Boston College Law Review

Volume 28
Issue 4 *Number 4*

Article 1

7-1-1987

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BOSTON COLLEGE
LAW REVIEW

VOLUME XXVIII JULY 1987 NUMBER 4

LIBERALISM AND THEORIES OF ADJUDICATION†

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One recurring theme of the Critical Legal Studies Movement is skepticism that an acceptable, or even coherent, theory of adjudication can be constructed from the various political and philosophical doctrines known as liberalism.[1] This position is perhaps best articulated in Roberto Unger's comprehensive work on liberal psychology,[2] and in a powerful pair of articles by Mark Tushnet.[3] Unger and Tushnet assert the logical impossibility of simultaneously supporting three liberal positions: first, that judicial review should be available to curb majoritarian excesses; second, that judicial independence should be restrained structurally, to foreclose the possibility of judicial anarchy; and third, that adjudication should be "value-free," that is, that judges should not appeal in their decisionmaking to unwritten, transcendent values.[4] From the interaction of these three propositions arise contradictions allegedly irresolvable by any liberal theory of adjudication.[5] The liberal principle that seeks to empower an independent judiciary conflicts, it is said, with the equally revered policy that judges must discharge the law rather than personal opinion, which in turn is incompatible with a traditional liberal reluctance to articulate timeless social and ethical values. These three balls never have been juggled successfully, say the skeptics, and never will be. The prospect for liberal

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[1] *See, e.g.*, R. UNGER, KNOWLEDGE AND POLITICS (1975) [hereinafter R. UNGER]; Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 337–39 (1978); Parker, *The Past of Constitutional Theory — And Its Future*, 42 OHIO ST. L.J. 223 (1981); Singer, *The Player and the Cards, Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984) and sources cited therein; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) [hereinafter *Following the Rules*]; Tushnet, *Darkness on the Edge of Town: The Contribution of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980) [hereinafter *Darkness on the Edge of Town*]; Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 563–602 (1983) [hereinafter *Critical Studies Movement*]; *cf.* Alexander, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, 28 UCLA L. REV. 816, 817–18 (1981) (discussing B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980)); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 160–61 (1981).

[2] R. UNGER, *supra* note 1.

[3] Tushnet, *Following the Rules*, *supra* note 1; Tushnet, *Darkness on the Edge of Town*, *supra* note 1.

[4] Tushnet, *Darkness on the Edge of Town*, *supra* note 1, at 1037–38.

[5] *Id.* at 1038, 1061. *See also* R. UNGER, *supra* note 1, at 6–7, 97.

legal theory is thus gloomy, as each new attempted reconciliation is merely a slightly different instance within the inescapable three-cornered conundrum. Regardless of its level of abstraction, therefore, liberalism is said to provide unreliable and ineffectual guidance to the difficult choices that attend constitutional and common law adjudication.[6]

Policy in liberal society is thus described as adrift, parts of a ship long ago ripped apart by conflicting forces. Similarly, Unger and Tushnet also argue that individuals and their respective beliefs are radically isolated in a liberal society.[7] The atomized view of truth that results from this isolation is said to hamper empathetic understanding among people, thereby preempting the formation of community values.[8] Conflicts concerning society's goals and methods are thus allegedly perpetuated amid personal acrimony and confusion. By implication, the two authors would reform drastically, or replace, liberal culture with conditions enabling the emergence of a more unified, harmonious community.[9] In other words, their envisioned solution is to transcend the mistrust, disunity, and pluralism that propels liberal philosophy. In their view this can occur only through the emergence of shared community values of such vigor as to make institutional checks and balances superfluous. This solution quickly faces another obstacle from liberalism: In *social* life as in political and legal life, the critics claim that liberalism retards community harmony by its celebration of conflict, and its insular version of truth. Therefore, for many in the Critical Movement, liberal values must be resisted strongly, or even discarded, so as to achieve ethical and political unity.

This Article disputes that Critical analysis, and attempts to outline an understanding of adjudication that satisfies the liberal goals of institutional power-sharing, pluralism, and individualized decisionmaking based on rational dialogue. In fashioning this understanding, this Article examines and rejects various aspects of contemporary legal theory. Critical skepticism provides invaluable insights into that process. Nonetheless, the Article takes issue with the conclusion of some writers that liberal values impede the development and functioning of legal and social life. On the contrary, it may well be that the liberal attributes of conflict, disharmony, piecemeal problem-solving, and even philosophical incoherence contribute to a workable and desirable system of law. The

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[6] Tushnet, *Following the Rules*, *supra* note 1, at 784–86, 824–27; Tushnet, *Darkness on the Edge of Town*, *supra* note 1, at 1057–62; R. UNGER, *supra* note 1, at 97.

[7] R. UNGER, *supra* note 1, at 55–59; Tushnet, *Following the Rules*, *supra* note 1, at 783–86.

[8] R. UNGER, *supra* note 1, at 102–03; Tushnet, *Following the Rules*, *supra* note 1, at 826–27.

[9] Tushnet's call for dialogue based on interpersonal understandings, scarcely feasible under his rendering of liberalism, seems to warrant this implication. *See* Tushnet, *Following the Rules*, *supra* note 1, at 824–27. Unger writes: "Liberalism must be seen all of a piece, not just as a set of doctrines about the disposition of power and wealth, but as a metaphysical conception of the mind and society. Only then can its true nature be understood, and its secret empire overthrown." R. UNGER, *supra* note 1, at 6. Accordingly, Unger aims toward a nonliberal conception of mind and society that "vindicates the claims of communities of shared purposes against the liberal conception of society as an association of independent and conflicting individuals." *Id.* at 20. Elsewhere, however, Unger seems to have softened this position in favor of one much closer to what is advocated in this article:

> The program I have described is neither just another variant of the mythic, antiliberal republic nor much less some preposterous synthesis of the established democracies with their imagined opposite. Instead, it represents superliberalism . . . . [I]t represents an effort to make social life resemble more closely what politics (narrowly and traditionally defined) are already largely like in the liberal democracies: a series of conflicts and deals among more or less transitory and fragmentary groups.

Unger, *Critical Studies Movement*, *supra* note 1, at 602.

role of liberalism is to promote diverse and imaginative opinions, and to use such disunity to constrain the abuse of power by both the judge and the legislator. Such constraints are accomplished by structures internal to liberal legal systems. If the effectiveness of liberalism is disputed, the explanation may lie not with the inadequacies of liberalism, but rather with the architects of legal theory and their detractors, most of whom chronically undervalue the dynamic power of liberal conflict and disharmony.

Unger and Tushnet provoke two specific questions that shall be addressed in this Article: first, is the liberal model of truth as atomized and subjective as they claim? Second, is the only solution to adjudicative theory to make it superfluous through ethical and political uniformity?[10] Notwithstanding their major contributions toward understanding the interplay of law and social and political forces, they err by attempting to describe liberalism too precisely. Because of this impulse, they adopt a highly rationalistic methodology that underestimates the diversity of concepts that comprise liberalism.[11] Moreover, they thereby fail to explore the ironic possibility that philosophical inconsistencies may contribute both to the persistence of liberalism, and to the political dialogue that they seek.

In the sections below, the Unger/Tushnet analysis is elaborated and used to examine the assumptions underlying a variety of contemporary legal theories.[12] Next, their assertion of the incoherence of liberalism is shown to be an unjustified generalization.[13] Finally, liberal adjudication is examined from an alternative, stronger perspective, with the aim of reconciling liberal goals in a fashion that renders immaterial the issues of coherence and consistency.[14] Liberal conflict and disharmony are neither ends in themselves, nor does a careful and precise fashioning of a workable legal system result from such conflict; *but ethical, social, and political disunity complement a normative system that is essentially beyond human control.* Through the ideas articulated in reasoned debate, the legal system has the raw materials with which to refine the justness of its own indeterminacy. The seeming paradox of this sentence is resolved only when, as elaborated in the concluding portions of the Article, the focus of lawmaking and legal decisions moves away from the human mind, and to the legal *system* that many minds gradually have created. Ethical and social unity are potentially dangerous concepts, and not only for holders of minority opinions. It is not clear that our legal system could survive total consensus.

I. The Atomistic Model of Liberal Epistemology and Its Effects on Contemporary Legal Theory

Liberalism as a philosophy, and as a way of constructing power-sharing governmental institutions, emerged from Renaissance secularism and expansion of trade.[15] Its

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[10] *See* R. Unger, *supra* note 1, at 100–03; Tushnet, *Following the Rules*, *supra* note 1, at 826–27.

[11] R. Unger, *supra* note 1, at 9. In Law's Empire, Ronald Dworkin also criticizes Professor Tushnet's description of liberalism, along lines similar to some of those taken in this Article. R. Dworkin, Law's Empire 440–41 n.19 (1986). This Article was substantially completed prior to the appearance of Professor Dworkin's book.

[12] *See infra* notes 15–138 and accompanying text.

[13] *See infra* notes 141–174 and accompanying text.

[14] *See infra* notes 176–219 and accompanying text.

[15] G. Dietze, Liberalism Proper and Proper Liberalism 51–53 (1985); J.H. Hallowell, The Decline of Liberalism As An Ideology, With Particular Reference to German Politico-Legal Thought 21 (1946); H. Laski, The Rise of European Liberalism 11–58 (1962).

primary policies include freedom of the marketplace, the rule of law, the prevention of tyranny through structural checks and balances, and the advancement of individuals as free moral agents.[16] Unger argues that one of liberalism's key metaphysical positions is opposition to the ancient doctrine of "intelligible essences."[17] This doctrine posits that all things display an irreducible essence that can be apprehended humanly, albeit non-empirically.[18] In the investigation of the physical world, the doctrine of intelligible essences was almost completely eclipsed by the advances of the scientific method, which attempts to analyze or "reduce" things or phenomena into increasingly smaller parts. Were scientists to posit, for example, that gold has a fundamentally different essence than iron as revealed by their differing respective properties, little progress in atomic theory could be made. So also in political history, some liberals have criticized the intelligible essence doctrine or related legal doctrines, such as the medieval *jus naturale*, for the social stagnation that it entails.[19] More recently, Karl Popper has argued that "essences" are little more than definitions, which are then used as premises from which undisputable analytical truths are deduced logically.[20] Scientific and social progress are thereby equally frustrated. As shall be developed, Unger anchors his analysis of the evolution and composition of liberalism in liberalism's alleged opposition to the doctrine of intelligible essences and its corollaries.

The intangibility of metaphysical issues tends to cast a certain pedantic air to the disputes about them. Yet the question of whether everything is reducible to something else, or rather has an irreducible essence, has vital epistemological and social implications. First, the issue of reducibility affects whether truth is deemed to be personal or social. Second, the issue determines whether knowledge should be attained by decomposing things into discretely intelligible parts, or whether knowledge is better discovered by investigating undivided wholes and their emergent properties.

On the first point, Unger states that liberals dispute the existence of social knowledge.[21] They are said to deny independently existing, "objective" essences, *which necessarily includes objectively existing ethical values*.[22] All values, says Unger, must for liberals be only "subjective," that is, the result of personal preference.[23] Furthermore, if all values are subjective, then logically, liberals must believe in "value-free adjudication."[24] Unger maintains that liberals cannot hold that judicial review, for example, is informed by a set of culturally approved values independent from the personal preferences of the judge, because to believe in values that transcend individuals is to believe that there exist objective, intelligible essences.[25] This proposition will be described below as "the subjectivity of truth" proposition.

Concerning the second point, Unger contends that liberal epistemology entails the belief that all things may be fully understood by the process of decomposition. He thus

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[16] *See generally* DIETZE, *supra* note 15; LASKI, *supra* note 15; D.J. MANNING, LIBERALISM (1976); A. RYAN, PROPERTY AND POLITICAL THEORY (1984).

[17] R. UNGER, *supra* note 1, at 31–32, 76–77, 133.

[18] *Id.* at 31.

[19] *See* H. LASKI, *supra* note 15, at 11–12, 14; *cf.* 2 K. POPPER, THE OPEN SOCIETY AND ITS ENEMIES: THE HIGH TIDE OF PROPHECY: HEGEL AND MARX 10–12 (5th ed. 1966).

[20] 2 K. POPPER, *supra* note 19, at 9–12.

