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AN ESSAY ON DISCRETION

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Few terms have as important a place in legal discourse as "discretion." Despite the importance of the term, however, those who use it do not agree on its meaning. It is universally accepted that discretion has something to do with choice; beyond this, the consensus breaks down.

If there is little agreement about the meaning of discretion, there is even less agreement about its desirability. Indeed, participants in the judicial process and observers of that process take a schizophrenic view of discretion. Sometimes they praise it and sometimes they execrate it. This article is an essay on the meaning of discretion, the conflicting attitudes people have toward it, and the reasons why their feelings about it will probably always remain ambivalent. Although this article primarily focuses on the law, the broader context is a political one, because discretion relates to the way that people interact with each other in a political context. Discretion involves power relationships and the ways that people work out these relationships in an ongoing political system.

I. AN ANALYTICAL FRAMEWORK

Two of the most important and useful discussions of discretion are those of Maurice Rosenberg[1] and Ronald Dworkin.[2] In the judicial context, Rosenberg distinguishes between primary discretion and secondary discretion.[3] Primary discretion arises when a decisionmaker has "a wide

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1. Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above,* 22 SYRACUSE L. REV. 635 (1971).

2. Dworkin, *The Model of Rules,* 35 U. CHI. L. REV. 14 (1967), *reprinted in* R. DWORKIN, TAKING RIGHTS SERIOUSLY 14 (1977).

3. Rosenberg, *supra* note 1, at 637.

range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decision process."[4] Used in this sense, discretion can mean simply that a person has the authority to decide. Courts, judges, and legal scholars often use the term discretion in this sense, referring simply to authority to decide, or unconstrained choice. For example, in his dissent in *Heckler v. Day*,[5] Justice Marshall declared: "Although Congress has delegated to the Secretary 'full power and authority to make rules and regulations and to establish procedures,' 42 U.S.C. § 405(a), that discretion is limited by the requirement that procedures be consistent with the Social Security Act . . . ."[6] Presumably, if the discretion had not been limited it would have been equivalent to the unconstrained authority to decide. Legal scholarship provides another example of this usage of the term discretion in Professor Westen's statement: " '[D]iscretion' means . . . an area within which the discretion-holder has authority to adopt, or not to adopt, whatever rule he deems fit."[7] When used in this sense, discretion is quintessentially associated with variability of result.[8]

Rosenberg contrasts the primary form of discretion with "the secondary form, [which] has to do with hierarchical relations among judges."[9]

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4. *Id.*

5. 467 U.S. 104, 120 (1984) (Marshall, J., dissenting).

6. *Id.* at 124. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), the Court had occasion to interpret the provision in the Administrative Procedure Act (APA) that prohibits judicial review of administrative actions "committed to agency discretion by law." 5 U.S.C. § 701 (1982). The Court adopted a statement in the Senate Report on the APA that this exception to judicial review "is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " *Overton Park*, 401 U.S. at 410 (quoting S. REP. NO. 752, 79th Cong., 1st Sess., 26 (1945)).

7. Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 642 (1983).

8. Nagel, *Discretion in the Criminal Justice System: Analyzing, Channeling, Reducing, and Controlling It*, 31 EMORY L.J. 603, 604-05 (1982). *See also* Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 363, 378 (1975). This approach is also taken by Kenneth Culp Davis, who declares that "[a] public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction." K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 4 (1969). Davis devotes much of his book to the question of how officials' discretion might be confined. *See also* K. DAVIS, POLICE DISCRETION (1975). Influential discussions of the possibility of narrowing the discretion of officials charged with the administration of criminal justice include A. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA (1981); McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972); and Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651. *See also* Williams, *Police Rulemaking Revisited: Some New Thoughts on an Old Problem*, LAW & CONTEMP. PROBS., Autumn 1984, at 123. For a skeptical view of whether the police can be compared to an administrative agency, see Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62 (1976); Allen, *The Police and Substantive Rulemaking: A Brief Rejoinder*, 125 U. PA. L. REV. 1172 (1977).

9. Rosenberg, *supra* note 1, at 637.

The secondary form of discretion

> enters the picture when the system tries to prescribe the degree of finality and authority a lower court's decision enjoys in the higher courts. Specifically, it comes into full play when the rules of review accord the lower court's decision an unusual amount of insulation from appellate revision. In this sense, discretion is a review-restraining concept. It gives the trial judge a right to be wrong without incurring reversal.[10]

In the limiting case, the choice made by a person exercising primary discretion is by definition the correct choice. The correctness of the choice cannot be attacked because there are no external criteria on which to base such an attack. When secondary discretion is involved, one can attack the correctness of a choice, although the authority of the person to make that choice may be beyond attack. Thus secondary discretion involves the authority to make the wrong decision. To illustrate secondary discretion, Rosenberg describes two famous incidents from college football.[11] In the 1940 Cornell-Dartmouth game, a confused official allowed Cornell a fifth down in which they scored to win the game. In the 1961 Syracuse-Notre Dame game, a Syracuse player fouled a Notre Dame player *after* Notre Dame had unsuccessfully attempted a field goal as the clock ran out in the fourth quarter. Once the player had kicked the ball, Notre Dame no longer had possession, so the penalty could not rightfully extend the game. Nevertheless, the officials gave Notre Dame another chance. This time the field goal kick was successful, and Notre Dame won 17-15. In both cases, everyone agreed that the officials were clearly wrong; but, in both instances, no redress for those errors was possible.

Rosenberg only uses the football examples to dramatize his point. He is concerned with the effect of secondary discretion on appellate courts' treatment of certain contested rulings of trial courts, particularly procedural rulings such as denials of motions for new trials. Naturally, in any hierarchically organized bureaucracy, there are limits to the amount of perverseness that superiors are prepared to tolerate in their subordinates. In practice, therefore, Rosenberg's secondary discretion—the authority to make wrong decisions—usually boils down to the authority to make decisions to which reviewing authorities will accord a presumption of correctness. The reviewing authority will intervene only if the initial decisionmaker *abused* his discretion.[12]

A cynic might contend, however, that Rosenberg's notion of secondary discretion merges with what he calls primary discretion when an

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10. *Id.*

11. *Id.* at 639-40.

12. Behind this linguistic formula, of course, lie the difficult questions: How perverse must the initial decision be before it will be said to be an abuse of discretion? And are there any objective criteria for deciding degrees of abuse?

inferior is given the authority to make wrong choices that cannot be overturned. There is no practical difference between the authority to make whatever decision one chooses and the authority to make decisions that will be enforced even if they are felt to be wrong. Indeed, primary and secondary discretion do sometimes seem to merge at the edges, but one clear distinction exists—different types of criticism can be leveled at decisions made under different types of discretion. Any decision, whether decided under primary or secondary discretion, can be criticized for such failings as being dumb, stupid, impractical, or counterproductive. But only decisions made through the exercise of secondary discretion can additionally be criticized as wrong. Obviously, in a legal context, this distinction assumes that one can determine the legally correct solution. Keeping this point in mind, let us approach the notion of discretion from Professor Dworkin's point of view.

Dworkin initially asserts flatly that "[t]he concept of discretion is at home in only one sort of context: when someone is in general charged with making decisions subject to standards set by a particular authority."[13] He then proceeds to identify two "weak" senses of discretion. In the first, "we use 'discretion' in a weak sense, simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment."[14] In the second, "we use the term in a different weak sense, to say only that some official has final authority to make a decision and cannot be reviewed and reversed by any other official. . . . Thus we might say that in baseball certain decisions, like the decision whether the ball or the runner reached second base first, are left to the discretion of the second base umpire, if we mean that on this issue the head umpire has no power to substitute his own judgment if he disagrees."[15] This second weak sense of the term "discretion" looks very much like what Rosenberg called secondary discretion.

Dworkin distinguishes these two "weak" senses of discretion from a "stronger" sense: "We use 'discretion' sometimes not merely to say that an official must use judgment in applying the standards set him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question."[16] Although this "discretion in a stronger sense" looks very much like what Rosenberg characterizes as primary discretion, it does not seem to fit within Dworkin's broader analytical scheme. A discrepancy exists between Dworkin's basic position that "[t]he concept of

13. Dworkin, *supra* note 2, at 32.
14. *Id.*
15. *Id.* at 32-33.
16. *Id.* at 33.

discretion is at home in only one sort of context: when someone is . . . charged with making decisions *subject to standards* set by a particular authority"[17] and his statement that when a decisionmaker has discretion in the strong sense he is "*not controlled by a standard* furnished by the particular authority" in question.[18] Dworkin of course is not saying that either of these hypothetical decisionmakers is beyond criticism. He recognizes that (almost) all decisions can be criticized.[19] Depending on the context, we might attack a particular decision as being dumb, irrational, unfair, malicious, or careless, but such criticisms are different from the criticism that those decisions failed to conform to a set of standards. The criticisms only become the same if by "set of standards" one means broad notions of rationality and fairness to which all people—and, by extension, all decisions—are subject. In that sense, all decisions are discretionary. But surely the notion of standards governing decisions would lose much of its utility if one defined "standards" so broadly.

Even if the criteria of possible criticism were much more concrete than vague notions of rationality and fairness, it might not be desirable to call all decisions discretionary. Consider, for example, the choice of a wife made by a man who attended a small, socially elite college, graduated first in his class at a major law school, and has associated with rich and fashionable people all his life. For years, this man confided to all his friends that the woman he married must be beautiful, intelligent, and, most importantly, rich. Suddenly, however, he decides to marry a plain, not exceptionally intelligent woman of humble background whose entire employment history consists of jobs in fast-food restaurants, and who is neither preguant nor thought to be pregnant at the time of the marriage. Observers could criticize this man's choice of a wife on the basis of various criteria. With such different backgrounds it is hard to imagine that the couple could have enough in common upon which to base a happy marriage. In addition, the choice of a wife who possessed none of the characteristics ostensibly sought is totally irrational in the absence of any evidence that the man has changed his value system. Still, we cannot say that this person abused his discretion, because he is not *accountable* to us. Although we may want to say that he has made the "wrong" decision, it was not a wrong to us. Admittedly, one of the subsidiary dictionary meanings of "discretion" is prudence or sound judgment,[20] and all human choice, especially the choice of a marriage partner, engages the exercise of prudence. But criticizing a person for acting imprudently or

17. *Id.* at 32 (emphasis added).
18. *Id.* at 34 (emphasis added).
19. *See id.* at 33-34.
20. *See* 3 A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 435 (1897).

indiscreetly, or for failing to show or exercise discretion, is not the same thing as criticizing him for abusing his discretion, or for making a decision that was beyond his discretion, or for claiming to have any discretion in the first place.

