CRITERIA FOR A THEORY ABOUT LAW*

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JURISPRUDENCE AS THEORY ABOUT LAW

In many areas of inquiry about social process today scholars are engaged in creating comprehensive and well-articulated frames of reference—"general orientations" or "conceptual maps"—designed to guide and assist in the conduct of studies.[1] Different scholars in different areas seek of course to serve many different intellectual functions or purposes through this creation of new and more effective theory, but in a burgeoning literature, certain broad purposes appear with high frequency:

> the identification of the scholar or observer in relation to the events being observed, with specification of his standpoint and purposes;
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> the delineation of relevant foci for inquiry, with location of the particular events being subjected to inquiry in the larger context of events with which they interact;
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> the specification of a range of intellectual tasks pertinent to inquiry about any aspect of social process, including: clarification of goals, description of trends, analysis of conditions, projection of future developments, and invention and evaluation of alternatives;
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> the development of dependable and economic procedures for performing the intellectual tasks regarded as relevant; and

 This article is excerpted from a larger study which the authors have in progress.

In the formulations here presented we have drawn freely upon certain prior publications. Lasswell & McDougal, *Jurisprudence in Policy-Oriented Perspective*, 19 FLA. L. REV. 486 (1967); McDougal, Lasswell & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968); and upon unpublished work in collaboration with W. L. Morison, W. Michael Reisman, Mary Ellen Caldwell, Luis Schuchinski, Michael Libonati, and others.

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1. For a convenient review of relevant developments see O. YOUNG, SYSTEMS OF POLITICAL SCIENCE (1968); O. YOUNG, A SYSTEMATIC APPROACH TO INTERNATIONAL POLITICS (1968); E. MEEHAN, THE THEORY AND METHOD OF POLITICAL ANALYSIS (1965); and W. MACKENZIE, POLITICS AND SOCIAL SCIENCE (1967).

the postulation and explicit disclosure of the comprehensive goal values assumed in, or sought to be served by, inquiry.[2]

It will be observed that the purpose thus sought in these newer frames of reference are more expansive than those either of traditional scientific investigation, in the sense of search for highly generalized explanatory principles,[3] or of traditional philosophic inquiry, in the sense of derivational exercises in the syntactic dimension or other less specified domains.[4] What is aspired to in the new frames of reference is the development of theory, both sufficiently comprehensive and sufficiently detailed and articulated at all necessary levels of abstraction, to aid—in ways that are dependable, appropriately selective, creative and economic—in the performance of all the pertinent tasks of inquiry about social process.

It is an unhappy fact that in the long history of systematic reflection and writing about law, stretching back at least to the beginning of cities, scholars have seldom sought to construct theory of comparable reach.[5] Most of the great traditional, recurring emphases in theory, sometimes characterized as "schools of jurisprudence," which continue to have important effects upon both inquiry and decision, have been partial and incomplete theories, too narrowly restricting their focus

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2. Detail about the various recommendations being made may be found in FOREIGN POLICY DECISION MAKING (B. Snyder, W. Bruck, & B. Sapin eds. 1963); K. DEUTSCH, THE NERVES OF GOVERNMENT (1963); A. KAPLAN, THE CONDUCT OF INQUIRY (1964); VARIETIES OF POLITICAL THEORY (D. Easton ed. 1966); Kaplan, *International Systems*, 15 INT'L. ENCYC. SOC. SCI. 479 (1968); CONTENDING APPROACHES TO INTERNATIONAL POLITICS (K. Knorr & J. Rosenau eds. 1969); Eisenstadt, *The Development of Sociological Thought*, 15 INT'L. ENCYC. SOC. SCI. 23 (1968); W. RUNCIMAN, SOCIAL SCIENCE AND POLITICAL THEORY (1963); READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES (M. Brodbeck ed. 1968); E. NAGEL, THE STRUCTURE OF SCIENCE (1961); H. EULAU, THE BEHAVIORAL PERSUASION IN POLITICS (1963); and R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (1957).

3. A more limited view of scientific investigation is expressed by Professor Marion Levy, *"Does It Matter If He's Naked?" Bawled the Child*, in CONTENDING APPROACHES TO INTERNATIONAL POLITICS, *supra* note 2, at 87; *cf.* Schwartz, *A Learning Theory of Law*, 41 S. CAL. L. REV. 548 (1968).

4. Derivational exercises in the syntactic dimension are illustrated in contemporary "linguistic" approach. *See, e.g.*, G. RYLE, THE CONCEPT OF MIND (1949).

Some of the inadequacies of analysis largely confined to the "linguistic" are indicated in, Weisstub, *The Conceptual Foundations of the Interpretation of Agreement*, 22 WORLD POLITICS 255 (1970).

5. An appropriate historical perspective is offered by such studies as M. LEVI, THE POLITICAL THEORY OF THE ANCIENT WORLD (1965); E. HAVELOCK, THE LIBERAL TEMPER IN GREEK POLITICS (1957); Speiser, *Cuneiform Law and the History of Civilization*, 107 PRAC. AM. PHILOSOPHICAL SOC. 536 (1963); A. BOZEMAN, POLITICS AND CULTURE IN INTERNATIONAL HISTORY (1960); J. NEEDHAM, 2 SCIENCE AND CIVILIZATION IN CHINA (1956); G. SEIDLER, THE EMERGENCE OF THE EASTERN WORLD (1968); and R. POUND, INTERPRETATION OF LEGAL HISTORY (1922).

