarantee" behavior, and for this reason we may think of a law as a kind of *endowment*. It endows actors with a power to achieve their goals that they otherwise would not have.³

Legislative endowments, that is, laws, vary in the extent to which they acknowledge social differences and have a distributive end openly in view. Some laws are on their face status neutral in that they create categories extracted from all social context (e.g., the categories of citizen, defendant, property owner) and give the same rights and duties to all who fit the category created. Other laws take explicit account of social or economic positions and seek to allocate values accordingly. Laws that are status neutral do not specify a particular distributive goal to be achieved; that is, they do not on their face mandate actions that will impose special costs on a preexisting class of organizations or individuals or give special benefits to another such class. The distributive consequences of status neutral laws are instead determined by the actions of individuals and organizations and the ways these parties choose to invoke the law. Thus status neutral laws often have the appearance of distributive neutrality and seem to be motivated by an abstract evaluation of the kinds of rights and duties that will allow communal life to flourish rather than by some conception of a desired end state; or if there is a desired end state, the end, such as deterring homicide or keeping traffic within a speed limit, will not be tied to or directed against the interests of some discrete social group. Status neutral legal language is well suited to judicial formalism and is apparently removed from redistributive concerns. We must, however, be cautious in taking the appearance for reality. Status neutral laws are nonetheless purposive. Legislatures pass them to achieve certain ends. The end may be the promotion of individual achievement or the enhancement of communal life in a status neutral fashion. Or it may be to create legal rules that will allow one group or class to advance itself at the expense of another group or class. In Chapter 12 we saw how the application of status neutral laws in an unequal society could have this effect. A legislature enacting laws for such a society presumably knows what neutral norms imply for the distribution of

3. The endowment may be less than what is promised or it may never have to be invoked. Legislative endowments may be less than what is apparently promised because the administration or enforcement of a law may be only partial, generally lax, or even subversive of the legislative intent. They may never have to be invoked because the legislation may command behavior that would occur anyway or the existence of the law may, without more, be sufficient to bring about the behavior ordered. Yet except in the extreme cases where a law is clearly a dead letter or where no one would think of doing otherwise, legislative endowments are real and consequential even if they do not fully determine how the behavior they purport to deal with is ordered. In particular, we saw in Chapter 6 on negotiation that law may be vitally important to the resolution of disputes even if cases do not officially enter the legal system (cf. Mnookin & Kornhauser, 1979).

welfare. Nevertheless, in examining legislation, it is helpful to treat status neutral law as a distinct type.

The opposite type consists of laws that take social status specifically into account and subordinate the ideals of legal neutrality and individual rights to the attainment of particular ends. Laws of this type aim at specific end states that usually involve some redistribution of welfare in society. Thus we shall call such laws *distributively oriented*. Courts act consistently with the legislature's goals if they interpret such laws with a close eye to the distributive goals the legislature hoped to achieve. This requires a judiciary that is sensitive to the extralegal values and interests that stimulated the legislation.

We can also distinguish two ways in which laws come to be enacted. At the extremes powerful status groups may have effective control over the legislative process or those affected by the laws may be relatively equal in their influence on what is enacted. In the former instance, legislation can be expected to systematically advantage the most influential groups. In the latter, legislation should ideally reflect some general consensus, but in practice, it is likely to reflect shifting coalitions that temporarily gain control over the legislative process to advance positions that they value. The process of building a coalition, however, often tempers the gains of those who seek a particular law and cushions the impact on those who will be disadvantaged by it. Thus where relatively equal influence prevails there is frequently a distinction between what the groups that most strongly support a law desire and what they get.

Keeping the concept of the legislative endowment in mind and cross-classifying the types of law by equality of influence, we obtain the following fourfold table (Table 13.1):

TABLE 13.1
Law Creation and Legislative Endowments

<i>The Law-Making Process</i>	<i>Type of Law</i>	
	<i>Status Neutral</i>	<i>Distributively Oriented</i>
<i>(More or less) equal influence</i>	Equally accessible general endowments (3)	Welfare-oriented endowments (4)
<i>(Greatly) unequal influence</i>	Differentially accessible general endowments (2)	Class-oriented endowments (1)

Distributively Oriented Endowments

Where dominant groups have inordinate control over the rule-making process, and where the legislature is not bound in any way by a commitment to neutral rules, we have the situation specified in cell 1. The organized power of the state

is at the service of a particular class. Laws of this type are “instrumental” in that they are instruments or tools used by socially dominant groups to achieve their ends. Logical consistency if it is part of the legal culture is required only with reference to self-defined interests, not with regard to some internal logic of rules. Much of the law of slavery falls in this cell, as do those English laws that facilitated the private exploitation of what had been publicly available pastures and American legislation that hampered the activities of trade unions. In each case the dominant class bent the state to its will and so could proceed legally to pursue its narrow class interests. Laws in this cell take explicit account of the status differences of the affected parties and allocate values accordingly.

The dividing line between cell 1 and cell 4 is not discoverable by looking at the law itself, for welfare-oriented endowments like class-oriented endowments are purposive statutes that openly seek to advance specific subsets of social interests. However, law in cell 1 is a powerful force for the preservation or extension of existing inequalities, since it reinstitutionalizes the power of the dominant class in the legal arena, while law in cell 4 seeks to advance the common welfare⁴ and is potentially a means to increased social justice.

These differences reflect differences in political power; that is, in power to influence the law-making process. In cell 1 in the ideal case a class or status group clearly dominates, and it can make law without attending to the interests of any other social group. The only restraints on how such powerful interests use the legal system are the benevolent restraints of *noblesse oblige* and the calculated restraints of self-interest. In cell 4 no one group can control the legal process, so legislation will reflect either widely shared interests or the give-and-take needed to form winning coalitions. In the latter instance, laws will either compromise the interests of various groups or be part of a package deal in which interest groups support each other so that they will be supported in turn.

Instances of these three different processes are common. For example, laws regulating pollution are in the perceived interest of so many people that the vested interests in opposition have been unable to resist effectively much of what has been attempted. Laws establishing determinate sentencing programs were originally a compromise between liberals and conservatives who each had their own reasons for wanting to discard a penal system oriented toward rehabilitation and the system of indeterminate sentencing that went with it. The result in many jurisdictions was a new, less flexible sentencing structure with average prison terms that were longer than the liberals thought appropriate but shorter than the conservatives wanted. Finally, the logrolling process that has congressman A

4. What we call welfare law, like the AFDC program, fits this cell, but the term *welfare* is used more generally to refer to all kinds of redistributive legislation aimed at some vision of the common good. Again, the line between cell 1 and cell 4 is blurred because a dominant minority can claim that laws that further enhance their status are in the common good. However, at the extremes we think the distinctions between cell 1 and cell 4 are clearly recognizable. They are also recognizable if we focus on the process since in cell 1 unlike cell 4 a particular group or class consistently dominates the legislative process and the law consistently reflects their domination.

voting to support a shipyard in congressman B's district on the condition that B vote to construct a dam for A's constituents is a familiar political phenomenon.

If perfectly equal influence, the situation that *ideally* characterizes cell 4 (and cell 3), in fact existed, social justice would not be problematic because equal influence in the legislative process will not exist unless there is an equal division of wealth, power, and privilege in the larger society. Law in such a society would be in the common interest, for if it ceased to be, the condition of equal influence that defines the pure type would disappear. In the real world, or at least in the portion of the real world we call Western democracies, the influence that different identifiable interests have on the legislative process is not equal, but it is not so unequal that one group or class consistently dominates. To capture this and to better relate our analysis to actual legal systems, we have relaxed the defining condition for laws in cells 3 and 4 and have posited a society in which individual welfare and influence on the law-making process are only "more or less" rather than absolutely equal. Given that some inequality persists in such a society, it is not obvious why the interests of weaker groups occasionally prevail, with justice, in the Rawlsian sense, being advanced by something like the difference principle. Why, for example, do we have a large body of welfare law that transfers money from the wealthier to the less well off? Why do not the more powerful elements of society consistently form coalitions to advance themselves at the expense of the least well off?

We do not propose to deal with these questions at length, but a word is in order. There are several reasons why legislation may give special advantages to groups that have little social power. First, the interests of stronger groups are often antagonistic. If their power is closely balanced, weaker groups may be in a position to strike a balance between them and, in exchange for their support, they may be able to demand substantial benefits. The institutional requirements for coalition building are crucial in determining the power that relatively weak groups possess. Thus, in Israel, where the parliamentary system allows small parties to flourish, extremely orthodox religious parties, whose support has been needed to form a government, have been able to insist that some religious practices they favor be imposed throughout the state. In the United States the single member district system is death to third parties, but because large numbers of otherwise powerless people participate in elections the dominant parties cannot afford to ignore their interests entirely. Indeed, the Democratic party is, to a large extent, organized around the expectation that they will get the vote of the less well off, and legislation that the party passes when in office often responds to the interests of this core constituency.

Other reasons welfare-oriented legislation often benefits the less well off include the altruistic instincts of the powerful, self-interested judgments about the cheapest way to keep the dominated under control and the fact that distinctions between the weak and powerful are by no means clear-cut.

Altruism is a particularly powerful instinct when restated in an ideology that demands certain actions. Thus the idea that humans were equal in the eyes of God helped create the climate for a war that was in part about freeing slaves,

and the idea, a century later, that humans were equal before the law led, as we saw in Chapter 11, to a series of legal skirmishes that enhanced the social and political power of those slaves' descendants. Pure self-interest may also lead dominant coalitions to share benefits with less powerful groups. Sharing benefits may be a cheap way to secure popular cooperation with laws that disproportionately aid those on top. Some would argue that the modern welfare state was invented to prevent repetitions of the Russian revolution, and colonial regimes typically reward some elements of the native population to keep other elements under control. Sharing benefits is, of course, a strategy that may inform cell 1 type laws as well.

Finally, there may be important ties between members of more influential and less influential groups that lead the former to support legislation in the latter's interest. For example, future accident victims by virtue of being both unknown and unorganized have little direct influence on the legislative process. Yet their interests are well-represented when industries or insurance companies seek to make tort recoveries less lucrative or more difficult to attain. This is because personal injury lawyers, a quite influential group, realize that their financial interests are inextricably linked with the rights accorded future victims. Perhaps more to the point, even if the elderly were not a potentially powerful political force, it would be difficult to cut back on the Social Security retirement program because many of the more active and influential younger citizens who are children of the elderly would feel obligated to support their parents if the state subsidy were not available.

This litany of reasons why the interests of the relatively less influential are likely to be advanced by welfare-oriented endowments when political influence is divided more or less equally across individuals and groups should not mislead one into thinking that in such a society it is better to have less influence than more. The more powerful are likely to benefit disproportionately from the legislative process even if they cannot effectively bend the law into the specific instrument of class domination that it is in cell 1. Special benefits to the more powerful are endemic in modern capitalist democracies. Yet an important qualification must be added. The very features that cause a group to stand out as influential can make its interests a natural target when other, individually less influential groups, coalesce. Indeed, it may be the disproportionate influence of a powerful group that stimulates the formation of more powerful counter coalitions. At the extreme the result will be a social revolution that strips the previously most powerful single element of its power base. Less extreme but more common is the mobilization of a coalition to pass a particular law when an especially powerful element appears to be overreaching. Thus the railroads, the most powerful of the nineteenth century industries, could not forestall the popular movement for regulated freight rates that led to the Interstate Commerce Commission, and the large trusts could not derail the perceived need for laws attacking the monopolies that they spawned. However, in each instance the fate of the enacted regulatory schemes reminds us of the tenacity of powerful organizations and the transience of many coalitions.

A more or less equal distribution of legislative influence among actors and social groups is also consistent with endowments that trample on the interests of some weaker parties. Coalitions are formed that increase social injustice. For much of this century a coalition of well-to-do and poor southern whites enforced a system of segregation that disadvantaged the black population. American Indians and aliens in many countries have had to confront legislation that sought to give portions of their wealth to more dominant groups. At some points in our history there has been an overwhelming consensus supporting laws designed to stifle political dissent. And even where legislative majorities have not oppressed minorities, the interests of some groups, such as the interest that short people have in avoiding discrimination, are almost entirely ignored. This then is the dark side of cell 4. Although welfare-oriented legislation has the potential to enhance justice by endowing weaker parties with state-supported entitlements, it may also do the opposite. In particular, there is the danger that has been called the "tyranny of the majority," a situation in which the dominant coalition dismisses the interests and rides roughshod over the rights of those who are collectively less powerful. The tyranny of the majority is particularly likely where the same stable coalition dominates on many issues.

In any given society that is sufficiently egalitarian so that welfare-oriented endowments are possible, the quality of the legislation that is enacted will turn on the interests of identifiable groups, on their potential influence in the legislative process, and on institutional arrangements that allow groups to link up or channel the exercise of power. In short, it will turn on politics, for in cell 4 as in cell 1 the way that law orders behavior is the realization of a political process; not autonomous from it.

Status Neutral Endowments

The situation is somewhat different when we look at cells 2 and 3. Laws that fit these cells are characterized by the appearance of status neutrality. They create entitlements that are, in theory, open to all; impose duties that are, in theory, binding on all; or establish conditions under which any private party can invoke the power of the state in pursuit of personal ends. Some examples include the rights that people have to use their private property as they see fit, the restraints imposed on all by the criminal law, and the ability that contract law gives people to hold others to their promises.

