

LAW AS A PROCESS OF DECISION:  
A POLICY-ORIENTED APPROACH  
TO LEGAL STUDY\*

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IT MAY BE SEEN, if we address ourselves to certain fundamentals, that those who are just beginning the study of law and those who are in mid-passage, or growing old, share a common, continuous responsibility for achieving conceptions of law and of legal study adequate to the crises of our time.

For appropriate perspective, let us first reflect for a moment upon the social role of the legal profession. Perhaps the best way in brief to describe the distinctive role of the lawyer is to say that he is an especially skilled expert in the use of authoritative language and authoritative procedures for affecting or influencing decisions. Some freshman law students will, thus, if they follow in the footsteps of their predecessors, themselves become government officials, making decisions in the name of authoritative community expectation and with community coercion behind them. They will, for example, become senators, congressmen, governors, mayors, judges, aldermen, state representatives, delegates to the United Nations, and so on. Others will become the counsellors and advocates, in large and small affairs, of the individuals and groups who seek decisions from such officials. They will become counsel to private business associations, to labor unions, to churches and schools, to political parties and pressure groups, and, in the sum, to all the institutions of our organized community life. Some fifteen years ago Professor Lasswell and I summarized as follows:

It should need no emphasis that the lawyer is today, even when not himself a "maker" of policy, the one indispensable adviser of every responsible policy-maker in our society—whether we speak of a government department or agency, of the executive of a corporation or labor union, of the secretary of a trade or other private association, or even of the humble independent enterpriser or professional man. . . . Certainly it would be difficult to exaggerate either the direct or indirect influence that members of the legal profession exert on the public life of this nation.

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\* This paper represents one of a series of orientation lectures delivered by members of the Yale Law School faculty to the entering class in the fall of 1955. It is offered in this Forum because of its emphasis that all authoritative decision-making involves a creative choice among alternative values. When decision-making is thus conceived as a process for the explicit clarification and consideration of values, all the larger perspectives to which this Forum is dedicated become relevant.

For better or worse our decision-makers and our lawyers are bound together in a relation of dependence or of identity.<sup>1</sup>

The magnitude of the impact of lawyers upon the shaping and sharing of all our values in all our communities defies easy description. Our responsibility for this impact is that of a professional group to which society affords a peculiarly long period of incubation and training for acquisition of the skills and information necessary to responsible leadership.

From this perspective of the social role of our profession, I should now like to direct attention back to our principal inquiry into appropriate conceptions of law and of legal study. For the purpose of giving order to this inquiry, I propose to organize my remarks under the following four main heads:

First, the conception of law as a process of decision in accordance with community expectation.

Second, the intellectual tasks indispensable to the rational study of decisions.

Third, the limited relevance of traditional legal theory for the performance of such intellectual tasks.

Fourth, and finally, the major characteristics of an emerging policy-oriented approach to legal study.

## I

We begin with our first problem, the clarification of a conception of law adequate to rational study. How we conceive our major focus of attention is likely to affect decisively both how we conceive any part of our study and our choice of intellectual tools for inquiry.

Despite all the critical demolitions by the American legal realists, the conception of law still most often professed in this country, and indeed in most of the world, is that of a body of rules. Thus, in our most recently published systematic treatise upon jurisprudence, that by Professor Patterson of Columbia, we come, after some 150 pages of analysis and rejection of roughly comparable prior definitions, upon this conclusion:

A law, then, is a norm having the authority of the state acting in the way and within the limits prescribed by the ultimate political sovereign.<sup>2</sup>

This is, of course, the conception which underlies both the over-all organization of curricula and the detailed patterning of most particular courses in Anglo-American law schools; the organizing principle of both whole and

1. Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L. J.* 203, 208-09 (1943).

2. PATTERSON, *JURISPRUDENCE* 159 (1953).

part is largely that of legal technicality, with particular subject matters purportedly demarcated and arranged in terms of highly ambiguous, overlapping and contradictory concepts of authoritative myth. Nor is this conception simply provincial myopia. Mr. Vyshinsky's definition is indistinguishable. He defines "law" as "the totality (a) of the rules of conduct, expressing the will of the dominant class and established in legal order, and (b) of customs and rules of community life sanctioned by state authority"; and "Soviet law" as "the aggregate of the rules of conduct established in the form of legislation by the authority of the toilers and expressive of their will."<sup>3</sup> Similarly, in whatever book, in whatever language, one may look for conceptions of international law—the law that transcends the boundaries of particular nation-states—the definition one commonly finds is that of a "body of rules" governing the relations of nation-states in their reciprocal interactions.<sup>4</sup>

It has, however, become increasingly recognized in recent decades, because of the criticisms by the American legal realists and others, that this traditional conception of law leaves too many difficult questions either unasked or unanswered. Both "states" and "ultimate political sovereigns" must act through ordinary human beings, and different observers may differ in any particular context in determining what rules and procedures are authoritative and controlling. For us, as law students, the most important general question is: How does one identify authoritative and controlling rules? In more detail, who in any given community prescribes what rules, with respect to what values, for whom, and by what procedures? Who makes effective recommendations to such authoritative prescribers and upon what intelligence, achieved by whom and by what procedures? Who, authorized how, may invoke the application of what prescriptions, with respect to whom, in what arenas? Who, for the promotion of what policies, applies what prescriptions to whom, by what procedures? Who appraises prescriptions and terminates them when they cease to serve community purposes? By what factors in the environments and predispositions of decision-makers are all the various types of decisions above affected? What is the impact of community process, culture, class, personality, skill, affiliation, crisis, and so on, upon the expectations of decision-makers? Upon what expectations of improving what value positions of what individuals and groups do decision-makers in particular contexts choose between alternatives in action?