Only where there is accountability can we meaningfully speak of discretion in choice. Accountability, not the existence of standards, is the identifying feature of contexts in which discretion is "at home." In other words, the notion of discretion arises when some people are attempting to exercise power in a political context and other people are prepared, at least on occasion, to challenge these attempts.[21] Discretionary choices are sometimes, but not always, made in contexts in which there are fairly specific criteria or standards that we can use to judge the soundness of the choice; recall Dworkin's "strong sense" of discretion—the type of discretion Rosenberg calls "primary"—that by definition exists when there are no such standards. This absence of standards does not immunize a decision or the person who made it from criticism, including the criticism that the discretion has been abused. To distill the essence of this discussion of various types of discretion, we may say that discretion is "at home" in contexts in which people who are accountable in some way to others can expect to be subjected to criticism for the choices they make.[22]

Judges, by definition, make choices for which they are accountable.[23] So, of course, do other public officials, including legislators. According to the analysis thus far presented, it makes sense to say that all these officials exercise discretion. Nevertheless, the situation of the legislator seems different from that of the judge. Although the legislator is accountable to the persons who elected him, his range of choice is so great that it seems odd to describe legislative choices as discretionary.

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21. For the proposition that the notion of accountability requires the creation of discretion, see Pepinsky, *Better Living Through Police Discretion,* LAW & CONTEMP. PROBS., Autumn 1984, at 249. *Cf.* Allen, *Foreword, The Nature of Discretion,* LAW & CONTEMP. PROBS., Autumn 1984, at 1, 11 ("[C]hoice does not imply accountability even though it may imply responsibility."). Both of these pieces are part of a symposium on discretion, particularly police discretion, that was edited by Professor Allen.

22. Many people would qualify this statement by saying that discretion can only exist where there are at least two permissible choices that the decisionmaker can make. Discretion is not only authority, but also authority to choose, and choice implies alternatives. This qualification is unobjectionable, but I prefer to underplay it so as to avoid sterile inquiries into whether a person is exercising a discretionary function or a merely ministerial one. How confined a person's choices must be before they can no longer be said to have any element of discretion in them is a question not worth pursuing here. Even an official filling out a form, a function many would characterize as ministerial, can choose to use block or cursive letters, to write with a ballpoint pen or a fountain pen, and he might be criticized for his choice even if the form is not declared invalid.

23. Even members of final appellate courts make choices for which they are accountable. *See infra* notes 30-31 and accompanying text.

Identifying the difference between legislative choice and judicial choice is a difficult matter, and one that has received much critical attention.[24] I suggest that the distinction does not necessarily lie in the range of choice that is available to the decisionmaker. There are many legislative decisions that seem obvious and foreordained, just as there are many judicial decisions that are impossible to predict and that will be difficult to make. The difference between legislative and judicial choice lies rather in the range of criteria that are available to the decisionmaker for the making of his choices. No official has a totally unconstrained range of criteria of choice. The range of criteria to which different public officials may properly resort is dictated partly by the role played by each official[25] and partly by societal expectations. One can argue that judicial choices, no matter how difficult, must be made on the basis of a circumscribed set of criteria, whereas legislative choice may be based on a much more extended range of criteria. It might, for example, be unobjectionable for a legislator to take his fourteen-year-old daughter's advice about how to vote on an issue, but intolerable for a judge to decide a difficult case on the same basis.

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24. For twenty years Ronald Dworkin has been trying to express the difference between legislative decisions (or choices) and judicial decisions (or choices) by contending that in judicial decisionmaking there are (almost always) right answers to the questions presented for decision. This assertion has generated a vast literature, and Dworkin has made many revisions in his argument to meet the objections of his critics. Initially he attributed the rigor that he believed existed in legal decisionmaking to the existence of principles that supplied the answers when so-ealled legal rules were indeterminate on a matter or were determinate but conflicting. Dworkin, *supra* note 2, at 22-31. The "model of principles," however, could not serve the purpose prescribed for it unless there were some means of weighing the various principles, often inconsistent with each other, that might be brought to bear on a particular case. Since he could not produce such a weighting system, Dworkin then asserted that there are right answers even in difficult cases because the judge must (and presumably can) "find a coherent set of principles" that will justify "in the way that fairness requires" the decision in the case before the judge in light of the "institutional history" of a society's legal structures. Dworkin, *Hard Cases,* 88 HARV. L. REV. 1057, 1082-101 (1975), *reprinted in* R. DWORKIN, *supra* note 2, at 81, 105-23. Dworkin assumes that only in rare cases in advanced and complex societies will one set of principles, and the decision they justify, fail to provide a better fit with society's basic legal structure than a competing set of principles pointing to a different or even a contrary decision. Furthermore, when one of these rare cases arises, Dworkin asserts that courts should resort to what he calls "moral facts." Dworkin, *No Right Answer?,* 53 N.Y.U. L. Rev. 1, 24-25 (1978). These facts, in some way, proceed from moral and political theory and ultimately produce moral rights.

For a critical analysis of Dworkin's views, see G. CHRISTIE, LAW, NORMS AND AUTHORITY 8-9, 38-41 (1982), which contains citations to most of the more important critical comment that Dworkin's thesis has provoked. Greenawalt, *supra* note 8, specifically focuses on Dworkin's notion of discretion as applied to judicial reasoning. *See also* Greenawalt, *Policy, Rights, and Judicial Decision,* 11 GA. L. REV. 991 (1977). Dworkin, of course, continues to reformulate and reassert his thesis. *See* R. DWORKIN, LAW'S EMPIRE (1986); R. DWORKIN, A MATTER OF PRINCIPLE (1985).

25. *See* M. KADISH & S. KADISH, DISCRETION TO DISOBEY 15-36 (1973).

In addition to roles and societal expectations, countless other factors that are vague and indeterminate and that we cannot completely capture in a formalized system also circumscribe the decisionmaker's range of criteria.[26] Moreover, the procedures decisionmakers must employ and the form of the justifications they must give can limit the range of criteria as effectively as the considerations they are either directed or forbidden to take into account.[27] Nonetheless, the presence or absence of criteria for choosing is not what makes a choice a discretionary one. If people are accountable for their choices, they have discretion. If they are not accountable for their choices, then talk of discretion is out of place.

II. THE IRRESISTIBLE URGE TO NARROW THE SCOPE OF DISCRETION

Despite the inevitable omnipresence of discretion in any form of social organization, the existence of discretion in *other* people often creates a sense of unease. We feel uncomfortable with the idea that we will be bound by some other person's best judgment about what he ought to do, and we seek ways to constrain that person's exercise of his authority. Sometimes, however, the people to whom a decisionmaker is accountable are unable to exercise very much ongoing supervision of the decisionmaker's performance. A legislator, for example, is accountable to his constituents. But these constituents form an amorphous group, able to exercise their right to discipline their legislative representatives only at discrete intervals that may be separated by substantial periods of time. Under these conditions, the constituents can neither specify an exclusive, all-encompassing set of criteria for the legislator to consider in making choices nor enforce conformity to these criteria on a day-to-day basis. They must inevitably be prepared to accept relatively untrammeled decisionmaking from their legislative representative.

This is not to say that constituents are powerless. A well-organized group of constituents may be able to make it perfectly clear what the legislator must do regarding a particular issue, under pain of risking defeat should he seek reelection. In these matters the legislator's "discretion" is quite constrained. Nevertheless, legislators will generally have

26. Indeed, there is no necessary connection between the formalization of decisional constraints and the achievement of decisional restraint. That is, the effectiveness of decisional restraints is not a logical matter.

27. Joseph Raz usefully notes that normative systems, including legal systems, have not only first-order reasons for deciding what to do but also second-order reasons, such as rules excluding consideration of certain otherwise relevant matters in reaching decisions. *See* J. RAZ, PRACTICAL REASON AND NORMS 35-48 (1975). As noted above, however, I am making the broader point that restraining choices in a legal system is more than a matter of applying logical constraints. *See supra* note 26.

comparative freedom of decision over a wide area. The vast range of questions over which legislative choices must be made, coupled with the constituents' inability to exercise close supervision,[28] may account for the feeling that legislative choices are so open-ended that perhaps they should not be described as instances of discretion at all.[29]

Admittedly, final appellate courts are not subject to the close supervision of superior authorities either, and many people would say that such courts have the ability to make choices that are almost as wide-ranging as those of a legislature. Still, there are some special constraints that apply to judicial choices. A legislature may "overrule" judicial decisions.[30] Moreover, judges, as members of an elite profession, are subject to the expectations of their coprofessionals. These expectations influence judges' perception of their role in a way that affects their decisionmaking.

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28. The closeness of supervision is a matter of degree, of course, and constituents are not the only source of effective controls over legislators. In some political systems, party discipline can be a very effective form of supervision and control. Even in a body like the United States Senate, the need to make legislative accommodations and to operate within the seniority system of the committee structure can often be very effective restraints.