Status neutral laws attribute meaning to behavior based on the legal categories into which the behavior fits and not on the meaning it may have in the larger society. Thus the destruction of draft board records to protest the arms race is in law like throwing a rock through a school window for the hell of it. Both are the malicious destruction of public property. The protestor who believes he should be treated differently from the vandal will be told in a status neutral system that the law perceives no essential difference in the two behaviors. Similarly, a poor woman who agrees to sell her wedding ring for a quarter of

its known value because she desperately needs money to feed her children will, if she later tries to renege on the deal, be treated no differently from a wealthy woman who agreed to sell a ring cheaply because she wanted to rid herself of a reminder of her former husband and was indifferent to what she was paid. The relevant legal categories do not attend to the social status of the contracting parties or to the immediate motivations of specific agreements. Only certain aspects of agreements are regarded by the law as important, and if these aspects have the proper form, the law will proceed to enforce the agreement as if that were all that mattered.

The problem with status neutral law from a social justice standpoint is, as we saw in Chapter 12, that it treats people from all walks of life as if they are equally well situated to comply with the law or to benefit from it. By not attending to differences of power and status, it cannot correct for them. And by distributing rights or responsibilities as if social status had nothing to do with their enjoyment or burden, status neutral law in a substantially unequal society differentially endows people with legal power or differentially exposes them to state regulation.

In a generally egalitarian society, status neutral law is more likely to enhance mutual well-being and advance social justice. The law establishes conditions under which individual action will be protected without specifying in detail the direction those actions should take. Ordinarily this is liberty enhancing. People know, for example, that their agreements will be enforced, but they are free to agree on whatever suits them. Guarantees against overreaching derive not from the law, but from the fact that power and status are equal to begin with. Rights and obligations with respect to property cannot further entrench the power of one group vis-à-vis another when preexisting disparities are absent.

Thus we see that the implications of formally neutral law for social justice depend crucially on the distribution of power in nonlegal spheres. But this is not the whole story. Law also affects that distribution. Where power is initially distributed more or less equally but not perfectly so, status neutral law inhibits planned social change that might wipe out vestiges of inequality. There are two reasons for this. The first is that if the law does not recognize the way that individuals are unequally situated it can neither compensate for inequalities nor develop programs to obliterate them. The second is that status neutral law tends to democratize the state's power, that is, to endow all the state's citizens more or less equally with legal entitlements. This interferes with planned change both by dispersing power rather than focusing it and by investing people with rights that allow them to resist concerted efforts to reach egalitarian goals. Indeed, the point is more general. In a more or less equal society people may have rights protected by status neutral law that allow them to resist laws that the majority of the moment thinks are in the common interest.

Where the distribution of power is markedly unequal to begin with, status neutral law acts as a restraint on the dominant class. It must be general and tends to be consistent across a wide body of law. Thus it is not a finely tuned instrument designed to meet the specific, immediate needs of a powerful group. The advantage of status neutral law for the better off is that its entitlements are more

accessible to the wealthy than to the poor, and the duties it imposes on the wealthy are less onerous. However, it can cut against the interest of specific members of the dominant class even if its tendency as a whole is to better their positions. Rich murderers, for example, are occasionally hanged for their crimes, and an ordinary homeowner who is sentimentally attached to his property may thwart the plans of a wealthy developer.

REASONS FOR STATUS NEUTRALITY

Law that is not overtly purposive, *is nonetheless passed with a purpose*. We can always ask of a law, in whose interest is it? If status neutral law imposes limits on efforts to advance both the common good and the good of groups with overwhelming political power, why do such laws ever get passed and why is the common law, which is by and large a body of status neutral case law, not overturned by legislation? Why, in other words, does not the majority of the moment in a more or less equal society or the dominant group in a decidedly unequal society limit their lawmaking to legislation that is aimed overtly at the distributive ends they seek to achieve?

One reason has to do with culture and tradition; some values are taken for granted even if they are not in an actor's immediate interest. It is probably important that the common law is largely status neutral. Not only is the common law at the core of Anglo-American legal education and thus important in shaping the expectations that young lawyers have about law, but it also provides a context into which new legislation must fit.⁵

Here, however, we want to focus on another part of the explanation, for status neutral law can be in the perceived interest of those who dominate the political process. In a more or less equal society there will be no one group that dominates. Instead, policy will be the product of temporary majorities and shifting coalitions. All groups are likely to be satisfied with the way some issues are resolved and dissatisfied with the resolution of others. Influential groups may, however, fear that the coalition structure will change to exclude their interests. In particular, groups that do not dominate but have relatively more power and influence at a particular moment may feel that their privileged status might lead others to coalesce against them, and if so, they will be hopelessly outnumbered. Status neutral law is a protection against the "tyranny of the majority" that

5. In the next section we discuss issues of judge made law. The common law is judge made. Some of its norms seem to be judicial distillations of what was once popular or specialized (e.g., among merchants) morality. An exploration of the origins of the common law is beyond the scope of this book. Its general status neutrality may reflect ideals or requisites of judicial neutrality. Judges should not legislate, and one way to avoid the appearance of legislating while making law is to suggest that natural law, precedent or statutory law, mandates the particular decision and to present that decision in language that is addressed to the general well-being of society rather than to the particular ends of some status group. Also, it may be that the specialized and popular moral codes that have been assimilated over the years into the common law are themselves status neutral.

might otherwise result. Thus in a more or less equal society the coalition favoring neutral solutions will often be dominant, and there will be a tendency to build such solutions into constitutions, schemes of representation, and other institutions that cannot be changed at the will of a temporarily dominant majority.

Status neutral law may also reflect the difficulties of planning for desired ends. Extending rights to all in a more or less equal society means that the effects of the law will reflect individual judgments and desires as mediated by some approximation to a market. Not only might such an approach appear more efficient than an attempt at detailed regulation, but it is also a way of compromising differences among groups that generally agree about how social life should be regulated but disagree on the details.

In decidedly unequal societies there is another reason for status neutral law. It tends to mask the exercise of power and obscure the degree to which law is the servant of one class. This is important because the fact that one class clearly dominates does not mean that control is not problematic. Maintaining control is often difficult, expensive, and precarious. If the legal system is seen as a naked tool by which one group rules others, it will be opposed by those hostile to the group in power. If, however, the law is seen as rising above class differences, it may be accorded respect and its commands may be taken for granted as right (Hay, 1975).

We call this attitude toward law "legitimacy." The fact that a legal order is regarded as legitimate does not necessarily mean that there will be compliance when self-interest suggests that lawbreaking holds greater promise of reward. But it does increase the probability of compliance and, more importantly, increases the probability that those whose self-interest is not obviously affected by the law will cooperate with the lawmaker rather than with the lawbreaker. As a result, legitimacy reduces the frequency with which legal commands must be backed up with force.

It appears that laws which endow everyone with entitlements that only the best off are likely to be in a position to enjoy and restrict everyone with prohibitions that are disproportionately likely to pinch the worst off are more likely to be regarded as legitimate than laws that more openly enhance the position of the best off or diminish the position of the worst.⁶ Contrast, for example, your reaction to a law that says "Jews and blacks may not join the Elite Country Club" and a law that says "Private clubs are free to choose their own members." The two laws may be equally effective in keeping Jews and blacks from joining the Elite, but reactions to them, particularly on the part of "good thinking" white Christians, will probably differ.

If you were intent on keeping the Elite a WASP organization, which law

6. This may well be contingent on the prevailing ideology. In a society where the ideals of freedom and equality are regarded as important the textural argument is most likely to hold. In a highly stratified society where the stratification is accepted as in the order of things, laws that openly distance the dominant strata from the lower orders may be accepted by both the upper and lower strata as legitimate.

would you prefer? The choice is not completely clear, for you might find some day that a less-bigoted clique had come to dominate the club. But formally neutral law is likely to be less expensive to enforce since the Elite is less likely to be attacked for bigotry, and it is likely to be more enduring since everyone, including Jews and blacks, may see some advantage in laws that allow private clubs to choose their own members. To generalize, the prospect of enhanced legitimacy is, in many situations, likely to be sufficiently attractive to those who dominate a legal order that status neutral law will be preferred to more openly distributive enactments. Although the former is not so neatly tailored to the end in view as the latter and some slippage may be inevitable, proceeding by neutral rather than by clearly distributive rules may appear to offer greater prospects for promoting class interests in the long run.

LAW APPLICATION

Now that we have considered four basic types of law and some reasons for these approaches, we must consider how these types interact with the ways that law may be applied. Thus we return to a topic that we discussed in detail in Chapter 12, but we examine it from a different perspective. First, we discuss senses in which courts make law while applying it. Next, we contrast the substantively oriented court with the formalist court we considered in Chapter 12. Finally, we see what these judicial stances imply when courts apply laws of the types specified in Table 13.1.

Judicial Lawmaking

In moving from lawmaking to law application, we shift our attention from legislation to adjudication and from legislatures to courts. In doing so, we must first address the fact that there are some senses in which courts make law. Courts are directly responsible for the law of the case, which is the law as it applies specifically to the litigating parties. When John Jones came to court charged with burglary the law was that anyone who breaks into the dwelling of another at night is guilty of burglary and may be punished by a prison term of from 1 to 10 years. When John Jones left court, a convicted felon, the law insofar as it applied to John, was that he had broken into the dwelling of another at night and as a consequence had to serve 3 years in prison. The situation is similar for Susie Smith who was stopped at a red light when an Ajax moving van ploughed into her. When Susie sued Ajax the law was that if Ajax's driver had not exercised the care that might have been expected of a reasonable person and in consequence had injured someone, Ajax would have to pay the injured person's damages. When the lawsuit was concluded, the law, insofar as it concerned Susie and Ajax, was that Ajax's driver had not, in fact, been exercising reasonable care when his van struck Susie, and Ajax was obliged to pay her \$126,000.

Now this kind of lawmaking is inherent in any adjudicative process. Courts cannot help but engage in it. Indeed, one of the features that distinguishes adjudication from mediation is the adjudicator's ability to determine the law of the case without seeking the parties' consent (McEwen & Maiman, 1984). Thus if courts did not make law in this sense, they would not be adjudicating.

At the extreme, all that courts are doing when they make law in this way is finding facts. John Jones either did or did not break into the dwelling of another at night. If he did, he is guilty of burglary; if not, he is innocent. Once the facts are determined, the implications of the law are self-evident. But almost invariably, applying the law to cases involves some interpretation. What, after all, does it mean for a truck driver to exercise the care of a reasonable person? Is it reasonable to look back at one's load after hearing a loud crash and so risk not seeing a light turn red up ahead? Interpretive tasks like these are routine occurrences at trials (Stone, 1966).

Often, however, questions of interpretation rise that are easily extracted from the facts of the case. If the court interpreting the law has the power to pronounce rules that will guide other courts in similar cases, law in a more extended sense may be created. Not only is the rule pronounced binding on the parties to the case, but it is also binding on similarly situated parties in future cases. It is a new rule to guide behavior. For example, suppose that John Jones had just moved into a new subdivision in which all houses look alike. Coming home late one night he turned into the wrong cul-de-sac and walked to the wrong house. Frustrated at finding that his key did not work, he broke a window pane and entered the house. He is charged with burglary.

To decide whether John is guilty of burglary is to decide whether the law that criminalizes breaking into the dwelling of another person at night applies when one reasonably believes he is breaking into his own house. However the highest court in a jurisdiction resolves this issue, there will be a new rule of general applicability. Either a good faith mistake will be a defense to the crime of burglary or one breaks into a home he thinks is his own at his peril.

A court in this instance is clearly making law, and the type of rule it enunciates is not very different from the kinds of rules that legislatures enact. For example, had the legislature contemplated the case we describe, it might have specifically provided that the burglary statute did not apply where the proscribed actions were the result of a good faith mistake. Yet the practice by which the court made law is sufficiently distinct from the legislative approach to lawmaking that it makes sense to call it adjudication. The Court was not deciding on the best policy to apply in *State v. Jones*. Instead, it was trying in good faith to determine how the legislature wanted its rules to be interpreted. The judges were not trying to impose their values on the case, but were instead trying to determine what the values of the legislature—the accepted lawmaker—had been.

Now, in practice, when legislative language is open to interpretation in a case of first impression it is almost impossible for a judge to determine what the legislature would have intended without being in some degree influenced by his

or her own values.⁷ To vary our burglary example somewhat, consider the case of Sally Smith who was lost in the woods for ten days surviving on insects and berries. One night, shortly after sundown, she stumbled into a clearing and saw a hunting cabin. When no one answered her knock, she broke a window, entered the cabin, found food, and prepared a decent meal. This case involves two issues of legal interpretation. The first is whether a hunting cabin that is ordinarily vacant qualifies as a “dwelling” within the meaning of the statute. The second is whether the statute contains an implicit exception for starving people who break into dwellings in search of food.