[21] R. UNGER, *supra* note 1, at 76–77.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 94–97.

[25] *Id.*

suggests that one defining element of liberalism is the belief that nothing can be more than the sum of its respective parts, and through exhaustive analysis of those parts the whole can be completely apprehended.[26] This epistemological proposition will be referred to below as the "whole and parts" doctrine.

After detailing these two epistemological propositions and their respective criticisms, this Article will argue that neither principle is a *necessary* belief of liberalism.[27] On the contrary, illustrations are supplied of alternative positions that have informed liberal thinkers.[28] By revealing the epistemological options for liberals, and by demonstrating the disruptive influence that Unger-style beliefs have had on liberal efforts to construct satisfactory legal and political theories, the way is cleared for the emergence of a more cogent liberal theory of adjudication.[29]

A. *The Subjectivity of Truth*

Unger's contention that liberals view truth as radically subjective, or atomized, is best described in a passage discussing values. Unger states:

> Values are subjective in the sense that they are determined by choice. Subjectivity emphasizes that an end is an end simply because someone holds it, whereas individuality means that there must always be a particular person whose end it is. The opposing conception is the idea of objective value, a major theme of the philosophy of the ancients. Objective values are standards and goals of conduct that exist independently of human choice. Men may embrace or reject objective values, but they cannot establish or undo their authority.
>
> From the start, liberal political thought has been in revolt against the conception of objective value.
>
> . . . .
>
> [T]he teachings of liberalism *must be*, and almost always have been, uncompromisingly hostile to the classic idea of objective good.[30]

The idea of subjective value has indeed been highly influential in contemporary legal thought, and Unger's insight is valuable. The chronic theoretical conundrum is to reconcile the "perceived need for judicial objectivity"[31] with the seemingly inescapable conclusion that the personal beliefs of judges strongly influence, if not determine, their decisions.[32] A common approach to resolving the dilemma has been to hold that the value choices made by the judiciary must be based on determinations of a "higher authority."[33] This reconciliation by higher authority, however, has had two divergent expressions, which are characterized below.

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[26] *Id.* at 46, 81, 125.

[27] *See infra* notes 40–176 and accompanying text.

[28] *See infra* notes 151–163, and accompanying text.

[29] *See infra* notes 165–219 and accompanying text.

[30] R. UNGER, *supra* note 1, at 76, 77 (emphasis added).

[31] Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 495 (1984) [hereinafter Bennett].

[32] *Id.*

[33] *Id.*

1. "No judicial judgment is legitimate, except on grounds that are visibly approved by the political process."

The first formula for reconciling the need for adjudicative impartiality with the principle of subjective truth is probably the least satisfactory. Theoretically, this formula prevents possible judicial anarchy by constraining severely the sort of substantive reason that can be used to justify any judicial decision. To require the judiciary to look to politically approved rationales as the bases for their determinations badly compromises their ability to carry out the liberal goal of providing a check against possible majoritarian tyranny. Accordingly, advocates of this formula as a means of reconciling their epistemology with their political and legal values are at the fringes of the liberal tradition. They place themselves in a philosophical position not unlike that of Jeremy Bentham, whose vigorous reformist spirit was accompanied by a strong antipathy to the common law, and a commensurate heavy reliance on the wisdom and power of legislatures.[34] Among modern writers, this first formula perhaps best describes the approaches taken by constitutional "originalists"[35] such as Raoul Berger or Robert Bork,[36] and analytical positivists such as H.L.A. Hart.[37]

Constitutional originalists argue that the only constraints on the current majority's will should be found in a Constitution interpreted strictly on the basis of its framers' expressed, literal intent. Not surprisingly, their theory results in recommendations of judicial restraint. Moreover, this favoring of political majoritarianism is strongly emphasized at a deeper epistemological level. Their theory tends to equate truth with individual preferences. As Ronald Dworkin explains,[38] any theory that focuses on individual intentions, or preferences, is drawn toward a type of utilitarianism that weighs collective increases and decreases in individual happiness to determine the appropriateness of an action. Such unprincipled decisionmaking carries dangers of social and ethical irrespon-

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[34] *See* D'Amato, *Towards a Reconciliation of Positivism and Naturalism: A Cybernetic Approach to a Problem of Jurisprudence*, 14 W. ONT. L. REV. 171, 177–78 (1975).

[35] *See* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980) [hereinafter Brest]. Constitutional originalists look to the intentions of the framers of the Constitution for the political authority they feel is necessary to legitimate specific holdings in cases of judicial review. Bennett, *supra* note 31, at 496. The term "originalist" is sometimes used synonymously with "interpretivist." The latter word, however, is frequently used to describe those writers like John Hart Ely and Henry Monaghan who stress the process attributes of Constitutional law. *See* J.H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 356 (1981); *infra* notes 156–57 and accompanying text. This article refers to that approach as "proceduralist" as a way of distinguishing such writers from those like Bork who embrace the subjective theory of truth more heartily.

[36] R. BERGER, GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). The term "originalist" is elastic in several directions. Brest, *supra* note 35, at 204–05 suggests the term can also be subdivided into "moderate" and "strict" "textualists," and also "intentionalists."

[37] H.L.A. HART, THE CONCEPT OF LAW (1961); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

[38] Dworkin is an advocate of the subjective theory of value, and therefore his criticism of an epistemology based on individual preferences seems at first blush inconsistent. Dworkin takes great effort, however, to disassociate his epistemology and ethical theory from utilitarianism. The focus of Dworkin's work is not individual preferences, but rather individual rights, as interpreted by judges who have developed comprehensive, principled political and moral philosophies. *See infra* notes 54–62 and accompanying text.

sibility, since the content of the collective preferences is subordinate to the issues of the numbers of persons holding the preference, and the intensity with which it is held.[39]

In addition to objections concerning the social consequences of adopting the originalist argument, others have argued that intentionalist theories are based on intellectual delusion. These commentators assert that the original intentions of the framers of a document more than two hundred years old simply cannot give "objective" guidance to contemporary adjudication.[40] These technical problems associated with the originalist approach have been summarized as: the practical difficulties of ascertaining the intentions of individuals long dead; the problem of determining what manifestations of an individual's psyche constitute "intent;" and, if such individual intents are discovered, the problem of "summing" these intents to derive a group intent.[41] The originalist fails, therefore, to remove the subjective element to judicial decisionmaking. At the same time, however, the theory could readily result in vulnerability to prevailing majoritarian demands.

The attempt to legitimize judicial judgments on the basis of political higher authority is also reflected in the analytical positivism of H.L.A. Hart.[42] Hart responds differently in particulars from the originalists — especially regarding political connotations of their theory — but similarly in tying adjudicative legitimacy to its grounding in clearly promulgated political policy.

Hart's legal theory turns on the need to identify what is properly a "legal rule," and therefore appropriate as grounds for an adjudicative decision.[43] Every legal system promulgates a process by which law is legitimately created. This process Hart refers to as the "rules of recognition."[44] Only where gaps in the law appear, where the legislature has not clearly expressed itself, are judges free to exercise "discretion" to determine what the law ought to be.[45] Even in such cases, however, Hart's theory remains true to the above formula that adjudication is legitimate only when tied to reasons that are politically declared. This is because when judges exercise this "gap discretion," they must act in a fashion that is subordinated in two ways to the political process. First, they should attempt to second-guess the content of what the legislature might do with the

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[39] Dworkin states:

> Can we find [an] underlying political virtue for the positivist model of constitutional adjudication expressed in Bork's opinion? I believe so: it is the virtue of economic efficiency, conceived as the goal of satisfying the preferences of the community overall, including its political and moral . . . preferences . . . . Their conviction that the majority's political power should be limited as little as possible — that it should be limited only by the explicit text of the Constitution or the unambiguous intentions of its framers — reflects . . . an unrestricted utilitarianism that . . . denies any constraint on the kind of preferences that must be counted in that calculation.

Dworkin, *Law's Ambitions for Itself*, 71 VA. L. REV. 173, 185–86 (1985).

[40] *See, e.g.*, Bennett, *supra* note 31, at 456–65; Brest, *supra* note 35; Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977); Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1060–72 (1981); Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 806–08 (1982).

[41] *See* Bennett, *supra* note 31, at 456.

[42] *See* H.L.A. HART, THE CONCEPT OF LAW, *supra* note 37; Hart, *Positivism and the Separation of Law and Morals*, *supra* note 37.

[43] N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY 229 (1978).

[44] H.L.A. HART, THE CONCEPT OF LAW, *supra* note 37, at 92–107.

[45] *Id.* at 138–43; *cf.* Greenawalt, *Discretion and Judicial Discretion: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359–60 (1975).

question.[46] Second, and on a more conceptual level, they are to fashion this content "in response to the evidence and arguments of the same character as would move the superior institution if it were acting on its own."[47]

As with constitutional originalism, such profound subordination to a political authority compromises significantly the liberal principle that the courts are to provide a bulwark against majoritarianism.[48] Furthermore, this positivist version of the first formula is similarly open to technical objections. In the now famous dialogue between Hart and Lon Fuller,[49] Fuller sought to demonstrate that it is inherent in the nature of both morality and language that neither courts nor legislatures can be reduced to a mechanical role in interpreting the law.[50] Rather, "in applying the statute[s] the judge . . . must be guided not simply by its words but also by some conception of what is fit and proper . . . ; conceptions of this sort are implicit in the practices and attitudes of the society of which he [or she] is a member."[51] Fuller's argument has now been much elaborated by linguistic[52] and philosophical analysis.[53]

As a device to reconcile core liberal policies with a belief in subjective truth, the formula that ties adjudicative legitimacy to articulated political policy is inadequate. Both the originalist version and the positivist version of the formula fail for technical reasons to remove all discretion from judicial decisionmaking. Moreover, the formula has the unavoidable effect of substantially weakening the concept of judicial review because of its deference to external political authorities. The failure of the positivists' efforts arguably led directly to the fashioning of the second formula, which is associated primarily with the writings of Ronald Dworkin.

2. "Non-political values may be imported into judicial decision-making, but *only* such values as will yield the objective, 'right' answer."

This formula is in many respects the converse of the first. The first is a response to the possibility of judicial anarchy implied by the principle of subjective value, and it overshoots the mark by drastically weakening judicial independence. The second formula responds to the possibility of majoritarian despotism by positing the existence of values that override utilitarian legislative determinations. The device by which judicial anarchy is prevented is the doctrine that judges are not free to indulge their personal preferences in declaring or interpreting these higher order, nonpolitical values. Rather, the values

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[46] R. DWORKIN, TAKING RIGHTS SERIOUSLY 82 (1978).

[47] *Id.*

[48] *Id.* at 84–85.

[49] L. FULLER, ANATOMY OF THE LAW (1968); H.L.A. HART, THE CONCEPT OF LAW, *supra* note 37; Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Hart, *Positivism and the Separation of Law and Morals*, *supra* note 37.

[50] L. FULLER, ANATOMY OF LAW, *supra* note 49, at 11–13, 17–18, 39–40, 57–59; Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, *supra* note 49, at 644–48; *see also* D'Amato, *supra* note 34, at 178.

[51] L. FULLER, ANATOMY OF THE LAW *supra* note 49, at 59.

[52] *See* Moore, *supra* note 1.

[53] Much of Dworkin's work, for example, could be described as dedicated to proving Fuller's proposition. *See* R. DWORKIN, *supra* note 46, at 149; *see also infra* notes 154–55 and accompanying text for a discussion of the "due substance theorists."

operate in each adjudicative circumstance in a way that is "correct" culturally and historically, quite independent of the particular judge.[54]

If the "correct" answer is historically determined in a given case, however, what remains of the theory of subjective value? Dworkin is the primary proponent of this formula, and the subjective value issue causes great difficulties for him. The torturous way in which Dworkin struggles to affirm the principle, while also maintaining the efficacy and respectability of his theory of legislation-trumping "rights," reveals strikingly the fundamental tensions identified by Tushnet and Unger.[55] Dworkin unquestionably supports the theory of subjective value.[56] To avoid inconsistency, therefore, his concept of rights must remain somehow out of the objective realm. The device Dworkin employs is to assert that rights are *not* values beyond human choice, but rather are a *way that judges should reason* within the legal system.[57] That is, rights are not content-laden, specific ideas; rather, Dworkin's rights are the responses of individual judges discharging their duties to reason in a particular fashion when deciding hard cases. Therefore, the "rights" do not exist in any given case apart from the reasoning process of the individual judges. In a sense, then, they remain wholly "subjective." Their strength, their particular articulation and substance, depend entirely on each individual judge having formulated a comprehensive political theory by which to decide hard cases.[58] However, Dworkin's political theory and its implications for hard cases is not mere personal preference. He believes there is only one right answer to how political, moral, and legal theory are best melded in a given hard case.[59]

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[54] R. DWORKIN, *supra* note 46, at 279. He writes: "My arguments suppose that there is often a single right answer to complex questions of law and political morality." *Id.* Michael Perry, in THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 102 (1982) (*discussed in* Bennett, *supra* note 31, at 450 n.15) also suggests this possibility, at least in the context of fundamental rights.