29. In an interesting recent paper, Professor George P. Fletcher distinguishes between discretion and prerogative. *See* Fletcher, *Some Unwise Reflections About Authority,* LAW & CONTEMP. PROBS., Autumn 1984, at 269, 281-83. Examples of the exercise of prerogative would be presidential decisions to pardon, to appoint someone to the Supreme Court, or to veto congressional legislation. According to Professor Fletcher, no criteria govern the decisional choice in these cases. (As already noted, I do not think one can make a sharp distinction between those choices subject to criteria of choice and those subject to no such criteria. There are possible criteria governing all choices, if only personal consistency.) Fletcher's interesting analysis is based on identifying four uses of the term discretion: discretion as the exercise of wisdom, discretion as the exercise of managerial authority, discretion as the injection of personal input into the decisionmaking process, and discretion as the exercise of power. *Id.* at 276. The first two uses Fletcher characterizes as traditional; the second two, as modern usages of which he is critical. Fletcher sees legal decisionmaking on substantive matters, as opposed to procedural or managerial rulings, as not being discretionary at all because, when challenged, the decisionmaker must justify his decision; and that justification can neither be the flat statement "It was my best judgment," nor can it be "I had the power to do what I did." In other words, the existence of governing legal rules, while not negating either wisdom, authority, personal input, or power, nevertheless make a court's decisional process one that is neither discretionary nor the exercise of power. Strongly implicit in Fletcher's assertion is the assumption that it is always at least theoretically possible to resolve substantive legal disputes—that there is, in short, "a right answer."

30. In the Portal to Portal Act of 1947, ch. 52, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 251-262 (1982)), Congress retroactively overruled, and withdrew federal court jurisdiction over, cases seeking to implement Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); Jewell Ridge Coal Corp. v. Local No. 6167, 325 U.S. 161 (1945); and Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944). Those cases construed the Fair Labor Standards Act of 1938 in a manner so as to impose huge potential liabilities upon employers. Between July 1, 1946 and January 1, 1947, almost six billion dollars worth of claims were filed. The constitutionality of the Portal to Portal Act was upheld by a host of lower federal courts. *See, e.g.,* Battaglia v. General Motors Corp., 169 F.2d 254, 259 (2d Cir.), *cert. denied,* 335 U.S. 887 (1948).

For a British example, see the War Damage Act of 1965 (1965, ch.18), *overruling* Burmah Oil Corp. v. Lord Advocate, 1965 App. Cas. 75 (1964) (Scot.).

The stylized ways in which judges are required to justify their decisions also impose some limitations on the decisions they can make.[31] Finally, insofar as the procedural requirements for instituting litigation circumscribe the ability of people to seek judicial decisions, the opportunities for courts to exercise wide-ranging and unconstrained discretion will be limited. Nevertheless, I would certainly concede that lack of effective close supervision of judges or of other decisionmakers will inevitably lead to the exercise of, and our toleration of, a wider range of choice by people like judges who are ostensibly accountable to us.

The converse of this axiom is of course equally true. The more capable we feel of closely supervising people ostensibly accountable to us, the more likely we are to try to exercise that supervision by curtailing the range of choices available to those people.[32] We may try to exercise that supervision by specifying the criteria that the decisionmaker must take into account in making choices, or, less ambitiously, we may specify criteria that a decisionmaker is prohibited from considering but otherwise leave the choice of criteria to the decisionmaker. We can also arrange for the supervision of decisionmakers by requiring the prompt reporting of decisions so as to give a higher authority the opportunity to reverse the decision of a subordinate decisionmaker. In the typical case, of course, a combination of methods will be used.[33]

In discussing appellate courts' control over exercises of discretion by trial courts, Rosenberg notes that the "ultimate type of [an] unreviewable trial court order is the judge's declaration of a mistrial in a jury case."[34] As Rosenberg succinctly puts it, "[s]ince no appellate court can put Humpty Dumpty together again once the jury has been discharged and has disbanded, the trial court's decision is immune to appellate reversal for any ground or on any basis."[35] That is, although trial courts may be accountable to appellate courts, appellate courts are unable to do anything about some of the choices trial courts make.

But where accountability is joined with effective power in the superior body, the situation is markedly different. Rosenberg notes a number

31. *See* Christie, *Objectivity in the Law,* 78 YALE L.J. 1311, 1312 (1969).

32. Although this article is primarily concerned with discretion as it appears in judicial contexts, the operation of the axiom that the perceived ability to control inevitably leads to attempts to control is not confined to judicial contexts. The War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1982), is a classic illustration of the operation of the axiom in a political context. *See* Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution.* 133 U. PA. L. REV. 79 (1984). Nor can anyone deny that the revolution in communications inevitably leads to attempts by supreme decisionmakers, whether Presidents or the Fuehrer of the Third Reich, to control even the operational decisions of their subordinate military commanders and diplomatic representatives.

33. *See supra* note 8 (discussing methods of limiting discretion) and note 27.

34. Rosenberg, *supra* note 1, at 650.

35. *Id.*

of instances in which appellate courts accepted trial courts' so-called discretionary decisions while intimating that they did not agree with them,[36] but he also notes other instances in which appellate courts intervened on the ground that the trial court had "abused" its discretion, even in the absence of express criteria supposedly governing purported exercises of discretion.[37] One has the impression that something rather quixotic is happening. Many of the cases are hard to explain. All one can say is that appellate courts will sometimes use the power they have over trial courts to second-guess them. When they will and when they will not very often seems rather subjective.

Accountability to a superior authority conjoined with power in the superior authority to intervene thus often leads to reviewability, even when the decisions being subjected to review are said to have been "discretionary." But the urge to restrict the scope of discretion can also lead to review in cases where the superior authority simply has power, and no accountability has previously been thought to exist. Consider, for example, the use of peremptory challenges to strike prospective jurors from the venire. Traditionally, counsel have not been accountable for their exercise of peremptory challenges.[38] As one court has remarked, "[w]hen peremptory challenges are subjected to judicial scrutiny, they will no longer be peremptory."[39] Since 1965, however, courts have increasingly used their power to control the exercise of peremptory challenges, thus eroding an area of decisionmaking formerly within the exclusive province of counsel.

In *Swain v. Alabama,*[40] decided in 1965, the Supreme Court held that an individual could not judicially challenge a prosecutor's use of peremptory challenges to keep blacks off a jury in a particular case. The Court so held despite a record indicating that, at least since about 1950, no black had ever served on a petit jury in Talladega County even though the venires had included, on the average, six or seven black members.[41] Justice White, writing for the Court, declared: "The essential nature of

36. *Id.* at 647-49, 651.

37. *Id.* at 649-50, 652-53.

38. A good brief history of the ancient pedigree of peremptory challenges is contained in the Supreme Court's opinion in Swain v. Alabama, 380 U.S. 202, 212-19 (1965). Peremptory challenges seem to be as old as trial by petit jury. Trial by petit jury came to be the established method of trying criminal cases in the period after 1215 when the Fourth Lateran Council condemned trial by ordeal, and, as a consequence, the ordeal was abolished by royal decree in 1219. *See* J. SMITH, DEVELOPMENT OF LEGAL INSTITUTIONS 184-97 (1965).

39. Neil v. State, 433 So. 2d 51, 52 (Fla. Dist. Ct. App. 1983), *rev'd,* 457 So. 2d 481 (Fla. 1984) (holding that demonstrated discriminatory use of peremptory challenges may be subject to judicial scrutiny and use of new jury pool for voir dire).

40. 380 U.S. 202, 221-22 (1965).

41. *Id.* at 205.

the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[42] If the state itself had been responsible for excluding blacks from serving on petit juries in Talladega County, the Court noted that it might have intervened, but the record did not support the inference that the prosecution was solely responsible for this state of affairs or that the prosecution was "bent on striking Negroes, regardless of trial-related considerations."[43] The dissenters disagreed; they thought that a sufficient showing of systematic exclusion had been made.[44]

Most state courts followed *Swain.*[45] But some state courts, beginning with California in *People v. Wheeler,*[46] were prepared to intervene. In *Wheeler,* the California Supreme Court held that, although a California statute defined a peremptory challenge "as one for which 'no reason need be given' . . . it does not follow therefrom that it is an objection for which no reason need *exist.*"[47] The court proceeded on the basis that the purpose of all challenges, whether peremptory or for cause, was to enable a party to exclude jurors on the basis of "specific bias." The court then went on to rule that, even if there is such a phenomenon as group bias, it is improper to exclude potential jurors on this basis. To do so would undermine the requirement that a jury should be a representative cross-section of the community. The California court stated that the decisions

42. *Id.* at 220.

43. *Id.* at 226-27.

44. *Id.* at 233-35 (Goldberg, J., dissenting).

45. *See, e.g.,* Howard v. State, 278 Ala. 361, 364, 178 So. 2d 520, 522 (1965); Brown v. State, 239 Ark. 909, 923, 395 S.W.2d 344, 353 (1965), *cert. denied,* 384 U.S. 1016 (1966); Brookins v. State, 221 Ga. 181, 184, 144 S.E.2d 83, 88 (1965); Collins v. State, 88 Nev. 168, 170, 494 P.2d 956, 957 (1972); State v. Rochester, 54 N.J. 85, 90, 253 A.2d 474, 477 (1969); Commonwealth v. Anderson, 302 Pa. Super. 457, 464, 448 A.2d 1131, 1135 (1982); McKissick v. State, 49 Wis. 2d 537, 542, 182 N.W.2d 282, 285 (1971).