of inquiry and too severely limiting the intellectual tasks with which they are concerned.[6] In few of the historic emphases have the standpoint and purposes of the scholarly observer been clearly distinguished from those of the more active participants in the social processes being subjected to inquiry; much too often, instead of creating theories *about* law which might facilitate comparisons through time and across community boundaries, scholars have been content to frame their own studies in terms of technical theories *of* law, mere shadowy and ambiguous fragments of the data under observation.[7] In many emphases, still pervasive, authority has been conceived in transcendent terms—such as divine will, metaphysical eternal verities, or autonomous legalisms—which do not admit of empirical inquiry. Quite commonly attention is restricted to alleged rules of law, or largely unspecified perspectives, to the neglect of the actual operations of legal process; a clear focus upon empirical decision, or the aggregate flow of decision, is thus not obtained. Authority and control are not always distinguished, and confused and ambiguous references are made simultaneously to both these indispensable components of law. Frequently, the whole range of established decision-makers is not identified, and there is little clear focus upon a comprehensive process of authoritative decision, extending to the making as well as the application of law in the maintenance of preferred public order. The events in social process which give rise to claims to authoritative decision are seldom systematically categorized in value and institutional terms; hence, only anecdotal attention can be given to the causes and consequences of decision. Characteristically, the complex interpenetration of patterns of authority and control across territorial community lines is scarcely noted, much less realistically described, and dubious myths are projected about the interrelations of "national" and "international" interests and law. In most of the emphases, the intellectual task most honored in exercise is that of logical derivation, and the various other tasks necessary to both effective inquiry and rational decision are largely neglected.[8]

6. These limitations are apparent even in explicit consideration of the scope of jurisprudence. *See* H. KANTOROWICZ, THE DEFINITION OF LAW (1958); J. MONTROSE, THE SCOPE OF JURISPRUDENCE (1965), reprinted from ME JUDICE; Bodenheimer, *The Province of Jurisprudence*, 46 CORN. L.Q. 1 (1960).

7. E. PATTERSON, JURISPRUDENCE 2, 3 (1953) notes, but does not develop a distinction between theories *of* and *about* law. Past trends in recognition of such a distinction will be noted in the discussion below of observational standpoints.

8. Documentation of these observations, which are developed in more detail in the text below, may be found in any of the classic histories of legal philosophy or jurisprudential thinking. *See* R. POUND, I JURISPRUDENCE (1959); A. BRECHT, POLITICAL THEORY

The inadequacies of our inherited theories for inquiry about law are well illustrated in the oldest, and perhaps the most continuously influential, emphasis of all, that of "natural law," which grounds "authority" in transempirical sources.[9] In this frame of reference the task allocated to the jurist is avowedly theological or metaphysical: his job is to put into effect on earth either the divine will or the requirements of certain postulated, or derived, transcendental essences. It could not be surprising that scholars dominated by such conceptions of authority would exhibit but minimum concern for the formulating of comprehensive theory designed to facilitate inquiry about empirical decision in its community context. Though the transempirical emphasis cannot, any more than other emphasis, entirely escape concern for effective decision, its principal focus of attention has been, not upon authoritative and controlling decision, but rather upon certain limited types of justification for decision. The great historic contribution of this emphasis has of course been in its appeals from the realities of naked power to authority, and in its emphasis upon the relevance of goals. It is common knowledge how much "natural law" notions have aided both the development of modern national constitutions and the recognition and development of international law.[10] Too often, however, the technique of goal clarification exemplified by the theological or natural law emphasis has been that simply of logical derivation, and it has not always carried its transempirical justifications of goals forward to the development of detailed specifications in empirical terms. The important abiding difficulties with transempirical justifications are that the same justifications can be employed to support diametrically opposed empirical specifications and that all such justifications must remain vulnerable to short circuiting by rivals

(1959); H. CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL (1949); J. JONES, HISTORICAL INTRODUCTION TO THE THEORY OF LAW (1940); C. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE (2d ed. 1963); W. FRIEDMANN, LEGAL THEORY (4th ed. 1960); J. STONE, LEGAL SYSTEMS AND LAWYERS' REASONINGS (1968), HUMAN LAW AND HUMAN JUSTICE (1965), and SOCIAL DIMENSIONS OF LAW AND JUSTICE (1967); E. BODENHEIMER, JURISPRUDENCE (1962); G. PATON, A TEXTBOOK IN JURISPRUDENCE ch. I. (3d ed. 1964); G. SABINE, A HISTORY OF POLITICAL THEORY (3d ed. 1961).

9. The temper of this variegated, diffuse emphasis may be sensed in A. Chroust, *On the Nature of Natural Law*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 70-84 (P. Sayre ed. 1947); H. ROMMEN, THE NATURAL LAW (T. Hanley transl. 1947); A. PASSERIN D'ENTREVES, NATURAL LAW (1951); L. FULLER, THE MORALITY OF LAW (2d ed. 1969); C. BECKER, THE HEAVENLY CITY OF THE EIGHTEENTH CENTURY PHILOSOPHIES (1932); and Northrop, *Naturalistic and Cultural Foundations for a More Effective International Law*, 49 YALE L.J. 1430 (1950).

10. E. BODENHEIMER, JURISPRUDENCE 57 (1962) offers a concise summary of some of the "practical achievements" of the natural law frame.

which declare the primacy of more direct or recent revelations. In a frame of reference not explicitly and systematically linked to human choice in community process, even an orientation toward the various other intellectual tasks required for effective inquiry and rational choice would be incongruous.