Such questions are but a few of the many difficult questions of the same type which continually, and inevitably, confront both the practicing lawyer

3. VYSHINSKY, *THE LAW OF THE SOVIET STATE* 50 (1948).

4. Examples are collected in McDougal, *International Law, Power and Policy; A Contemporary Conception*, 82 *RECUEIL DES COURS* 137 (Hague Academy of International Law 1953).

and the legal scholar. From the light of these questions, even without their answers, it should be reasonably clear that what we as law students are, in sum, concerned with is not a mere body of rules but a whole process of decision, and a process of decision taking place within the context of, and as a response to, a larger community process.

Perhaps the easiest way to clarify this emerging conception of law as a process of decision is to begin with the context of community process, the context which presents the events to which decisions are response, conditions decisions, and receives the impact of decisions. The community process to which we generically refer is that of individual human beings interacting in many particular communities, of varying degrees of comprehensiveness, from local through regional to national and global. From the perspective of the anthropologist, one may observe that individuals interact in these communities, and across the lesser communities, in both organized and unorganized forms. Sometimes the individual acts through the form of, or plays organizational roles in, the nation-state, but at other times he may play roles in and exercise influence through international governmental organizations or political parties or pressure groups or private associations of the greatest variety, such as churches, educational institutions, and business associations. Sometimes a particularly gifted individual may be observed to act as a total personality, playing for his own purposes many different roles in many different organizations in many different communities. The values sought by the individual in these interactions may cover the whole gamut of human demand. Professor Lasswell and I have sought to categorize these as power, wealth, enlightenment, respect, well-being, skill, rectitude, and affection;<sup>5</sup> but any other categorization which offers operational indices in terms of the concrete demands of individual human beings will serve equally well. The values which the individual and his groups may employ as bases of power to influence outcomes in particular interactions may cover an equally broad range. The particular strategies or practices adopted by the individual and his groups to affect outcomes include all those commonly characterized as diplomatic (agreements, deals), ideological (communications to mass audiences), economic (manipulation of goods and services), and military (employment of armed forces); and such practices may obviously be combined in many different modalities, ranging through a spectrum from maximum persuasion to maximum coercion. The effects of any particular interaction upon the values of the participants or others may extend to few or many, in few or many different communities. The perspectives of the participants in any given interaction may, further, include expectations, of

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5. *Supra* note 1. Comprehensive exposition is offered in LASSWELL AND KAPLAN, *POWER AND SOCIETY* (1950).

varying degrees of realism, that any decisions to be made will be made with varying degrees of deference to authoritative community policy, from minimum to maximum.

Let us now look more closely at those interactions in which the perspectives of the parties include expectations that decisions will be taken in accordance with authoritative community policy. Certain participants in the community process have deprived, or are threatening to deprive, other participants of claimed values, and one or both sets of participants, threatening as well as threatened, may appeal to the processes of community authority to facilitate or restrain the deprivation. Comprehended in such processes of authority one may observe a wide variety of policy functions being performed. Many different officials and representatives of effective control groups are both continuously gathering and disseminating information or intelligence for the enlightenment of the authoritative prescribers and appliers of policy and continuously recommending specific policies to such prescribers and appliers. Certain officials, both of nation-states and international governmental organization, and employing many different procedures, are continuously formulating broad, general policies with respect to interactions of the type in controversy and projecting such formulations into the future as authoritative community prescription. Still other officials, as well as effective participants, engage in the function of invoking application of general prescriptions to specific controversies. Officials of both nation-states and international governmental organizations are continuously responding to such invocation and, by many different procedures, making application of general prescriptions for the resolution of specific controversies. By still different procedures, both officials and representatives of effective control groups are in constant process of appraising and terminating outmoded prescriptions. The processes of authority here designated under the headings of intelligence-serving, recommending, prescribing, invoking, applying, appraising, and terminating are more conventionally described as legislative, judicial, executive, and administrative; the common usage of these latter terms makes, however, such shifting and confusing reference from function to institution and back again, that some newer terminology seems preferable.

The distinction we make between decisions that are taken in accordance with the expectations and processes of community authority and other decisions may now enable us to clarify and sharpen the conception of law we recommend. When decisions are taken in the sense that severe deprivations, or threats of such deprivations, are marshalled to support demands or choices without regard for authoritative community prescription, such decisions are not law but naked power or unlawful coercion. When, on the other hand,

effective power is not at the disposal of authority, and expectation of decision in accordance with community prescription lacks realism, such authority is not law but illusion. The conception of law that we recommend is, accordingly, that of the process of decision in which authority is conjoined with effective control, in which decisions are both authoritative and controlling. It is only when we focus thus explicitly upon patterns of both authority and control that we can achieve a conception of law adequate to guide and facilitate the type and scope of investigation that our times demand.

## II

Our next principal point requires an itemization of the intellectual tasks we suggest as indispensable to the rational study of decisions.