The legislation is ambiguous on both points. Indeed, had the problem been posed, different legislators might have had different views. Yet the court is supposed to determine legislative intent. A judge who believes firmly in the sanctity of private property is more likely than a judge with socialist leanings to find that the statute covers any property in which people sometimes dwell and is likely to hold that although the particular motivations for breaking into another’s dwelling might justify a lenient sentence or a gubernatorial pardon, they do not change the fact that the behavior is proscribed by the law. A judge who places a high value on human life and a lesser value on private property might hold that the legislature did not intend its proscription to apply in emergency situations, or if the judge felt constrained by the legislative language on this point, he might interpret “dwelling” to mean a “regularly inhabited building.”⁸

Here the court is clearly close to lawmaking in a legislative sense. The judges are applying their own values to determine not what the legislature would have intended had they contemplated the situation that arose, but rather, what the legislature *should* have intended. Nevertheless, we would still call this adjudication provided two conditions are met: (1) that the interpretation be interstitial in nature; that is, the court is filling in gaps in what is, generally speaking, a legislatively ordered scheme of things; (2) that the court interpret in good faith the cues that exist concerning legislative intent. These include committee reports and other legislative history as well as the statutory language. Good faith interpretation requires an awareness of one’s own values and the ability to perceive and respect conflicting values that are embodied in legislation.

Finally, we come to the other extreme in which legislative texts give no guidance or, fairly read, suggest a different interpretation from that which the court endorses. Here judges are, in effect, stating what they think is the best policy to govern a situation. This is pure judicial lawmaking. Perhaps the best example of judicial lawmaking in recent years is the abortion case, *Roe v. Wade*,

7. On some occasions there are clear guides such as statements in floor debates, committee reports, or other legislative history that contemplate the situation that has arisen and state how it would be resolved under the law. Judges will also consult for guidance related laws and precedents in their own and other jurisdictions.

8. Note that both judges might find they had to refine their interpretations further in future cases. The first judge might think a different rule justified when the entrance was to save those in a dwelling from a fire, and the second judge might come to interpret “regularly inhabited” differently when confronted with cases in which vacation homes had been entered by vandals or thieves.

410 U.S. 113 (1973) and, in particular, the detailed lines the Court draws. Nothing in the Constitution (or readily derived therefrom) suggests that states cannot regulate abortions during the first trimester of pregnancy, can engage in limited regulation during the second trimester, and can regulate extensively during the final three months. Yet this is what a majority of the Supreme Court held.

We do not mean to imply by this analysis that the decision in *Roe* was wrong. We express no opinion on that matter. We are saying that the Supreme Court in this case, as in other cases, crossed the fuzzy line that usefully, if somewhat unclearly, separates adjudication from legislation. The majority in *Roe*, almost completely unconstrained by the language of the Constitution or the received body of law, enunciated what they thought was the wisest policy given the conflicting values involved.

In defense of the Court one might argue that it was forced to act as it did. For the Constitution as it had been interpreted to that point did not clearly imply that there was not a right to abortion or that states were free to restrict abortions as they chose (Regan, 1979), and the body of precedent involving privacy rights on the one hand and the states' police power on the other cut in two directions. This is often the situation when courts make law in this sense. They are called on to resolve a conflict, and the received law either fails to give substantial guidance or, especially in the case of precedent, is too dated to merit respect. Judges are, in effect, forced to make legislative judgments. But even in these circumstances there is an important sense—perhaps the most important sense—in which the decision making remains adjudicative. When courts make law, norms of judicial behavior are salient, and courts follow judicial procedures. Adjudicative processes differ from legislative ones, and the differences can have important implications for the law that results.⁹ Moreover, courts generally see their task not as deciding on the best possible rule to govern a situation but as choosing from among a more limited set of rules that it is plausible for a court to enunciate given the case posed by the parties. Thus in *Brown v. Board of Education* the Supreme Court could make law by declaring legally segregated schools unconstitutional. It could not in *Brown* have ordered the Congress to allocate special funds to southern school boards that dismantled dual school systems. While the Court's decision in *Brown* was arguably legislative in nature,

9. One difference is that adjudication centers around a particular case while legislation usually focuses on a particular problem. A second difference is that legislators can reach out to inform themselves through constituent polls and legislative hearings, and may count on hearing from those interested in the legislation in any event. Only the parties to a case have a right to inform a court no matter how widespread the implications of a prospective ruling, but courts knowing they shall make law often allow a few interested parties to state their concerns in what are called "amicus" or "friend of the court" briefs. Finally, and perhaps most saliently, legislators are expected to represent constituents and must regularly stand before them in genuinely contested elections. High court judges are usually appointed for life or for long terms punctuated by elections that are either seldom seriously contested because incumbency is such a substantial advantage (Dubois, 1984) or turn more on a judge's party affiliations than on the decisions he or she has reached.

it was appropriate for a court although other kinds of legislative commands would not have been.

Finally, to make law judges must write opinions, for it is the opinion that identifies the legal rule. While in a particular case a ruling broadly favoring either party might be appropriate, not all justifications for possible rulings are permissible. This need to justify decisions constrains the kinds of legal rules that courts make. *Roe*, arguably, would have appeared much less exceptional had a different justification been advanced (Regan, 1979).

Styles of Judging

When we look at judicial decision making, we can distinguish two approaches. Following Weber (1968) we call these stances *formal rationality* and *substantive rationality*. These terms describe styles of thought—ways that courts position themselves vis-à-vis the *corpus juris* they must apply and interpret. Formal rationality is the mode of thought associated with judicial formalism as we describe it in Chapter 12. As we have noted, it abstracts persons and actions out of the real world, fits them into legal categories, proceeds to manipulate those categories as the law specifies, and decides cases accordingly.¹⁰ A formally rational court might reason as follows in the case of our suburbanite, John Jones, who turned down the wrong cul de sac:

The statute proscribes breaking and entering the dwelling of another at night. When Jones smashed a window pane and then lifted the window and walked through it, he was certainly breaking and entering. The dwelling was owned by another person and the act occurred after sundown and before sunrise. Therefore Jones is guilty of burglary.

The formally rational jurist might find the result that his analysis leads to dissatisfying, but that does not concern him *as judge*. What concerns him is that the result follow logically from the facts as he understands them and from the law as it is written.

Perhaps the best example of a judge who was able and felt compelled to make such a separation was Felix Frankfurter. In one case (*Louisiana ex rel Francis v. Resweber*, 329 U.S. 459 (1947)) the Court confronted the situation of a young man who was condemned to die in the electric chair. For some reason the chair was faulty, and although electric current apparently shot through the man, he survived. The issue was whether a second electrocution could proceed or whether it was barred by the constitutional proscription of cruel and unusual

10. For those familiar with Plato's allegory of the cave, we can offer a nice analogy to formal rationality. Real people and real actions are, in all their complexity, like the live people walking before the mouth of the cave. The law is the sun that casts images on the wall of the cave. Legal categories are the two-dimensional shadows that only partly capture the nature of the real people and objects that they represent. Formally rational jurists are people who have been in the cave for such a long time that they take the shadows for the real thing and proceed to act accordingly.

punishment, double jeopardy and other violations of due process. Frankfurter, finding that the chair's deficiency was entirely accidental, concurred in the decision of the majority of the Supreme Court that nothing in the Constitution prevented the state from proceeding with a second execution, but he also implied that the situation was one in which a governor might be expected to intercede with executive clemency. Not content with this, Frankfurter, after the opinion was filed, wrote a personal letter to the governor urging the extension of mercy. Thus the man who could have prevented the execution as a judge (the case was decided by a 5-4 vote) felt that in this capacity the law required him to let the execution proceed, but as a private person he directed his immense prestige toward the end of sparing the life of a young black man he did not know. Power, however, lay in the role and not the person, for the governor allowed the execution.

The substantively rational judge proceeds, by contrast, with an end in view. The end must to some extent be derived from some normative system that is external to the legal system, for if the end were fully specified by law, substantive and formal rationality would collapse into the same set of prescriptions for legal affairs. To draw on the "Case of the Confusing Cul-de-Sac" for one last time, a substantively rational judge might have acquitted Jones by looking not at the language of the law,¹¹ but at the ends that the legislature that passed the breaking and entering statute might have had in mind. He might argue that the legislature was concerned with breaking and entering because this was a common prelude to evils such as vandalism or theft and that they wished to be able to punish those who were interrupted before they had completed the crimes for which they entered. Finding that John Jones did not enter with the intent to engage in any criminal act, this substantively rational judge might acquit. Another substantively rational judge might decide that the legislature's goal was to deter breaking and entering the dwellings of others for any reason. Finding that John Jones could not have been deterred even had he known of the statute because he did not know that the house he was entering was not his own, this substantively rational judge might also acquit.

In each of the preceding cases the judge in interpreting the statute purports to be deciding what end the legislature that enacted that law had in view and is refusing to apply the statute when it does not serve the legislative end. However, by hypothesis neither the statute nor its legislative history suggest any end except the punishment of those who break into the homes of others at night. John Jones clearly did this. In deciding that he should not be punished, our first substantively rational judge is relying on the Judeo-Christian normative ethic as it relates to the moral implications of intent, and the second substantively rational judge is guided by the ethic of utilitarianism. Thus concepts from extralegal ethical systems get infused into the law since they are a reference point for determining what the legislature was about. If the goal is to interpret faithfully the legislative

11. Recognized guides to statutory interpretation such as statements in legislative debates explaining the meaning of legislative language might be consulted by the formally rational jurist as part of an internally focused analysis of legislative meaning.

intent, this is not necessarily improper. The legislature probably never contemplated poor John Jones lost in a too familiar cul-de-sac, but if they had, they might well have rewritten the statute to exempt good faith mistakes. Nor is this surprising; the values of judges and legislators are often likely to be rooted in the same extralegal ethical systems.

There are two circumstances in which the substantively rational judge may look to different sources of norms and values from those that influenced the legislature. One is when the cultural milieu in which the legislature acted has been so transformed over time that to be true to what were perhaps the specific understandings of the legislature is to be untrue to the concerns that motivated the legislation. In this situation a substantively rational court may try to discern the concerns of the legislature that enacted the law and interpret the statute so as to best realize those concerns in the context of contemporary culture. For example, the Congress that proposed the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution was trying to guarantee political equality for black people and by so doing wipe out the "badge of slavery." They probably did not think that the Fourteenth Amendment would someday entail the destruction of segregated school systems. Indeed, schools in Washington, D.C., whose practices the Congress could have controlled, were segregated at the time the Civil War amendments were passed. Yet by 1954 the effort to guarantee political equality and to stamp out the vestiges of slavery required the destruction of legally segregated school systems. In this context, to be guided by what the lawmakers thought the Fourteenth Amendment entailed for segregated schooling would be to undercut the grander purposes they hoped to accomplish. If the Amendment was to remain an effective vehicle for the abolition of vestiges of slavery, it would have to be interpreted in the light of contemporary culture and not by reference to the normative understandings of a century before.

The second circumstance in which a substantively rational court looks to extralegal norms and values different from those that motivated the legislature is when the court subscribes to a different ethic and is trying to achieve a different substantive goal. Thus in *Lochner v. New York*, 198 U.S. 45 (1905) the Supreme Court struck down a state law establishing a 10-hour maximum workday and a 6 day workweek for bakers, holding that because baking was not an especially unhealthful profession, the legislature could not interfere with people's rights to sell their labor. The state legislature was seeking to enact a set of norms grounded in their perception of the nature of professional baking and what the welfare of the workers required. The Court was advancing its conception of freedom of contract, a conception that was closely linked to entrepreneurial values in a capitalist society. Judges, however, are not supposed to substitute their normative views for those of legislatures; therefore, in cases like *Lochner* the process has to be disguised.

Perhaps the simplest solution is to ignore issues or dismiss them without serious consideration when good faith attention to what the law implies might mandate a result inconsistent with substantive goals. Appellate decisions in

routine criminal cases suggest that this technique is frequently applied (Davies, 1982). Courts often dismiss in a sentence or two a defendant's possibly substantial objections to the way his case has been processed when it is clear that the defendant has committed the crime charged. Alternatively, evidentiary or procedural errors at trial are acknowledged, but they are dismissed as "harmless," even though to one reading the opinion—and sometimes to dissenting judges—it appears that the error might well have affected the verdict. The other side of this, and equally revealing of a substantive orientation, is that when an appellate court believes that an injustice has been done at trial, it will if necessary seize on relatively trivial errors that are unlikely to have affected the verdict and reverse the case on these grounds.

A second technique is to misinterpret the legislature's intent and claim to be upholding it while in fact embellishing or even subverting it. This was the technique of the *Lochner* majority who found in the language of the Fourteenth Amendment an intent to preclude certain kinds of state interference with the ability of people to set the terms on which they sold their services. Yet there is no reason to believe that drafters of the Fourteenth Amendment had any intention to preclude racially neutral labor regulations like those in *Lochner*, nor is such an intention fairly deducible from the language or history of the amendment.¹²

A third method is to retreat to pseudo-formalism. A court interpreting ambiguous language may pretend it is constrained by the language used when the legislative language could be fairly construed to mean something very different and the legislature obviously meant to attach the different meaning. Or a court may distort reality in order to reach a desired result. In *Lochner*, for example, the legal rule the Court purported to be following was that legislation setting maximum hours of work was an unconstitutional interference with freedom of contract unless there was a valid health-related reason that justified the limitation. Since the majority of the Court found that baking was not an especially unhealthy occupation, it followed that the rule had to be struck down. However, the dissent made it clear that there was substantial evidence that baking was a particularly difficult and unhealthy profession. The majority simply ignored this evidence so that their conclusion appears required by a logical, formal analysis. It is only when we read the dissent that it appears that the decision is controlled not by a true commitment to formalism, but by a desire to achieve substantive ends that are inconsistent with the concerns that motivated the legislature.