46. 22 Cal. 3d 258, 277, 583 P.2d 748, 760, 148 Cal. Rptr. 890, 903 (1978) (Mosk, J.). *See also* State v. Neil, 457 So. 2d 481, 487 (Fla. 1984); People v. Payne, 106 Ill. App. 3d 1034, 1036-37, 436 N.E.2d 1046, 1054 (1982), *rev'd,* 99 Ill. 2d 135, 457 N.E.2d 1202 (1983); Commonwealth v. Soares, 377 Mass. 461, 484, 387 N.E.2d 499, 514, *cert. denied,* 444 U.S. 881 (1979); State v. Gilmore, 199 N.J. Super. 389, 401-03, 489 A.2d 1175, 1181-83 (1985), *aff'd,* 103 N.J. 508, 511 A.2d 1150 (1986); *cf.* State v. Davis, 99 N.M. 522, 523-24, 660 P.2d 612, 613-14, *cert. denied,* 99 N.M. 578, 661 P.2d 478 (1983). A similar New York appellate division decision, People v. Thompson, 79 A.D.2d 87, 96, 435 N.Y.S.2d 739, 752 (1981), was seemingly overruled *sub silentio* in People v. McCray, 57 N.Y.2d 542, 549-50, 443 N.E.2d 915, 918-19, 457 N.Y.S.2d 441, 444-45 (1982), *cert. denied,* 461 U.S. 961 (1983). McCray raised the issue in a habeas corpus proceeding in federal court and this time succeeded on sixth amendment impartial jury grounds. McCray v. Abrams, 750 F.2d 1113, 1131 (2d Cir. 1984), *cert. granted and judgment vacated,* 106 S. Ct. 3289 (1986). The Second Circuit's approach was followed in Booker v. Jabe, 775 F.2d 762, 766-67 (6th Cir. 1985), *cert. granted and judgment vacated sub nom.* Michigan v. Booker, 106 S. Ct. 3289 (1986), but rejected in United States v. Leslie, 783 F.2d 541, 549 (5th Cir. 1986) (en banc), *petition for cert. filed,* 54 U.S.L.W. 3811 (U.S. Apr. 19, 1986) (No. 85-1961).

47. *Wheeler,* 22 Cal. 3d at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901.

imposing this requirement often share an unstated rationale: that the diverse viewpoints and deep-rooted biases of members of different groups will somehow cancel each other out, and only in this way will the goal of an impartial jury be achieved.[48] To ensure, therefore, against the use of peremptory challenges to exclude for group bias, the court held that, if a party makes out a prima facie case of the improper use of peremptory challenges,[49] "the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone."[50] The court declared:

> The showing need not rise to the level of a challenge for cause. But to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or

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48. *Id.* at 266-67, 274-77, 583 P.2d at 754-55, 760-62, 148 Cal. Rptr. at 897-98, 901-03. One of the authorities upon which the California Court relied was the plurality opinion of Justice Marshall in Peters v. Kiff, 407 U.S. 493 (1972), a case which involved the question whether a white defendant could object to the total exclusion of blacks from grand and petit juries. The cancelling-out argument is related in Commonwealth v. Soares, 377 Mass. 461, 480-81, 486-89, 387 N.E.2d 499, 512, 515-16, *cert. denied,* 444 U.S. 881 (1979). *See also* State v. Gilmore, 199 N.J. Super. 389, 404, 489 A.2d 1175, 1183-84 (1985), *aff'd,* 103 N.J. 508, 511 A.2d 1150 (1986).

The suggestion that only the cancelling out of the divergent group-based biases of the various jurors will enable the jury to arrive at an impartial verdict is superficially and misleadingly reminiscent of a point made in Aristotle's *Politics:*

> The many, of whom each individual is but an ordinary person, when they meet together may very likely be better than the few good . . . just as a feast to which many contribute is better than a dinner provided out of a single purse. For each individual among the many has a share of virtue and prudence, and when they meet together, they become in a manner one man, who has many feet, and hands, and senses . . . . Hence the many are better judges than a single man of music and poetry; for some understand one part, and some another, and among them they understand the whole. . . .

10 THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH 1281a43-1281b10 (W. Ross ed., B. Jowett trans. rev. ed. 1921).

Aristotle's point is not that the prejudices of the various members of the collective will cancel each other out, but rather that, if each member of a collective contributes his best qualities, the collective may well produce a judgment that is superior to that of a single individual, however eminent and virtuous that individual might be. This conclusion follows from the more basic epistemological position expressed in Aristotle's *Metaphysics:*

> The investigation of the truth is in one way hard, in another easy. An indication of this is found in the fact that no one is able to attain the truth adequately, while on the other hand, we do not collectively fail, but every one says something true about the nature of things, and while individually we contribute little or nothing to the truth, by the union of all a considerable amount is amassed.

8 THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH 993a30-993b3 (W. Ross ed. & trans. 2d ed. 1928).

49. One makes out a prima facie case by showing "a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." *Wheeler,* 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. This may be done, inter alia, by showing either that one party "has struck most or all members of the identified group . . . or has used a disproportionate number of his peremptories against the group . . . [or] that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole." *Id.*

50. *Id.* at 281, 583 P.2d at 764-65, 148 Cal. Rptr. at 906.

> witnesses—i.e., for reasons of specific bias . . . . And again we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.[51]

Both California, in *Wheeler,* and subsequently Massachusetts, in *Commonwealth v. Soares,*[52] expressly stated that the forbidden use of peremptory challenges to challenge jurors on the basis of group bias applied to more than just racial groups. In *Wheeler,* the court refers to "persons . . . being challenged because of their group association" but, beyond noting that the case before it involved blacks, the court refused to state what might be a cognizable group for that purpose.[53] In *Soares,* the Supreme Judicial Court of Massachusetts spoke of "discrete groups" and declared that the equal rights amendment of the state constitution was "definitive, in delineating those generic group affiliations which may not permissibly form the basis for juror exclusion: sex, race, color, creed or national origin."[54] The Florida Supreme Court took a different position in *State v. Neil,*[55] which limited the group bias prohibition to challenges "solely on the basis of race." Almost all courts that have interpreted their state constitutions to permit restrictions on the exercise of peremptory challenges have declared that the ability to challenge the use of peremptory challenges resides in the prosecution as well as in the defense.[56]

The Supreme Court finally created a federal right to challenge the use of peremptory challenges in 1986. In *Batson v. Kentucky,*[57] the Court held that the equal protection clause of the Constitution requires

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51. *Id.*

52. 377 Mass. 461, 387 N.E.2d 499, *cert. denied,* 444 U.S. 881 (1979).

53. *Wheeler,* 22 Cal.3d at 280 n.26, 583 P.2d at 764 n.26, 148 Cal. Rptr. at 905 n.26. Although it is not yet clear what groups are cognizable under *Wheeler,* the Supreme Court of California has ruled that ex-felons and resident aliens are not cognizable groups. *See* Rubio v. Superior Court, 24 Cal. 3d 93, 99, 593 P.2d 595, 599, 154 Cal. Rptr. 734, 738 (1979). The court conceded that members of both groups could be said to have had experiences which would "unify the group by giving its members a shared perspective on life in our society." *Id.* at 99, 593 P.2d at 598, 154 Cal. Rptr. at 737. But it concluded that ex-felons and resident aliens shared the respective perspectives of ex-misdemeanants and naturalized citizens. Since the latter groups were eligible for jury duty, the court refused to recognize the former groups as cognizable under the *Wheeler* doctrine. *Id.* at 99-100, 593 P.2d at 599, 154 Cal. Rptr. at 738.

54. *Soares,* 377 Mass. at 488-89, 387 N.E.2d at 516. The court noted that, if the prosecution's contention that the defense used its peremptory challenges to strike all veniremen of Italian descent were established, the defense's actions would "fall within this area of prohibited practice." *Id.* at 489-90 n.35, 387 N.E.2d at 517 n.35.

55. 457 So. 2d 481, 486 (Fla. 1984).

56. The only state case that talked exclusively in terms of challenges by the prosecution was People v. Thompson, 79 A.D.2d 87, 88, 435 N.Y.S.2d 739, 742 (1981), but, as noted previously, that case appears to have been overruled *sub silentio* by People v. McCray, 57 N.Y.2d 542, 549, 443 N.E.2d 915, 919, 457 N.Y.S.2d 441, 445 (1982), *cert. denied,* 461 U.S. 961 (1983), which refused to adopt the *Wheeler-Soares* position.

57. 106 S. Ct. 1712 (1986).

courts to entertain attacks upon a prosecutor's use of peremptory challenges to remove members of "a cognizable racial group"[58] from a jury panel. If the defense can show that the fact of exclusion and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude veniremen because of their race, the prosecutor must come forward with a neutral explanation. That "explanation need not rise to the level justifying exercise of a challenge for cause," but it may not consist of the "assumption" or "intuitive judgment" that the veniremen struck "would be partial to the defendant because of their shared race."[59] Unlike most of the state courts that have considered the question, the Court restricted itself to ruling upon the prosecution's use of peremptory challenges and to the situation where the defendant and the persons struck were of the same race.

In attempting to control the use of peremptory challenges, courts have set forth three recognizable goals. All three are related to the concept of fairness. One goal is to secure an impartial jury by selecting jurors whose varied and disparate group biases will cancel each other out. Another is to eliminate resort to stereotypes in juror selection. A third is to use procedures in criminal trials that the public will perceive as being fair. Laudable though these motives may sound, it is doubtful whether judicial control of peremptory challenges helps to attain these goals, and there are costs that accompany the attempt to achieve them.

The first suggested goal that courts may hope to attain through control of peremptory challenges is the selection of an impartial jury. Insofar as seating jurors of countervailing group-shared biases is thought to yield an impartial jury, it would seem that the more varied and disparate the group biases of the jurors, the better. But seating a group of wildly assorted jurors with no shared perspectives may result in a total impasse. As one perceptive criticism of the state court decisions rejecting *Swain* has noted, one basic function of a jury is to agree,[60] especially when unanimous verdicts are required. It would be foolish to make extraordinary efforts to impanel juries whose internal dynamics would make hung juries more likely, particularly when there is no reason to believe that the presence of a clash of diverse social perspectives necessarily enhances the ability of juries to arrive at correct decisions.[61]

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58. *Id.* at 1722-23.

59. *Id.*

60. Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation,* 41 MD. L. REV. 337, 354-55 (1982).

61. Aristotle suggests that collective judgment may be superior to individual judgment not because opposing biases will cancel each other out, but rather because the contribution of each individual's best qualities may permit a collective judgment to be superior even to the judgment of the most gifted individual. *See supra* note 48.