The frame of reference emphasizing historical origins, which reached its fullest flower in Europe and the United States nearly a hundred years ago, did have the advantage of seeking to ground authority in finite community process.[11] Its difficulty was that its principal proponents radically misconceived such process. They sought authority not so much in the actual perspectives of living peoples engaged in cooperative activity in the maintenance of a community as in some mythical disembodied *geist* thought to be unique to each particular community. In this emphasis, law—like poetry or music—sprang from the soul or common will of the people in a community, and every community was different. It will be observed that some of these notions are scarcely less mystical than those of the transempirical emphasis. The task of an observer was regarded as that of comprehending the inner workings of a particular *geist* through intuitive understanding; he had to immerse himself in the *geist* to extract the norm which gave it meaning. Since every *geist* was unique, there could be no comprehensive map, transcending community boundaries or extending through time in a single community, in terms of which observations could be systematically organized and evaluated. Because of the almost total immersion in community process, it was difficult for proponents of this emphasis to obtain a clear focus upon particular authoritative decisions and their relations to the larger contexts. For this reason, they never devised a method, other than the largely anecdotal, even for the historical task of describing past trends in decision for enriching the experience at the disposal of community decision-makers. The potentialities of goal clarification they minimized because of a pervasive determinism; though *geists* could change as a result of deep forces in a community, law could not control these forces and there was especially little that a legislature could do. The deliberate invention of new alternatives in decision was a notion completely contradictory of the underpinnings of their thought; law was not so much

11. The important perspectives are summarized in R. POUND, INTERPRETATIONS OF LEGAL HISTORY (1923) and I JURISPRUDENCE, 81-87 (1959).

Note the sharp appraisal in Kantorowicz, *Savigny and the Historical School of Law*, 53 L. Q. REV. 326 (1937). *See also* H. MAINE, ANCIENT LAW (1881); J. CARTER, LAW: ITS ORIGIN, GROWTH, AND FUNCTION (1907); and P. VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE (1920-1922).

the instrument of the regulation of social change as the passive consequence of it. In an age in which man is becoming more and more capable of reshaping both his physical and his cultural environment and even of initiating changes in his own psychosoma, such an emphasis—as contrasted with deliberate and systematic effort to canvass past experience for the guidance it can give to future choice—can only be regarded as sentimental anachronism.

The frame of reference commonly described as "analytical" or "positivistic" jurisprudence which dominates thinking in much of the world today was shaped by reaction against both the transempirical notions of the theological or natural lawyers and the vague diffuseness of the historical school.[12] In contrasting emphasis it seeks to find "authority" in systems of rules emanating from established officials. For such purpose law is defined as the rules prescribed and applied by distinctive institutions of authority—sovereigns, courts, and legislatures—and jurisprudence is proclaimed as "the formal science of positive law."[13] This hallmark of obsession with rules *of* law, as contrasted with rules *about* law, was firmly implanted upon the frame by its most influential proponent, John Austin, who insisted that the appropriate scope of "general jurisprudence" consists, in the words of a distinguished contemporary expositor, "in the elucidation of fundamental legal notions to be achieved by the analysis of the distinctive vocabulary of the law and by the classification of its terms in such a way as to bring out their logical interconnexions."[14] Austin appeared also to believe that there are "resemblances between different systems" which are necessary as "bottomed in the common nature of man."[15] It has been observed even by friendly critics that such a position embodies certain elements of the rejected natural law theories,[16] as well as metaphysical notions of transcendent categories, extracted by *a priori* pro-

12. Expositions contemporarily influential include J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE (Introduction by H. L. A. Hart and Bibliographical Note) (1954); J. GRAY, THE NATURE AND SOURCES OF LAW (2d ed. 1921); H. KELSEN, GENERAL THEORY OF LAW AND STATE (1945); E. PATTERSON, JURISPRUDENCE (1953); and H. L. A. HART, THE CONCEPT OF LAW (1962).

13. One famous crystallization of this perspective is that of T. E. HOLLAND, JURISPRUDENCE ch. I (13th ed. 1924).

It is interesting that Holland found even the Romans progressing from "a homely and quite unscientific sense" of jurisprudence as "a knowledge of the law" to "the idea of a science of those legal principles which exist independently of the institutions of any particular country." *Id.* at 2, 3.

14. H. L. A. Hart, *Introduction* to JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE at XV (1954).

15. *Id.* at 373.

16. *Id.* at XV.

cedures;[17] certainly, many contemporary adherents to this emphasis appear to assume that legal rules can have a largely autonomous reference, different from community policy in context. When limited by such perspectives, jurisprudence becomes of course more a "science" of logical derivation of syntactic forms than an empirical science concerned with causes and consequences in social process.[18] In such an emphasis, though it cannot ignore authoritative and controlling decision, decision is not observed directly as events in social process but rather obliquely through the mirrors of ill-defined concepts and rules; the focus is not so much upon flesh-and-blood decision-makers and their choices in context as upon rules which purport to confer competence.[19] Authority and control are not clearly differentiated as twin components of lawful decision, whole systems of rules are merely assumed to be effective, and scholarship is exhausted by the description of patterns in authoritative myth, without systematic investigation of the degree to which they are in fact controlling. An emphasis explicitly focused upon the institutions of the modern state and inspired by exaggerated notions of sovereignty, unable to observe in the world arena either appropriate centralized institutions or an identifiable monopoly of force, has insoluble difficulty in accounting for the patterns of authority and control transcending nation-state lines and must, perforce invent a maze of mystical theories to explain the interrelations of national and international law.[20] An emphasis which ascribes so high a potency to autonomous rules must, further, adopt a calculated obliviousness to many otherwise relevant intellectual tasks of inquiry. When it is assumed that a system of theories of law can simultaneously describe what past decisions have been, predict what future decisons will be, and state what future decisions ought to be, there remains little place for more comprehensive and intensive inquiry about what is in fact happening. The location of authority in autonomous rules does little to encourage the detailed clarification of basic community policies from sources beyond the rules or even by a contextual interpretation of rules; the "analyst" is not allowed to state

17. J. MONTROSE, THE SCOPE OF JURISPRUDENCE 3 (1965), *reprinted from* ME JUDICE.

18. Though he regards his "imputation" as somehow different from derivation, Kelsen is explicit in his effort to isolate authority from social process.

19. In his inaugural address, "Pericles and the Plumber" (The Queen's University of Belfast, 1969), Professor W. L. Twining recalls "Langdell's idea 'that law is a science . . . [and] that all the available materials of that science are contained in books'" (p. 5). *Cf.* Woodard, *The Limits of Legal Realism, An Historical Perspective*, 54 VA. L. REV. 689, 699, 900 (1965).