In separating formalistic from substantive stances in judging, we do not mean to imply that one style necessarily yields better results or, indeed, is more

12. Earlier Supreme Court decisions had extended the scope of the Fourteenth Amendment in this direction, so the *Lochner* majority was building on precedent. To the extent that judges in the *Lochner* majority were actually responding to the fair implications of precedent that they felt constrained by rather than to some extralegal perspective of where the good of society lay, the Court was looking to a recognized source of legal authority in a common law system and there is a formalist element to *Lochner*.

appropriate for a court than the other (cf. Kennedy, 1976; pp. 1710–1711). As we shall see in the discussion that follows, depending on the context in which a law is applied, one or the other style may be more likely to enhance justice or aspects of justice in the sense we have been using that term.

It is also important to note that the separation in styles that we can make at the level of ideal types is far neater than what one finds when the behavior of actual judges is examined. Formalist judges must work with language that is not defined by the legislature but is comprehensible because judges and lawmakers share a community of meaning. Behind this community of meaning are shared extralegal norms including rules of grammar and ethical norms that help a judge understand what a legislature means by the language it uses. Moreover, cases continually arise which are hard because the implications of legal language are not clear, and the formalist judge must do more than reason logically from distinctively legal sources of authority. Even with respect to procedural issues, that special province of formalism, results that appear substantively absurd properly shape the interpretation of legal language, for it is usually reasonable to assume that a legislature did not intend absurd results to follow from procedures it specified. Thus, a judge often cannot understand what a legislature means by certain language unless he shares an extralegal standard that allows certain interpretations to be ruled out because their implications would be silly or intolerable.

A substantively oriented judge on the other hand is still working within the confines of law and legal procedures. As we earlier noted, even if a variety of decisions may be reached on the facts of a case, many decisions that might be possible for a legislature (or a dictator, for that matter) are unavailable to a judge. Similarly, not all plausible justifications for a permissible decision may be advanced by judges. Usually a judge motivated by substantive concerns must at least be able to dress up an opinion—if the case requires one—in formalistic language, and if such dressing up is difficult it may be that the decision is changed. Also substantively oriented judges are likely to proceed formalistically in much of what they do. The role of judge contains a commitment to formalism at its core. Where the implications of legal language and procedures are clear, the substantively oriented judge is likely to accept them even though this results in an outcome that is by reference to some nonlegal standard undesirable. If a judge only drew on nonlegal sources as guides to decisions, he would, in a modern Western society, not be acting like a judge.

Despite the necessary commingling of formalist and substantive tendencies in actual judging, it is helpful to separate the two styles as ideal types. As we shall see next, strong tendencies in these directions when combined with different types of laws can yield legal systems with distinct implications for relations between classes and the quality of justice in society. These systems too are ideal types, but we shall show by way of example that laws in the spirit of such systems do exist, and that actual legal systems are mixtures of laws that tend in several of the directions we identify.

THE QUALITY OF APPLIED LAW

In looking at legislation, we noted that at the extremes it is either status neutral or distributively oriented in character. Building on Chapter 12 and on the foregoing discussion, we can characterize a court's approach as either formalistic or substantive when it is called on to apply legislation. A formalist court is one that approaches law in the way that we describe in Chapter 12 as judicial formalism. Judicial formalism is characterized by a formally rational approach to the interpretive problems arising when courts apply law. This entails two elements that we discussed separately in Chapter 12. The first is close attention to legislative meaning. The law is taken by a formalist court as given and is interpreted in accordance with the logical implications of the statutory language, supplemented where the language is ambiguous, by legislative history, precedent, and other recognized sources of legal meaning. The second is the attempt to reduce legislative meaning to a set of distinctly legal categories that are used to classify behavior and determine its legal implications. In addition, judicial formalism also includes a commitment to procedural regularity regardless of what is in dispute.

It is important to note that these factors taken together do not necessarily guarantee a specific outcome in a particular case. The law is often sufficiently open textured that formalist reasoning does not yield a unique answer to the questions a case poses. What is important is the stance the judge takes toward the law. A formalist judge not only proceeds as described in the preceding paragraph, but is also not influenced in his reasoning by the outcome the interpretive process yields except to the extent that the law or other sources of legal authority specify that the particular outcome is to be taken into account.

A substantive approach, on the other hand, looks, as we have seen, to sources outside the law in determining the legal implications of action. The extralegal sources of authority may be of a social, ethical, or political sort. A court may, as some nineteenth-century courts apparently did (Horwitz, 1977), ask what kinds of rules would best promote industrialization and decide accordingly. It might, in deciding on the constitutionality of Sunday closing law be influenced by its view that Sunday is the Lord's day. And it might in deciding the constitutionality of rules that, in effect, imprison citizens who have committed no crime [*Korematsu v. United States*, 323 U.S. 214 (1944)] or in trying alleged subversives (Solzhenitsyn, 1973), be responding to what the political exigencies of the day seem to require.

The extralegal sources of normative authority that a substantively oriented court looks to in applying the law may or may not be the same sources that influenced the legislature in its law-making activity. If the source is not the same, the court may hamper or even forestall a legislative effort to achieve certain goals. At certain points in U.S. history, most notably before the Civil War and in the early New Deal period, crises developed because the Supreme Court in interpreting the Constitution was influenced by a set of extralegal social and

ethical values that were antithetical to those that were motivating the legislature. At other points the receptiveness of courts to values other than those that motivated the legislature has been celebrated for its contribution to freedom. Indeed, one institution, the jury trial, is largely predicated on the value of building into the legal system a decision maker that may freely import values from extralegal spheres.

Although cases in which a substantively oriented court seeks to subvert the legislative intention are striking, it is no doubt more common for a court to share the values that motivated the legislature. After all, judges and legislators are both politically sensitive elite decision makers and typically share a common culture. Where a substantively oriented court shares legislative values, decisions are typically outcome-driven. The court strives to achieve the ends that motivated the legislature even when the legislative language, higher law (e.g., the Constitution), or its own procedural requirements do not countenance the desired result. This situation is particularly evident in appellate decisions in criminal cases where courts routinely overlook procedural and constitutional flaws when they think the defendant is in fact guilty (Davies, 1982; Lempert & Saltzburg, 1982, p. 2).

In the discussion that follows we identify different ideal types of applied law and examine their implications for social justice. To do this without writing another book, we must make a number of simplifying assumptions. First, we assume that a substantively oriented court shares the legislature's extralegal values, and that these shared values include a concern for equality where legislative influence is more or less equal and a concern for the dominant class's interests where great inequalities of influence exist. The substantively oriented court differs from a formalistic court in that in seeking to achieve these and other shared values, it is relatively unconstrained by the features that define judicial formalism, although in writing opinions it may appear to bow to them. Because the substantive courts we consider aim at ends the legislature seeks to achieve, ordinarily these courts will decide cases in the same way as formalistic courts which are, at the level of the ideal, oriented solely to legal norms. We shall ignore such cases and focus on situations in which the judicial stance makes a difference.

We assume also that in a society in which people have more or less equal influence, the parties also have more or less equal competence in making claims on the legal system, and that in societies where political influence is very unequal, legal competence similarly varies.¹³ Thus where political and social equality prevails people will be generally familiar with their legal rights, will know how to pursue claims on their own, will know when to turn to lawyers, and will be able to retain legal counsel where necessary. In highly unequal societies access to law will be closely associated with other indices of social power.

13. This assumption collapses one requisite of legal autonomy with one of the dimensions that distinguishes the four types of legal endowments that we specified earlier in this chapter. This congruence is not necessary, but we expect that as an empirical matter a correlation between the two is likely.

Finally, we are concerned here only with what the legal system—by which we mean the law and the way it is applied—implies for individual rights and for the distribution of power and welfare across classes or other identifiable social groups. This concern means that we are at least as interested in the run-of-the-mill adjudication that occurs in ordinary trial courts as we are in the less frequent but more visible decisions that emerge on appeal. Also we do not concern ourselves with aspects of the law as applied that have no systematic distributive consequences.

If we cross-classify the four types of endowments that legislatures can create (Table 13.2) with the different stances that courts can take when applying them, we get the following possibilities:

TABLE 13.2
The Quality of Applied Law

<i>Type of Legislative Endowment</i>	<i>Judicial Stance Toward Legislation</i>	
	<i>Substantive</i>	<i>Formalistic</i>
<i>Class-oriented endowments</i>	Unrestrained class domination (1)	Bounded class domination (2)
<i>Differentially accessible general endowments</i>	Illusory rights (3)	Formal autonomy (4)
<i>Equally accessible general endowments</i>	Egalitarian justice (5)	Pure autonomy (6)
<i>Welfare-oriented endowments</i>	Substantive justice (7)	Formal justice (8)

At the outset it is important to note one distinction that pervades this table. Recall from Chapter 12 that formalism is a core component of legal autonomy in the law application process. The other two components, equal competence and neutral norms, are in this table aspects of the four types of legal endowments we identified earlier. *Formalism by itself is sufficient for partial autonomy.* A legal system characterized by judicial formalism is, other things being equal, more autonomous than one in which substantive adjudication is common. Note also that legal autonomy may sound like a good thing, but its full implications should be considered before making value judgments.

Unrestrained Class Domination

Cell 1 of Table 13.2 describes the situation that exists when one class openly dominates both the legislative and judicial processes.¹⁴ In such a system laws are passed to promote the interests of the dominant class, and they are interpreted by courts with the same end in view. If it should happen that a law designed to

14. We speak throughout of a dominant class, but it may be that groups with somewhat different class interests share dominance.

advance the interests of the dominant class threatens to run counter to those interests, the law will be interpreted to avoid these untoward results.

For example, a powerful immigrant group may choose to move less powerful natives from rich farmlands to barren territory. The move may be formalized in a treaty by which the chiefs of the native groups agree to trade their fertile land for the new territory. If the legal system is of our first type, a suit by a native seeking title to his ancestral homeland on the ground that he did not consent to the treaty and that the consent of his chief was coerced will be rejected by the courts even if all other land transfers in the society require the consent of the landowner and are void when consent is coerced. On the other hand, should valuable minerals be discovered on the land given to the natives, they will be again moved, and should they seek to resist the move in court, the treaty guarantees will be found in some way deficient. For example, a court might argue that the presence of substantial mineral wealth meant that the guarantees were void because of mutual mistake. The appropriate remedy will, however, not be the return of the native's original property as would have happened had a contract between two members of the dominant group been voided for mutual mistake. Instead, the remedy will be to find land as valueless as the original land was thought to have been, and to move the natives to it. Of course, had it been the rich farmlands that yielded even more valuable minerals, the native's claim that the treaty should be voided for mutual mistake would be dismissed out of hand. This is because a court in this cell does not look first to what the facts and the law imply for the outcome, but instead decides what outcome is most in the interest of the dominant class and finds facts or interprets the law so as to yield that outcome.

A system in which law is both enacted and applied in such a purely instrumental fashion is one of *unrestrained class domination*. The legal system in such a society is insofar as it applies to transactions between classes a sham. It is a convenient form of governance, designed to give the appearance of legality to a use of state power that is *entirely* predictable from the relative class positions of the parties to the dispute. In its pure form, the legal system defined by cell 1 is the legal system of a tyranny which, in fact, rules by force.

Bounded Class Domination

Cell 2, which we call *bounded class domination*, is more interesting. As in cell 1, legislation is openly designed to advance the interests of the dominant class. Unlike cell 1, though, the decision to proceed through rules is respected in the judicial process, and rules, even those enacted to advance one class's interests, have a certain generality to them. In particular, even as applied they only order behavior with reference to categories and in ways that the legislature has specified in advance, and they can only be applied through legal procedures. The fair

application of these rules will not always leave those of higher status in a dominant position and will limit the ways in which the wishes of the powerful can be realized. E. P. Thompson (1975) makes the point convincingly in his study of the Black Act, an English law that made capital a variety of offenses that were common in forested areas, such as stalking deer in disguise at night, poaching hares or fish while armed and disguised, and cutting down planted trees. Although the acts were bloody, enforcement was far more restrained than many landed gentry would have liked. At a minimum it was necessary to prove guilt in a court of law. Knowing that someone is guilty does not necessarily mean that the offense can be proven. Tactics that might have been more effective in preventing poaching such as the abduction and slaying of suspected poachers were precluded once the decision was made to proceed through law.