Of the various possible intellectual tasks which a student might perform in the study of decisions those which best promote the effective calculation of appropriate means to clarified ends may perhaps be most economically categorized as follows:

First, one may seek to describe trends in past decisions. Description in terms of trends, description which will permit comparisons through time and across community boundaries, must, of course, extend beyond the mere reporting of anecdotal features, as found in casebooks, to careful categorizations of the events (value changes) to which decisions are a response and of the effects upon values of decisions.

Secondly, one may seek by scientific study to account for the variables which affect decisions. Such study, if it is to be consequential, must obviously extend beyond inquiring about such technical doctrines as may be invoked and applied to consideration of a great range of environmental and predispositional factors, including the factual claims put forward by the parties, the policy formulations argued, and the attitudes, class, skills, personality, and affiliations of the decision-makers, and so on.

Thirdly, one may seek to project patterns into the future and predict what decisions will be. When appropriately disciplined by scientific knowledge of conditioning variables and by appreciation of context, such anticipations of the future are not likely to be exhausted by simple-minded extrapolations of the past.

Fourthly, one may seek to clarify community policies with respect to decisions and to state what future decisions should be. Such clarification may include both the description of the policies sought by others and the recommendation of one's own specific preference as disciplined by knowledge of context.

A fifth, and final, task is that of inventing and evaluating new alternatives in rule and institution for the more effective promotion of clarified policies.

It is not, of course, our pretense that there is anything startlingly novel in this itemization of intellectual tasks. All of these tasks are being performed all the time, with varying degrees of consciousness and with corresponding variations in effectiveness, by both legal scholars and practitioners. Our contention is merely that by the most careful formulation of guiding theory and by the more systematic use of the intellectual resources of the contemporary world such performance could be vastly improved to the great policy advantage of all our communities.

### III

Our third principal point relates to the limited relevance of traditional legal theory for the performance of the indispensable intellectual tasks.

The language of traditional legal theory, in its first injection of confusion, commonly fails, and sometimes explicitly refuses, to distinguish the very different perspectives of the detached observer and of the decision-maker, and hence fails to distinguish the theory necessary for inquiry about decisions from the authoritative myth which decision-makers apply in the course of decision. Such theory, accordingly, both focuses to excessive degree upon the policy function of *application*, in relative disregard of all the other important functions indicated above, and, further, presents itself as composed of verbal statements that are both highly ambiguous and often overlapping or contradictory—that is, composed of pairs of complementary opposites.

The peculiar ambiguity of traditional legal theory we have elsewhere described as “normative-ambiguity.”<sup>6</sup> By this we mean that such theory seeks in a single confused statement to perform multiple intellectual tasks. Thus, the ordinary legal rule or concept seeks, at one and the same time, to describe what decision-makers have done in the past, to predict what they will do in the future, and to prescribe what they ought to do. In such attempted description the authoritative words commonly refer, further, with indiscriminate abandon to the facts to which decision-makers are responding, to the policies invoked before decision-makers, and to the particular responses of decision-makers which are sought to be predicted or justified. In an earlier formulation we described this ambiguity as follows:

Consider, for a moment, the following statement uttered by a law teacher who is expounding a case, a legal adviser who is arguing with a client,

6. *Supra* note 1 at 267.

or an advocate who is addressing the court: "This is the law (followed by a statement of a 'doctrine')." This statement may be treated as a summary of past statements made by sources who are treated as qualified spokesmen (authorities). It may also be taken to refer to future events, predicting what certain authorities will say (even though there is doubt about what they have said in the past); or it may be construed as a declaration of preference by the professor, adviser, advocate—a statement of what the speaker thinks the law should be even though the authorities (before or after) dissent. If this last construction is put upon the words, the speaker may affirm that he is misunderstood, since he did not use words that categorically convey preference; nevertheless, the listener may believe that the speaker lays himself open because so many talkers do in practice say "the law is so and so" when what they mean—in the sense of what they say if challenged—is a preference for the law to be so and so. Under some circumstances the statement goes beyond a simple preference and becomes a volition to do whatever is feasible to get the "should" accepted as an "is."

Hence if we take the statement of the "law" at face value we may find it ambiguous; and we can call it *normative-ambiguous*, because the word "law" is used, and "law" is a word that refers to norms, even though it is unclear whether the norm in question pertains exclusively to the speaker, whether it is shared by the speaker with others, or whether, though a norm of others, it is not the norm of the speaker at all.<sup>7</sup>

Perhaps an illustration from a well-known case will clarify the confusion we seek to describe. In *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*<sup>8</sup> the defendant admitted that it was broadcasting reports and descriptions of baseball games and that it had secured its news from observers whom it had stationed at high vantage points, outside the playing field, from which they could see over the inclosure and note the plays made. The plaintiffs were the owner of the team and the field and this owner's grantees of an allegedly "exclusive right to broadcast," and they sought an injunction to restrain the defendant from his broadcasts. The court found for the plaintiffs and granted the injunction upon the grounds that the activities of the defendant were "a violation of the property rights of the plaintiff."

In the first year Property course the teacher, after noting an Australian case<sup>9</sup> in which the court upon comparable facts reached the opposite result, may attempt to confound the student by asking whether the plaintiffs won because they had property rights or whether they had property rights because they won. In the course on Credit Transactions the instructor will most

7. *Id.* at 266-267.