The second suggested goal of courts in controlling peremptory challenges is the reduction of reliance on stereotypes.[62] But the solution proposed in *Wheeler, Soares,* and *Batson* does not eliminate the resort to stereotypes. Given the limited time and resources available for examining venire members, the parties must resort to stereotypes. *Wheeler, Soares,* and *Batson* merely attempt to prevent resort to one stereotype—race—or at best some few stereotypes. There is, however, no logical reason to focus only on these few stereotypes; it is not at all clear that race, gender, or national origin are more important than groupings based on educational level, economic class, or physical disability. Moreover, *Wheeler, Soares,* and *Batson* do not preclude counsel's ability to rely on even those group associations recognized as suspect. In order to maintain a distinction between peremptory challenges and challenges for cause, courts require only that counsel be able to articulate a "reasonable" or "bona fide" basis for using a peremptory challenge against a member of a suspect group.[63] It has been suggested that this standard may be easy for counsel to satisfy with manufactured reasons and that, if the attempt to articulate an acceptable reason is not immediately successful, counsel may still be able to argue that the attempt to state a reason has so antagonized the prospective juror that this antagonism alone now justifies unseating the juror.[64]

The third goal of courts in controlling peremptory challenges is to use procedures in criminal trials that the public will perceive to be fair. Arguably the use of peremptory challenges to remove prospective jurors belonging to certain groups destroys the public belief in the legitimacy of the trial process.[65] The problem is particularly acute in states that allow

62. To rephrase the matter in the language normally used in discussions of discretion, the courts are attempting to impose a looser form of control in which certain reasons, such as race, are to be excluded from the consideration of the decisionmaker. *See supra* note 27 and accompanying text.

63. The court in *Wheeler* declared that counsel must present the court with "bona fide reasons" to rebut a prima facie showing of the improper use of peremptory challenges. *Wheeler,* 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906. This passage was quoted with approval in *Soares,* 377 Mass. at 491, 387 N.E.2d at 517. *See also Batson,* 106 S. Ct. at 1723 (state must "come forward with neutral explanation").

64. *See* Younger, *Something New Under the Sun: Unlawful Peremptory Challenges,* 21 JUDGES J., Winter 1982, 27, 55-56 ("[C]ountering a defendant's *Wheeler-Soares* objection takes only articulateness.").

65. *See Wheeler,* 22 Cal. 3d at 267 n.6, 583 P.2d at 755 n.6, 148 Cal. Rptr. at 896 n.6, *quoted with approval in Soares,* 377 Mass. at 480 n.18, 387 N.E.2d at 512 n.18. *Cf. Batson,* 106 S. Ct. at 1724 ("In view of the heterogeneous population of our nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.").

large numbers of peremptory challenges.[66]

Whether following the lead of cases like *Wheeler* and *Soares* leads to either fairness or the appearance of fairness is an open question. Suppose a black male accused of raping a black female wanted to use his peremptory challenges to remove black females from the jury. Would he consider the procedure fair if he were not permitted to do so? One cannot remove this problem by only attempting to control the prosecution's use of its peremptory challenges. It does not lead to public confidence in the fairness and legitimacy of a criminal trial if a defendant is able to pack a jury with people whom the public believes are most likely to acquit the defendant.[67] This is undoubtedly why most courts that have attempted to control the use of peremptory challenges have refused to limit only the prosecution's use of them. In his concurrence in *Batson,* Justice Marshall argued that it would be unfair to regulate only the prosecution's use of peremptory challenges. His proposed solution was to abolish all peremptory challenges.[68] This position has some logical force, but it re-

66. In California, for instance, each side in a capital case has twenty-six peremptory challenges. CAL. PENAL CODE § 1070(a) (West 1985). The fewer peremptory challenges available to the parties, the less acute the problem is, at least if one assumes that the number of biased jurors in the venire who cannot be challenged for cause is greater than the number of peremptory challenges granted to the parties. Under this plausible hypothesis, it has been persuasively argued that it is irrational for a party to use his peremptory challenges to strike jurors solely on the basis of suspect group association since doing so leaves him with fewer peremptory challenges to remove potential jurors whom he actually suspects of being biased against him. *See* Salzburg & Powers, *supra* note 60, at 365. For a more recent critique of the *Wheeler-Soares* doctrine, see Comment, *Is There a Place for the Challenge of Racially-Based Peremptory Challenges?,* 1984 DET. C.L. REV. 703. For a contemporary critical reaction to *Wheeler,* see Comment, *A New Standard for Peremptory Challenges:* People v. Wheeler, 32 STAN. L. REV. 189 (1979). The *Wheeler-Soares* doctrine has, of course, also attracted substantial favorable comment. For citations see Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis,* 81 MICH. L. REV. 1, 13 n.45 (1982).

67. For an example of the use of peremptory challenges by defendants to remove members of groups whom they believe will be hostile to their cause, see Booker v. Jabe, 775 F.2d 762, 764, 772 (6th Cir. 1985) (defendants used thirty-seven of their forty peremptory challenges to excuse whites, and prosecution used twenty-two of its twenty-six peremptory challenges to excuse blacks; court held that both sides acted improperly), *cert. granted and judgment vacated sub nom.* Michigan v. Booker, 106 S. Ct. 3289 (1986). *See also* King v. County of Nassau, 581 F. Supp. 493, 504 (E.D.N.Y. 1984) (unsuccessful challenge to use of peremptory challenges by defendant to eliminate black prospective jurors in civil case); *Soares,* 377 Mass. at 489 n.35, 387 N.E.2d at 517 n.35 (prosecution asserted that defense strnck all persons of Italian descent).

Even with regard to the use of peremptory challenges by the prosecution, the problem does not affect only blacks. In Roman v. Abrams, 608 F. Supp. 629, 639-40 (S.D.N.Y. 1985), the court noted that in arson cases arising in Bronx County, it was a common practice for prosecutors to strike whites from the jury.

68. *Batson,* 106 S. Ct. at 1728 (Marshall, J., concurring). Justice Marshall thought that eliminating peremptory challenges was necessary because "the inherent potential of peremptory challenges to distort the jury process" could not be removed by the procedures imposed by the majority. *Id.*

quires the jettisoning of almost 800 years of history in which the practice of peremptory challenge, although never held to be constitutionally required, has been considered to be one of the guarantors of a fair trial.[69]

The problem of peremptory challenges illustrates how the ability to control leads to the attempt to control, that is, to make the choices of those potentially subject to our power into discretionary choices for which we will hold them accountable. As this example shows, subjecting to our control people whom we have the power to control is not without its problems and costs even in the judicial context. However freewheeling discretionary choices can be, there may be some choices that require the even less structured context of total nonaccountability.

III. THE IRRESISTIBLE URGE TO EXPAND THE SCOPE OF DISCRETION

If we are uneasy about the choices made by those who are accountable to us, we usually have no such qualms about the choices that we ourselves make. We almost inevitably seek to increase our freedom of action, that is to increase the ambit of our "discretion," rather than subject ourselves to "artificial restraints." As part of their critique of the perceived sterile formalism of traditional analyses of legal decisionmaking,[70] the American realists urged that we pay more attention to the purpose of so-called legal rules and in particular to the factual contexts out of which legal disputes arise. Implicit in the writings of men like Herman Oliphant[71] and Karl Llewellyn[72] is the assumption that, if we know more about how society works and more about the concrete problems of the parties engaged in classes of legal disputes, the right answers to legal disputes will somehow jump out at us.[73] The realists do not associate

69. The Supreme Court has stated that "[t]he right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury." Lewis v. United States, 146 U.S. 370, 376 (1892). For references to the historical development of peremptory challenges, see *supra* note 38.

70. One of the earliest of such critiques, and certainly the most famous, was that of Oliver Wendell Holmes, Jr. in THE COMMON LAW (1881):

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Id. at 1. *See also* Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 465-66 (1897).

71. Oliphant, *A Return to Stare Decisis,* 14 A.B.A. J. 71 (1928).

72. Llewellyn, *A Realistic Jurisprudence—The Next Step,* 30 COLUM. L. REV. 431 (1930). *See also* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

73. Although the general point is made more clearly in Llewellyn's 1930 article, *supra* note 72, in his later work he talks of "The Law of Singing Reason," that is "[a] rule which wears both a right situation-reason and a clear scope-criterion on its face yields regularity, responsibility, and justice all

rationality with the sterile forms of logic but with the articulation and weighing of the policy reasons and factual presuppositions underlying a particular conclusion.[74] Known variously as interest balancing or as factor analysis, this technique became the dominant trend in the analysis of legal decisionmaking. The late William Prosser applied this technique in drafting the Second Restatement of Torts,[75] and it also figures prominently in the Second Restatement of Conflicts.[76] Of course, interest balancing was put forward to increase the rationality of judicial decisions and to make them more sensible accommodations of the often conflicting imperatives of public policy. The result, however, has been to increase the area of judicial choice without necessarily leading to the "better" decisions that the realists hoped interest balancing would produce.[77]

An adequate theory of interests must initially confront the problem of defining and identifying what is meant by an "interest." Writing during his heyday as a realist, Llewellyn argued that the "interests" bandied about in common speech were nothing more than aphorisms. Expressions like "security of transactions" were merely rubrics or what Llewellyn called "a red flag to *challenge investigation* in certain general directions."[78] For Llewellyn, interests were "*groupings* of behavior claimed to be significant."[79] When talking about interests, it was important to examine "the objective data, the *specific* data, *claimed* to represent an interest."[80] "What is left, in the realm of *description,* are at the one end the facts, the groupings of conduct (and demonstrable expectations) which may be claimed to constitute an interest; and on the other the practices of courts in their effects upon the conduct and expectations

together." K. LLEWELLYN, *supra* note 72, at 183. Llewellyn also discusses what he calls "The Law of Fitness and Flavor." *Id.* at 222-23.

74. This position was expressed explicitly by Holmes, *supra* note 70, at 474.

75. Although Dean Prosser died before the Second Restatement was published, he served as reporter during much of the drafting, including the drafting of section 520, discussed *infra* at notes 85-104 and accompanying text.