[55] *See* R. DWORKIN, A MATTER OF PRINCIPLE 196–204 (1985); R. DWORKIN, *supra* note 46, at 279–90.

[56] As Dworkin wrote recently, "[We] are not a community tied together by a concrete moral settlement, by shared opinions about the details of what justice and fairness and a decent and valuable life require. (We would, I believe, be a worse community if we did achieve consensus about these matters.)" Dworkin, *Law's Ambitions for Itself*, *supra* note 39, at 187. *See also* R. DWORKIN, *supra* note 46, at 191–92.

[57] R. DWORKIN, *supra* note 46, at 87; Bennett, *supra* note 31, at 491–93; Greenawalt, *supra* note 45, at 367.

[58] As Dworkin summarized:

> Judges develop a particular approach to legal interpretation by forming and refining a political theory sensitive to those issues on which interpretation in particular cases will depend; and they call this their legal philosophy. It will include both structural features, elaborating the general requirement that an interpretation must fit doctrinal history, and substantive claims about social goals and principles of justice. Any judge's opinion about the best interpretation will therefore be the consequence of beliefs other judges need not share.

R. DWORKIN, *supra* note 46, at 161–62.

[59] As Bennett states:

> Ronald Dworkin . . . calls for a "fusion of constitutional law and moral theory" as an antidote to judicial discretion. He repeatedly suggests that the fusion will allow moral and political philosophy to lead a sufficiently diligent and talented judge to right answers to questions of constitutional law. In that way, a philosophically inspired theory provides not only an objective source for judicial values but the authoritative source as well.

The device of conceiving rights as the duty of a politically responsible judicial official, rather than as transcendent, timeless, objectively statable "things," neatly reconciles the opposing liberal goals of judicial power and judicial restraint within the principle of subjective value.[60] Theoretically, it accomplishes what Tushnet and Unger deem to be impossible. Yet it is a difficult system to comprehend, as witnessed by the enduring confusion over the nature of the duty said to be owed by the judge to decide cases consistently with both law and the judge's own political theory.[61] The theory also lacks realism and depends entirely on judges being capable of exercising an almost supernatural (Dworkin would call it "Herculean") power of reasoning. Dworkin's system is therefore open to the charge that it lacks a clear procedural and moral direction for judges to follow.[62] Consequently, Dworkin has achieved an accommodation of the liberal goals of judicial power and judicial restraint, but at the possible cost of lack of effectiveness in achieving either.

The balance-wheel of Dworkin's reconciliation is the "one right answer" thesis, and specific opposition to this has been articulated from practical and political perspectives. Practical objections have been articulated, for example, by Sanford Levinson.[63] He maintains that the thesis is contrary to the experience of practicing lawyers,[64] for whom the appearance of even so few as two clear alternatives is a rarity.[65] This criticism is echoed by Kent Greenawalt,[66] who points out that in ordinary discourse, the existence of discretion is assessed by whether a range of decisions is acceptable to the persons to whom the legal system is responsible.[67] Moreover, even if one assumes the case *outcome* to be describable by such epistemological absolutes as "true/false"[68] or "correct/incorrect," and therefore beyond judicial discretion, the judge inevitably will play a creative, non-absolute role in both the reasoning process leading to the judgment[69] and in writing the opinion.[70]

Recently, Dworkin has softened the right answer thesis somewhat, through a more sophisticated analysis of the process of interpretation.[71] The interpretative role of the judge is now acknowledged straightforwardly. Curiously, however, Dworkin denies that judicial interpretation has the latitude to choose between two or more permissible legal outcomes. This is because in hard cases, as in easy cases, there is always one choice among a possible range that is the proper outcome.[72] Such a concept of interpretation

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Bennett, *supra* note 31, at 450 (citations omitted); *see also* Farago, *Judicial Cybernetics: The Effects of Self-Reference in Dworkin's Rights Thesis*, 14 VAL. U.L. REV. 371, 379–85 (1980); Greenawalt, *supra* note 45, at 360–61; Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1381–84 (1979).

[60] *But see* Leedes, *supra* note 59, at 1389, where Dworkin's methodology, if not his explicit argument, is said to be "a rejection of liberal premises that presuppose a divergence of values voluntarily chosen by each individual." *Id.*

[61] *Cf.* Bennett, *supra* note 31, 493–94.

[62] *See, e.g., id.* at 493–95; Greenawalt, *supra* note 45, at 359–66; Richards, *Taking* Taking Rights Seriously *Seriously*, 52 N.Y.U. L. Rev. 1265, 1307–08 (1977).

[63] Levinson, *Taking Law Seriously: Reflections on "Thinking Like a Lawyer"*, (Book Review) 30 STAN. L. REV. 1071 (1978).

[64] *Id.* at 1083.

[65] *Cf.* Richards, *supra* note 62, at 1315.

[66] Greenawalt, *supra* note 45, at 368.

[67] *Id.*

[68] R. DWORKIN, *supra* note 46, at 283; *see also* Farago, *supra* note 59, at 407.

[69] Farago, *supra* note 59, at 409.

[70] Greenawalt, *supra* note 45, at 378–81.

[71] *See* Dworkin, *supra* note 55.

[72] Most recently, Dworkin has argued that in hard cases there may be "competition" among

would not easily be accepted by those experienced in literary or aesthetic interpretation.[73] Both Levinson[74] and Gary Leedes,[75] for example, argue that no authoritative answers emerge from interpretation, absent the existence of some consensus about ultimate values. For them, the concept of interpretation implies that alternative, but contradictory, outcomes are possible and valid, unless the society has a strong, excluding version of truth about all matters touched by the text. To date, however, no such consensus exists in our society concerning ultimate values.[76] Some would go further and maintain that even if a consensus were forged regarding general social causes and goals, the inherent semantic variability in the words of particular legal texts would preclude interpretation from becoming anything more than "a messy business of guesswork predicated on practical knowledge of language, conventions, and the situations in which they operate."[77]

Compounding the interpretative indeterminedness that stems from semantic variability is the variety of *perspective* from which a rule may be interpreted.[78] This aspect of interpretation is particularly prone to manipulation as part of litigation strategy. Judicial interpretation may proceed from the standpoint of the meanings of the words used, probably the most common perspective, the intentions of the rule makers, the social purposes of the rule,[79] or, according to Dworkin, the judge's personal political philosophy.[80] Even the Herculean outcome to a case, therefore, is "right" only according to the particular criteria that shape the interpretive process.

B. *The Doctrine of the Whole and Its Parts*

The doctrine of the "whole and parts" describes two related principles ascribed by Unger to liberalism: the principle of analysis and the principle of individualism. The two principles are united epistemologically; both consider the "whole" of a thing to be nothing more than the sum of its parts. Analysis posits that all knowledge may be reduced to the elementary ideas of which it is composed; individualism states that groups are nothing more than the collected qualities of their constituent members.[81] From this

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contending legal principles, but not "contradiction." R. DWORKIN, *supra* note 11, at 73–86, 243–71. *See also* Greenawalt, *supra* note 45, at 366.

[73] *See, e.g.*, Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983); Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982) [hereinafter Fish, *Chain Gang*]; Graff, *"Keep Off the Grass," "Drop Dead" and Other Indeterminacies: A Response to Sanford Levinson*, 60 TEX. L. REV. 405 (1982); Levinson, *Law As Literature*, 60 TEX. L. REV. 373 (1982).

[74] Levinson, *supra* note 63, at 1084–85.

[75] Leedes, *supra* note 59, at 1389–90.

[76] Levinson, *supra* note 63, at 1084–85.

[77] Graff, *supra* note 73, at 410; *see also* Fish, *Chain Gang*, *supra* note 73; Moore, *supra* note 1.

[78] G. GOTTLIEB, THE LOGIC OF CHOICE 91–104 (1968). Dworkin addresses this issue throughout his work, clarifying that the perspective of his interpretive theory is neither the meaning of particular words nor the intentions of the law creators. Rather, his perspective is broadly contextual and inclusive of moral ideas.

[79] *Id. See also* Williams, *Language and the Law*, 61 L.Q. REV. 384 (1945).

[80] *See supra* note 58 and accompanying text.

[81] Unger writes:

> [Liberalism] states that there is nothing in any piece of knowledge that cannot be analyzed back into the elementary sensations or ideas from which it was composed and then built up again from those sensations and ideas. It is the principle of analysis.
>
> . . .
>
> Suppose we consider any aspect of our knowledge a whole whose parts are the

central doctrine is said to flow liberal thinkers' heavy reliance on analytical reasoning and their reluctance to conceive of humans in terms of the groups they form.

In contrast to the principle of subjective truth, which pertained to legal theory at the level of rule or specific holding, the whole and parts doctrine pertains to legal theory at the level of the legal system.[82] A legal theorist who accepts the doctrine of the whole and its parts will conceive legal systems according to one of the following two precepts: First, that a legal system is merely a way to identify valid rules, *i.e.*, it is a collection of rules that in itself has no independent significance. Or, second, that a legal system forms a harmonious, unified whole whose consistency is insured by adopting analytical reasoning in adjudication. In practice, the two points are very similar, but separating them here illustrates an important distinction.

1. Legal System as a Collection of Rules

Those who believe the first version of the whole and parts doctrine deny that any worthwhile end is served by conceiving of the legal system as anything apart from a collection of rules and principles. Valid rules or principles gain recognition within the legal system according to predetermined methods that can be fully described and which determine whether a given legal proposition is, or is not, legitimately part of that system. Moreover, the application of rules to specific factual cases proceeds within the confines of yet other rules or canons of interpretation.

This approach to legal system is best exemplified by the theories of Hart[83] and the Scandinavian Realist Karl Olivecrona.[84] Both postulate weak "systems" of law, which are really nothing more than collections of rules. Those rules, in turn, have little necessary interrelationship beyond what is required to identify them as valid laws.[85] That each writer views the legal system as lacking structure or importance reflects a highly atomized concept of legal rule. Hart is a behaviorist, identifying rules in particular human actions, each instance of which has little effect on other instances.[86] Olivecrona, on the other hand, conceives of legal rules as psychological facts, and hence "equates a legal system with a 'mass,' 'conglomerate,' [or] 'complex' of rule-ideas."[87] For such a structure-free, non-interactional system it is not necessary to believe that the rules that operate within

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> sensations or ideas with which it is made. The principle of analysis may then be rephrased as the proposition that in the acquisition of knowledge the whole is the sum of its parts.

R. UNGER, *supra* note 1, at 46. The principle of individualism is similar: "a group is simply a collection of individuals; in other words, the attributes of a group are the sum of the attributes of its individual members." *Id.* at 81.

[82] The term "legal system" is here used not to refer to the various institutions and personnel of law, such as courts, legislatures, police, or regulatory bodies. Rather, it is meant to refer to the internal relationships among all available legal rules, principles, and policies.

[83] *See* H.L.A. HART, THE CONCEPT OF LAW, *supra* note 37; Note, *Hart, Austin, and the Concept of a Legal System*, 84 YALE L.J. 584 (1975).

[84] K. OLIVECRONA, LAW AS FACT (2d ed. 1971).

[85] J. HARRIS, LAW AND LEGAL SCIENCE: AN INQUIRY INTO THE CONCEPTS "LEGAL RULE" AND "LEGAL SYSTEM" 44–46, 54–64 (1979).

[86] *Id.* at 63.