Even slave law that validates the dominance of the master class may as part of the scheme of domination accord rights to slaves that are respected in court. Marc Tushnett (1975) in an erudite article on the antebellum South shows how the ultimately unsuccessful attempt to define slaves simultaneously as chattel, personal property, and, in some respects, human beings, resulted in a set of rules that restrained the general power of whites over blacks and, in some measure, the power of masters over their own property. Eugene Genovese (1972, p. 36) describes the particularly poignant story of a slave named Will, who had attempted to run away from an overseer who was trying to whip him. The overseer got a gun and tried to shoot Will. Will killed the overseer instead and pleaded innocent by reason of self-defense. The Supreme Court of North Carolina sustained Will's plea, but fearing extralegal retaliation Will's master sold him and his wife to a slave owner in Mississippi. A few years later the wife arranged to have herself sold back to her former master, but Will was not with her. He had killed a fellow slave in Mississippi, and he had been tried for murder, convicted, and executed. As his wife recalled, "Will sho'ly had hard luck. He killed a white man in North Carolina and got off, and then was hung for killing a nigger in Mississippi." Formal justice triumphed in both instances.

Systems of bounded class domination are found in societies in which marked stratification is so entrenched that substantial inequalities are taken for granted. There is no need for the dominant class to act as if its supremacy was not preordained or to eschew using the legal system to institutionalize the dominant order. At the same time, there are pressures on the dominant class to rule through law. This may in part be because a measure of legitimacy attaches to the rule of law even when the legal order perpetuates inequality. It may also, and in larger measure, be because law has become the accepted way of regulating relationships within the dominant classes, and it is natural to use the same device to regulate relations between classes. In regulating behavior within classes, the legal system is largely autonomous of class interests because social class does not substantially differentiate the parties. This autonomy and, in particular, the formalistic approach to law application that is its hallmark, carries over to some degree when intraclass differences are in issue.

Illusory Rights

Cell 3 defines a system in which differentially accessible general endowments are interpreted and applied by a substantively oriented court. We call such a system a system of *illusory rights*. Where such a system exists the decision of the dominant class to proceed by creating differentially accessible endowments rather than class oriented endowments is a kind of mystification. Rights are apparently open to all, but, in fact, they are largely accessible only by those in the dominant class, and so the enforcement of those rights serves to perpetuate the existing system of domination. Rights to private property in a markedly unequal society have something of this character as does the right to sue in court when this is, in practice, conditioned on the ability to pay substantial lawyer and filing fees.

From the point of view of the dominant element the problem with differentially accessible general endowments is that the *in principle* openness of rights means that on occasion those from the dominated groups will be in a position to assert rights against those who are ordinarily on top. This flaw may be "corrected" by a substantively oriented judiciary, that is, a judiciary that values the same ends as the dominant class and will sacrifice formalism to obtain them.

In these circumstances rights prove illusory. When the less-advantaged attempt to assert them they disappear, for they were not meant to be asserted by the less advantaged in the first instance. For example, a society may purport to value freedom of speech, and cloaked with this freedom, those who control the media establishment may disseminate whatever message they choose. But when less powerful groups through their own media try to organize unions, promote pacifism, or suggest revolution the right to free speech may be reinterpreted so that it does not apply where there is a clear and present danger to the national security and the likelihood of imminent harm may be found even though a fair reading of the facts does not justify the conclusion. Thus, the desirability of the outcome from an extralegal political perspective determines how the facts and law are manipulated to yield a decision.

Pseudo-formalism of this sort is likely because the decision to proceed through status neutral law in the first instance probably reflects the belief that there are advantages to be gained from the appearance of neutrality. Pseudo-formalism helps preserve this appearance. The illusion of neutral rights can, of course, be heightened if the rights of the less advantaged are genuinely respected in situations where this carries no implications for the relative power of contending classes.

To some extent laws creating differentially accessible general endowments are found in contemporary capitalist and socialist states. However, in the case of the Western democracies at least, the pure type is too extreme to capture what is going on. Class structures are not so extreme; and it is not clear that most rights were established largely to advantage superior classes. Moreover, only some courts some of the time interpret rights differently depending on the status of the claimant, so rights in the system are not fully or generally illusory.

Formal Autonomy

Cell 4 describes a type of law we call *formal autonomy*. Such systems are like systems of illusory rights in that legal endowments are created with full knowledge that they are differentially accessible. They differ in that once legal endowments are created, all those in a position to assert a right can enjoy its benefits regardless of whether they are members of the initially privileged classes. Systems of formal autonomy tend to reproduce the existing class structure, but it is a permeable structure that is reproduced. By acquiring wealth and power despite a legal system skewed in favor of those who are already well off, the initially disadvantaged can move into the advantaged strata. Those of higher status can similarly slip if they fail to take advantage of the benefits that are specially accessible to them. Such transpositions of places have few if any implications for the distribution of power between classes, for the class system is more or less indifferent to the specific people who occupy the dominant or subordinate positions in society or the backgrounds from which they come (Balbus, 1977, Pashukanis, 1980).

Formal autonomy is often associated with law under capitalism. Positions are open to talent and there is considerable movement of people across positions, but it unquestionably helps to start life as a well-off member of society. Furthermore, the system of rights is structured so that those who have power can use the legal system to reinforce and legitimate the power they choose to exercise. The legal system of the United States in the late nineteenth century most resembled a system of formal autonomy, and residues of that system are still very much with us.

Egalitarian Justice

Cell 5, which we call *egalitarian justice*, describes a system in which legal endowments created by status neutral laws are in theory and to a large extent, in practice, equally accessible to all. Where egalitarian justice exists there can be no gross inequalities that deny large numbers of people access to rights that are in principle theirs or the ability to invoke the law effectively. In an absolutely egalitarian society, cell 5 would collapse with cell 6 because everyone would have the same access to rights and a formalist jurisprudence would treat everyone asserting a particular legal right or duty the same. Absolute equality is, of course, achieved nowhere, a fact we recognized when we constructed our endowment types.

In the less than ideal world the difference between the social conditions of a society that can expect the egalitarian justice of cell 5 and one that is likely to be characterized by the illusory rights of cell 3 is one of degree. In cell 3 disparities in social status and legal competence are so extreme that some groups are largely precluded from enjoying rights apparently extended by the legal system. In cell 5 differences in social status are small and if neutral endowments

are not in fact equally accessible, they are more or less so. Indeed, in such a society we may expect welfare-oriented legislation, like laws providing free legal services to the poor, that provides nothing of value except access to the legal process.

The most striking difference between law in cell 5 and that in cell 3 is not, however, in the quality of rights available nor is it even in the ability of people to take advantage of the law. Rather, it is in the attitude courts take when hearing cases that involve parties of unequal status. Where rights are illusory it is because substantively oriented courts deny claims that would be honored if the social status of the litigants was reversed. Where egalitarian justice prevails, a substantively oriented court, equally aware of differences in social status, but responding to a different set of extralegal normative imperatives acts in almost the opposite fashion. It seeks to ameliorate some of the advantages that the better off enjoy because of their social status. This follows from our assumption that courts (and legislatures) value equality in societies where equality of influence is more or less achieved. Cases consistent with this assumption are in fact encountered.

Everyone, for example, has a right to enter into contracts, but more powerful parties generally enjoy important advantages in contracting with those who are weaker. These include better access to information, access to many alternative contracting partners, familiarity with legal negotiations, and the ability to wait for a better deal because immediate needs are not pressing. These and similar advantages can, however, be offset if a court is willing to take the contracting situation into account in deciding if or in what ways contractual agreements are binding. Where egalitarian justice prevails, courts do this by considering the bargaining situation that would have existed had the parties negotiated as equals. Thus contracts may be voided because one party with special access to information did not share it with another, and in the extreme cases bargains that are on their face too one-sided will be struck down as unconscionable. Recall the judge in Chapter 8 who refused to compensate the garage mechanic for the repairs he had made to the car he sold a Mexican-American. From one perspective the judge ignored the law governing the rights of parties to contracts, but from another perspective he was enforcing the contract the parties might have reached had they been in a more or less equal bargaining position.

In the area of contracts, courts have been most active in constructing “as if” equalities in their interpretation of “contracts of adhesion.” *Contracts of adhesion* are contracts between parties who are so unequally situated that one party to a bargain has little choice but to accept a deal on the terms the other offers. We are all familiar with contracts of adhesion, for we are parties to many of them every year. Look at the print on the back of the next ticket you buy for a train, plane, or boat, or check on the back of your motel door for the details of the management’s liability should a thief break into your room and steal your valuables. Do you really consent to the limitations on liability that these forms state? Do you have any ability to bargain over the terms? If you were chartering a plane or filling a hotel for a convention, you might, but not if you are a lone

customer. Persist in objecting to the imposed terms and you will walk to the next town and have no place to sleep.

Some courts, responding to the obvious inequalities of bargaining power that underlie such contracts, have declared particularly onerous clauses void as against public policy and have held that ambiguous language should be interpreted against the interest of the party who dictated the terms. Judge Clark, a distinguished federal judge, nicely summed up for one subset of such cases a result that might be frequent in a regime of egalitarian justice. "An insurance contract," Judge Clark said, "is interpreted just like any other contract, except the insurance company always loses."¹⁵ Similar substantively rational decision making may occur on the criminal side when the poor are not punished as seriously as the wealthy would be for similar acts because their initial disadvantage makes their criminal behavior more understandable. Thus decisions that embody egalitarian justice occur, although they do not predominate, in the courts of the modern welfare state.

Pure Autonomy

Cell 6 defines a system whose prerequisites we laid out in Chapter 12. We call it *pure autonomy*. In the ideal case where absolute equality prevails in society the outcomes of a purely autonomous system are pure procedural justice. We discuss this possibility in the final section of this chapter. In its real-world approximations pure autonomy occurs in societies that are more or less equal when courts accept the inequality that exists and enforce rights and obligations accordingly. The important difference between the pure autonomy of cell 6 and the egalitarian justice of cell 5 is that in the former unlike the latter courts do not try to "correct" in deciding cases for the status disparities that persist in a more or less equal society.

There are two important differences between law in this cell and the formally autonomous law of cell 4. They both have to do with what it means for legal endowments to be differentially accessible. First, differential accessibility is a function of the rights that are extended. Thus the protections accorded private property are available only to those who own property in the first instance. This type of difference is tolerable in systems of both pure and formal autonomy. But in systems where autonomy is only formal, the degree of inequality is by

15. Reported by Professor Charles Alan Wright, a former clerk to Judge Clark, to a first year class in civil procedure at the Harvard Law School in the academic year 1964–1965. The quotation may be inexact and the precise date is forgotten. The rule was called by Professor Wright "Judge Clark's law." The occasion for the pronouncement was to avoid breaking up a dinner party when two law review students who were present proposed to retire to prepare for their insurance law exam. One can only imagine what the professor grading the exam must have thought when two of his students cited such a rule and attributed it to one of the country's leading judicial authorities on insurance law.

definition much greater than in systems of pure autonomy. Thus the enjoyment of rights and the burdens of duties are substantially more skewed by class in the formally autonomous system.

Second, differential accessibility is a function of one's ability to make a claim in court. Thus a property owner whose property is wrongfully repossessed to satisfy an alleged debt has no effective property right if he cannot hire a lawyer to object to the repossession and bring suit. State or private programs may, however, equalize people's access to court by establishing centers for informal justice or by paying for attorney's fees, court costs, and the like. Such subsidies do not improve the general position of a less well-off party, for they do not improve his social position or expand his stock of rights.¹⁶ But the subsidies make it possible for less well-off parties to claim in practice whatever legal rights are theirs in theory. Subsidized access to law is, we would argue, necessary to pure autonomy and antithetical to formal autonomy. In both types of systems inequalities may affect the arrangements that parties enter into, but where pure autonomy prevails there is a guarantee that the privately made arrangements will be enforced as such. In other words, social differences in a purely autonomous system affect the arrangements parties make between them and may systematically advantage the more powerful, but the advantage will stem from social power generally and not from superior access to the legal system.

This is why the funding of legal services to the poor is often such a hot political issue. Easy access to legal services threatens to transform a system of formal autonomy into one of pure autonomy or even egalitarian justice. This is no small redistribution of power. Pure autonomy like formal autonomy and egalitarian justice is part of the mix of law found in the modern welfare state. It is perhaps most prevalent in such common law fields as tort, property, contract law, and criminal law.

Substantive Justice

Cell 7 describes the law that arises when a legislature enacts laws directed toward particular goals, and the judiciary, responding to the same values that motivated the legislature, takes a substantively oriented stance toward the statutes. Although legislation can further almost any end a legislative majority approves of, we will focus on laws designed to reallocate benefits from the better off to the less well off and thus increase justice according to Rawls's difference principle. Where a court interprets such statutes with the legislature's redistributive ends in view, the scheme is what we call *substantive justice*.

For example, suppose a legislature enacts a public housing program designed to provide decent subsidized housing to poor people. Such programs commonly

16. Except, of course, by adding a right to legal services, but the value of this right depends entirely on the range of other rights that exist.

provide for a local housing authority that oversees the construction of housing projects and then rents apartments to low-income tenants. The housing authority might, as most authorities do, rent its units with a month-to-month lease that, in accordance with local landlord-tenant law, allows either party to terminate the lease on 30 days notice for any reason whatsoever. Suppose a tenant whose lease has been so terminated alleges that she is being discharged for her efforts to organize tenants into a union that can pressure the authority to act less like a bureaucratic landlord and more in the tenants' interests. Tenants' unions appear consistent with the goal of the statute, which is to improve the position of the poor in respect to housing; so if the woman is being evicted for attempting to found a tenants' union, the goals of the statute are being subverted. A substantively oriented court will read the Public Housing Act or more general principles of constitutional law as prohibiting the local authority from evicting the woman or acting in other ways that are inconsistent with the overriding goal of the statute even though neither source of law specifically addresses the issue and the Housing Act contemplates housing authorities that rely on local law to manage evictions [cf. *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969)].