8. 24 F. Supp. 490 (W. D. Pa. 1938).

9. *Victoria Park Racing and Recreation Co., Ltd. v. Taylor*, 43 Arg. L. R. 597 (High Ct. of Australia 1937).



assuredly inquire whether the mortgagee gets immediate possession because he has the title or has the title because he gets possession, whether the mortgagee is denied possession because he has a mere lien or has a mere lien because he is denied possession, whether the surety is allowed to set up the defenses of the principal because the defenses are real or the defenses are real because the surety is allowed to set them up, whether the surety is denied the defenses of the principal because such defenses are personal or the defenses are personal because the surety is denied them. Similarly, in the Estates course the instructor may ask whether the donee gets the bonds the deceased donor left in his safe deposit box because there was a "constructive trust" or there was a constructive trust because . . . and so on. The point to all these questions is, of course, the normative-ambiguity point.

The all-pervasive roles both of normative-ambiguity in concept and of complementarity or bipolarity in rule might be systematically demonstrated both in the basic, highest-level, abstractions which transcend all the principal fields of myth and in the detailed formulations of particular fields. Brief, suggestive illustration must, however, suffice.

First, let us note basic terminology and certain highest-level abstractions. A right is a *legally enforceable* claim; a duty its correlative, and no-right its opposite. A privilege is a *legal* freedom against the act of another; a no-right is its correlative, and a duty is its opposite. A power is an ability to produce a change in a *legal* relation; a liability is its correlative, and a disability is its opposite. An immunity is a freedom against having a *legal* relation changed; a disability is its correlative, and a liability is its opposite. An interest includes a varying aggregate of rights, privileges, powers, and immunities. An owner has one or more interests. Property is a *legally protected* interest. A contract is a *legally enforceable* agreement. A tort is an *actionable* wrong. A crime is a *punishable* offense. And so on.<sup>10</sup>

Next, we may note the complementarity, paired-opposites characteristic of detailed myth in several important fields.<sup>11</sup> In public international law the appropriate "subjects of international law" (nation-states, international governmental organizations) are arrayed against "non-subjects" (individuals, private associations, political parties, pressure groups); "sovereignty," "independence," "domestic jurisdiction," etc., against "international concern," "world order," etc.; aggressive war against self-defense; military necessity against humanitarianism; reprisals against proportionality; *pacta sunt servanda* (agreements must be honored) against *rebus sic stantibus* (but not if conditions

10. The point to note is that these common definitions assume the answer to the question which is in issue whenever they are relevant.

11. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928), offers classic exposition from a variety of fields.

change); "freedom of the seas" against "contiguous zones" and "territorial sea"; change of "government" against change of "state"; and so on. In so-called private international law one may, similarly, note at least four different levels of complementarity. With respect to the initial claims of nation-states to jurisdiction, the power to prescribe and apply policy, justifications in terms of "territoriality" may oppose justifications by "nationality," or "passive personality," or "protection of interests," or "universality." When nation-states in mutual tolerance defer to each other, "immunity" or "act of state" may counter any of the justifications above. Within the concept of legislative acts of state, prescriptions about choice of law are, further, so bountiful that not merely two but multiple alternatives are always possible. Once choice of law is determined, the decision-maker is, finally, confronted with all the vagaries of the national myth of the body politic chosen. Constitutional law presents similar alternatives: powers granted (war, commerce, treaty, etc.) are paired against limitations imposed (bill of rights, specific prohibitions); the powers not granted to the central government may be reserved to the provinces, with both grant and reservation left undetermined; and powers may be divided in ill-defined categories of executive, legislative, and judicial in an attempted balancing of each against the others. In private law fields, the existence of "contract" is paired against defenses in terms of fraud, mistake, duress, absence of consideration, impossibility of performance, etc.; the existence of "tort" against defenses in terms of assumption of risk, contributory negligence, privilege, etc.; the existence of "crime" against defenses in terms of official act, capacity, intent, self-defense, mistake, etc. And so on.

By all this emphasis upon the normative-ambiguity and complementarity of authoritative myth it is not our intent to suggest that such myth does not affect decision. On the contrary, since the most fundamental demands, identifications, and expectations of all our decision-makers, authoritative and/or controlling, are with the continuous aid of our law schools organized and made dynamic in terms of this myth, it may have the most important effects upon decision. What we do assert is that inquiry in terms of this myth is not adequate either to ascertain what those effects are or to perform the other relevant intellectual tasks and should not be confused with adequate theory. The language of authoritative myth is not adequate to the descriptive task because it does not make clear and discriminating reference to the events that precipitate decision, the variables that affect decision, or the effects of decision. Similarly, such language is not adequate to the predictive task because it can neither control nor give clear guidance to choice. The rational limits of logical exercises, deductive and inductive, with such language have seldom

been better stated than by the late Professor Oliphant. Summarizing the point we make by emphasis upon complementarity he wrote:

Upon reflection, it must be clear that, for any case wherein there is a clash of two groups having conflicting interests, two conflicting major premises can always be formulated, one embodying one set of interests, the other embodying the other. Each group has had its advocate to formulate its interest into general propositions and our novel cases all involve some such conflict of interests.<sup>12</sup>

Framing the dilemma confronted by those who seek to induce controlling principles from prior cases, he added:

If the principle thus "induced" is no broader than the sum of the previous cases which it summarizes, it obviously does not and cannot include the case to be decided, which, by hypothesis, is a new and an undecided case, and, hence, can form no part of the generalization made from previous cases only. If it does not include the case to be decided, it is powerless to produce and determine a decision of it. If it is taken to include the case to be decided, it assumes the very thing that is supposed to be up for decision.<sup>13</sup>

The language of authoritative myth is not adequate, finally, to perform effectively the prescriptive task because most commonly it is not explicitly and clearly related to the values affected by decision. As Professor Bodenheimer has aptly put it, "law" is an "institution" which attempts "to solve the tensions and conflicts inherent in social life, not by arbitrary force, violence, or terror, but by an orderly and peaceful adjustment of the reasonable claims of individuals or groups," and it "incorporates certain values which are largely coextensive with the values of human civilization as such."<sup>14</sup> Whether the authoritative decision-maker knows it or not, his every decision makes community policy. When the values affected by decision are left unarticulated or confused, the chances of irrational decision are in comparable measure enhanced. Creativity in decision is fortunately both inescapable and desirable.<sup>15</sup>

There have of course been many schools of jurisprudence which have sought to cope with the difficulties we have described.<sup>16</sup> An analytical school

12. OLIPHANT AND HEWITT, *INTRODUCTION TO RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES* xv (1929).

13. *Id.* at xix.

14. BODENHEIMER, *JURISPRUDENCE* vii (1940).

15. LASSWELL, *Current Studies of the Decision Process: Automation Versus Creativity*, 8 *WESTERN POLITICAL QUARTERLY* 381 (1955); LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1948).

16. Surveys may be found in JONES, *HISTORICAL INTRODUCTION TO THE THEORY OF LAW* (1940) and STONE, *THE PROVINCE AND FUNCTION OF LAW* (1946).

has appropriately emphasized the importance of community sanction and of the rational use of logic, but it has failed to escape the toils of normative-ambiguity and to focus upon many important variables that affect decision; and in recent manifestations, as in Kelsen and his disciples, this school has attempted an impossible divorce of myth from power and other social processes.<sup>17</sup> A historical school has appropriately emphasized the importance of the study of conditions, and of location in community context, with exploitation of trend thinking, but it has failed to employ scientific modes of thought; and it has imported mystical, metaphysical, and fatalistic notions into its study, with, consequently, little consideration of alternatives. A philosophical school has emphasized goal-thinking and the relevance of values, but has been largely lost on the higher levels of abstraction in overreliance on derivational modes of thinking. A sociological school has stressed both goals and conditions, and the notion of community, and has employed scientific modes of thought; but it has offered few techniques for performing the various other intellectual tasks and has failed to relate specific goals to more inclusive value clarifications. A school of legal realism has rejected overemphasis upon the technical formula of authoritative myth, with clamant demand for goal and scientific thinking; but it has relied upon inadequate conceptions of scientific method, without employing the developmental mode of thought, and has failed to achieve a comprehensive model of the decision-making process or of community process, and has not related specific goals recommended to the comprehensive preferences of a free society.

What our times require is a new framework of guiding theory which will build upon and synthesize these successes of the past, while avoiding the oversights and failures.

#### IV

This brings us to our fourth, and final, principal point, the major characteristics of an emerging policy-oriented approach to legal study.<sup>18</sup>

The first aspiration of an approach to legal study which rationally emphasizes policy, must of course be, by careful distinction of the perspectives of the detached observer and decision-maker, to escape the confusion of the

17. The latest expression of this school in Hart, *Definition and Theory in Jurisprudence*, 70 L. Q. REV. 37 (1954) represents but a limited escape from traditional verbalisms.

18. Emphasis upon a policy-oriented approach to decision-making is perhaps more marked in other fields than in legal study. An introduction to a growing literature is offered, with references, in *THE POLICY SCIENCES* (Lerner and Lasswell ed. 1951). See also EASTON, *THE POLITICAL SYSTEM* (1953); SNYDER AND FURNISS, *AMERICAN FOREIGN POLICY* (1954); SIMON, *ADMINISTRATIVE BEHAVIOR* (1947); BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* (1946); BROSS, *DESIGN FOR DECISION* (1953); Edwards, *The Theory of Decision-Making*, 2 *PSYCHOLOGICAL BULLETIN* 380 (1954).

normative-ambiguity and complementarity of traditional myth and to formulate a comprehensive framework of theory which subsumes both authoritative decisions and the myth that makes them authoritative among the phenomena to be investigated and locates both in context.<sup>19</sup>

It may be recalled that the flow of authoritative and controlling decisions, which we suggested as the most appropriate reference for the word "law," occurs in a context of community process, composed of a great variety of particular social processes. Decisions are responses to precipitating events best described as value changes in social processes, are conditioned by many different variables in the particular social processes in which they occur, and have in turn continuing effects upon such processes. Guiding theory sufficiently comprehensive to facilitate performance of the various intellectual tasks about decisions must, accordingly, begin with a language for talking about social processes, capable both of the highest degree of abstraction and of the most minute refinement.