[87] *Id.* at 46 (citations omitted).

the system will be consistent or harmonious. Indeed, Olivecrona has specifically recognized the possibility of contradiction within a legal system.[88]

The criticism applied below[89] to this version of the whole and parts doctrine is based on general systems theory.[90] General systems theory advocates the importance of conceptualizing a separate existence of the larger system in which seemingly discrete items are imbedded. Drawing on analogies from the natural and physical worlds, general systems theorists have developed rich, subtle concepts of system dynamics. Before moving to that criticism, however, the second version of the whole and parts doctrine should be introduced.

2. Legal System as Controllable Unity

Those adopting the second version of the whole and parts doctrine are concerned with legal system *qua* system, but view the internal relationships of the system components as fully consistent, specifiable, and most importantly, controllable.[91] Inconsistency between aspects of the system in a given case are always seen to be resolvable by rules granting priority to one item or the other. As one commentator described this version of the legal system, "[t]he norms of legal reasoning are oriented toward consistency: Many well-known 'collision-norms' demand that the lawyers do not accept incompatible legal norms as simultaneously binding but arrange them in priority orders, for example, according to the principle that a later statute has priority before an earlier one."[92] Or, as another stated, "[a] rational system of rules is consistent. Contradictions must be resolved either by requiring that one rule overrides the other, as in our hierarchical precedent system, or by limiting each rule so as to avoid the contradiction."[93]

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[88] *Id.* at 48 (construing Olivecrona's summary of John Austin's legal theories in K. OLIVECRONA, *supra* note 84 at 33).

[89] *See infra* notes 104–18 and accompanying text.

[90] *See, e.g.*, L. VON BERTALANFFY, GENERAL SYSTEMS THEORY: FOUNDATIONS, DEVELOPMENT, APPLICATIONS (1968); E. LASZLO, INTRODUCTION TO SYSTEMS PHILOSOPHY: TOWARD A NEW PARADIGM OF CONTEMPORARY THOUGHT (1973); R. LILIENFELD, THE RISE OF SYSTEMS THEORY: AN IDEOLOGICAL ANALYSIS (1978); S.C. PEPPER, CONCEPT AND QUALITY — A WORLD HYPOTHESIS (1967); P.A. WEISS, HIERARCHICALLY ORGANIZED SYSTEMS IN THEORY AND PRACTICE (1971); Mattessich, *The Systems Approach: Its Variety of Aspects*, 28 GENERAL SYS.: Y.B. SOC. GENERAL SYS. RESEARCH 29 (1983–84); Simon, *The Architecture of Complexity*, 10 GENERAL SYS.: Y.B. SOC. GENERAL SYS. RESEARCH 63 (1965).

[91] D'Amato, *supra* note 34, at 201 (summarizing the nature of the "positivist" view of legal systems).

[92] Pecezenik, *Moral and Ontological Justification of Legal Reasoning*, 4 LAW & PHIL. 289, 292 (1985).

[93] Weaver, *Is A General Theory of Adjudication Possible? The Example of the Principle/Policy Distinction*, 48 MOD. L. REV. 613, 617 (1985). *Accord*, Dworkin, *Is Law A System of Rules?* 35 U. CHI. L. REV. 14, 27 (1967). The context of the remarks of both Dworkin and Weaver is in distinguishing rules from principles. Principles are said not to have the binary, valid/invalid qualities of rules, but rather to retain their validity even when they conflict. In such instances, each principle will have a relative weight, which will determine the outcome of the case. Yet this refinement of the composition of the legal system adds little sophistication to the concept of the system itself. No greater sense of internal relationships among the various aspects of the system is assumed by the addition of the principles. The structural distinction between principles and rules seems merely to be that they are born by different rules of recognition: Rules are validated within the system, principles by moral

This view of legal system is most closely associated with the "legal science" of Hans Kelsen[94] and J.W. Harris.[95] It assumes strong logical connections among the rules that comprise a legal system, even though the rules connect more in a linear, descending chain of validity than in a multi-dimensional "field" in which various components may intersect in diverse ways.[96] Furthermore, this view reflects a strong assumption that the system can be controlled perfectly, since all legitimate laws derive from authorized individuals or agencies. Metaphorically, the law of a legal scientist is the product of a rational will.[97]

With the specification of legal content and its application firmly within rational human control, case outcomes are harmonious and consistent, save for judicial errors and "gaps" in the law. More ominously, however, perfect control of the system attributes of law implies substantial and predictable potential *social* control.[98] In turn, this absolutist belief in the human controllability of a legal system may lead to defining law in terms of such control,[99] or analyzing and attempting to use law instrumentally as a device of social engineering.[100]

The image of a legal system developed by legal scientists contrasts strongly with that entailed by the theories of Hart or Olivecrona. The legal scientist's legal system strictly limits the possible valid sources of law. It assumes hierarchical relationships in such sources, which determine the rule that will prevail in case of conflict. It also assumes that where rules emanate from the same source, contradiction among the rules is not possible.[101] Law creation seems disembodied from social life, a view that necessarily accords to legal rules almost unassailable power to effect social change. It is this school that Unger seems particularly to have in mind when he writes:

> The dominant consciousness in the liberal state includes a characteristic view of the relation between [the person] as an agent or a thinker and the external world . . . . [I]t emphasizes the subjection of nature to human will as the ideal

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beliefs articulated within and beyond the legal system. Farago, *supra* note 59, at 379. Dworkin's own remarks on this subject are enigmatic. He states:

> I did not mean, in rejecting the idea that law is a system of rules, to replace that idea with the theory that law is a system of rules and principles. There is no such thing as 'the law' as a collection of discrete propositions, each with its own canonical form.

Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1256 (1977).

[94] *See generally* H. KELSON, GENERAL THEORY OF LAW AND STATE (1946); H. KELSEN, PURE THEORY OF LAW (1967).

[95] J. HARRIS, *supra* note 85.

[96] H. KELSON, GENERAL THEORY OF LAW AND STATE, *supra* note 94, esp. at 112–13.

[97] *See* J. HARRIS, *supra* note 85, at 32–33; R. UNGER, *supra* note 1, at 19; *cf.* Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1327–33 (1974).

[98] *See* D'Amato, *supra* note 34, at 201. *See also* S.F. MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH 1–3 (1983).

[99] As one commentator describes the function of law: "law is, thus, an instrument of the homeostasis of social co-existence . . . . Without proper norms this coexistence would not be possible and there would be a situation of anarchy and/or anomy." Wroblewski, *Law as an Instrument of Social Homeostasis*, 67 *Archiv für Rechts–und Sozialphilosophie* 1, 9–10 (1981).

[100] *See generally* Summers, *Pragmatic Instrumentalism in Twentieth Century Legal Thought — A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981).

[101] J. HARRIS, *supra* note 85, at 10–11.

> of action and the choice of efficient means to given ends as the exemplary procedure of reason.[102]

Although the following general systems theory criticism addresses primarily the first formula of the whole and parts doctrine, the skepticism of general systems theory concerning the human controllability of systems is also apposite to this second version. The major criticism of the second version, however, is summarized in the following section.[103] Discussed there are empirical studies carried out largely by legal anthropologists, whose training and research interests better alert them to the many connections between law and other facets of human culture.

3. Systems Theory Criticism

Formal general systems theory is a branch of philosophy devoted to uncovering the uniform structures and behaviors of "systems."[104] In a sense it might be said to build on notions expressed by Wittgenstein that discrete phenomena are scarcely comprehensible except as they flow over a riverbed of background ideas.[105] Virtually any natural or social phenomenon may be analyzed as a system; all that is required to be so labelled is a set of elements that display a continuity of interrelationships or interdependencies over time.[106] The set of all laws within a particular jurisdiction is therefore a natural subject for general systems analysis. The major focuses of such an inquiry would be first, to discover the ways in which particular laws take their meaning and perform certain functions through the influence of the collectivity of all other laws; and second, to discover the ways in which a change in meaning or use of a particular law will change both other particular laws and the general nature of the collective laws.[107]

Two distinctions quickly emerge between the general systems theorist's views of the legal system, and the views that would be held by a believer in the whole and parts

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[102] R. UNGER, *supra* note 1, at 19.

[103] *See infra* notes 119–38 and accompanying text.

[104] *See supra* note 90 and sources cited therein.

[105] In ON CERTAINTY (G.E.M. Anscombe, G.H. von Wright, eds. 1974) Ludwig Wittgenstein writes:

> Sec. 141. When we first begin to *believe* anything, what we believe is not a single proposition, it is a whole system of propositions. (Light dawns gradually over the whole.)
>
> Sec. 142. It is not single axioms that strike me as obvious, it is a system in which consequences and premises give one another *mutual* support.

Id. at 21e. *See also* Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157, 167–68 (1980).

[106] P.A. WEISS, *supra* note 90, at 9–13. Weiss writes:

> [A system] is not a haphazard compilation of items nor a complex of rigidly linked pieces or events, . . . for in either of those cases, the compilation of the total unit could still be predicted unequivocally from the information about its constituent parts, pieced together. In a system, . . . the *state of the whole* must be known in order to understand the *coordination* of the collective behavior of its parts; . . . [it is] "control" of the components by their collective state. The system as a whole has some characteristic conservative configuration which is maintained, not *through* a rigid concatenation of its component subunits, . . . but *despite the absence* of such internal interlocking braces.

Id. at 13. *See also* Simon, *supra* note 90, at 63–64.

[107] The general principles that describe how complex systems become organized to achieve stability and unity of action are collectively known as "cybernetics." C.H. WADDINGTON, TOOLS FOR THOUGHT 97 (1977). *See also* Simon, *supra* note 90, at 63.

doctrine. The first difference in viewpoint deals with the density of relationships among the component laws of the system, *i.e.*, the number of ways in which each law interacts with other laws. The second distinction deals with the authority relationships among such laws, *i.e.*, the extent to which the laws are structured to clarify precedence in the event of a conflict between the component laws.

Relative to the systems theorist, the whole and parts believer holds a restricted conception of the interrelationships of various laws. Rather than seek intricate ways in which seemingly unrelated laws subtly affect one another, most whole and parts believers will be quite concerned with identification features (what is, and is not, validly within the system)[108] and rules of priority within the system for resolving conflicts among the various mutually exclusive laws. This concern with identification and priority dictates a particular view of the authority that holds between norms in the system. To a believer in the whole and parts doctrine, all authority relationships inevitably appear unidirectional and simple. The general systems theorist, in contrast, will posit that the system is open rather than closed, and will therefore not attempt to identify any rule of recognition. The systems theorist will not assume that one rule has consistent "authority" over another. Rather, the view will be of mutual influence, with an authority/dominance pattern that may change slowly, or even oscillate with rapidity.[109] Since each norm is capable of influencing every other norm, the system of rules creates a field of meaning.[110] This image may be contrasted with the linear perspective of the legal scientists, who expect each norm to be insular except for its derivation of validity.

A third distinction is not so easily apparent, but because it concerns the concept of a rationally controllable legal system, it is crucial to understanding the persistence of the influence of the whole and parts doctrine on traditional concepts of legal systems. General systems theory maintains that the interactions of system components, and therefore the details of what a system is and how it behaves, cannot be totally controlled. According to this theory, certain features that enable a system to sustain its identity in spite of significant internal disruptions cannot be directed externally. These features emerge spontaneously from the various internal interactions of the system parts.[111]

Systems theorists carefully distinguish phenomena displayed within a self-regulating, internally directed system, from any phenomenon that occurs through the operation of a chain of micro-precise causes.[112] The way in which a row of dominos falls, for example, or the way in which a cell multiplies, illustrates a chain of micro-precise sequential causes. If even one link in the chain of causation is disturbed significantly, the process stops and the "event" to be produced by the chain does not occur.[113] In contrast, a self-regulating

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[108] *See supra* notes 43–44 and accompanying text.

[109] R. LILIENFELD, *supra* note 90, at 179; Simon, *supra* note 90, at 67; *cf.* Dworkin, *Does Law Have A Function? A Comment on the Two-level Theory of Decision*, 74 YALE L.J. 640 (1965).

[110] R. LILIENFELD, *supra* note 90, at 179–81; *see generally* S.C. PEPPER, *supra* note 90; Simon, *supra* note 90.

[111] *See supra* notes 106, 109 and accompanying text.

[112] *See supra* notes 106, 109 and accompanying text.