When legislatures attempt to reallocate wealth to the needy and courts subscribing to the same ethic cooperate by reading reallocative statutes so as to maximally advance the interest of the intended beneficiaries, we have a system oriented to substantive justice. Of course, reallocations may flow in the opposite direction, for welfare-oriented endowments are not necessarily designed to enhance the welfare of the worst off. If they are not, and a judiciary that shares the legislature's values interprets the legislation in the light of those values, marked injustice as measured by Rawls's difference principle can result. The law as applied will tend to worsen rather than correct for existing inequalities.

In the extreme, there is the danger of going full circle and returning to cell 1. This will occur if the group that enjoys legislative ascendancy is during its period of triumph able to redistribute wealth sufficiently so that the condition of more or less equal influence that supports welfare-oriented endowments no longer pertains. What is more likely, however, is not the transformation of society that would occur if the legal system became overtly class-oriented, but the consistent exclusion of certain interests from legislative majorities, with the result that these minority interests are sacrificed to the majority's self-interested vision of the common good. For example, legislation might criminalize membership in the Communist party or make membership in the Communist party a basis for denying passports. When a court that shares the majority's values takes a substantive stance toward such legislation, we have what we may call unrestrained majority domination, or the tyranny of the majority. The dominated and dominating groups may or may not be identifiable social classes. If they are, domination is likely to be across many areas of social life. If they are not, domination may be along one dimension. In either case the possibility of majoritarian tyranny should alert us to the fact that even in a more or less equal society in which distributive justice is valued, the ideological argument for a substantively oriented judiciary is fraught with danger. If the political climate changes, the jurispru-

dential habits that are engendered by such a regime give courts a license to promote injustice.

Formal Justice

Just as cell 2 dampens the substantive tendencies that make law in cell 1 a force for tyranny, so can the formalism of cell 8 limit the justice enhancing effects of legislation that in cell 7 is a potent force for change. For example, in the case of the tenants' union leader we have just described, a formalistic court would not look to the political and ethical values that it shares with the legislature that enacted the public housing laws. Instead, the judge would look at the means or form by which the legislature sought to accomplish its end. The primary means was by creating local housing authorities to stand in the place of private landlords in renting apartments to poor people. Since the authorities take the form (legal category) of private landlords, a formalistic court might hold that they have the private landlord's right to evict anyone, tenants' union leader or inveterate troublemaker, so long as the statutory notice is given.¹⁷ Such a court would not attempt to look behind the law of *tenancies at will* to see whether, when applied to public housing tenants, it furthered the values that underlie public housing or the purposes of the public housing statute.¹⁸

17. Complexities arise if the legislative history or some other recognized guide to statutory interpretation spells out the social, political, or ethical values the law is designed to promote. If a court relies on such an aid—like a preamble that says the purpose of a statute is to provide better housing for poor people—to reach a conclusion regarding permissible grounds for eviction is it reasoning formalistically or substantively? The answer turns on the extent to which it is permissible to rely on such guides given the clarity of the legislative language and on whether the court is motivated by its interpretation of the language of the preamble and about its views of the weight such language should bear or whether it is motivated by some extralegal sense of where justice or wise policy lies. In other words, the court is reasoning substantively if it would reach the opposite decision if its values were different. We can, however, seldom know whether this is the case, so we are often unable to determine empirically, at least in individual cases, whether a decision is controlled by substantive or formal considerations. Often, however, when we look at a series of cases, consistencies or the lack thereof in the ethical content of decisions and the use made of statutory language or guides to interpretation allow us to identify some judges as being oriented more to formal justice and others as moved more often by substantive concerns. In addition, the formalistic judge will in the ideal case seek to reduce the implications of legislation to manipulable rights, duties, and other legal categories in the way we describe in Chapter 12.

The fact that we may not always be able to neatly label decisions as formal or substantive does not threaten the basic analysis advanced. The formalistic judge is still subjectively more constrained by legal language and categories with the restraints this implies than is the substantive judge. The fact that there is genuine debate about the weight that is appropriately given to various guides to statutory construction when statutory language is of varying clarity is one reason why a commitment to legal formality will not necessarily yield a unique decision. What will result, however, is a decision that reflects judgments about the weight to be accorded statutory language and various guides to interpretation rather than judgments about the most desirable outcome given some extralegal normative perspective.

18. It would, however, also consider constitutional requirements. A formalistic interpretation of the law and precedent might lead a court to conclude that the authority's actions were unconstitutional.

This does not mean that law in cell 8 cannot enhance justice in the sense we are using this term. It can to the extent that the legislature clearly mandates justice-enhancing redistributions. In the example we have been pursuing, hundreds of thousands of poor tenants who refrained from rocking the boat and did not ask of the authority more than it was willing to give would benefit from subsidized housing. However, the justice-enhancing aspect of the legislation would be limited by the forms the legislature chose to follow and the specific endowments that were given. For this reason we think of the law that results from the intersection of a formalistic stance toward law and welfare-oriented endowments as “formal justice.”

MIXED JUSTICE

We have often noted that the types we create in this book through cross-classification are ideal and may not be found in any actual system. In the instant case we think the different types of law may be identified—sometimes in their pure forms—in actual legal systems. However, no legal system is purely of one type. Instead, different stances toward law may be found within the bounds of a single legal system. Thus in Nazi Germany the law relating to the affairs of Jews may in its application have fit nicely into cell 1, but the law relating to contracts between Germans may have fit into cell 4 and in some instances into cell 5 or 6. In the United States one may argue that laws representing all the types we have defined exist now or at one time could have been found.

The Anglo-American legal system is, however, special in one respect. The institution of the jury guarantees that in wide areas of law tendencies toward judicial formalism will to some extent be counterbalanced by substantive tendencies. These tendencies need not, of course, reflect the substantive values that motivated the legislature. Consider, for example, the role that juries played in worker injury cases or the role that they continue to play in auto accident cases as discussed in Chapter 5. In these examples jury justice apparently advances the interests of the less advantaged parties. This is not necessarily the case. Recall that extralegal substantive concerns motivated southern juries in the 1950s and 1960s to acquit whites in the face of overwhelming evidence that they had beaten or killed black people.

The situation can be similar when judges interpret law. To simplify our discussion, we have thus far assumed that substantively oriented judges share the values that underlie legislative policies. This need not be the case, and institutional arrangements like lifetime judicial tenure work to ensure that a segment of the judiciary will not at any given point in time share the legislature’s values. Where values are not shared, a substantively oriented court may pronounce rules that are inconsistent with or even opposed to those of the legislative majority.

Yet there are limits on what a judiciary that does not share the legislature’s values can do to thwart the will of the majority, limits so substantial that one

of the leading students of the Supreme Court, Alexander Bickel (1962), was led to call the judiciary the "Least Dangerous Branch." Perhaps the most substantial limit is that courts ultimately do not command armies; they depend on the cooperation of the other branches for enforcing their orders. But this naked limit on the judiciary's power is seldom apparent, for courts almost never escalate conflicts with the other branches to the point that raw power is an issue. The judicial role ultimately demands deference to insistent political forces. This is because judges always purport to be applying laws that may be changed by nonjudicial processes. If the laws are sufficiently clear, a judge will almost always comply. Thus a substantively oriented court with values different from the legislature's may gut a statute by interpreting it to mean almost the opposite of what the legislature intended. Yet if the legislature reenacts the law to make its purposes inescapably clear, the court will usually enforce the revised law as written. Judges acknowledge the legislature's right to have the last word, and our respect for courts depends to some extent on this acknowledgment.

Within these limits, however, courts have substantial leeway to promote their own substantive agendas. A legislature may be deeply divided on an issue, and it may be impossible to get a majority to pass any new law. In these circumstances the judicial interpretation of a statute will stand whether or not it accords with the values of the majority that originally drafted and passed the law. Furthermore, judicial decisions, particularly when they appear to be a fair reading of the law and evidence, are accepted by many as legitimate and help shape the popular conception of where justice lies. Thus courts motivated by different values from those of the legislative majority may limit a statutory scheme by a formalist interpretation. Judicial formalism does not obviously advance the court's own values and, perhaps for this reason, seems to mute opposition that might exist if the court acted with specific reference to an antimajoritarian substantive agenda. Moreover, some judicial action may not be overturned by simple legislative majorities. This is most often the case when courts are interpreting constitutions that can be amended only by some supramajoritarian process. When the difficulties of overturning a court decision are coupled with an authoritative text so open textured that its various provisions can mean almost anything, a substantively oriented judiciary has the opportunity to pronounce binding rules that advance values quite different from those to which the majority of the moment subscribes. Such rules may be justice enhancing in the Rawlsian sense, or they may be just the opposite.

The issues that arise when courts, either through judicial lawmaking or under the guise of fact finding, respond to substantive concerns that differ from those of the legislature are fascinating, but we do not have the space to pursue them further here. The purpose of our brief introduction of these issues, together with our more extended general discussion of the qualities of different types of law, is to stress how important it is, in viewing any legal system, to study systematically the ways in which institutional arrangements affect how courts apply law and the social implications of law as applied.

THE PROSPECTS FOR CHANGE: RISKS AND GAINS

The American legal order, as we have just pointed out, is not a pure type. Yet some species of law are more predominant than others. In particular, over the past half century, especially with regard to the distribution of social and economic goods, the dominant tendency has been toward redistributive welfare-oriented laws. The new laws do not, however, all tend in the same direction. Some seem likely to increase existing inequalities, many seem designed to reduce inequality, and some seem aimed at improving the general interest with little attention to how welfare is distributed among groups or classes. Thus we have the Reagan “tax reform” of 1981 which left the wealthy better off relative to the poor than they had been previously. We have numerous transfer programs that like the food stamp program or public housing enhance the relative status of the poor. And we have programs like those regulating toxic dumps that appear to be in almost everyone’s interest.

The allocative aspect of legal rules has gained new prominence not only in areas like civil rights law, but in more mundane areas such as automobile accidents and worker’s compensation. It is a movement that from a Rawlsian perspective has mixed implications for social justice. It involves not only potential gains, but potential losses as well. In the final section of this chapter, we discuss some of the prospects and risks facing those who would use law as an instrument of social justice.

LEGAL ARRANGEMENTS: LAW AND THE ENDS OF JUSTICE

We saw in Chapter 9 that in John Rawls’s theory social justice is treated as a product of the arrangement of rules and institutions. What we have just been discussing is a set of such arrangements at the societal level. We call it the “legal system” and our ideal types have been designed to illustrate the themes that may predominate in particular societies at particular points in time.

Liberty Interests

To focus on the situation we know best, the American legal order as it is presently constituted comes fairly close to achieving the first principle of justice as defined by John Rawls. It secures a good deal of the basic individual liberties for citizens, both liberty of conscience and political liberty; and its legal institutions guard against the possible encroachments of a police state. The movement to enfranchise blacks which we examined in Chapter 11 removed what had been until recently the most glaring imperfection. But despite these virtues, the system is by no means perfect. One great danger to the equal distribution of basic liberties is, as Chapter 10 points out, the potential for economic inequality to encroach

on rights. A related danger is that the level of welfare in some segments of society is below the minimum needed for self-respect and meaningful political rights. Finally, there are still identifiable social groups, such as immigrant aliens, whose members lack full political rights.

The Trend Toward Equality

When we turn from liberty interests to equality interests and Rawls's second principle of justice, imperfections mount. The lack of a fair opportunity structure and large inequalities of welfare that are not justified by the difference principle are serious problems with which the legal order is just beginning to deal.

When a society is unequal to begin with, the move toward equality through law is problematic because, as we saw in Table 13.1, relative equality (as opposed to gross inequality) is necessary for both equally accessible general endowments and welfare-oriented endowments. The former tend to preserve a more or less equal status quo in which people rise and fall according to their ability rather than because of some ascribed status. The latter can take status into account, with the goal of eliminating status differences.

It might seem that the only way to achieve equality is through revolution rather than by law, yet the rise of modern welfare democracies tends to belie this. We shall not at this point attempt even a brief history of how this could happen, but a few speculations are in order.

To begin, the absolute wealth and power of those in the lower social ranks has increased substantially over the years and their aggregate power relative to the higher classes has almost certainly increased as well. Consider, for example, the implications of some well-known developments. The advance of capitalism created competition for labor, thereby increasing its value. Changes in the way warfare was conducted made the ability to conscript masses of men and hold their allegiance essential to military success. The development of specialized labor forces and a monetary economy opened up numerous opportunities for small businesses which could become independent bases of power. The possibility of migration to or within underdeveloped countries further increased the value of labor and allowed those who migrated to set themselves up as land-owning farmers or in businesses that served the growing farming class. Education, spurred by the value of an educated work force and literate consumers, added to the knowledge of the lower classes and made possible the widespread dissemination of ideas that threatened to mobilize them for concerted action. In short, the technological and social developments associated with the rise of capitalism not only destroyed the old system of feudal privileges, but it also dispersed power in society, creating a powerful bourgeoisie and a potentially powerful working class.