The highest-level abstraction that we propose with respect to particular social processes is that such processes may be described in terms of participants pursuing values by applying institutions to resources. By "values" we refer to demanded relations between human beings and, as indicated, we have suggested categorizations under the eight headings of power, respect, enlightenment, wealth, well-being, skill, affection, and rectitude. The particular categorizations and the number of headings are not, however, important if operational indices of sufficient precision are offered in alternative formulations to permit translation of equivalences in reference. By "institutions" we refer to the detailed patterns of practices by which values are pursued, and these may be described in terms of all relevant modalities, such as varying emphasis upon persuasion and coercion, varying bases of power invoked and applied, varying audiences to which appeals are made, and so on.<sup>20</sup> For purposes of seeking the factual orientation indispensable to the rational study of decisions, any particular value process may, accordingly, be described, with whatever degree of refinement necessary, in terms of the *participants* in the process (individuals, groups specialized to the value, groups specialized to other values but having indirect effects on the value), the *situations* of inter-

19. An amusing statement of the need for this basic distinction in perspectives appears in Arnold, *Institute Priests and Yale Observers—A Reply to Dean Goodrich*, 84 U. PA. L. REV. 811 (1936).

It is continuance of traditional confusion of the perspectives of the observer and of the decision-maker, and of the differences between the various intellectual tasks, which makes irrelevant the strictures of Professor Fuller in *American Legal Philosophy at Mid-Century*, 6 J. LEGAL ED. 457, 470, 471 n. 25 (1954).

20. A concise survey of contemporary derivations is presented in Northrop, *Ethical Relativism in the Light of Recent Legal Science*, 52 JOURNAL OF PHILOSOPHY 649 (1955).

action in which the value is at stake; the *bases of power* brought to bear by different participants to effect outcomes in such situations, the particular *practices* in persuasion and coercion or other modality employed by participants, and the *effects* of the specific outcomes of interaction upon the various values of the participants and others. The totality of any community process, world or lesser, might thus be described in terms of a series of interrelated value processes: a power process, a respect process, an enlightenment process, a wealth process, and so on, with the power process (including both authority and control) being affected by and in turn affecting all the other social processes.

For the detailed description of power processes, the processes comprehending the authoritative and controlling decisions of our primary concern, the mode of analysis we recommend is simply an application of the same general framework of inquiry suggested for any other social process. Our suggestion is that power is most usefully conceived not, as some commentators on the world arena prefer, as mere naked force, but rather as a coercive relation between human beings in which some are able, by threats of severe deprivations or promises of high indulgence, to make, and enforce, for others choices affecting a distribution of values. From this perspective, comprehensive description of a power process (or even of a single decision) must extend to the interacting *participants* (government officials, political parties, pressure groups, private associations specialized to values other than power, private individuals), to the situations or arenas in which decisions are expected (government, non-government), to the particular *bases of power* upon which participants premise their demands (control over people, resources, values, institutions), to the particular *practices* employed by participants in the management of base values (diplomatic, ideological, economic, military; intelligence, recommending, prescribing, invoking, applying, appraising, and terminating), and, finally, to the *effects* of decision upon the value position, potential, and expectancy of participants and others, including any aggregate changes in the composition of participants and arenas.

Description of social and power processes beginning in these broad terms might permit the description of any particular decision or of any flow of decisions (including precipitating events, conditioning variables, and effects), with whatever degree of comprehensiveness and whatever degree of refinement, performance of the various intellectual tasks might require. The greater the degree of both comprehensiveness and detail achieved in description, the more effective, obviously, might be performance of the intellectual tasks; but policy purposes might be served by considerably less than perfection, even by asking the relevant questions and keeping consistently at the focus of attention the

distinctions between precipitating events, conditioning variables (including legal technicality), authoritative response, and the effects of response. The general framework of inquiry is, as indicated above, intended to be equally applicable to all the communities in which we are interested: world, regional, hemispheric, national, state, metropolitan, and local.

Within such a framework of comprehensive guiding theory, the next and principal aspiration of policy-oriented study must, of course, be to postulate and clarify policies and to bring all the designated intellectual tools to the study of particular decisions in the most effective implementation of such policies.

The values we recommend for postulation are those which are today commonly described as the values of human dignity in a free and abundant society. The student who explicitly commits himself to such values merely locates himself in the main stream of the rising common demands and expectations of our time. For two centuries or more, despite feudal residues and the counter-currents of totalitarianism, the world arena has continued to exhibit a growing unity and ever-increasing intensity in the demands of people everywhere for the greater production and wider sharing of all the values which we have referred to in terms of power, respect, enlightenment, wealth, well-being, skill, affection, and rectitude. The strength and frequency of these demands are demonstrated in formulations of authority and effective assertion, both international and national, of the greatest variety, such as the United Nations Charter, the Universal Declaration of Human Rights, the proposed covenant on human rights, regional agreements and programs, a host of existing and proposed international agreements on specific functional problems, national constitutions (both old and new), political party platforms, pressure group and private association programs, and so on. Though all these demands are expressed in many different cultural and institutional forms, and though they are commonly justified by many varying references, empirical and transempirical, to religion, natural law, science, metaphysics, history, common sense,<sup>21</sup> and so on, their general trend in insistence upon the democratization of fundamental relationships between human beings is unmistakable.<sup>22</sup>

It may perhaps, however, bear emphasis that a clarification of values designed to serve policy purposes in the study of authoritative decisions must extend, beyond the mere repetitive invocation of such highly ambiguous symbols as "justice" or the "maintenance of public order" or even "human dignity" and the derivation of such symbols from still more inclusive symbols of prefer-