[113] Events produced by a chain of microprecise causes illustrate what Pepper has called the "organic" hypothesis. S.C. PEPPER, WORLD HYPOTHESES: A STUDY IN EVIDENCE 232–314 (1957). The various components of an organic structure, and their causal connections, can be precisely mapped. A significant disturbance to the structure may so disrupt the causal chains that the structure "fails," *i.e.*, collapses, or is incapable of producing a novel property. For example, the propellor shaft of an airplane connects in precise fashion to other components. If the shaft is broken, the novel

system also produces "events" greater than could be predicted from looking only at the various components, *but it does this in unpredictable, or in multiple, self-adapting ways.*[114] Various components could be disrupted significantly, but the system events still would emerge. The causal operations producing the event, however, may have had to be changed by intricate internal adjustments among many system components.[115] Examples of a phenomenon produced by a self-regulating system are the way the price of a commodity emerges in a free market system,[116] or the way the molecules of a liquid arrange themselves within a container,[117] or the emergence of consciousness from a human brain. Although little is known of such processes, it is likely that they involve substantial structural redundancies that are capable, when needed, of offsetting one another in an appropriate fashion, rather than always working in complement. This is a fashioning of component interaction that is highly flexible and adaptive to circumstance, but not a fashioning that is unified, consistent, harmonious, or even necessarily "rational."

Looking at legal systems through the eyes of a general systems theorist, therefore, would create much skepticism about certain whole and parts presumptions of clear, controllable, top-down authority patterns; about closed, non-contradictory, rational, and orderly structures; and about the possibility of outcome precision in particular cases.[118] The impact of systems thinking on legal philosophy is not, however, wholly negative. Seeing the legal system as self-regulating might encourage greatly our faith in its ability to achieve just results, even in the face of conflicting desirable principles or rapid social change.

4. Empirical Criticism of the Efficacy and Controllability of Law

In addition to the conceptual criticism of the whole and parts doctrine that emerges from using the perspective of general systems theory to understand law, empirical evidence of the inconsistency, disharmony, and lack of efficacy of legal systems can also be offered to dispute the whole and parts doctrine, especially in response to the "legal scientists'" version that is dominated by beliefs about the precision, clarity, order, rationality, and efficacy of rules.[119]

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property of an airplane, *i.e.*, the ability to fly, fails to emerge. *See id.* at 300. In a true system, however, the result of a significant structural disruption is a series of subtle modifications in the relationships among the various components, so as to assure the persistence of the structure and its major operations. *See* R. LILIENFELD, *supra* note 90, at 11–12; P.A. WEISS, *supra* note 90, at 13–14.

[114] *See infra* notes 197–199 and accompanying text. *See also* McNeill, *Sentences as Biological Systems*, in P.A. WEISS, *supra* note 90, at 59–68.

[115] *See* M. POLANYI, THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINDERS 174–200 (1951).

[116] *Id.* at 160–61.

[117] *Id.* at 155.

[118] *But see* Dienes, *Judges, Legislators, and Social Change*, 13 AMER. BEHAVIORAL SCIENTIST 553 (1970), in which the author, although advocating a general systems philosophy, also presumes that full knowledge of systems interaction will empower the conscious manipulation of the systems. *See also* Forrester, *Behavior of Social Systems*, in P.A. WEISS, *supra* note 90, at 81–122. I remain skeptical, however, that in any social setting the various interactions can be mapped with sufficient precision to permit human manipulation.

[119] *See supra* notes 91–102 and accompanying text.

Based on her studies of preindustrial societies, the legal anthropologist Sally Falk Moore[120] disputes that either the aggregate of legal systems, or by implication any particular system, can be fully successful in organizing and controlling human behavior.[121] She states:

> The social reality is a peculiar mix of action congruent with rules (and there may be numerous conflicting or competing rule-orders) and other action that is choice-making, discretionary, manipulative, sometimes inconsistent, and sometimes conflictual . . . . Hence it is inherent in the nature of legal systems that they can never become fully coherent, consistent wholes which successfully regulate all of social life.[122]

Even more pointedly she declares, "[t]he making of rules and social and symbolic order is a human industry matched only by the manipulation, circumvention, remaking, replacing, and unmaking of rules and symbols in which people seem almost equally engaged."[123] The power and efficacy of legal rules thus appears attenuated, when viewed within the context of social life.

Fieldwork in India prompted Marc Galanter to reach a similar conclusion:

> Our model of modern law emphasizes its unity, uniformity, and universality. Our model pictures a machinery for the relentless imposition of prevailing central rules and procedures over all that is local and parochial and deviant. But no actual legal system is really so unified, regular, and universalistic. [In every legal system there are] sources of diversity, variety, irregularity, and particularism . . . .[124]

The indeterminedness inherent in legal systems can be said to arise from at least four sources. First, the primary material of a legal system is a rule, about which James B. White has said: "There is a sense in which the very structure or syntax of the rule — the way it works — makes it a radically fictional expression."[125] This "fiction" of legal rules is said to be due to several unrealistic and inaccurate characteristics of those rules: they reduce all that can be said about an event to a binary yes/no conclusion;[126] they work by a labelling or naming process that masks complexity;[127] they assume that the

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[120] S.F. MOORE, *supra* note 98.

[121] *Id.* at 1–4, 54–81.

[122] *Id.* at 3. On a broader level she writes:

> [I]t is useful to conceive an underlying, theoretically absolute cultural and social indeterminacy, which is only partially done away with by culture and organized social life, the patterned aspects of which are temporary, incomplete, and contain elements of inconsistency, ambiguity, discontinuity, contradiction, paradox, and conflict . . . . Even in matters where there are rules and customs socially and culturally generated, indeterminacy may be produced by the manipulation of existing internal contradictions, inconsistencies, and ambiguities within the universe of relatively determinate elements.

Id. at 49.

[123] *Id.* at 1.

[124] Galanter, *The Modernization of Law*, in MODERNIZATION: THE DYNAMICS OF GROWTH 153, 157 (M. Weiner ed. 1966).

[125] J. WHITE, THE LEGAL IMAGINATION 228 (1973).

[126] *Id.*

[127] *Id.*

labels are consistent and always mean the same thing;[128] and finally, the rules operate at a compromising and inaccurate level of generality "between the specific command and the vague ideal."[129]

The second major source of system inconsistency is the method by which legal systems are constructed, which Moore labels "piecemeal alterations over time, accretion and doctrinal synthesis."[130] Legal creation does not occur as part of an ongoing systematic conception of law; rather, it arises as discrete responses to "particular circumstances at particular moments," leading to an "unplanned total result."[131]

A variation on this theme that has been argued by several writers is the arbitrariness by which rules are selected. Niklas Luhmann,[132] for example, maintains that the specific content of many social rules is not dictated so much by policy as by dominant personalities advocating a certain position, or by lack of understanding of problems and alternative solutions, or by concealment of the persistence of dissenting positions to that taken in the rule.[133] Also contributing to imperfect control over the selection of rules for inclusion in the system are the multiple sources of rule-generation that anthropologists tend to identify,[134] even if positivists do not.[135]

The final reason for doubting the harmony and consistency of decisional outcomes from any legal system is simply that the law as written is often not the law that is applied.[136] This phenomenon is virtually self-evident, and again the sources of the indeterminacy are several: legal decisional and enforcement agencies overlap in jurisdiction, many legal system personnel may be subject to local political pressures, and "the necessity of accommodating values and interests that are not explicitly acknowledged by the legal system."[137] This incongruence between formal law and law as acted out in the society was a major impetus of the Realist movement, with its methodological focus on specific disputes and actual judicial resolutions.[138]

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[128] *Id.* at 228–29; *see also* Fuller, *supra* note 49; Hart, *Positivism and the Separation of Law and Morals*, *supra* note 37; Williams, *supra* note 79, at 400–04; *cf.* Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1316 (1969).

[129] J. WHITE, *supra* note 125, at 229.

[130] S.F. MOORE, *supra* note 98, at 9.

[131] *Id.*

[132] N. LUHMANN, A SOCIOLOGICAL THEORY OF LAW (E. King and M. Albrow trans. 1985).

[133] *Id.* at 55. Or, as stated by another commentator: "the historical approach introduces the element of irreverence . . . for it shows by what absurd shifts and accidents much of the law has been arrived at . . . ." A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW 8 (1966), *quoted in* S.F. MOORE, *supra* note 98, at 9.

[134] S.F. MOORE, *supra* note 98, at 13–31.

[135] *But see* J. RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM (1970), in which he discusses the possibility of multiple rules of recognition.

[136] Galanter, *supra* note 124; *see also* E.A. HOEBEL, THE LAW OF PRIMITIVE MAN 30 (1954); S.F. MOORE, *supra* note 98.

[137] Galanter, *supra* note 124, at 157–59. In modern legal systems, says Galanter,

> [P]arochial interests and concerns find expression in new ways. Federalism, limitations on government, rules of contract, and voluntary association all provide enclaves; . . . Devices like juries, and locally elected judges and prosecutors, permit differences under the veneer of uniformity. Selective nonenforcement, planned inefficiency, *sub rosa* compromise, tolerated evasion, and, finally, corruption — all these permit the local, the particularist, the deviant, to assert themselves while maintaining the fiction that the law is uniform and unvarying.

Id. at 163.

[138] *See* E.A. HOEBEL, *supra* note 136, at 29–45.

C. *Conclusions*

The doctrine of the whole and its parts is a proposition distinct from the principle of subjective truth, and it is possible to hold one belief without holding the other. Nonetheless, in the doctrines of legal theory to which each proposition have given birth, the two views are mutually reinforcing. First, the system assumptions of rationality and complete control of legal outcomes make more plausible the notion that single right answers are available in particular cases. Conversely, modern single answer theories must take their precise answers from humanly created sources. Finding such answers seems far less mystical where the answers can be asserted to lie embedded in a unified and harmonious system.

Perhaps because comparatively little research has been devoted to analyzing legal systems, the grip of the whole and parts doctrine over contemporary legal thought is probably even stronger than the influence of the subjective truth theory. Nonetheless, the whole and parts doctrine is less defensible. It depends on a mechanistic metaphor that was long ago abandoned in the natural sciences. As shall be explored below,[139] the failing of Unger and Tushnet is ironically traceable to their inability to transcend the very whole and the parts approach they criticize.

II. Are Unger's Two Epistemological Principles Necessary Beliefs of Liberalism?

As suggested above,[140] belief in the atomization of truth has led to some labored theorizing to find a reconciliation with core liberal goals. The effort has been largely unsuccessful, and this arguably has lessened the effectiveness of the various liberal theories of adjudication. Much the same disruption and confusion in the formulation of coherent legal and political philosophy has resulted from embracing the doctrine of the whole and its parts. However, are such efforts at reconciliation necessary? What, if anything, in the foundations of liberal thought compels allegiance to these epistemological principles? In the paragraphs below, Unger's construction of liberalism is examined critically. It is submitted that neither the principle of subjective truth, not the doctrine of the whole and its parts, is a necessary belief of liberals. Moreover, not all liberals have embraced either proposition.

Unger derives liberal attributes through tight logic. Yet the logic is also highly vulnerable to refutation, since each new premise is based on a previous conclusion.[141] The cornerstone of his theory is the doctrine of intelligible essences and the alleged liberal opposition to that doctrine. From this assertion follows deductively the conclusion that liberals deny that ethical values might "exist" in some sense apart from the purely personal preferences of discrete individuals. And from that conclusion it follows that liberals would deny the legitimacy of injecting external ethical values into Constitutional litigation.

Unger offers thin proof that belief in subjective truth is a distinguishing characteristic of liberalism. He cites only Hobbes to support his claim,[142] yet in another citation concedes that Locke, and many liberals succeeding Locke, have rejected the concept of

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[139] *See infra* notes 165–74 and accompanying text.
[140] *See supra* notes 31–33 and accompanying text.
[141] R. Unger, *supra* note 1, at 13–16, 115–18.
[142] *Id.* at 306 nn.14–15.

subjective truth.[143] Hobbes certainly was part of the skeptical, secular movement, but few liberals would acknowledge him as an intellectual ancestor.[144] Basically, Hobbes very unliberally advocated an all-powerful sovereign with unconstrained authority.[145] Hobbes's intent in advocating a subjective theory was not the atomization of truth, but rather, merely the redirection of its source from the Church to the State.[146] If subsequent liberals developed a deontological philosophy as Unger suggests, it was in the context of supporting the protection of individual rights and expression, rather than freeing the monarch from Church authority.[147] Both historically and logically, therefore, Unger's case tying liberalism to the subjective theory of truth is problematic.