The increase in the aggregate power of the lower ranks and the demise of traditional dependency relationships made government more problematic. One option that took hold because it seemed to work was the attempt to establish

legitimacy. In the political arena this involved first giving leading citizens and then giving almost all citizens a role in government as electors. In the legal arena this involved regulation through apparently status neutral laws and judicial formalism, the result being a regime of formal autonomy. This as we have seen tends from a systemic point of view to preserve existing disparities, but it also allows both upward and downward mobility, and it permits those of lesser rank to stake out positions vis-à-vis the higher classes that are legally protected.

From this point the trend toward greater equality has been an iterative process. With increased power comes the ability to use force and the threat of force. In the United States labor no doubt benefited both from the costs they could inflict on industry and third parties through strikes and from the specter of European revolutions. The spread of the franchise without regard to wealth and the consequent competition for the voting allegiance of the less well off has also contributed. Promises have been made and kept to those on the lowest rungs of society. This in turn increases their power and gives force to demands for further improvements. The rise of modern Communist and Socialist states has kept the issue of class inequality at the forefront of the political process. Ideology has also been important. Although the mechanisms by which ideologies rise and flourish are poorly understood, the idea of equality has undoubtedly been a driving force in modern social life.¹⁹

This capsule description of some trends over several centuries may read as if we mean to suggest that we are in the midst of an inexorable movement toward increased equality in social life. This is not our conclusion. We should not be deceived by our ability to make sense of history. It is only in retrospect that trends appear inevitable. There is no guarantee that the patterns we describe will continue into the future.²⁰

19. Note that even if we have accurately described a general trend, it may still be the case that some groups have been left out, and that the general increase in social wealth has made them *relatively* less powerful and relatively poorer with respect to average levels of power and well-being in society than their counterparts were several centuries ago.

20. In particular, it is possible that material circumstances are less conducive to equality (including equal liberty) than they were a century ago. Modern weaponry makes the allegiance of the masses less important militarily than it was when fire power had a closer relation to the number of troops that could be mustered. They also make a military coup more of a threat and a popular revolt less of a threat to those who control power in modern states. Techniques of social organization and communication that give those who govern direct access to masses of people, as well as the government's ability to target threats to people, may make the need to maintain the general legitimacy of government less important than it once was. These techniques also allow governmental power to be further removed physically (the movement of power from local to state to federal government) and psychologically (the development of bureaucracy) from the people and in these senses may also tend to limit the power of the masses. If these speculations are sound, the structure of institutions, like democratic procedures for choosing those in power, and ideologies, like the ideal of equality, are increasingly important for maintaining the freedom we enjoy and for the future enhancement of social equality. To the extent that ideologies change or the workings of democratic processes allow tyrannical majorities to control the government, liberty and the advance of equality are accordingly threatened.

Law as an Instrument for Equality

Consider the situation of the United States. Considerable inequality exists and with it disparities of political and social power. Those on top have both the potential for disparate influence and incentives to resist changes that make them absolutely, and maybe even relatively, worse off. Indeed, they not only stand to gain from changes that do not give anything to the disadvantaged, but they may gain by exploiting the few goods the disadvantaged possess.²¹ How in such a society may law be used to open up opportunities for the worst off and otherwise increase their enjoyment of valued goods, actions that following Rawls, will be justice-enhancing so long as basic liberties are not sacrificed in the process.

Three conditions must be met if law is to be an effective force for increased equality in social life. First, the legal system must in large measure be insulated from the special pleadings of those who are better off. Second, legal norms must aim at reducing status differences and at transferring wealth and power from the better to the worse off.²² Third, such norms must be able to penetrate the existing socioeconomic structure and bring about the changes they aim at.

21. Other things being equal, in a society where one person has 10 units of absolute pleasure and another 5, one would expect the person on top to approve of a change that gives each person 11 units of pleasure. Consistent with this, it appears that movements toward increased equality fare best when the "pie" is increasing for all. However, at some point satisfactions may attach to differences in relative positions and the difficulty of judging absolute well-being may lead those on top to believe that increased equality is absolutely harmful. For example, in one affirmative action suit a white worker sought to overturn a plan that admitted black workers with less seniority to an in-plant craft training program ahead of him [*United Steelworkers v. Weber*, 443 U.S. 193 (1979)]. He probably felt that this effort to enhance interracial equality hurt him. Yet the in-plant program had been established because the local craft unions from which the company had previously recruited its craft workers had historically barred blacks thus precluding them from high-paying skilled positions. The white plaintiff was seeking to enhance his salary and position by getting into a program that would not have existed but for a history of discrimination against blacks. Clearly, he had not been made worse off by this development. Indeed, while blacks with low seniority were admitted to the in-plant program ahead of whites with greater seniority, whites were admitted separately according to their seniority. In the long run, the plaintiff would be made better off by the movement for enhanced equality because he would eventually have an opportunity that otherwise would not have existed. Nevertheless, the case he brought suggests he felt victimized by what had occurred. 22. An exception exists according to Rawls when these differences improve the lot of the better off. *Thus when we discuss the movement toward equality as justice-enhancing, we intend to implicitly include the limitation on movement toward equality implied by the difference principle.* It is our view that although some inequalities of wealth and status enhance the lot of the worst off, given our current starting point considerable movement toward equality may be accomplished without any necessary detriment to those on the bottom. The set of equality enhancing changes that the law must specially aim at and the ones we are most concerned with are those that narrow the gap between the rich and poor by simultaneously diminishing the advantages of the rich and increasing the well-being of the poor (cf. Rawls, 1971, p. 79). Particularly important are changes that diminish the access of the advantaged to positions of wealth and power by creating conditions of fair equality of opportunity that allow the disadvantaged to compete successfully for higher status positions.

Formal Autonomy. The first of these, the insulation of the legal system from the special pleadings of the better off is largely accomplished by a legal regime of formal autonomy. Formal autonomy, as we have seen, is characterized by differentially accessible general endowments coupled with a formalistic application process.

The move to formal autonomy from the more status-oriented legal systems of earlier years appears in retrospect to be a natural development for emerging capitalist societies. The switch from class-oriented endowments to general ones eliminated ancient privileges that stood in the way of economic development. The development of a formalist jurisprudence made the legal consequences of investments and trades predictable. The status neutral character of both general endowments and formalist jurisprudence lent legitimacy to the class system, for it made legal outcomes turn on the actions of organizations and individuals rather than on their social status.

In addition to these virtues, there are important ways in which formal autonomy promotes liberty. The hallmark of formally autonomous law is a system of basic rights, which are in principle enjoyed by all. So long as these rights are exercised in ways that respect the rights of others, the law does not constrain action. Nor is liberty constrained by uncertainty about what the law implies. The allocation of wealth and status is mediated not by governmental intervention but by market-like mechanisms that depend on individual choices rather than on collective decisions. This means that the legal system does not seek to reallocate welfare over individual objections. Quite to the contrary, some rights it creates, like the right to own private property, stake out areas of individual sovereignty, and other rights, like right to enter into contracts, open up areas for action by allowing people to plan more confidently for the future. To the extent that these rights involve basic liberties, formal autonomy preserves the core component of justice. Formally autonomous law cannot, however, reshape the status quo in the direction of increased equality. It makes only the "negative" contribution of limiting the extent to which law can be used to forestall tendencies toward equality rooted in other spheres.²³

Formally autonomous law extends rights equally to all individuals, but, as we pointed out when we first discussed formal autonomy, rights are useful only to the extent that one can take advantage of them. The right to own property is, for example, not worth much to a person who lacks the ability to acquire any. Indeed, it limits certain kinds of redistributions that might make people more equal since a corollary of the right is that the unconsented taking of property is theft. The example may be generalized. One aspect of being better off is being

23. Formally autonomous law is, in other words, more conducive to equality than a system of class-oriented endowments or one of illusory rights. Unlike class-oriented endowments, the differentially accessible general endowments associated with formal autonomy do not muster the state's power with the specific goal of maintaining or extending the advantages of the better off. And unlike systems of illusory rights, formally autonomous systems respect the legal entitlements the worse off are able to obtain even if this threatens the interests of persons of higher status.

better able to take advantage of the rights that formal autonomy extends to all.²⁴ Thus in an unequal society formal autonomy tends to reproduce the status quo or even to increase existing inequality.

The Transfer of Welfare. If law is to be an independent force for equality, it must recognize social differences and seek to eliminate them. This is the second of the three requisites we identified: Legal norms must aim at reducing status differences and at transferring wealth and power from the better to the worse off.²⁵ They must be redistributive welfare-oriented endowments. How is this state of affairs to come about? If we have an unequal society, why should the better off, who presumably have disproportionate influence in the law-making process, consent to laws that transfer welfare to those beneath them? These questions are, of course, not rhetorical, for thousands of laws that effect such transfers exist. Nor are the answers simple. Here we can only sketch some possibilities.

First, because it is most obvious, there are ideological elements. The Judeo-Christian ethic has an important egalitarian aspect, in that human differences pale before God, as well as an important charitable component. Helping the less well off is a Judeo-Christian virtue. In the United States this ideology energized redistributive efforts ranging from the localized poor relief programs that have existed in this country from colonial days onward to the movement to free the slaves which became a central cause of reform Protestantism during the first half of the nineteenth century. Complementing this ethic and, no doubt, related to it is a political culture, in which, as evidenced by the Declaration of Independence and portions of the Constitution, egalitarian themes have long been deeply embedded.

Also important is the ideology of formal law. Formal law is legitimating because it suggests that legal rights are equally available and that when people come to law, status differences do not matter. The more obviously false these propositions are, the less likely the law is to be accepted for its own sake, and the more likely it is that believers in the ideology will support corrective action.

The deficiencies in the formally autonomous model are especially glaring when the impoverished are unable to call on courts to enforce their rights or are unable to exercise their rights when called into court by others. The appeal of the formal autonomy is best revealed in the reception accorded steps taken to rectify these situations. On the criminal side, the Supreme Court decisions requiring the state to appoint counsel in felony [*Gideon v. Wainwright*, 372 U.S.

24. The better off are also ordinarily more able to avoid the duties that a regime of formal autonomy imposes on all.

25. At the point where transfers from the well off diminish the amount of goods available to the worst off, transfers, according to Rawls, should stop. This might happen, for example, if taxes were so high that skilled people had no incentive to do more than a minimal amount of work and everyone's standard of living dropped accordingly.

335 (1963)) and many misdemeanor [*Argersinger v. Hamlin*, 407 U.S. 25 (1972)] cases have caused virtually no controversy. Yet in comparison to the highly controversial exclusionary rule, the right to appointed counsel has, no doubt, cost the state considerably more money, and it has probably allowed more factually guilty people to escape conviction for the behavior with which they were charged. On the civil side, the federal government is currently spending more than a quarter of a billion dollars a year on legal aid to the poor. Most revealing was the outcome of the battle early in the Reagan Administration, which may be repeated in Reagan's second term, to eliminate the federal legal service program entirely. The administration appeared motivated by both a principled commitment to minimize redistributions²⁶ and the sense that empowering the poor to assert their legal rights hurt the interests of valued constituents and interfered with their agenda for government. That the administration's plan was thwarted largely due to the defection of conservative congressmen who would ordinarily support the administration testifies to the ability of an ideology to motivate action and to the general fit between the ideology of formal autonomy and conservative views of government.²⁷

A second reason why redistributive legislation gets passed which is less obvious than ideology but probably more important has to do with the nature of inequality in the United States and the character of political life. Inequality is not constant across all areas of social life, nor are the interests of the more advantaged uniformly antagonistic to those of the less well off. Equality is itself a relative matter.

For example, each black person's vote counts the same as each white person's vote. It is true that money counts in politics as it does elsewhere, but if the average black does not have much influence beyond his vote, neither does the average white. Thus blacks are probably more equal to whites in the political arena than they are in economic matters. Moreover, in systems of territorial representation the ability to aggregate votes within defined boundaries is crucial to a political voice. Blacks together with other relatively impoverished minority groups now dominate the political machines in many of the country's largest urban areas. With local domination there comes not only representation at higher

26. The widespread state funding of counsel in both criminal and civil cases is a relatively recent phenomena, yet the ideology of formal rationality and the realization that not everyone in fact had access to the courts or could perform effectively once in court has been around for a long time. This suggests that even if we are right about the importance of the ideology of formal autonomy in this area, the disparity between ideology and actuality was not sufficient to motivate change. What was missing until recent decades was the idea that the government had an affirmative responsibility for the well-being of individual citizens (cf. Sandalow, 1981).

27. The lobbying efforts of the organized bar were also important and perhaps essential in the struggle to save legal services. However, while the self-interest of the bar is obvious, the elites who supported the lobbying had little at stake personally. They were probably motivated by their professional commitment to formal autonomy. In arguing to the Congress, the theme of equal access to justice was one to which they constantly returned.

levels of government but also the obvious potential to swing state or even national elections. The end result is that relatively greater equality in the political sphere can lead to transfers that increase equality in economic and social life.