20. This theme is developed in McDougal, Lasswell, & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L. L. 188 (1968).

clearly to himself, or to anyone, the criteria upon which he relies to choose among the alternatives made available by textual confrontation and evaluation. The elaborate specification of the concatenations of systems of rules falls far short of a careful description of past uniformities in decision of comparable cases in terms of degrees of approximation to clarified community goals. When it is postulated that rules are the factors that predominantly affect decision, inquiry for other factors in predisposition and environment tends to get truncated. When decision-makers are asserted to be under "obligaton" to make future decision correspond to the rules employed in justifying past decisions, the prediction of future decision becomes mere extrapolation, as simple-minded as it is unreliable. The ultimate, integrative task of inventing and evaluating new rules and institutions, better designed to secure community policies, is not likely to be attended by success, even when attempted, in the absence of the more adequate performance of the other relevant tasks. A jurisprudence which can contribute to a comprehensive program of inquiry about law only at the expense of the integrity of its theory sometimes comes to be regarded as a "stench in the nostrils" of practical men.[21]

The various emphases subsumed under "sociological jurisprudence" and "the sociology of law," all inspired by accelerating developments in the natural and social sciences, have had the common aspiration to bring inquiry about law, as well as law itself, into a more realistic relation to the facts of social process.[22] It has not, however, been characteristic of emphases in this frame to make direct and frontal attacks upon traditional legal perspectives and techniques and no great transformations of such perspectives and techniques have been recommended. Thus, authority is found variously in "positive enactment," "received ideals of the legal system," "taught tradition," "group convictions," "interests of individuals and groups," "the inner order of associations," "jural postulates of civilization," "sacred tradition," and "faith." The principal innovation has been in a common emphasis upon the scientific study of explanatory factors and social consequences. Improvements during the past century in techniques of

21. Memory is that this characterization derives from A. V. Dicey.

22. The classic presentation is of course that of Dean Pound in I JURISPRUDENCE ch. 6 (1959). His earlier *Scope and Purpose of Sociological Jurisprudence* (pt. 1-3), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140, 489 (1911-1912), is still a useful survey of differing emphases. *See also* E. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (W. Moll transl. 1912).

A comprehensive, and highly persuasive, exposition of sociological perspectives is N. TIMASHEFF, AN INTRODUCTION TO THE SOCIOLOGY OF LAW (1939).

inquiry and knowledge, first about the natural sciences and later about the social sciences, gave scholars a new incentive to bring scientific findings and skills to bear upon the study of law. Yet many of the representatives of this new aspiration remained infected with mysticisms from the natural law and historical emphases and few came closer than had the analytical emphasis to an understanding of a comprehensive process of authoritative decision in context. Some of the most creative proponents of the new emphasis have even sought to keep their inquiries about law and their sociological investigations in separate compartments, making a curious distinction between "sociological jurisprudence" and "the sociology of law."[23] Lacking a clear focus upon decision in their inquiries and ignoring the dependence of the scientific task of inquiry upon all the other tasks, as upon goal clarification for indications of importance, they have not made the contributions to knowledge for which many had hoped. Goal clarification has sometimes been eschewed as an unscientific operation and is often permitted to regress toward traditional methods of philosophical speculation. Trend studies seldom present an organized, systematic flow of comparable decisions in relation to their conditions and consequences in social process. The search for conditions, though often appropriately multi-factored in terms of environmental and predispositional variables, sometimes degenerates into a search for the "natural laws" of social interaction. The projection of the future is not uncommonly confined to intimations that "positive laws" which do not conform to "the living law" will be ineffective. The deliberate invention and evaluation of alternatives, save in the notable exception of the late Dean Pound, is seldom recommended. Dean Pound, certainly the most influential proponent of the sociological frame in the United States, did for some decades make eloquent and articulate demands for a "continuously more efficacious and social engineering,"[24] but his own working conception of law never fully escaped from the confines of judicial techniques and rules, and he never elaborated his conception of "interests" into a comprehensive and homogeneous set of categories in aid of performance of the various relevant intellectual tasks. The sociological school of jurisprudence clearly has still not risen to the task of taking full advantage of the findings and techniques of modern sociological inquiry.

Within the broad sociological frame, some emphases, in the name

23. One who makes this distinction is Max Weber. *See* M. WEBER, ON LAW AND ECONOMY IN SOCIETY 11 *et. seq.* (M. Rheinstein ed. 1954).

24. R. POUND, SOCIAL CONTROL THROUGH LAW (1942).

of providing a superior picture of the empirical world and a strategic guide to policy within it, have seized upon a single factor for the explanation of man, society, and law. The most influential emphasis of this kind, perhaps in fact more metaphysical and pseudo-historical than sociological, owes its origin primarily to Marx and Engels who found what they regarded as a golden key in the primacy of "material" over "ideological" factors.[25] From this premise, they asserted a law of historical development to which they ascribed overwhelming potency in the past and future of human association.[26] Explanations that stress a single factor as of predominating importance are, however, in a peculiarly vulnerable position as knowledge advances. During the past century in particular an enormous accumulation of empirical studies has occurred: in the early years of the nineteenth century the psychological and social sciences had few practitioners; by the middle of the twentieth century they could be numbered in tens of thousands. It has, thus, become increasingly clumsy to divide all factors in psychological and social processes into "material" and "nonmaterial." Any attempt to do so must mean that a scholar will be compelled to spend his time making definitions whose siguificance is of dubious importance for the furtherance of inquiry. A two-valued system can, of course, be made to serve some purposes of investigation, but its utility is modest, and it greatly increases the hazards of rigidifying an entire approach into empty dialectic, unrewarded and unaided by the findings of competent inquiry. In the light of contemporary knowledge, it would appear much more productive to conceive of psychological and social processes as multi-factored, and to get ahead with the task of exploring the many relevant interdeterminances.