76. Examples from the Second Restatement of Torts are discussed *infra* at notes 97-104 and accompanying text. For examples from the Second Restatement of Conflicts, see *infra* notes 105-09 and accompanying text. The evolution of the English law of negligence has also been described as being "a part of a wide shift in post-liberal society from formalistic law to 'ad hoc balancing of interests.'" Smith & Burns, *Donaghue v. Stevenson—The Not So Golden Anniversary,* 46 MOD. L. REV. 147, 162 (1983), *citing* R. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 196 (1976). Smith and Burns then go on to say: "It is a device whereby courts are enabled to exercise a discretion as to the creation of a legal liability . . . ." *Id.*

77. In the discussion that follows I build on and go beyond Christie, *The Perils of Writing an Intellectual History of Torts,* 79 MICH. L. REV. 947 (1981), which was a lengthy review of G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980).

78. K. LLEWELLYN, *supra* note 72, at 445.

79. *Id.*

80. *Id.* at 446.

of the laymen in question."[81] Thus defined, interests are complex entities that are difficult to summarize in a few words and difficult to identify in individual cases.

Furthermore, even if a court could come up with relatively concise and yet meaningful statements of the interests involved in a particular case, one would face the further problem of deciding whether the interests identified were really comparable enough to permit balancing them against each other. Roscoe Pound long ago pointed out that one cannot directly weigh social or public interests against individual interests.[82] That would be like comparing apples and oranges. To weigh individual interests against social interests, the individual interests in, say, security of the person, would have to be translated into the *social* interest in the security of the individual.[83] Even assuming that all the necessary translations could be made so that all the interests being considered were in the same universe of discourse, the ultimate problem would remain: how should courts *weight* the interests?[84]

With this background in mind, let us turn to an example from the Restatement and the Second Restatement of Torts which illustrates both why the temptation to expand judicial discretion arises and why that effort so often leads to unsatisfactory results. In 1938, section 520 of the Restatement of Torts subjected the operator of an "ultrahazardous activity" to strict liability if the activity miscarried, and defined such an activity as one that (a) "necessarily involves a risk of serious harm" to others and (b) "is not a matter of common usage."[85] The common-usage exception was intended to accommodate Lord Cairn's declaration in *Rylands v. Fletcher*[86] that the liability established in that case was limited to the "non-natural use" of land. One practical implication of the common-usage exception posed some difficulties. What about fumigation of commercial buildings? It certainly was a common enough activity; indeed, in many cities it was required by law. Nevertheless, the Supreme Court of California held that although fumigation might be a common activity, only a very small number of professionals performed fumigation and thus it was not a matter of common usage.[87] Accordingly, the court could

81. *Id.* at 448.

82. Pound, *A Survey of Social Interests,* 57 HARV. L. REV. 1, 1-3 (1943). This article was a revised version of a paper presented to the American Sociological Society in 1921. *Id.* at 1 n.*.

83. *Id.* at 3. The point was well restated, although unfortunately without reference to Pound's contributions, in Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test,* 76 HARV. L. REV. 755, 763 (1963).

84. *See infra* note 97 and accompanying text.

85. RESTATEMENT OF TORTS § 520 (1938).

86. 3 L.R.-E. & I. App. 330, 339 (H.L. 1868).

87. *See* Luthringer v. Moore, 31 Cal. 2d 489, 500, 190 P.2d 1, 8 (1948).

appropriately classify it as an ultrahazardous activity subject to strict liability.[88] The court cited the commentary to section 520 as support for its conclusion.[89] The Oregon Supreme Court took a different approach, classifying cropdusting as an ultrahazardous activity despite the fact that the court considered it a matter of common usage.[90] The court found the dangerousness of the activity alone sufficient to justify this classification.[91]

When Volume III of the Second Restatement was published in 1977, several changes had been made in section 520. Instead of "ultrahazardous activity," the Second Restatement used the term "abnormally dangerous activity."[92] More to the point, the Second Restatement replaced the two-pronged test of the Restatement with a factor analysis that included interest balancing. The full text of section 520 of the Second Restatement merits quotation:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.[93]

This statement of the test leaves two overriding questions: who is to make the determination of what is an abnormally dangerous activity, and how is the required factor analysis and interest balancing to be done? As to the first question, the commentary to the Second Restatement declares that the judge, not the jury, is to decide whether an activity is abnormally dangerous.[94] Although the commentary concedes that in a negligence case a jury might have to make a host of subjective determinations in deciding the reasonableness of an activity, it concludes that the decision

88. *Id.* at 498, 190 P.2d at 7.

89. *Id.* at 500, 190 P.2d at 8 (citing RESTATEMENT OF TORTS § 520, comment b (1938)).

90. *See* Loe v. Lenhardt, 227 Or. 242, 253-54, 362 P.2d 312, 318 (1961).

91. *Id.* at 253-54, 362 P.2d at 317-18.

92. RESTATEMENT (SECOND) OF TORTS § 520 (Tent. Draft No. 10, 1964) (replacing "ultrahazardous" with "abnormally dangerous").

93. RESTATEMENT (SECOND) OF TORTS § 520 (1977). This volume of the Second Restatement was adopted in 1976 and published in 1977.

94. *Id.* comment *l*.

whether an activity is abnormally dangerous is of a different type. The principal difference asserted is that, unlike a jury's decision in a negligence case, the classification of an activity as abnormally dangerous could destroy an entire industry.[95] But of course a ruling that a product, say an airliner, is negligently designed could also destroy an industrial enterprise. Moreover, it seems to be generally accepted that, in actions brought on a theory of strict liability for defective products, the issue of product defect is submitted to the jury.[96] Why should strict liability under an abnormally dangerous activity theory be treated differently than strict liability for a defective product?

The second question raised by section 520 of the Second Restatement, and the one that most immediately concerns this discussion, is how the court should weight the six factors that are to guide the determination whether an activity is abnormally dangerous. The commentary declares that the determination is to be made by the court, "upon consideration of all the factors listed in this Section, and weight given to each that it merits upon the facts in evidence."[97] I submit that this is no weighting method at all. If taken literally, the commentary seems to suggest that each case is sui generis and that one need have no fear that an individual decision, whether made by a judge or by a jury, might ruin an entire industry. Thus, in any case involving an activity not covered foursquare by a precedent, one would have to litigate up to the highest court of the jurisdiction before knowing how the activity would be classified. The value of precedents covering other activities would be minimal. Whether or not one liked the old test, it was certainly easier to administer, since it asked only whether the activity involved "a risk of serious harm" to others that "[could not] be eliminated by the exercise of the utmost care," and whether the activity was "a matter of common usage."[98]

Some may object that the Second Restatement merely made explicit the factors courts already considered. This is not so. Of course, in any close case, a court is likely to consider individual equities like the comparative wealth of the parties and the social importance of the activity, and these factors will likely influence the decision. A court should never be expected to ignore individual equities. But to recognize that a court will be *influenced* by individual equities in deciding some legal issue is

95. *Id.*

96. *See* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 435, 573 P.2d 443, 457-58, 143 Cal. Rptr. 225, 239-40 (1978); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 176-77, 406 A.2d 140, 153 (1979); 50 CAL. JUR. 3D, *Products Liability* § 47 (1979).

97. RESTATEMENT (SECOND) OF TORTS § 520 comment *l* (1977).

98. RESTATEMENT OF TORTS § 520 (1938).

not the same as saying that these individual features themselves *are* the legal issue.

An enormous range of legal decisions could all be plausibly justified under section 520 of the Second Restatement. For example, it was held in Maryland that operating a neighborhood gas station, whose leaking storage tanks fouled the well of an adjoining landowner, was an abnormally dangerous activity.[99] An Oregon court disagreed.[100] In a Florida court, a mine operator seriously urged, again on the basis of the new version of section 520, that a mine producing phosphatic wastes was not an abnormally dangerous activity because of the location of the mine and its social importance.[101] But the court ruled against the mine operator because of the size of the activity and the possibility of enormous damage if the activity miscarried.[102]

Section 520 of the Second Restatement is not an isolated instance of the urge to inject factor analysis into judicial decisionmaking. For example, under the original Restatement, an intentional invasion of another's interest in the use and enjoyment of land was unreasonable (and hence a nuisance) "unless the utility of the actor's conduct outweigh[ed] the gravity of the harm."[103] The Second Restatement has now added a provision declaring that the invasion may also be unreasonable if "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible."[104] Admittedly, under the original Restatement, which tracked the traditional common law, courts were obliged to make the potentially open-ended decision about the utility of the defendant's conduct. Courts must still make that determination under the Second Restatement, but now, even if courts decide that the utility outweighs the harm, they must make the additional problematic decision

99. *See* Yommer v. McKenzie, 255 Md. 220, 222-27, 257 A.2d 138, 139-41 (1969). The court specifically held that section 520 of the Second Restatement (considered in draft form) had the effect of enlarging the circumstances under which the rule of strict liability will apply. *Id.* at 223-25, 257 A.2d at 139-40.

100. *See* Hudson v. Peavey Oil Co., 279 Or. 3, 8, 566 P.2d 175, 178 (1977). The court held that the operation of a gas station was not so exceptional a circumstance nor was the danger from seepage so grave as to warrant classifying the activity as "abnormally dangerous." *Id.*

101. *See* Cities Serv. Co. v. State, 312 So. 2d 799, 801-03 (Fla. Dist. Ct. App. 1975).

102. *Id.* at 803-04.

103. RESTATEMENT OF TORTS § 826 (1939).

104. RESTATEMENT (SECOND) OF TORTS § 826(b) (1977). The substance of the original section 826 is now contained in RESTATEMENT (SECOND) OF TORTS § 826(a). The Second Restatement has added a new section, section 829A, to flesh out section 826. Section 829A provides that "[a]n intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation."

as to whether it was nevertheless "feasible" for the defendant to compensate the plaintiff.

The Second Restatement of Conflicts[105] provides another example of how the use of factors by courts leads to an enormous range of plausibly justified decisions. In section 6(2), seven factors are set out as being relevant to choice-of-law problems.[106] Then additional, more topic-specific, factors are set out for applying the principles of section 6 to tort[107] and contract[108] disputes. The regime set up by these provisions is more the provision of a methodology or approach than a statement of "law."[109]

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105. RESTATEMENT (SECOND) OF CONFLICTS (1971).