Also the monolithic nature of those on top can easily be overemphasized while the implications of conditions that cut across class lines are ignored. In the United States, for example, both major political parties are multiclass coalitions. Although the Democrats do much better with those at the very bottom of the socioeconomic scale and the Republicans are the predominant choice of those at the top, the Republican coalition now extends well into the ranks of the working class, and Jay Rockefeller, to argue by way of example, is a Democrat. In order to maintain coalitions like these, the parties must offer rewards to those on the bottom. The rewards may be largely symbolic, such as the support for school prayer which in recent presidential elections has helped tie fundamentalist Christians to the Republican coalition, but symbols will often not do. Instead, concrete rewards that can only be realized by transfers from the better to the worse off are necessary.

In this connection it is important to note that government transfers are not confined to the downward direction. Not all welfare-oriented endowments are aimed at enhancing the welfare of the worst off, nor do they all draw from the well-to-do. Minimum wage laws, as we pointed out in Chapter 10, transfer wealth from the least skilled workers whose labor is not worth the minimum wage to those slightly more skilled who receive more than a market wage because of the laws. The tax deduction for home mortgages, coupled with the failure to tax imputed rent, tends to transfer wealth from renters to homeowners, although the class of homeowners are clearly better off than the class of renters. What we call welfare payments, like AFDC, transfer money collected largely from the middle class to those closer to the bottom. Thus one reason laws that aim at increasing equality exist is that welfare-oriented endowments aim at all sorts of transfers. Given that the poor play a role in the political process, it is not surprising that they gain some benefits. Whether as a purely economic matter the most advantaged have a larger share of the country's wealth than they would have in a system without massive government transfers (assuming such a system were possible) is an empirical question that has not yet been satisfactorily answered.²⁸

Equality is, of course, more than economic. Perhaps the most important legal contributions to equality have aimed at equalizing political and social rather than economic well-being. The laws we focused on in Chapter 11 when we discussed the role of law in promoting racial equality are an obvious example. Other recent examples include laws designed to prevent discrimination against women, laws mandating that new construction accommodate the handicapped,

28. Indeed, it may be impossible to answer since there is no obviously correct way to allocate the benefits of certain governmental expenditures, like those for national defense, across classes. Does everyone benefit the same? Do the poor benefit the most because they are most likely to be cannon fodder? Or do the wealthy benefit disproportionately because they have the most to lose from a destructive war or invasion?

laws relating to the “mainstreaming” of handicapped children, and laws limiting compulsory retirement. The groups benefited by these laws illustrate our point that being disadvantaged in one area (e.g., age) does not mean that one is disadvantaged along some other dimension (e.g., wealth). The justice-enhancing character of such laws is obvious for they aim to increase liberty and self-respect.

Another part of the explanation for laws that redistribute wealth downward is that the classes that dominate society are often beset by cleavages, and some elements of the dominant classes may be natural allies or even champions of those who are worst off. For example, in the effort to increase racial equality regional cleavages between elites played an important role. Indeed, the Civil War is often attributed more to the socioeconomic conflicts that divided the North and South than to a northern passion to abolish slavery. The two flurries of civil rights legislations, one following the Civil War and the other in the 1960s involved statutes supported by northern elites who did not foresee that any of the interests they represented might be threatened by such laws. When northern interests were threatened, however, as in school busing cases, the quality of some laws changed dramatically. For example, instead of laws mandating greater efforts toward equality, legislation sought to limit court-ordered busing. The point is, of course, general. Some laws that redistribute welfare to the worse off can be explained by the fact that they do not run counter to or are in the interest of the more elite segments of society. We offer as a general hypothesis the proposition that people are not reluctant to distribute welfare downward when it is someone else’s welfare they are distributing.

Consideration of elite interests brings us to our last point. Generally speaking, wealth and status in society is distributed much like a pyramid with the base being considerably broader than the apex. Although those on the bottom individually lack power, their numbers may mean that in the aggregate they can mount a genuine threat to those above them. Welfare endowments that enhance equality may reflect neither ideological considerations nor cleavages in the upper ranks. Instead, they may reflect calculations rooted in self-interest. Thus the labor laws we discuss in the appendix to Chapter 6 might never have been passed had not bloody and sometimes successful strikes suggested that industrial peace was in the national interest. And, somewhat more speculatively, the money and attention given to urban ghettos following the riots of the mid-1960s probably stemmed in part from a desire “to keep the lid on.”²⁹

29. To the extent that sheer numbers count in the exercise of both raw power and electoral politics, it may be that the forces leading to laws that enhance equality are self-limiting. As more people move out of the lower ranks into a broad middle class, the power of those on the bottom and the momentum for further egalitarian redistributions are likely to diminish. In this connection it is interesting to speculate on the effects of the inflation of the 1970s. Without increasing people’s real wealth, it raised the dollar incomes of many people substantially and often placed them in higher tax brackets. By increasing the dollar disparity among those in the lower third of the country’s income distribution and increasing the burden that transfers to the very poor placed on those at the upper end of this “low budget” range, it may have broken up a broad coalition of interests and substantially reduced the political power of those at the very bottom.

This brief survey of reasons why law-making processes dominated by elites may yield a substantial body of redistributive legislation does not pretend to depth or completeness. It does, however, begin to explain why, in capitalist democracies, laws that aim toward increased equality are neither rare nor surprising events.

Problems of Implementation. This brings us to our third requisite for using law to enhance justice. The enactment of a law is not the same as its implementation. If norms that seek to redistribute welfare are actually to contribute to increased equality, they must be able to penetrate the existing socioeconomic structures and bring about their intended reforms. In the case of some laws this is not problematic. With direct transfers of the money, like the AFDC or food stamp programs, for example, an efficient mechanism, the tax system, is already in place for taking welfare from those who have it, and self-interest leads most people who qualify for aid to seek it.

When increased social, political, or certain types of economic equality are the goals, the problems of penetrating the socioeconomic structure are much greater. The Voting Rights Act, for example, was only the first step toward giving southern blacks real political power. The consistent, sympathetic attention of federal administrators and courts was needed to make legal provisions for federal registrars, federal poll watchers, and the preclusion of structural changes (from single member to multimember districts, for example) that might dilute black votes effective. The law, in other words, is not self-executing, but in the case of the Voting Rights Act it apparently worked as intended.

Efforts to integrate schools by legal fiat have had a different history, and success in many areas has been limited. In many northern cities integration meant the destruction of a few mostly white schools, large-scale busing, and a resulting system in which every school was predominantly black. When white parents responded by moving to the suburbs or sending their children to private schools, the legal system was unable to cope.

This is not to say that coping was in theory impossible. It is conceivable that a substantively oriented court might have enjoined the opening or expansion of private schools where this would tend to hinder integration, and cross-district busing that consolidated largely black inner-city school districts with white suburban ones at one time seemed to be the wave of the future. But ultimately formalism prevailed. The private school option was never constrained except in the limited sense that some private schools that discriminated against blacks were denied the right to a tax exemption. Cross-district busing was severely restricted by a formalistic view of district boundary lines and because an association was required between the locus of the wrong and the remedy. Anything other than formalism might, however, have provoked a clash between the courts, on the one hand, and the president and Congress, on the other, that the courts could never have won.

We offer these brief summaries of matters discussed earlier by way of example. Our intention here is not to develop a theory of legal impact. Instead,

we are concerned with the possibility that law may be used to enhance social justice. Note how far we have come. We have seen that removing society from law, as in systems of formal autonomy, is not a promising option unless society is equal to begin with, in which case formal autonomy melts into pure autonomy and we reach the Nirvana of maximal freedom, given the available goods, and pure procedural justice. We have also seen that laws that aim at increased equality can be enacted in an unequal society and enforced despite social resistance. The possibility for an iterative progression toward complete equality exists. If the groups on the bottom grow relatively more powerful, they should be able to demand more in the way of further equality. They will seek laws that give them more and a judicial system that acknowledges their interests.³⁰

Liberty and Equality

If the goal is social justice, however, a contradiction may arise. As you will recall from Chapter 9, liberty is given priority over equality in Rawls's (1971) scheme of justice. Equality-enhancing changes are not permitted if they infringe on basic rights. Yet when law gets into the business of redistributing welfare it necessarily curtails the freedom of some. Endowments are status-oriented rather than neutral, and if the redistributive effort is to be maximally effective courts must eschew formalism and consider the ends to be achieved by the norms they are enforcing. A regime of substantive justice that aims for social equality is required.

But such a regime conflicts with liberty interests. Rights in property are diminished, for people are not free to spend their wealth as they wish. Instead, resources are taken from some and given to others. In addition, freedom of association might be limited. To promote fair equality of opportunity, male-only clubs might be ordered open to women and private schools might be forced to integrate along with public ones. Liberties enhanced by the good faith interpretation of written law are also diminished as courts respond to extra legal status considerations.

Now these consequences might strike many as tolerable if equality would in fact be enhanced. Indeed, Rawls's scheme would allow some of them, because not all liberty interests are "trump" but only certain basic ones are. And one might argue that enhancing economic equality enhances the total system of liberty as well. But if true equality were the goal, law would have to do still more. Free speech might have to be suppressed, at least to the extent of banning any language that degrades any status group. People might have to be assigned to jobs, for discrimination in the workplace can be subtle indeed. Procedural formalism would disappear from the legal process because it could interfere with

30. Repression, however, is another possibility as those on the top seek to stop the gradual erosion of their advantages before it is too late.

doing justice. And even the ballot might have to go, for a majority might not vote for a regime that sought to impose equality through state action. Ultimately, the picture one gets is not one of pursuing equality through law, but of pursuing equality despite it. The rule of law, in other words, entails constraints on the state. The pursuit of total equality at some point requires their elimination.

Of course, the last scenario is farfetched. The pursuit of equality is unlikely ever to extend so far as to encompass our parade of "horribles." But this is only because of the extreme way in which we have stated these possibilities. In less extreme form all of them have occurred. To prevent the degradation of women, statutes barring pornography have been passed, even though some of the material the statutes seek to suppress has heretofore been considered protected free speech. Quotas have led to choices between job candidates on the basis of race. Courts have ignored or overridden established procedural rules to reach decisions based on litigant status. And the ballot was certainly rendered meaningless for many southerners who sought policies that would forestall integration. Some or even all of these actions may be justified, but the threats they pose to basic liberty interests must be acknowledged.

Here we come to the inescapable dilemma. Liberty and equality, which we take to be the two fundamental desiderata of justice, cannot be maximized simultaneously.³¹

Not only do statutes that attempt to make people more socially and economically equal threaten liberty interests, but the pursuit of more equal liberty in the long run may also seem to call for the destruction of liberties that are currently enjoyed. The tension between the demands of liberty and the ideal of equality is clearly visible when we examine alternative legal systems. Formal autonomy, which protects basic liberty, does so for much of the population only in theory or only in part. The right to vote is not worth much if the lack of bus fare keeps one from the polls. The right to enter into contracts is of little value

31. Rawls (1971), of course, recognizes this, for much of a *Theory of Justice* is devoted to the relationship between these two goods. When equality is equality of liberty it is required, but Rawls never adequately confronts the fact that achieving equal liberty may require that seemingly basic liberty interests be overridden. Rawls would probably allow such overriding because he would allow the sacrifice of some liberty for a greater, more equal liberty in the long run (pp. 247–248). However, Rawls's discussion is ambiguous because infringing on some liberties, like liberty of conscience, seems not to be allowed. Moreover, since one could always argue that a liberty interest was being infringed in the interest of greater long-run liberty, unless Rawls meant his concession to apply only where liberty interests were in immediate conflict or in a few limited circumstances, the right to destroy liberty in the interests of long-run liberty would in actuality be a way of circumventing liberty's priority.

When equality concerns the more material aspects of well-being, the priority of liberty is clear, but the situation is complicated by the ways in which equality in material goods contributes to more equal liberty. Rawls also touches on this issue in a way that is not completely satisfactory. He suggests that some minimal level of material well-being may be necessary to enjoy basic liberties, but the level seems truly minimal and the implications for equal liberty of the difference between those above the minimum and those far above it are not adequately addressed. See, however, Rawls (1982).

if a lack of bargaining power means that one must always accept the terms another has set. All the rights in the world may seem meaningless if one's child has perished from a disease that adequate medical care could have prevented. In an unequal society, formal autonomy by treating everyone as equal will place the state's power behind arrangements that keep some people in second-class status.

Substantive justice, on the other hand, need not be directed at increased equality, and when it is, liberty interests are almost certain to be infringed. To some extent such infringements will be offset by the greater ability of those who have been aided to enjoy the liberties they have. However, as the pursuit of equality continues, the balance is likely to shift.

The difficulty confronting those who wish to use law as an instrument of social justice is to do so in a way that retains those aspects of formal autonomy that guarantee valued freedoms of individual action. The task is to achieve fair equality of opportunity, open offices, and a distribution of welfare in which the only inequalities are those allowed by the difference principle. This requires redistributive welfare-oriented endowments and is more likely when such laws are interpreted by sympathetic substantively oriented courts. Yet the goal must be accomplished without sacrificing political and moral liberty. These are protected by the legal autonomy associated with general endowments and formalism.

Ultimately, we must turn from Rawls to ourselves in order to decide on the type of legal system we prefer. Rawls's judgment of how to value liberty and equality is just one of many possible balances that may be struck (Hart, 1973). We must think philosophically, for we must weigh competing values. And we must develop law and social science, because we need more detailed knowledge about how law relates to valued outcomes.