21. For fuller exposition of the mode of analysis, see LASSWELL AND KAPLAN, *op. cit. supra* note 5.

22. MANNHEIM, *MAN AND SOCIETY IN AN AGE OF RECONSTRUCTION* (1940).

ence and justification, to the detailed relations of specific decisions in particular contexts to both short-term and long-term community interests. The rational performance of this intellectual task need not require of the student either the blind guessing at and adoption of community demand and expectation or the arbitrary projection of his own personal preferences. What such performance does require, in contrast, is a disciplined and contextual use of all the skills of thought itemized above. In any particular context the detailed clarification of values must proceed concurrently with detailed application of the other skills, asking with respect to the decisions under observation such questions as: What community values are at stake in the particular precipitating events to which the specified decision-makers are responding? What detailed policies have prior decision-makers sought and effected? What factors have conditioned their response and degree of achievement? What is the probable future influence of these and other factors? What practicable, operational indices can in this context be given to preferences for shared power, shared respect, shared enlightenment, and so on, for the appraisal of alternatives in decision? Which alternatives in decision offer the most effective short-term advance toward long-term goals? It is only, we suggest, by such systematic exposure of tentative formulations of preferred policies to specific contexts of past decisions, conditioning factors, and future probabilities, that the student can hope to achieve recommendations which are neither blindly conventional nor arbitrary, but rather rationally conceived for promotion of the overriding values to which he is committed.

## V

An example of the mode of analysis we recommend for application to any particular problem may be offered from the field of property law. In our society as a part of the process by which wealth is transmitted from generation to generation, donors commonly seek to regulate the future uses of the resources or claims to wealth which they transmit by various forms of "dead-hand control." In contemporary law school curricula the problems created by such efforts of donors are considered largely in courses on "future interests" or "possessory estates," in which the principal organizing foci are such esoteric technical terms as "possibilities of reverter," "rights of entry," "reversions," "remainders," "executory interests," "powers of appointment," and so on. What we recommend, in contrast, is that study should begin with a clear orientation in the facts of social interaction. The major outlines of these facts we have elsewhere summarized as follows:

The objectives for which donors seek such control include not only wealth effects but also effects on all other values. Wealth objectives include



both the care of dependents and successors and a wide variety of commercial purposes. Objectives with respect to other values embrace both community purposes (promotion of education, advancement of religion, improvement of government, relief of poverty, promotion of health or patriotism, and so on) and private purposes (preventing specified behavior, such as marriage, divorce, or gambling, by specified persons; or securing specified behavior, such as the care of tombstones, pets, or houses, from specified persons). The modes of control sought include the assignment of specified resources or a fund to specified purposes or a fund to specified purposes in perpetuity or for a long period of time, shifts from certain persons or purposes to others upon future events, ascertainment of beneficiaries only upon future events, restraints on the anticipation of income or principal, restraints on the transfer of specific resources, provision for the accumulation of income and restraints on management powers. The forms of wealth subjected to such controls may vary through all the many forms of land and funds. The management of the controls established may or may not include persons entitled to beneficial enjoyment. The mode by which intent is expressed may be through "legal" or "equitable" property forms, simple agreement, corporate charter, or other equivalents. The amounts of wealth affected are, of course, infinitely various, and transferors and transferees vary greatly in value and institutional position and, hence, in capacity to affect community values.<sup>23</sup>

With such orientation in the facts of attempted deadhand control, the student might then proceed to examine how community coercion has in the past been brought to bear upon such efforts in particular controversies. For purposes of sharpening policy distinctions, in addition to observing all relevant variations in the facts as indicated above, the student might further categorize particular controversies under headings which discriminate both between differing parties to controversy and different community functions, such as securing intent, fixing the policy limits of particular intents, the enforcement of commitments, protecting against third parties, honoring transfer of benefits, the construction of vaguely expressed intents, the termination of outmoded intents, and the subjection of community claims. With such refinement of both participating events and issues, comprehensive description might be attempted both of the flow of past decisions and of the variables that have conditioned decisions. Among the variables so observed would of course be the traditional technical doctrines of "future interests" and "possessory estates," with their alleged distinctions between "legal" and "equitable" interests and multiple categorizations into "possibilities of reverter," "rights of entry," "reversions," "remainders," and so on, as well as other commonly invoked

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23. McDougal, *The Influence of the Metropolis on Concepts, Rules and Institutions Relating to Property*, 4 J. PUB. L. 93, 108 (1955).

doctrines.<sup>24</sup> It might be discovered that there have been uniformities in decision with respect to each of the particular types of controversy indicated above, and in terms of the factual probabilities of a particular interest coming into possession and enjoyment when such probabilities are relevant to policies which largely ignore the supposed dictates of the traditional technical doctrines, with such doctrines lingering on only to stimulate or rationalize an occasional harsh or impolitic decision. When lines of probable future development are considered, it might be wondered whether doctrines which had their origin in an agricultural community, of family dynasties, competing courts, primitive modes of conveyancing, and so on, are likely to have much influence in modern metropolitan society, in which wealth is largely intangible, court distinctions removed, conveyancing improved, and demands for efficiency in land use most intense.