106. These factors are:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Id. § 6(2).

107. These factors are:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

Id. § 145(2).

108. These factors are:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Id. § 188(2).

109. *See* Reese, *Choice of Law: Rules on Approach,* 57 CORNELL L. REV. 315 (1972); *see also* R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 365-79 (3d ed. 1981). For a strong recent criticism of the Second Restatement's approach, see Juenger, *Conflict of Laws: A Critique of Interest Analysis,* 32 AM. J. COMP. L. 1, 12-50 (1984) (criticizing Currie's personal law principles as "shallow sophistry"). Other critical scholarly comment includes Brilmayer, *Interest Analysis and the Myth of Legislative Intent,* 78 MICH. L. REV. 392, 429-31 (1980) ("Interest analysis is simply too unpredictable and parochial to be a plausible theory of constructive intent."); and Ely, *Choice of Law and the State's Interest in Protecting Its Own,* 23 WM. & MARY L. REV. 173, 212-13 (1981) (rejecting interest analysis and advocating a careful return to a more rule-oriented approach).

Drawing on the use of factor analysis in conflict of laws, section 403 of the proposed RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Tent. Draft No. 2, 1981), sets forth eight factors to be considered in determining the reasonableness of a state's exercise of jurisdiction to prescribe rules of conduct. Judge Wilkey rejected this approach in Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 948-55 (D.C. Cir. 1984). For a favorable reaction to *Laker,* see Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 VA. J. INT'L L. 7, 33-41 (1984). *Cf.* Fugate, *Antitrust Aspects of the Revised Restatement of Foreign Relations Law,* 25 VA. J. INT'L L. 49, 60-61 (1984) (Restatement helps in analysis of antitrust problem, but does not translate well to international jurisdiction). As Maier notes, the proposed section 403 has recognized that

Constitutional adjudication also provides illustrations of decisionmakers' attempts to broaden the scope of their discretion. Consider the question of how to determine whether some particular punishment in a noncapital case is cruel and unusual punishment under the eighth amendment. In *Solem v. Helm,*[110] the Supreme Court, in a 5-4 decision, held that imposition of life imprisonment upon a defendant who had been convicted previously of six similarly minor felonies was unconstitutional. The majority, writing through Justice Powell, declared that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[111] The dissent, written by Chief Justice Burger, argued that "[w]hat the Court means is that a sentence is unconstitutional if it is more severe than five Justices think appropriate."[112] Quoting from a previous case upholding a sentence of life imprisonment after conviction for a third nonviolent felony, the dissenters declared that "drawing lines between different sentences of imprisonment would thrust the Court inevitably 'into the basic line-drawing process that is pre-eminently the province of the legislature' and produce judgments that were no more than the visceral reactions of individual Justices."[113]

Needless to say, even if judges making these kinds of decisions are making the sorts of decisions that are thought to be within the province of legislators, the judges are accountable for their decisions, and their choices are constrained in some ways that legislative choices are not.[114] And yet, while these and other institutional factors might lessen our uneasiness over what courts seem to be doing, they do not by any means eliminate it.

It would be doctrinaire, perhaps even naive, to maintain that there is no place for factor analysis in judicial decisionmaking. Discretion arises in the context of power relationships, and it is not rational to insist that

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the assertion of jurisdiction by two states may be reasonable and accordingly has been amended to direct that the factors enumerated be used to determine which state should yield. Maier, *supra,* at 39 (analyzing Tentative Draft No. 6). This proposal does not meet Judge Wilkey's point that if Congress has legislated in the area, it is not for the courts to refuse to hear a case clearly within the statute. *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 948-55 (D.C. Cir. 1984).

110. 463 U.S. 277 (1983).

111. *Id.* at 292.

112. *Id.* at 305 (Burger, C.J., dissenting).

113. *Id.* at 308 (quoting Rummel v. Estelle, 445 U.S. 263, 275 (1980)).

114. *See supra* notes 30-31 and accompanying text.

courts always exercise power in inflexible or stylized ways. Whatever the problems presented by relatively unfettered "discretion," we cannot completely eliminate such discretion from judicial decisionmaking. We must therefore consider more closely and from other perspectives the question of how to reconcile our traditional expectations concerning the judicial role with relatively open-ended judicial decisionmaking.

IV. On Relatively Open-ended Discretion in Judicial Decisionmaking

We may get some insight into reconciling the judicial role with relatively open-ended judicial decisionmaking by turning for a moment to what might initially be considered a different set of problems and exploring whether we might adapt the solutions proposed for these problems to resolve our present difficulties over the desirable range of discretionary choice in judicial decisionmaking. One such continuing controversy is the permissible scope of judicial review of findings of fact. The problem is presented either in the context of a trial judge's disagreement with a jury's determination or an appellate court's dissatisfaction with the trial court's factual determinations, whether made by a jury or by a judge sitting without a jury.[115] The problem thus involves the relationships among judicial powerholders in circumstances in which superior powerholders disagree with the conclusions of inferior powerholders, but in which there are no clearly accepted criteria by which to judge the correctness of the conclusions of either set of powerholders. As is well known, in their many unsuccessful attempts to supply an adequate conceptual framework for analyzing the problem, courts have traditionally distinguished among questions of fact, questions of law, and mixed questions of law and fact.[116] Questions of fact are for the jury or other trier of fact. Questions of law are for judges, whether sitting at the trial level, with or without a jury, or at the appellate level. Mixed questions of law and fact are of course those questions on which trial judges and appellate judges will second-guess a jury and on which appellate judges will second-guess trial judges. Identifying mixed questions of law and fact is a source of much judicial disagreement.[117]

115. It is generally considered that a reviewing court will be slightly more ready to reexamine the factual conclusions of a trial court sitting without a jury than it would a jury verdict or the factual findings of an administrative agency. 5 K. Davis, Administrative Law Treatise § 29:5 (1978).

116. *See, e.g.*, ICC v. Union Pac. R.R., 222 U.S. 541, 547-48 (1912).

117. In Maggio v. Fulford, 462 U.S. 111, 117 (1983) (per curiam), for example, the majority opinion concluded that the question of an accused's competence to stand trial in a state court was a factual question to be resolved by a state court whose findings could only be overturned in a federal habeas corpus proceeding if, in the language of 28 U.S.C. § 2254(d)(8), they were not "fairly sup-

Oliver Wendell Holmes, Jr. is one of the legal thinkers who rejected the mixed-question-of-law-and-fact analysis as the explanation of why judges will intrude upon the jury's province more in some situations than they will in others.[118] Using negligence questions as an example, Holmes accepted that one of the functions of the jury was to determine what in fact happened. This was purely a factual determination. But, when the jury is called upon to decide whether on the facts found to exist a party was negligent, the jury is deciding a question of law, and it is doing so by *making* law. The jury in effect is performing a legislative function. In Holmes's *The Common Law,*[119] he explained that the jury was left to determine the applicable standard of reasonable conduct in a given situation because the judge

> not entertaining any clear views of public policy applicable to the matter derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment. Therefore it aids its conscience by taking the opinion of the jury.[120]

Holmes made the point even more explicitly later, after he had become a judge:

> From saying that we will leave a question to the jury to saying that it is a question of fact is but a step, and the result is that at this day it has come to be a widespread doctrine that negligence not only is a question for the jury but it is a question of fact.
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> . . . .
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> I venture to think, on the other hand, now, as I thought twenty years ago, before I went upon the bench, that every time that a judge declines to rule whether certain conduct is negligent or not he avows his inability to state the law, and that the meaning of leaving nice ques-

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ported by the record." Justice White, who concurred in the result, *id.* at 118-19 (White, J., concurring), and Justices Brennan, Marshall, and Stevens in dissent asserted that the question was one of mixed law and fact. *Id.* at 120 (Brennan, J., dissenting); *id.* at 120-21 (Marshall, J., dissenting). In Patton v. Yount, 467 U.S. 1025 (1984), decided the following term, there was a similar dispute as to the status of a state trial court's ruling on whether a prospective juror had a preconceived opinion that disqualified him from serving on the jury. On the other hand, in Miller v. Fenton, 106 S. Ct. 445, 451-53 (1985), the Court held, with Justice Rehnquist dissenting, that the issue of whether a confession was a voluntary one was a mixed question of fact and law and thus not subject to the strictures of § 2254(d)(8).

118. O. HOLMES, *supra* note 70, at 122-27. The notion of a mixed question of law and fact was also rejected by the late Roy Stone. *See* Stone-de Montpensier, *The Compleat Wrangler,* 50 MINN. L. REV. 1001, 1009-10 (1966). For Stone, so-called mixed questions of fact are merely questions of fact that are not decided by further observation but by reflection. The question is explored in Christie, *Judicial Review of Findings of Fact* (forthcoming).

119. O. HOLMES, *supra* note 70.

120. *Id.* at 123.

> tions to the jury is that while if a question of law is pretty clear we can decide it, as it is our duty to do, if it is difficult it can be decided better by twelve men taken at random from the street.[121]

Holmes believed, however, that if a judge felt sure about the matter or if several juries had brought in similar verdicts on similar facts, the judge should no longer submit the question of the appropriate standard to the jury but should declare it himself, in which case the jury's function would be strictly limited to determining what had happened.[122]

It is well known that Holmes applied his theoretical perspective in *Baltimore & Ohio Railroad Co. v. Goodman,*[123] in which the Court, writing through Holmes, overturned a jury verdict for the plaintiff that had been sustained by both the trial court and the United States Court of Appeals for the Ninth Circuit. Holmes ruled that the plaintiff's decedent was contributorily negligent when, upon approaching a railroad grade crossing, he did not get out of his truck and make sure that a train was not approaching. Fortunately, Holmes's attempt to justify and extend the "stop, look, and listen" rule ultimately failed. In *Pokora v. Wabash Railway Co.,*[124] a case very similar to *Goodman,* a unanimous Court, writing through Justice Cardozo, reversed the court of appeals' affirmance of the trial court's granting of a directed verdict. Cardozo pointed out the difficulties of applying a rigid "stop, look, and listen" rule to the myriad variations of grade-crossing accidents:

> Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. . . . The opinion in *Goodman's* case has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge, and has had only wavering support in the courts of the states. We limit it accordingly.[125]

Holmes recognized correctly that, in deciding questions such as whether *X* was negligent, the jury is exercising a lawmaking function. But he was wrong in arguing that the judge can properly take over this function, determining himself whether a party was negligent after having received sufficient guidance from juries. To return to the example from the Second Restatement of Torts, although I prefer the simpler treatment

121. Holmes, *Law in Science and Science in Law,* 12 HARV. L. REV. 443, 457 (1899).

122. *See* O. HOLMES, *supra* note 70, at 123; Holmes, *supra* note 121, at 457-58.