There is actually no reason to suppose that liberals embrace the subjective theory of truth, apart from their commonly held Kantian view that individuals are free, independent, moral agents.[148] Kantian humanism, however, does not logically entail the subjective truth proposition.[149] The existence of external values embraced by a culture does not differ epistemologically from the existence of mundane empirical properties. For example, the reality of a table does not cause anyone to say that the individual perceiving the table, and making a judgment to avoid walking into the table, has somehow been deprived of the freedom of individual judgment. Similarly, the existence of cultural values that exist apart from particular personal choices of individuals, *does not deprive an individual of a free moral judgment about those cultural values.* Individual judgment is always based on information, whether that information is perceptible to the senses, or only to the mind. No proposition of Kant requires that this information not exist. On the contrary, the notion of free moral choice is spiritually empty unless some information exists external to the individual self.[150] Individuals ultimately may or may not observe these external values, or may rank the importance of various values in highly disparate ways, but these propositions differ from the claim that liberalism entails the principle of subjective truth.

An entirely different type of refutation of the Unger/Tushnet description of liberalism is to examine the philosophy as a social fact, rather than as the set of ideas by which the two authors define liberalism. Liberals have, for example, simultaneously

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[143] *Id.* at 301 n.18B. Unger states:

> There is a recurring tendency in the history of liberal thought to attempt to escape from the principle of arbitrary desire by reverting to a doctrine of intelligible moral essences. The advocates of the reversion characteristically try to perpetuate the doctrine without accepting its bases in more general ideas about thought and language. Moreover, they want to admit some of the consequences and to reject others. They therefore fall into an incoherent eclecticism.

Id. (citation omitted). Unger further describes how Kant and Spinoza "attempt to accommodate some version of intelligible essences," *id.* at 297 n.1, and that only Hobbes and Mill "reject the classical doctrine outright by developing a nominalist conception of essences." *Id.* at 297–98 nn.1–2. The issue is whether particular liberals have fallen into "incoherent eclecticism" or, rather, whether Unger has simply mislabelled liberalism. *See infra* notes 165–78 and accompanying text.

[144] D.J. MANNING, *supra* note 16, at 34.

[145] Tushnet, *Following the Rules*, *supra* note 1, at 783.

[146] H. LASKI, *supra* note 15, at 12, 105, 118, 119, 127.

[147] J.H. HALLOWELL, *supra* note 15, at 21–22.

[148] *See* G. DIETZE, *supra* note 15, at 136–43.

[149] *Contra* M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982), in which the subjective truth proposition is well argued in the context of Mill and Rawls.

[150] A. RYAN, *supra* note 16, at 75; *cf.* M. SANDEL, *supra* note 149, at 117–18.

opposed the doctrine of intelligible essences (or "essentialism" in more modern terms), yet vigorously advocated the existence of certain timeless, fundamental human values. A case in point is Karl Popper's *The Open Society and Its Enemies*.[151] Written during World War II, the book is almost literally a call to arms in defense of the liberal principles of reason, liberty, and piecemeal democratic solutions.[152] In the same work, however, essentialism is bitterly attacked as antirational, leading inevitably to mysticism or Scholastic stultification.[153] Simultaneously holding these two positions may well be logically inconsistent, but that prevents neither its occurrence, nor the fact that both doctrines are legitimately associated with liberalism; nor, finally, does its strict logical incoherence impair the political and intellectual power of Popper's arguments.

More recently, those Constitutional scholars that Henry Monaghan refers to as "due substance theorists"[154] display, within a liberal tradition, a willingness to specify particular substantive values which adjudication affirmatively should further. These values are not conceived solely as individual rights, but rather as general social aims. Monaghan writes disapprovingly:

> [O]ne cannot read the works of Professors Tribe, Karst, Michaelman, and a whole host of other due substance theorists without a profound feeling that, however much they might otherwise disagree, for them the constitution is essentially perfect in one central respect: *properly construed, the constitution guarantees against the political order most equality and autonomy values which the commentators think a twentieth century Western liberal democratic government ought to guarantee its citizens.* For these commentators . . . a necessary link is asserted between the constitution and currently valid notions of rights, equality and distributive justice.[155]

These two types of refutations of the Unger/Tushnet descriptions of liberalism, one based on questioning the premises used in deducing liberal attributes, the other based on viewing liberalism as a social event rather than as a set of ideas, could be repeated in the context of the doctrine of the whole and its parts. Certainly liberalism grew historically alongside the belief in reason as the proper method of gaining knowledge about the world. Certainly also many liberals adopt analytical reasoning in their approach to problem solving, and this tendency reinforces an outlook of the world that oversimplifies complex, elusive phenomena. But this "principle of analysis" by which liberals are said in part to be described also rests on the premise that they must embrace such a principle if they oppose the doctrine of intelligible essences.

Moreover, it is not clear that all, or even most liberals, accept the basic reductionist analytical method for apprehending the world. For example, many contemporary legal and constitutional theorists stress the "process values" of fairness, participation, privacy, and reasoned decisional justification that emerge from the specified procedures of ad-

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[151] 2 K. POPPER, *supra* note 19.

[152] 1 K. POPPER, THE OPEN SOCIETY AND ITS ENEMIES: THE SPELL OF PLATO viii, 1–4 (5th ed.) (1966).

[153] *Id.* at 10–21.

[154] Monaghan, *supra* note 35, at 357; *see also* Brest, *supra* note 35; Murphy, *An Ordering of Constitutional Values*, 53 So. CAL. L. REV. 703 (1980).

[155] Monaghan, *supra* note 35, at 358.

judication.[156] Implicitly these liberals comprehend legal systems in a way that rejects the doctrine of the whole and its parts, and indeed that resembles the doctrine of intelligible essences. Certain properties that exist only by operation of the whole — here the process values — are evaluated for their own qualities, apart from their instrumental value in achieving good results.[157]

At a higher level of abstraction, some legal philosophers have approached legal systems as would a general systems theorist.[158] Only rarely is the terminology used, but the idea of a legal system displaying not only emergent properties, but also "qualities" that assure its own continuation is traceable throughout modern legal thought. Dworkin, for example, alludes to certain legal maxims that express these qualities: "Law works itself pure;" "Law has its own ambitions;" "There is a higher law, written and yet beyond positive law, toward which positive law grows."[159]

A few contemporary theorists have openly embraced the general systems view of a legal system with dynamic, self-controlling properties.[160] Niklas Luhmann has developed this position most elaborately, although without using the terminology of formal systems theory.[161] Anthony D'Amato is explicit when he contrasts the positivist view of a legal system with the general systems-based alternative that he terms "naturalist."[162] He argues that a positivist views the legal system as an externally imposed control mechanism, while the naturalist views the legal system as beyond total human control:

> [A] positivist view of a legal system is something that we invent (by specification) to control people who would, absent the legal system, be unable to control themselves . . . .
>
> In contrast, naturalist theory would not call for any *a priori* designation of entities that must be controlled or the installation of machinery to effectuate control.

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[156] *See, e.g.*, Christie, *supra* note 128; J.H. ELY, *supra* note 35; Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 381–93 (1978); Monaghan, *supra* note 35; Summers, *Evaluating and Improving Legal Processes — A Plea for 'Process Values'*, 60 CORNELL L. REV. 1 (1974). In criticizing the proceduralists, Tribe summarizes their position as similar to one often taken by the Supreme Court itself:

> In deciding constitutional cases, the Supreme Court has often invoked a vision of how politics should work, justifying judicial intervention as a response to supposed gaps between that vision and political reality. Legislation or other governmental action is of constitutional concern, the Court suggests, when it seems to obstruct political representation and accountability — by blocking speech or voting, for example — or when it reveals the existence of past or present obstructions — by distributing the law's benefits and burdens in ways that show a particular group to have been denied fair representation.

Tribe, *The Puzzling Persistence of Process-based Constitutional Theories*, 89 YALE L.J. 1063, 1063 (1980). *See also* the criticism of process-based theories articulated in PARKER, *supra* note 1.

[157] *See* Summers, *supra* note 156; *cf.* Christie, *supra* note 128, at 1426–41; Fuller, *supra* note 156, at 381–93.

[158] *See supra* notes 104–18 and accompanying text.

[159] Dworkin, *supra* note 39, at 173.

[160] *See* N. LUHMANN, *supra* note 132; *see also* D'Amato, *supra* note 34; Goldman and Jahnige, *Eastonian Systems Analysis and Legal Research*, 2 RUT.-CAM. L.J. 285 (1970); Lewis, *Systems Theory and Judicial Behaviorism*, 21 CASE W. RES. 361 (1970); Raab, *Suggestions for a Cybernetic Approach to Sociological Jurisprudence*, 17 J.L. ED. 397 (1965); Shapiro, *Toward a Theory of Stare Decisis*, 1 J.L. STUD. 125 (1971); Sigler, *A Cybernetic Model of the Judicial System*, 41 TEMP. L.Q. 398 (1968).

[161] N. Luhmann, *supra* note 132.

[162] D'Amato, *supra* note 34, at 192 ff.

. . . .

> Under naturalist theory, a society's legal system controls itself . . . . [R]eal-world variety . . . cannot be handled by a smaller control system (as in the positivist model), [it] can only be regulated by the system itself . . . .[163]

This concept of the legal system as self-controlling, and therefore exercising powerful internal constraints on the potential effects of judicial indiscretion or majoritarian usurpation, is considered in greater detail below.[164] First, however, the criticisms of Unger's propositions about liberal epistemology may be summarized.

In his methodology, Unger has mimicked his own stereotype of liberalism. He offers a brilliant but ultimately rationalistic argument that breaks down liberalism into closely working component parts. He thereby denies that liberalism might represent a number of diverse, inconsistent or openly contradictory propositions that change constantly in mixture.[165] He thereby denies also that liberalism might have immanent qualities, whereby the whole is not completely specifiable by decomposition.[166]

An equally serious methodological problem, and one that yet more clearly reveals an examiner captured by his vision of the things examined, is Unger's use of self-contained, mutually exclusive analytical categories. Here it is worth recalling Popper's observation that "essences" are often merely elaborate definitions used as irrefutable premises from which non-falsifiable, unscientific deductions are made.[167] Unger creates, and uses for deductive purposes, such brittle oppositions as "objective/subjective" and "individual/communal."[168] Liberalism, concludes Unger, is an example of the pairing of "subjective" with "individual."[169] By implication, liberalism possesses nothing of the opposing qualities of "objective" or "communal." Unger's various propositions about liberalism follow deductively from this binary characterization.[170] But surely a social philosophy as comprehensive as liberalism cannot be represented accurately in the boxes created by such matrices.[171] One may legitimately ask: is there no middle ground between

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[163] *Id.* at 201–202.

[164] *See infra* notes 176–219 and accompanying text.

[165] Unger's assumptions about the unity and coherence of liberalism affect how he treats ideas partially inconsistent with this unified view. Where evidence is uncovered of a theory that accepts one aspect of Unger's model of liberalism, but appears to reject other aspects of the model, the theory is labelled "partial criticism" rather than seen as evidence that the asserted clumping of attributes cannot hold.

[166] *See, e.g., id.*, at 4–10; 125–33; 301 n.18. This fundamental defect is apparent to Unger. With commendable intellectual honesty he describes the constrained rationality and limited set of patterns by which he is able to approach his subject. R. UNGER, *supra* note 1, at 15–16, 115–19. He attributes the intellectual grip of this narrow world perspective to the intensity of liberal culture, and despairs of transcending it. *Id.* at 118. Yet by identifying the shortcomings of his own theory, he also reveals the wide-ranging influence of this same defect in contemporary theories of adjudication within the liberal tradition. This in turn points the way to a better understanding of the strengths and failures of those theories.

[167] 2 K. POPPER, *supra* note 19, at 10–12.

[168] R. UNGER, *supra* note 1, at 76.

[169] *Id.* at 76–77.

[170] *See supra* note 141 and accompanying text.