Policies considered for recommendation to community decision-makers might include with respect to wealth, such initial formulations as keeping specific resources free from deadhand restraints on productive use, encouraging savings and investment of capital in productive enterprise, and effecting an efficient transfer of reasonable economic security for dependents and successors, and with respect to values other than wealth, preventing the over-concentration of power that follows overconcentration of wealth, maintaining the stability of the social order by administering the process of wealth transmission with least disappointment of the reasonable expectations of beneficiaries, the securing from families of comparable wealth a uniform contribution to each generation for the general purposes of the community, and so on. Alternatives recommended for the better securing of such policies might include both the streamlining of authoritative prescription to express contemporary policy with respect to contemporary problems, including abolition of any enduring distinctions in application to the traditional categorizations of future interests or to "legal" and "equitable" interests or to contract and corporate forms, and the invention and adoption of new institutional practices such as an improved and broadened ante-mortem probate, improved statutes authorizing highly discretionary judicial sale, mortgage and lease of land subject to future interests, the integrated exercise of the taxing power and time limitations to impose rational limits upon the concentration of wealth, and so on.<sup>25</sup>

24. Systematic survey would of course include many other environmental and predispositional factors.

25. For more detail, see McDUGAL AND HABER, *PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT* (1948), c. iii.

A relatively detailed application of the same mode of analysis to a very different problem may be found in McDougal and Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 *YALE L. J.* 648 (1955).

## VI

It would of course immensely facilitate study for policy purposes if an entire curriculum, or comprehensive outline of inquiry, could be organized in terms of the factual processes of social interaction, rather than of normative-ambiguous technicality. The social and power processes of a community, like "the law," constitute, as we have seen, a "seamless web," with each process both affecting and being affected by all the other processes. A profession which aspires, as the legal profession does, to concern itself with aggregate effects upon community policy, rather than with mere episodic events, must, accordingly, seek intellectual tools adequate to locate every authoritative doctrine and practice, every decision, in its total context. Any particular social interaction may precipitate inquiry into the whole structure of authoritative prescription and procedure, and any bit of authoritative prescription or procedure may, in turn, require for its understanding and appraisal relation to the total community process in which it occurs.

Elsewhere we have sought to suggest certain possible outlines of such an entire curriculum or comprehensive outline of inquiry.<sup>26</sup> The main divisions of the over-all organization we recommend are under the headings of Power Processes, Value Processes, Private Associations, and Policy Procedures. Under Power Processes one might seek to perform the various policy-oriented intellectual tasks with respect to all the power processes which comprehend and influence our other activities, organizing inquiry with respect to each process—world, regional, hemispheric, national, provincial, and local—in terms of the general analysis (participants, arenas, bases of power, practices, and effects) indicated above and seeking with respect to every decision studied to ascertain the more precise interrelations of formal authority and effective control. Comprehended within this area of inquiry would be such traditional subjects as public international law, private international law, constitutional law, state and local government, and so on.<sup>27</sup> Under the heading Value Processes, subdivision might be made in terms of Agreements and Deprivations, and effort made to locate both agreements and deprivations in their most minute contexts of value change and institutional practice. The type of detail and cross-categorization required is indicated in the discussion above of expressions of intent designed to achieve deadhand control. Comprehended within this area would be all the traditional courses in contracts, commercial law, prop-

26. McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 *YALE L. J.* 915 (1952).

27. The outlines of a possible reorganization of public and private international law are suggested in the reference, *supra* note 4.

erty, torts, crimes, and so on. Under the heading *Private Associations*, attention might be directed to associations not primarily concerned to achieve power effects, and such associations might be conveniently divided into those primarily devoted to the production and sharing of wealth and those primarily devoted to other values. The first subdivision would comprehend the traditional study of both incorporated and unincorporated business organization and would range over problems of formation, finance, management and operation, termination and subjection to community claim. The second subdivision would include that great variety of nonprofit associations, created by agreement or declaration of trust or special or general incorporation, devoted to community values other than power or wealth, an area gravely neglected in traditional curricula. Under the heading *Policy Procedures*, inquiry might be directed to the present performance and possible improvement of the various community functions in formulating and applying authoritative prescription: intelligence, recommending, prescribing, invoking, applying, appraising and terminating.

The question is probably by now insistent whether any hoped-for consequences of so explicit a policy-oriented approach would be worth all the effort projected.

The faith that moves us is, however, that by continually deepening and sharpening his understanding of law as a great creative instrument of social policy, and his insight into himself as a decision-maker, man may be able to affect his apparent fate and move toward the eventual organization of security and freedom in a peaceful and abundant world community.<sup>28</sup> The social role and responsibility of the legal scholar we conceive to be that of bringing the intellectual resources of the modern world to bear upon clarification and recommendation of the policies and procedures by which movement may be made toward this eventuality. However fallible the scholar's forecast of specific decision may remain, and however few the universals his study may ever yield, whatever his tools of inquiry, it is possible that systematic and sustained application of the relevant, modern tools might yield the details of short-term, emerging relationships with unexpectedly high probability and might, by exposure of past rigidities in decision, greatly increase appreciation of opportunities for future change and greater rationality in decision. From this perspective, the scholar has, accordingly, but little alternative, other than surrender to the forces of human indignity and perhaps even of human annihilation, to continuous effort both to improve his tools of thought and inquiry and to apply such tools in the more effective execution of his chosen responsibility.

28. Cf. FRANK, *FATE AND FREEDOM* (Rev. ed. 1953).