The relatively recent frame of reference known as "American Legal Realism," sometimes described as having been deeply bitten by "the sociological prejudice,"[27] has in fact gone much beyond sociological jurisprudence in the comprehensiveness, directness, and intensity of its attack upon inherited legal theories and procedures.[28] The prin-

25. For brief review, *see* H. KELSEN, THE COMMUNIST THEORY OF LAW (1955); R. SCHLESINGER, SOVIET LEGAL THEORY (1945).

26. Because of this emphasis, many proponents might equally plausibly be grouped in the "historical" or "natural law" approaches.

27. E. PATTERSON, JURISPRUDENCE 541 (1953), ascribing the characterization to H. Kantorowicz, *Some Rationalism about Realism*, 43 YALE L. J. 1240, 1246 (1943). The Kantorowicz article, despite its great influence is a thin and uncomprehending piece, finding little of merit in the American realists that was not anticipated by the European sociologists.

28. The genuine contributions of the realist movement are perhaps best appreciated in the collecter essays of some of its major proponents. *See, e.g.*, W. HOHFELD, FUNDAMEN-

cipal tenet of this frame has been its insistence that law is *instrumental* only to social ends and, building upon Mr. Justice Holmes' "considerations of what is expedient for the community,"[29] it has consistently, if not always explicitly, found authority in peoples' empirical perspectives about social consequences. Its most important contribution has perhaps been in its largely novel emphasis, first popularized by Judge Jerome Frank and later adopted by many others, that law is most fruitfully conceived as *decision* in the sense of sanctioned authoritative choice. Indeed, some proponents of the frame, under the influence of a behaviorist psychology, have unfortunately carried the emphasis so far as to minimize the perspectives of authority attending choice in an exaggerated concern for "operations" and effectiveness. In their more constructive efforts the American realists have seized with great gusto upon anthropology, psychoanalysis, learning theory, sociology, social psychology, economics and related disciplines and exploited the findings of these several fields in their particular studies; they have flung the doors wide to any reporter of new discoveries in the expanding science of man. In particular, they have noted and decried the normative-ambiguity[30] and the complementarity of the technical concepts and rules of law which traditional theory proffered for the simultaneous performance of the descriptive, scientific, predictive, and preferential tasks. In lieu of the customary historical studies of the literary evolution of such concepts and rules they have insisted upon the careful description of past trends of decision in terms of narrow categorizations of the facts giving rise to the appeal to authoritative decision and of the choices actually made. Rejecting the notion that decisions are "the products of logical pathogenesis born of pre-exist-

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TAL LEGAL CONCEPTIONS (W. Cook ed. 1923); K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962); F. COHEN, THE LEGAL CONSCIENCE (1960); J. FRANK, A MAN'S REACH (1965). *Cf.* the provocative J. FRANK, LAW AND THE MODERN MIND (1930).

Influential early articles are Bingham, *What is the Law*, 11 MICH. L. REV. 1 (1912); Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303 (1927); Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 159 (1928); H. Oliphant & A. Hewitt, *Introduction* to REUFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES (1930).

A famous negative appraisal is Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934). *Cf.* McDougal, *Fuller vs. The American Legal Realists*, 50 YALE L.J. 828 (1940).

Comprehensive references may be found in W. RUMBLE, JR., AMERICAN LEGAL REALISM (1968); Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MT. L. REV. 1 (1962).

29. O. HOLMES, THE COMMON LAW 35, 36 (1881).

30. The reference is to disguised statements of preference—in terms of description, scientific statement, or prediction—for which the speaker does not take explicit responsibility. Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 267 (1943).

ing legal principles,"[31] they have spelled out in detail the thesis that judges are human and, hence, responsive to all the variables in predisposition and environment which typically shape the conduct of all men. They have not had high expectations about the possibilities of predicting particular future decisions under the best of circumstances, but have suggested that the chances of successful anticipation could be greatly enhanced by taking into acount the whole range of conditions affecting past decision and their probable future collocations. Calling for a deliberate and relatively clear specification of empirical social ends, they have demanded, and often supplied, an equally deliberate survey and evaluation of the available alternatives in doctrine, institutions, and procedures for securing such ends. Yet none of the American realists, despite this deep concern for the consequences of decision and the impact of law upon human beings, have ever developed a comprehensive set of value and institutional categories, or a systematic set of procedures, for goal clarification and the other tasks, to aid them in their study and appraisal of decisions. The abstractions which they have formulated are almost exclusively low-level abstractions,[32] and the problems with which they work, in the absence of a comprehensive guiding theory, can be related to each other only anecdotally.

The many important contributions of the American legal realists cannot, thus, be said to be much more than preliminary to the affirmative problems of jurisprudence.[33] The vivid assault of the early realists upon verbal "slot machine" conceptions of legal process did succeed, at least temporarily, in shaking loose incrustations of misplaced confidence in the pursuit of legal analytics. Yet there is a limit beyond which the laborious demonstration of equivalencies in the language of the courts cannot go: eventually the critic must offer constructive guidance as to what and how courts and other decision-makers should decide upon the whole range of problems importantly affecting public order. Similarly, some of the realists have done little service to "science" and scarcely more to "law" by merely proclaiming the virtues of scientific modes of thought and investigation. It is a disservice to science to exaggerate the contribution which science alone can make to the policy questions that are the distinctive problems with which lawyers are confronted. Science is sometimes said to be "value free";

31. F. COHEN, THE LEGAL CONSCIENCE 75 (1960).

32. Llewellyn, Frank, Cohen, Arnold, Sturges, etc. were interested in very specific legal reforms. *E.g.*, Llewellyn's contribution to the Uniform Commercial Code.