[171] Unger himself has displayed frustration at the channelling of thought that follows from rigid categorization quite similar to that offered now by him. Discussing the impoverished methodological choices available to the scholar where the world is tightly divided between "events" (occurrences for which humans are not responsible) or "acts," (occurrences that are humanly willed) Unger asks, "is it true that we must choose between a belief that propositions are reciprocally entailed and the view that they are unrelated?" R. UNGER, *supra* note 1, at 13.

objective and subjective, as the terms are used by Unger? Is it not possible to describe ideas that are *neither* "objective" in Unger's sense of being beyond human power to affect,[172] *nor* the product of direct consciousness, which is the import of Unger's definition of "subjective"?[173] Similarly, is there no middle ground between "individual" ends, *i.e.*, "the objectives of particular individuals" and "communal values" which is "understood as the aims of groups"?[174] The following section addresses these questions in response to the Unger/Tushnet claim that it is only through the creation of communal values that the seemingly inconsistent goals of majoritarian and judicial control can be resolved.[175]

III. Is Uniformity the Only Answer?

This section argues that there is indeed a middle ground between "objective" and "subjective," and between "individual" and "communal,"[176] and that the middle ground is reached by shifting the inquiry away from issues of human control and controlling humans, to inquiries about the legal system itself.[177] The discussion focuses on the legal system as a highly evolved procedure for problem-solving, thereby revealing the limited feasibility of majoritarian despotism. Similarly, the following discussion argues that seeing the legal system as "shared meanings" may resolve much of the traditional liberal concern about possible judicial anarchy.

The liberal legal system, with all its conflict, disharmony, incoherence and unpredictability, provides an effective alternative to Tushnet's advocacy of uniform moral values. The desired constraints on legislators and judges alike spring from two sources within legal systems: first, the procedures of adjudication itself, in which general rules and principles are applied to specific human contexts; and second, the broad language of the legal system, which shapes both law's possible meanings and the method of expressing such possibilities. Viewed from this perspective, the issues of the subjectivity of truth and value-free adjudication are of limited importance. The constraints here identified are internal, not external. To be sure, the constraints are not perfect and could be supplemented profitably by specifying values such as those advocated by the "due substance theorists."[178] To so advocate is not inconsistent with liberalism, but neither is it unliberal to prefer that the internal constraints be more weakly supplemented by the notion of "rights" as advocated by Dworkin, or even to prefer some version of value-free adjudication. This latter alternative, however, leads to a less dynamic and, in the opinion of the Author, less desirable concept of adjudication.

A. *The Legal System as an Evolved Method of Problem-Solving*

The first source of internal constraint is found in the structural differences between legislative and adjudicatory decisionmaking. For Dworkin, this difference represents the

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[172] Unger defines "objective values" as "standards and goals of conduct that exist independently of human choice." *Id.* at 76.

[173] As Unger states, "[v]alues are subjective in the sense that they are determined by choice. Subjectivity emphasizes that an end is an end simply because someone holds it . . . ." *Id.*

[174] *Id.*

[175] *See supra* notes 7–10 and accompanying text.

[176] *Cf.* Bennett, *supra* note 31, at 452, 491.

[177] This is the approach taken by those legal theorists who have embraced the general systems methodology. *See* citations at *supra* note 160; *see also* Barton, *Expectations, Institutions, and Meanings: A Review of Niklas Luhmann, A Sociological Theory of Law*, 74 Calif. L. Rev. 1805 (1986).

[178] *See supra* notes 154–55 and accompanying text.

distinction between policy and principles; that is, legislatures should determine and implement social goals based on utilitarian grounds while courts should determine individual rights based on non-utilitarian grounds.[179] Dworkin argues that the proper liberal system is achieved when each branch confines its decisionmaking within these respective constraints. Creating this distinction is a way for Dworkin to argue that the legislatures *should* not usurp judicial functions, but he fails to convince that such usurpation is impossible.[180]

Dworkin's argument takes on much greater force when adjudication and legislation are each viewed as bundles of distinct procedures by which particular sorts of problems may be solved. For example, if a certain *type* of problem chronically exists, and if only the procedure of adjudication can cope efficaciously with that sort of problem, then an indispensable role for adjudication also exists. As D'Amato suggests, even if a legislature were to attempt to usurp such role, it could do so only by resorting to the *procedures* used by adjudication.[181] In practical effect, this would greatly limit the intended usurpation. Legislatures could eliminate the functions of courts only by themselves devising new procedures that would function adjudicatively.[182] The converse would also be true. If certain sorts of problems can be solved only through techniques available to legislators, then that fact functionally constrains the degree to which a judicial system could control legislation.

This internal constraint has liberal roots. The checks and balances of government so carefully conceived by Montesquieu and Jefferson were institutional, but after two hundred years of evolution, formal institutional checks and balances have been supplemented by the problem-solving specialization that has developed in each respective institution. Although continuing liberal fears of majoritarian despotism are not baseless, as a practical matter legislative tyranny is difficult to effectuate because there simply is not a high degree of possible human control over this interaction of problems and their method of solution. *Through their very operation*, liberal institutions, once perhaps delicate, are slowly removing themselves from the possibility of human tampering.

The sorts of problems that are exclusively solvable, or at least far more efficiently solvable, through the procedures of adjudication rather than procedures of legislation[183]

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[179] R. DWORKIN, *supra* note 46, at 82–88; *see also* Richards *supra* note 62, at 1307–11.

[180] Some critics also have questioned whether logically this distinction can be maintained. *See, e.g.*, Weaver, *supra* note 93. Others dispute that a judge's role can be dissected so neatly into the two types of reasons, or that such a bifurcation is either appropriate or desirable. *See, e.g.*, Greenawalt, *supra* note 45.

Finally, Levinson incisively describes an ironic sort of moral trivialization that may follow from single case absolutism. Levinson, *supra* note 63, at 1090–91. Dworkin's thesis, he states, conflates law and morality. In so doing, it obscures "the presence of tragedy in history, when 'conscientious' judges are called upon to enforce legally valid, though morally iniquitous, acts." *Id.* at 1090. Dworkin would deny, for example, that there was really a dilemma for abolitionist judges on the issue of slavery. He would posit that the judges who struggled so intensely with their perceived conflict between professional responsibility and personal morality were not heroic, but rather were merely judicially unperceptive. *Id.* at 1090–91 (discussing Dworkin, *The Law of the Slave-Catchers*, THE TIMES (London) LITERARY SUPPLEMENT, Dec. 5, 1978, at 1437, col. 5.).

[181] D'Amato, *supra* note 34, at 191–92.

[182] *Id.*

[183] *See generally* Barton, *Common Law and Its Substitutes: The Allocation of Social Problems to Alternative Decisional Institutions*, 63 N.C.L. REV. 519 (1985) [hereinafter *Common Law and Its Substitutes*]; Barton, *Justiciability: A Theory of Judicial Problem Solving*; 24 B.C.L. REV. 505 (1983) [hereinafter *Justiciability*]; Richards, *supra* note 62, at 1311–12.

might be structurally described along three dimensions. First, such problems are not future-directed, either in the sense of predicting some future event or achieving some goal;[184] second, the problems may require making fine distinctions of worthiness or desert among particular individuals;[185] and finally, the problems are highly complex, being comprised of many interacting variables.[186]

Professor D'Amato has a strong vision of the importance of the first of these dimensions.[187] The distinction between a problem that is historical, and one that can be prevented or shaped as it unfolds in the future, illustrates a systemic constraint on the feasibility of legislative usurpation of the judicial role (and, although he does not discuss it, the converse judicial usurpation of the legislative role). He comes to this insight through his use of general systems theory.[188] A "cornerstone of cybernetic theory," he explains, is Ashby's "Law of Requisite Variety," summarized in the phrase, "only variety can destroy variety."[189] That is, flexibility in outcome or in structure of problem-solving procedures is required to resolve problems that make various demands. Based on that principle, D'Amato derives the following:

> The only way to control a situation, Ashby shows, is for the controller to have as much variety as the controlled. From the viewpoint of the legislature, the future of the real world has infinite variety and therefore can never be controlled in the legislative present by means of a finite number of statutory words. However, if we have a body that makes decisions relating to *past* actions, such a body will have the requisite variety to decide the cases so long as they are decided one at a time. This body [is] a 'court' . . . . The past is something that has been uniquely determined; the future consists of an infinite set of possibilities. The only way a legislature could completely control a court is to turn itself into a court. However, even if that happened . . . we could still speak of the combined body as at times functioning as a legislature (when making prospective rules) and at times functioning as a court (when deciding retrospectively), even if some of these instances overlap.[190]

Positivists such as Hobbes, Bentham, and Austin were presumptuous in thinking that the system procedures can be fully specified in advance, "so that the legal system simply follows . . . verbal commands in coping with real-world variety . . . . [T]heoretically such *a priori* specification is impossible. Real-world variety outstrips the ability of language to contain it."[191] Examples of problems that are exclusively historical, and therefore virtually impossible to be solved legislatively, include the administration of the criminal law and the monitoring of compliance with any governmental regulatory or planning policies.

The second structural aspect of problems that, if present, requires resolution by adjudicative procedures, is the need to make fine discriminations among factual contexts,

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[184] *See infra* notes 187–91 and accompanying text.

[185] *See infra* notes 192–95 and accompanying text.

[186] *See infra* notes 196–99 and accompanying text.

[187] D'Amato, *supra* note 34, at 190–92. *See also* Barton, *Justiciability*, *supra* note 183, at 512, 533, 539–40, 579–88.

[188] *See supra* notes 162–63 and accompanying text.

[189] D'Amato, *supra* note 34, at 191 n.25 (quoting ASHBY, AN INTRODUCTION TO CYBERNETICS 207 (1956)).

[190] *Id.* at 191–92.

[191] *Id.* at 199–200.

particularly those involving issues of individual psychology or individual moral worth.[192] Adjudication can be a highly personal inquiry because it solves general problems incrementally and in a decentralized fashion. Legislation, in contrast, solves problems by making far fewer "decisions" — often only one — and these are based on general evidence. In its ability to make particularized inquiries, courts therefore are well-equipped to solve problems containing factual nuances of great subtlety.[193] Moreover, adjudication is superior to legislation in resolving problems that demand personal participation by the problem-holders.[194] Thus, problems that turn on understanding human relationships or human psychology, or that require determinations of human intentionality, will elude solution by legislative procedures.[195]

Finally, the decentralized, incremental decisional structure of adjudication is well suited to solving problems of a particular level of complexity.[196] The common law can display the "spontaneous" rationality, as opposed to the "deliberative" controlling rationality used by legislatures, required where the only possible efficacious solution to a problem is one that requires hundreds of small adjustments over time, by individuals differently placed.[197] In this sense adjudication resembles the decisionmaking of the marketplace, whereby the "solutions" of problems such as price, supply allocation, and appropriate production level are resolved without conscious planning from a central source.[198] Although adjudication cannot cope with problems of that complexity, it nonetheless offers a vital "middle way" alternative for problems beyond the capabilities of central direction, but where some intrusion of human control is thought indispensable. For example, adjudication is more appropriate than other decisional institutions in solving a problem of such nuance and complexity as the fashioning of a healthy, multiracial society.[199]

A fair objection may be raised at this point that the above arguments concerning the structural constraints on majoritarian despotism do nothing to prevent exactly the sort of usurpation that has always centrally concerned liberals: minority group oppression, confiscation of property, and limitation of civil rights. Rather, the structural constraints prevent only usurpation of the function of judging the right and wrong of individual behavior, or attempts by legislatures to make subtle distinctions in factual

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[192] One sense of this is suggested by Thomas Cowan: "[L]aw is highly skilled in making value judgments, or . . . *feeling-value judgments*. By 'feeling' . . . I mean the process by which the distinctive worth of an individual is brought into view." Cowan, *Decision Theory in Law, Science and Technology*, 17 RUTGERS L. REV. 499, 501 (1963).

[193] As stated in Regan, *Glosses on Dworkin: Rights, Principles, and Policies*, 76 MICH. L. REV. 1213, 1263 (1978): "[W]e think [judges] are better suited than legislatures to engage in the careful parsing of relatively bounded dispute situations, repetitive in their general outlines but infinitely variable in detail, which these methods require."