The late Roger Traynor was one of the very few judges who accepted Holmes's argument, including the contention that although the jury's function was to advise the judge on the law, it was ultimately the judge's responsibility to decide what the law was. *See* Toschi v. Christian, 24 Cal. 2d 354, 364-65, 149 P.2d 848, 854 (1944) (Traynor, J., dissenting in part); *see also* Startup v. Pacific Elec. Ry., 29 Cal. 2d 866, 872-73, 180 P.2d 896, 899-900 (1947) (Traynor, J., concurring).

123. 275 U.S. 66, 70 (1927).

124. 292 U.S. 98, 103 (1934).

125. *Id.* at 105-06.

of the subject in the original Restatement, it would not be objectionable to determine whether a defendant has engaged in an abnormally dangerous activity for whose miscarriage he will be strictly liable based on a six-part factor analysis, so long as the jury makes that decision. The jury in these situations is quite simply making a legislative determination.[126] Judges of course also legislate in the course of their decisionmaking, but even in the course of legislating, they are subject to the more rigorous standards of accountability that apply to judges. A jury, on the other hand, is making a decision that has no precedential force, and that is not submitted to a process of public justification. Jurors can be subject to criticism for their decisions, but that criticism is much less focused than that to which judges or even legislators are subject. Given that every political system may find it impossible to exclude from legal determination questions that must be decided simply on the basis of someone's "best judgment," it makes eminent good sense to let a body that stands as a surrogate of the public answer those questions. The jury is quintessentially that sort of body. Obviously, a legislature could also make these determinations, but the number of decisions that need to be made is so great that referral to a legislature is not a plausible alternative.

Because a jury is not a legislature, its decision is only applicable to the actual case before it. The jury in effect becomes a legislature with authority to enact only private bills. This lack of precedential effect makes it possible to submit the question of whether the Dalkon shield is defective to juries over and over again. If the cost of that procedure in terms of wasted resources outweighs the benefits it provides by letting each litigant feel that his case is being taken seriously, then the legislature ought to ban the device and impose liability upon the makers of the device to all those whom the device has injured. The constitutional difficulties do not seem insuperable. For a court, however, to outlaw the device once and for all on a wide-ranging consideration of factual and policy considerations seems objectionable under our prevailing theories of government. A legislature could, of course, establish an administrative body to make this determination. There is much to be said for the administrative solution, and our society is increasingly choosing this option in areas as diverse as environmental protection[127] and automotive safety.[128] Nevertheless, there is a limit to our ability to place all of life under adminis-

126. This is perhaps implicitly recognized by the greater deference shown to jury verdicts than to the findings of trial courts sitting without juries.

127. *See, e.g.*, Federal Hazardous Substances Act, Pub. L. 86-613, 74 Stat. 372 (codified as amended at 15 U.S.C. §§ 1261-1275 (1982)).

128. *See, e.g.*, National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. 89-563, 80 Stat. 718 (codified as amended in scattered sections of 15 U.S.C. & 23 U.S.C. (1982)).

trative supervision. We need some means of handling situations that neither fit into the administrative superstructure nor are amenable to resolution by judicial fiat. The beauty of the jury system is that it provides us with another alternative.

To use the example from section 520 of the Second Restatement of Torts concerning abnormally dangerous activities, a jury can consider:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.[129]

For a court to make a decision on this sort of basis, it must be possible for the system rapidly to generate a sufficient number of cases on each of these factors so that the choices confronting the courts will no longer be completely open-ended. In point of fact, if the courts are to apply section 520, the inquiry will almost certainly boil down largely to the dangerousness of the activity.[130] For understandable reasons, the courts are unlikely to try to take advantage of the full extent of the decisional freedom (or "discretion") that formulas like section 520 of the Second Restatement appear to give them. When courts start intervening in areas of complex and competing social policy, they are inevitably driven to bright-line tests. This happens not only because they feel awkward making decisions that are perceived as being subjectively based, when many consider subjectivity an unsuitable basis for judicial decisions, but also because they recognize that the more multifactored a judicial decision is, the more wide-open and far-ranging the fact-gathering stage of the judicial process must be. They rightly fear that the machinery of the courts, the procedural requirements of judicial decisionmaking, and the limited resources the judiciary commands are not up to the task.[131] However comforting the notion of "case-by-case" development of the law may be,

129. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

130. *See* Cities Serv. Co. v. State, 312 So. 2d 799, 801-03 (Fla. Dist. Ct. App. 1975) (discussed *supra* notes 101-02 and accompanying text); *see also* Loe v. Lenhardt, 227 Or. 242, 362 P.2d 312 (1961) (discussed *supra* notes 90-91 and accompanying text).

131. On the difficulties experienced by courts when they appear to act as superlegislatures, see Christie, *A Model of Judicial Review of Legislation,* 48 S. CAL. L. REV. 1306 (1975). In Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), the Supreme Court, in a 5-4 decision, overruled National League of Cities v. Usery, 426 U.S. 833 (1976), itself a 5-4 decision, and held that

it is a dangerous illusion to believe that, when open-ended decisionmaking is involved, the long-range trend of judicial decisions is to reduce uncertainty.[132]

From the litigant's point of view, the expense and delay of the type of judicial decisionmaking envisioned by section 520 of the Second Restatement are staggering. If each case is sui generis, each case must be litigated; and if a judge must decide the ultimate issue, the parties must always contemplate having to take the issue to the highest court in a jurisdiction. Consider from the litigant's perspective *Doundoulakis v. Town of Hempstead,*[133] a case in which the New York Court of Appeals adopted section 520 of the Second Restatement.[134] The case involved "a hydraulic landfilling project . . . on 146 acres of swamp meadowland abutting plaintiffs' houses."[135] In remanding, because of lack of an evidentiary basis for applying the analysis of section 520, the court declared:

> The pivotal issue is whether it was established that hydraulic dredging and landfilling, that is, the introduction by pressure of . . . massive quantities of sand and water is, under the circumstances, an abnormally dangerous activity giving rise to strict liability.[136]
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> . . . .
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> There is little if any information, for example, of the degree to which hydraulic landfilling poses a risk of damage to neighboring properties. Nor is there data on the gravity of any such danger, or the extent to which the danger can be eliminated by reasonable care. *Basic to the inquiry, but not to be found in the record, are the availability and relative cost, economic and otherwise, of alternative methods of landfilling. There are other Restatement factors, and perhaps still others, which the parties may develop as relevant about which there is little or nothing in the record.*[137]

From the litigant's standpoint, a more easily applied standard that would allow him to ascertain his legal position more readily might be preferable.[138] That was the attraction of the original version of section 520 of the Restatement, which focused merely upon the dangerousness of the

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it was impossible for a court to decide what aspects of state governmental operations should be immune from federal regulation. The matter was best left to Congress and the political process.

132. For the provocative assertion that, in the long run, all systems of judicial decisionmaking tend towards uncertainty, see D'Amato, *Legal Uncertainty,* 71 CALIF. L. REV. 1 (1983).

133. 42 N.Y.2d 440, 368 N.E.2d 24, 398 N.Y.S.2d 401 (1977).

134. *Id.* at 448, 368 N.E.2d at 27, 398 N.Y.S.2d at 404.

135. *Id.* at 445, 368 N.E.2d at 25, 398 N.Y.S.2d at 402.

136. *Id.*

137. *Id.* at 448-49, 368 N.E.2d at 27, 398 N.Y.S.2d at 404 (emphasis added).

138. It has been pointed out that there are important economic benefits from what might be called "mechanical rules," even if such "rules" seem "silly or inefficient." *See* Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights,* 14 J. LEGAL STUD. 13, 47 (1985). Not the least of these benefits is that they enable the parties to reach private solutions to their conflicts. *Id.* at 46-48.

activity and the degree to which it was not a "matter of common usage." Some courts were even prepared to eliminate the common usage justification.[139]

Thus the old struggle between formal rationality and substantive rationality reappears. If one seeks objectivity in judicial decisionmaking, one may have no choice but to accept a certain simplification, even artificiality.[140] However one resolves the struggle between formal rationality and substantive rationality, cases like *Doundoulakis* suggest that if an open-ended form of decisionmaking is desired, placing responsibility for the decision on the jury is preferable. Not only is a jury determination likely to be accepted as more legitimate because a legislative-style policy decision no longer masquerades as the impersonal decision of a question of law, but it might also eliminate many time-consuming and expensive appeals. In the increasing number of states with two tiers of appellate courts, this is not an inconsequential consideration.

To conclude, this has been an essay on discretion and its characteristics, on the contexts in which it is found, the types of discretion appropriate to certain types of roles, and the reasons courts and other decisionmakers take such schizophrenic attitudes towards it. As long as some people are accountable to others, the problem of discretion will remain. For it is choice in the context of power relationships that is the essence of discretion. Although no political society can do without power relationships, our uneasiness about the exercise of power means that we will always have ambivalent feelings about the existence and exercise of discretion.

139. *See* Loe v. Lenhardt, 227 Or. 242, 248-49, 362 P.2d 312, 315-16 (1961). *See supra* notes 90-91, 130 and accompanying text.

140. *See supra* note 31 and accompanying text. *Cf.* G. CHRISTIE, *supra* note 24.