33. *Cf.* C. Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968).

and yet the most obvious fact about policy is that it is value oriented, since policy is only intelligible when it is seen as a deliberate search for the maximization of valued goals. To exaggerate the role of science is to prepare the ground for disillusionment with the relevancy of scientific modes of thinking and to discount the usefulness of the available results of scientific inquiry. "Built-in" potentiality for disillusionment is hardly to be commended among the specifications for a jurisprudential theory. The tie between the issues that rise in the clarification of value goals and the findings of science is so intimate that it must be the province of relevant theories about legal process to emphasize and assess these relationships rather than to overlook and evade rational assessment of their significance.

The inference we draw from our examination of past theories about law is, thus, that a jurisprudence which would serve the purposes of a free society must seek both a more comprehensive and a more penetrating frame of references, after the aspiration of the most advanced modern theories in other fields of inquiry about social process. The formidable challenge to legal scholars today is, in the language much abused by repetition, to create a jurisprudence which is "relevant": such a jurisprudence will find authority, not in theological or metaphysical or autonomous abstractions, but rather, in a conception known since at least six centuries before Christ,[34] in the perspectives of living community members—their demands for values, their identifications with others, and their expectations about the requirements of decision for securing their demanded values in all their communities—and it will provide, and apply, theory and procedures appropriate to implementing this conception of authority. From this man-centered, universalist and equalitarian perspective, the challenge is not merely to seek to resolve issues connected with law by "definition," but rather to relate authoritative decision to preferred public order. Though definitions are a part of life, by themselves they tell us nothing about life. Properly managed definitions are tools of discovery, since they guide attention to the social process itself where human beings are perpetually engaged in the never-ending transactions by which values are shaped and shared. Legal institutions, which are a part of the process of value shaping and sharing, must be appraised according to the contributions which they make to value outcomes and institutions. In any community, the legal system is but a part of a more inclusive system, the system of public order, which includes a

34. *Cf.* E. HAVELOCK, THE LIBERAL TEMPER IN GREEK POLITICS *passim* (1957).

preferred pattern for the distribution of values and a preferred pattern of basic institutions. The appropriate scope of inquiry into any legal system is, therefore, to appraise its significance for the system of public order which it expected to protect and fulfill. A relevant jurisprudence will define the full breadth and depth of this undertaking and identify the methods by which the pertinent tasks can be performed. In the aggregate, a legal system is to be appraised in terms of the values to be maximized in the total context of public order. The overall task of inquiry is, hence, to assess the degree of success or failure of the system, to account for the factors that condition these results, and to clarify the goals and the policy alternatives available in the emerging future. The indispensable function of a relevant jurisprudence must be to assist this inquiry by delimiting an economic frame of reference for studying the interrelations of law and social process and by specifying in detail the intellectual tasks by which such study can be made and applied to the solution of the exigent problems it reveals. A jurisprudence which would effectively serve the needs of both scholars and specialists in decision, and indeed of all who would understand and affect the social processes in which they live, must, accordingly, be comprised of a systematic, flexible, and configurative approach, exhibiting at least four major emphases:

1. It must achieve clarity in distinguishing the observational standpoints of the scholar and decision-maker, and in aid of enlightenment, as well as of decision, develop a theory *about* law, and not merely *of* law.

2. It must establish a focus of attention both comprehensive and selective, effectively relating authoritative decision to the larger social and community processes by which it is affected and which it in turn affects.

3. It must identify the whole range of intellectual tasks relevant to problem-solving about the interrelations of law and social process, and it must specify economic and effective procedures for the performance of each of these tasks.

4. It must make explicit, in all necessary degrees of abstraction and precision, the values which are postulated, or assumed, to be at stake in decision and inquiry.

Clarity about observational standpoint is important because the objectives of the scholar and those of the authoritative decision-maker, the professional advocate, the effective power holder, and the com-

munity member may be very different. The primary concern of the scholar must be, as we have indicated, for *enlightenment* about the aggregate interrelationships of authoritative decision and other aspects of community process, while the authoritative decision-maker and others may be more interested in *power*, in the making of effective choices in conformity with demanded public order. If the scholarly observer does not adopt perspectives different from those either of the community member making claims or of the authoritative decision-maker who responds to such claims, he can have no criteria for appraising the rationality in terms of community interest of either claims or decision. Hence, what the scholarly observer requires is a theory *about* law, designed to facilitate performance of the pertinent tasks in inquiry about decision, as distinguished from the theories *of* law which are employed by decision-makers and others for obtaining and justifying outcomes within the decision process and are, thus, among the variables about which the scholar seeks enlightenment. Good theory about law may of course on occasion be found useful by decision-makers and, hence, also become in the course of time a part of theories of law; similarly, good theories of law may sometimes be sufficiently precise and relevant to serve particular purposes of the scholar in his more comprehensive inquiry. Yet it can only compound confusion if the very different observational standpoints and purposes attending the use of the same or comparable signs are not kept in mind.

The comprehensiveness and realism with which an observer conceives his major focus of attention—what he regards as law and how he locates it in its larger community context—are important because they determine how he conceives every detailed part of his study: his framing of problems, his choice of tools and procedures, and his recommendation of alternatives.[35] When inquiry is focused only upon rules of law—perspectives—to the exclusion of actual choices or practices—operations—there can be no assurance that it will have any relevance to what is actually happening in a community. When considerations of authority are overemphasized, with relative neglect of control or effective power, the outcomes of inquiry may have little bearing upon the future course of law and public order; similarly, when naked power is overemphasized at the expense of authority, inquiry may not be appropriately creative. When law is conceived only as rules applied by courts or other agencies, there may be disastrous neglect of how

35. Anyone who questions whether conceptions of law make a difference might contrast the majority and dissenting opinions in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

rules are made, as well as of other important aspects of the comprehensive process of authoritative decision. When law is regarded as something mystical or autonomous and distinct from community policy, no inquiry is admitted, or tools afforded, for relating decisions to the events in social process to which they are a response and, in turn, affect. When neat distinctions are made between the characteristics of national and international law, and national law is regarded as isolated from the larger world about it, it becomes impossible either to account for many important factors which affect decision or rationally to clarify policies for the various interpenetrating communities which in fact embrace the activities of man. A relevant jurisprudence must, in sum, seek a comprehensiveness and realism in focus which will encourage both a systematic, configurative examination of all the significant variables affecting decision and the rational appraisal of the aggregate value consequences of alternatives in decision.