[194] *See generally* Barton, *Common Law and Its Substitutes*, *supra* note 183, at 528–31; Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410 (1978); Fuller, *supra* note 156.

[195] Barton, *Common Law and Its Substitutes*, *supra* note 183, at 529, 531.

[196] *Id.* at 523–28.

[197] *See* 1 F.A. HAYEK, LAW, LEGISLATION, AND LIBERTY 2, 8–21, 33, 141–44 (1973); M. POLANYI, *supra* note 115, at 154–56; Fuller, *supra* note 156, at 394; Fuller, *Adjudication and the Rule of Law*, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 1, 3 (1960); *see also supra* notes 112–18 and accompanying text.

[198] M. POLANYI, *supra* note 115, at 160–65; *cf.* Fuller, *supra* note 156, at 398.

[199] *See* Barton, *Common Law and Its Substitutes*, *supra* note 183, at 524.

settings. The judiciary's power of implementation and interpretation in particular settings, however, also serves as a constraint on what legislatures can accomplish. Social behavior frequently is far removed from the dictates of formal law.[200] As Sally Falk Moore has demonstrated,[201] unless legislative imperatives are embraced by more localized cultural institutions and officials, such as local judges, the effects of the legislation may be minimal or even contrary to that intended. This concept is a corollary of conceiving of the legal system as in some ways beyond perfect human control.

Nonetheless, it must be conceded that without something more, the structural demands of problems will not fully prevent majoritarian despotism. When supplemented by the existence of a constitution and the institution of judicial review, however, those sorts of possible abuses less affected by the "problem-solving" constraints are subject to another constraint. As shall be developed below,[202] judicial review in itself forces all legislation to join a pool of shared, highly developed linguistic meaning. The more refined this pool, the more difficult it is for particular legislation, or for particular judges, to circumvent its fundamental premises.

B. *Law as a System of Shared Meaning*

The linguistically-inspired criticisms of legal positivism and formalism have raised serious doubts as to the ability of language to convey particular, controllable meanings.[203] The converse of this proposition, however, is that language exerts cultural power over those who use it. Whitehead, for example, maintained that the practical boundary of thought was that which could be spoken.[204] There can be no doubt that law is a highly elaborate and specialized meaning system — so much so that it is largely inaccessible to those not trained in it.[205] In a sense, this density of meaning captures the imagination, and places great constraints on the ease with which one can escape, or change fundamentally, that system.

Several writers have described this phenomenon, although most do so in rather vague terms about tradition or continuity.[206] A more complete description of these

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[200] *See supra* note 136–38 and accompanying text.

[201] S.F. MOORE, *supra* note 98, at 54–78.

[202] *See infra* notes 208–19 and accompanying text.

[203] *See, e.g.*, D'Amato, *supra* note 34, at 189; Moore, *supra* note 1. As Unger writes:

> The formalist believes that words usually have clear meanings. He adopts, in one mode or another, Augustine's view of language as a series of names that point to things. . . . The chief vice of formalism is its dependence on a view of language that cannot be reconciled with the modern ideas of science, nature, and language that formalists themselves take for granted.

R. UNGER, *supra* note 1, at 92, 94.

[204] A.N. WHITEHEAD, MODES OF THOUGHT 46–49 (1958).

[205] *Cf.* N. LUHMANN, *supra* note 132, at 2.

[206] Professor Bennett, for example, writes:

> The legitimacy or objectivity of a [court] decision has to do more with its development from a preexisting tradition and natural growth from an institutional soil than with its approval by authority. This conception of objectivity explains the kind of constraint on judicial choice that is, in fact, generally accepted by judges; it produces real constraint on judicial choice while allowing growth in the law, and, in any event, it is the only form of check on judicial interpretation of broad constitutional language we

mutual constraints on language and the world apprehended through language is perhaps found through analogy to literary criticism. Commenting on Dworkin's theory of judicial interpretation, Stanley Fish offers an explanation of the process by which both the creator and interpreter of literature are constrained by the language itself.[207] Regarding the judge, he writes:

> What would it mean for a judge to strike out in a new direction? Dworkin doesn't tell us, but presumably it would mean deciding a case in such a way as to have no relationship to the history of previous decisions. It is hard to imagine what such a decision would be like since any decision, to be recognized as a decision by a judge, would have to be made in recognizably judicial terms.[208]

Any *comprehensible* attempt to escape law meaning, says Fish, "will have been implicit in the enterprise as a direction one could conceive of and argue for."[209] Hence within a language system as powerful as law, the range of potential possible meanings is limited by the system itself. True judicial capriciousness, in the sense of decisions that have no relationship to received prescriptive doctrine, is virtually impossible.

In their creation of law, legislators are similarly constrained by the way of thinking inherent in the legal vocabulary. This is illustrated by Fish's discussion of Dworkin's "chain novelist" image, in which Dworkin likens law and its interpretation to a novel, each chapter of which is written by a different person.[210] Only the first author, argues Dworkin, is free to create without structure; the other authors in the chain are confronted, and constrained, by the now historical text of the first chapter.[211] Yet Fish explains that the constraints are *equal* on the first, and the last, author in the chain:

> Just as the first novelist 'creates' within the constraints of 'novel-practice' in general, so do his successors on the chain interpret him [or her] (and each other) within those same constraints. . . . The last author is as free, within those constraints, to determine what 'the characters are really like' as is the first. It is of course tempting to think that the more information one has (the more history) the more directed will be one's interpretation; but information only comes in an interpreted form (it does not announce itself). No matter how much or how little you have, it cannot be a check against interpretation . . . .[212]

Interpretation, therefore, is neither compelled by the text nor assertable without constraint by the interpreter. Legislator and judge are yoked together in an ongoing indirect

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> can realistically hope to achieve.
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> . . .
>
> The real constraint on judicial choice . . . is produced by engaging in the process of decision rather than by governance from outside. It is an appreciation of the role of this process and of the environment in which it takes place.

Bennett, *supra* note 31, at 475, 496.

[207] Fish, *Chain Gang*, *supra* note 73.

[208] *Id.* at 556.

[209] *Id.* at 557.

[210] Dworkin, *Law As Interpretation*, 60 TEX. L. REV. 527, 540–48 (1982).

[211] *Id.* at 541–42.

[212] Fish, *Chain Gang*, *supra* note 73, at 554.

dialogue which, practically speaking, is the only way modern law may proceed. Truth comes to be not "reality," but rather the relationship of a proposition to all others within the meaning system, each providing for the others a part of a rational whole that must be comprehended before the meaning of any individual proposition can be fully established.[213]

This notion of propositions taking on meaning from the theoretical structure in which such propositions are embedded underlies Professor Schauer's work on constitutional language.[214] When part of an integrated constitution, he writes, even mundane language takes on special qualities — it becomes "theory-laden," and therefore is much less susceptible to discretional interpretation.[215] The language of the Constitution itself, rather than the supposed intentions of the framers, comes to have a density of meaning that acts as an important constraint on all those acting within the legal system.[216]

Niklas Luhmann speaks also of the system of meaning which constitutes one indispensable dimension of law. Terming it the "expectation of expectations," he conceives of legal meaning as a common understanding of human expectations. This meaning develops both as part of the mental equipment of individuals, and as systemic constraints within legal programs.[217] Moreover, recalling the previous discussion of the "problem-solving" constraint of the legal system,[218] Luhmann states, "system problems are defined by stating conditions of their solution (*constraints*) and . . . the definition of the *problem* itself arises from decision-making and is tested by decisions."[219] The meaning of the legal system, in other words, comes to affect greatly not only the solutions that can be conceived, but also the ways in which problems can be articulated. Meaning, as a systemic quality, therefore restrains both the creation and the implementation of legal solutions.

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[213] As stated by Professor Chevigny:

> Having abandoned the view of language as a 'copy' of the 'real world,' a set of names for objects, and assertions that have meaning only to the extent that they faithfully represent reality, philosophers increasingly think of language as a system of discourse in which assertions can have 'meaning' and be 'true' not as representations of 'reality' but as ideas for which good reasons can be found in other parts of the system of discourse. Essential to the meaning of any particular proposition is its relationship to such a system, a relationship which cannot be established without inquiry into the premises of both the proposition and the system of discourse. This is true for *any* proposition, even if it purports to be 'factual' or 'scientific.'

Chevigny, *supra* note 105, at 162 (citations omitted). Tushnet further supports this position when he writes, "[t]he ways in which people understand the world give meaning to the words that they use . . . ." Tushnet, *Following the Rules*, *supra* note 1, at 799.

[214] Schauer, *supra* note 40.

[215] *Id.* at 824–28.

[216] *Id.* at 828–31.

[217] Regarding legal meaning for individuals, Luhmann writes:

> [Expectations] can enter a context of meaning which engenders reciprocal proofs and agreements; they can be supported and defended with good arguments. As expectation, and not purely as the expected act, they can become capable of verbalisation, symbolisation, representation, and objection. They can serve as point of crystallisation for information, experience, traditions and interests. Such a context of meaning gains a value in its own right for the individual . . . . [I]t would be difficult to replace them so quickly.

N. LUHMANN, *supra* note 132, at 63.

[218] *See supra* notes 179–201 and accompanying text.

[219] N. LUHMANN, *supra* note 132, at 174.

IV. Conclusion

Describing liberal epistemology, Unger writes,

> It is . . . theory that determines what is to count as a fact and how facts are to be distinguished from one another . . . . [A] fact becomes what it is for us because of the way we categorize it. How we classify it depends on the categories available to us . . . . [R]eality is put together by the mind.[220]

Unger has classified many facts into a single category he calls liberalism, one that in his eyes "must be seen all of a piece . . . ."[221] That is the singular flaw in the important contribution of both Unger and Tushnet. They possess many insights into the less agreeable aspects of Western culture and psychology. They react to these with a justified sense of anger, and with a conviction that society can be transformed. With this analysis and these goals the Author has no disagreement. But for these insights to become "facts" by being categorized as "liberalism," and for that category then to be closed, is unjustified and possibly dangerous.

The liberal heritage is nothing if not pragmatically inconsistent.[222] It is a bundle of diverse reactions against political and religious tyranny and social inequality. Some of those reactions have been grievously naive or misguided, and some have indeed been ruthlessly opportunistic. But to abandon liberalism in the name of community harmony is counterproductive. Liberal adjudication supports individual resolve. Piecemeal, conflictual, incoherent, particular, it responds to grievances and enables local discourse about community values. Over time, it has developed a structure of procedures and meanings that has wider implications: it provides an assurance that official responses to grievances are based on proofs and arguments presented from within that system of thought, and it limits the feasibility of attempts from outside the system to take it over.

The complaint of Tushnet and Unger derives from a different implication of liberally constituted adjudication: that its procedures and systemic meanings trivialize and divert political discourse in ways harmless to its own preconditions. The system becomes, in their view, stiflingly insulated and self-justifying. Although descriptively their point is well taken, this phenomenon has little to do directly with liberalism. Circumscribing institutional dialogue is linguistically unavoidable, because current formulations are strongly directed by past assumptions. If the content of liberalism has any effect on this tendency, it almost certainly is to soften it. This is because liberalism is highly open as a philosophy. Externally, it permits change by erosion as well as accretion; internally, it is singularly self-doubting, and promotive of criticism.

Unger and Tushnet join that process by questioning the basic premises of liberalism.[223] We are indebted to their analysis, as it promotes understanding not only of the failings of contemporary theories of adjudication, but also of the alternative possibilities that liberal values afford. Yet the connections they identify between liberalism and adjudication are neither analytical truths nor indisputable historical facts, but rather are speculations about ideas changing through time, and the effects of those ideas on human

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[220] R. Unger, *supra* note 1, at 32, 33.

[221] *Id.* at 6.

[222] D.J. Manning, *supra* note 16, at 12–13.

[223] *See* Chevigny, *supra* note 105, at 167–68, 180–81 (discussing the basic premises of liberalism).

personality and social institutions. No causal relations have been demonstrated. Hence if we are dissatisfied with legal and political life, it is not clear whether the problem lies with liberalism, or with the legal system, or, for that matter, with the constructed visions of those doctrines and system. It is too early in the day to advocate that the linkages between law and liberalism be severed, or even assert that the objects examined have been described definitively.