The appropriate specification of a comprehensive set of intellectual tasks, or skills, is important because it is the range of tasks performed, as well as the quality of performance, which determines the relevance of inquiry for policy. The most deliberate attempts to clarify general community policy which do not at the same time systematically pursue other tasks, such as the description of past trends in decision and the analysis of factors affecting decision, may achieve only Utopian exercises. The description of past trends in decision, which is not guided by policy priorities and explicitly related to social processes, affords a most meager basis for drawing upon the wisdom of the past. The scientific study of factors affecting decision, which is not oriented by reference to problems in basic community policy, may be of no more than incidental relevance, despite enormous cost. The effort to predict future trends in decision by the mere extrapolation of past trends, without considering whether the factors that affect decision will remain the same, may produce destructive illusion rather than genuine forecast. In confusion about the character of, and appropriate procedures for, the different relevant intellectual tasks, the creativity in the invention and evaluation of policy alternatives, which is indispensable to rational decision, may be lost. For traditional exercises in derivational logic and the sterile pursuit of meaningless questions, a relevant jurisprudence will substitute the systematic and disciplined employment of a whole series of distinguishable but interrelated intellectual tasks.

The explicit postulation of a comprehensive set of goal values is

important, finally, not merely for the promotion of a preferred public order, but also as affecting the economic performance of the various relevant intellectual tasks. It is seldom questioned today that authoritative decision, in both particular and aggregate, has important impacts upon the distribution of values in a community; conversely, it is equally common knowledge that perspectives about value distribution, entertained by both authoritative decision-makers and community members, are among the most significant variables affecting decision. The scholarly observer is, further, inextricably a part of community process; he, like other community members, is incurably affected by preferences about value distribution, and the enlightenment (or obscurantism) which he achieves in inquiry must have inescapable effects upon community process. Just as there can be no neutral or autonomous theories of law, in the sense of rules devoid of policy content, so also there can be no indifferent theories about law, in the sense of knowledge or ignorance, without policy consequences. In the context of these exigencies, it is the unique opportunity of observers specialized to inquiry about law not merely to relate law to its past policy content, but rather, and further, to clarify and promote the policies best designed to serve the particular kind of public order for which they are willing to commit themselves with their fellow community members. It is only by the deliberate clarification of, and explicit commitment to, basic community goals—at all levels of abstraction and from both short-term and long-term time perspectives—that dependable, creative, and economic gnidance can be given to the examination of past trends, the allocation of effort to the assessment of factors affecting decision, and the evaluation of future probabilities and alternatives.

When jurisprudence is conceived in this recommended broad reach, it scarcely requires argument that everyone seriously concerned with inquiry about law—established official, effective decision-maker, advocate, community member, or scholarly observer—employs some kind of jurisprudence, however effective or ineffective and however consciously or unconsciously it may be held. Just as the human being tends to place any perception of the environment or of the self within a whole set of assumptions which give such perception meaning and significance, so also an observer of matters legal tends to locate these in a larger context of assumption about causes and consequences. Thus, the experienced lawyer may have a rich and varied body of expectations about the probable responses of different judges to different doctrines, styles of argument, and types of parties involved in contro-

versies. He may predict that one judge is heavily disposed to side with the prosecutor, while another seems to regard the defendant in actions to which the government is party as a weak and tragic figure who stands alone. Whether these perspectives are true or false, they are part of a siguificant set of assumptions about legal process which can be distinguished from the conventional language of legal doctrine. The more skilled the observer or practitioner the more comprehensive and explicit his assumptions about the larger context in which he operates are likely to be. One task of a relevant jurisprudence must of course be to bring all these vague assumptions—of varying degrees of comprehensiveness, consciousness, explicitness, and realism—to a clear focus of attention for rational evaluation and, perhaps, for renovation into more systematic and dependable knowledge.

II. GOAL CRITERIA FOR A CONFIGURATIVE JURISPRUDENCE

For elaborating the goal criteria we recommend for a more relevant theory about law, it will be convenient to organize our discussion about the four major emphases indicated above:

1. The establishment of observational standpoint.
2. The delimitation of the focus of inquiry.
3. The performance of intellectual tasks.
4. The explicit postulation of public order goals.

The recommendations we make are addressed to all who are concerned to improve our theory about law, to increase our knowledge of the reciprocal impacts of legal and social process, and thereby to enhance the quality of both law and public order in all our communities.

A. The Establishment of Observational Standpoint

The principal distinction which requires to be made is, as we have seen, that between the scholarly observer, whose primary concern is for enlightenment, and the authoritative decision-maker and others whose ultimate interest is in power, in the making of effective choices. It must of course be recognized that the scholar, the authoritative decision-maker, the advocate or counsellor, and the interested community member may all require the same enlightenment and may all find it necessary to engage in the same or comparable intellectual tasks in the course of rational inquiry and rational decision. The enlightenment which the scholarly observer achieves and communicates must,

further, have inevitable effects upon the intelligence and promotion functions of authoritative decision,[36] and the scholarly may on occasion deliberately assume active decision-making roles in the gathering of intelligence and promotion of policy. Yet it remains that for dependable, realistic, and effective inquiry and knowledge the scholar must distinguish himself and his purposes and procedures from the events which he has under observation, including the purposes and procedures of the participants in those events. It is of the utmost importance that the scholar create and maintain a *functional* theory which enables him realistically to perform the indispensable intellectual tasks in reference to the flow of authoritative decisions and the accompaniment of *conventional* theories employed to explain and justify decisions. If he permits the perspectives and communicative signs of the participants in legal and social process, which are a part of the data he is observing, to dominate his own perspectives and instruments of inquiry and communication, the consequences can only be intellectual confusion, distortion in perception and report, and loss of the enlightenment toward which his scholarly specialization is directed.

In emphasizing the importance of clarity in the scholar's perception of his unique standpoint and role, it is not our suggestion that he can, or should, completely isolate himself from participation in social and community process. On the contrary, it is our strong recommendation that the scholar should be as conscious as possible of the different communities with which he identifies, of which he is a member, and upon which he as unavoidable impacts. His most appropriate identifications are with the whole of the different communities, often concentric in their territorial reach and interpenetrating in their functional value processes, in which he participates, and the enlightenment he seeks should be that relevant to clarifying and implementing the common interests of all the members of these communities. It is the special role of the scholar—seeking to make appropriate discount for the biases of his cultural background, class and group memberships, personality formation, and previous experience—to assume a vantage point different from that either of the active community participants who make claims before processes of authoritative decision or of the authoritative decision-makers who respond to such claims, and from this vantage point to clarify and identify for the different participants

36. These terms are defined in the text below. For elaboration *see* McDougal, Lasswell, & Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. OF LEGAL ED. 253, 403 (1967).

in community process the common interests which they themselves may not have been able to perceive.

For discounting the biases conditioned by culture, class, interest, personality, and so on, and previous exposure to crisis, the contemporary scholar may, when necessary, take advantage of the broad knowledge and specialized procedures made available by modern psychological and behavioral science.

The establishment and maintenance of an appropriate scholarly standpoint does not necessarily require the development of some esoteric meta-language, employing words different from those ordinarily employed by lawyers and social scientists. What is required, however, is a set of words or system of signs, including more than words or word-substitutes, both sufficiently comprehensive and sufficiently precise, to make reference to all the significant features of the total context of legal and social process, and that these words or signs be employed in a functional, rather than conventional, sense. It is futile to hope, as so many scholars have hoped, that the confusions which so readily arise from multiple usage can be avoided by attempting to coin new terms as the exclusive idiom of jurisprudential theory. Systematic writers are part of society and as such are in more or less direct communication with practitioners who are concerned with the legal process of a local community or of the world community as a whole. Even systems of expression that contain many new words may succeed in making certain conceptions so articulate that these initial idiosyncracies are incorporated within written codes, opinions and briefs. In the process of dissemination these words are likely to become detached from the original definitions put forward by the systematizer. If confusions are to be kept at a minimum, the prophylaxis is neither the adoption of esoteric vocabularies nor timidity in introducing new terms in order to sharpen distinctions which are dimly perceived in ordinary usage. The appropriate strategy is to propagate intellectual skill in maintenance of observational standpoint and performance of relevant intellectual tasks. The pertinent skill enables a word-user to locate his position in the total context of communication, and deliberately to choose whether to employ particular terms in a sense that is conventional within a given legal system, or according to definitions that are chosen to perform the distinctive functions of jurisprudence. The well-instructed manipulator of language has intellectual tools enabling him to hold his vocabulary at arm's length and to select the label appropriate to the role which he has chosen to play. Hence the same label may be employed—quite deliberately—in several senses;

and different labels may be attached to the same conceptual frame. These choices will depend upon a host of factors connected with the many forums in which the individual scholar finds himself participating.

B. The Delimitation Of The Focus Of Inquiry

The most important criteria for delimiting the focus of inquiry are comprehensiveness and appropriate selectivity. The comprehensiveness and the realism in detail with which a focus is delimited affect both how particular problems are formulated and the dependability and economy with which the different relevant intellectual tasks can be brought to bear upon such problems. The broadest reach of an appropriately contextual, configurative jurisprudence must extend to the whole of the social and community processes in which authoritative decision is an interacting component; yet a viable theory must offer concepts and procedures which will facilitate a focus in whatever precision may be necessary upon particular decisions and particular flows of decisions.

The principal emphases of a focus of the required comprehensiveness and selectivity are not difficult to formulate. The central spotlight in such a focus will be empirically and explicitly upon *authoritative decision.* Decision will be observed as effective choice, composed of both perspectives and operations Perspectives will be seen to include expectations about both authority and control, and inquiry will be made about both patterns of authority and patterns of control in fact. Law will be regarded not merely as rules or as isolated decision, but as a continuous *process* of authoritative decision, including both the constitutive and public order decisions by which a community's policies are made and remade. The processes of authoritative decision in any particular community will be seen to be an integral part, in an endless sequence of causes and effects, of the whole social process of that community. Every particular community will, finally, be observed to affect, and be affected by, a whole complex of parallel and concentric, interpenetrating communities, from local through regional to global.

If it be questioned whether a focus of this comprehensiveness is really necessary, some of the imperatives for effective performance of the different relevant intellectual tasks may be recalled. The clarification of community policies can scarcely proceed rationally without taking into account, in so far as economy permits, the *aggregate* consequences of alternative choices; small gains with respect to one value

or in the short run may be offset by large losses with respect to another value or in the long run. The description of past trends in decision will not produce dependable knowledge if not made in terms of comparisons across boundaries and through time, in a context of causes and consequences; without an examination of the larger social and community context one cannot know, further, whether all relevant past experience has been observed. The effective performance of the scientific task of identifying significant environmental and predispositional variables must require, because of the interdependence of social and community processes, a map of the larger context of such processes. The forecast of future decisions, in whatever degree it can be made effective, is obviously dependent upon the prior effective performance of the descriptive and scientific tasks. The greater the range of alternatives considered in the management of social and decision processes, the greater of course the chances of creativity and success in the invention and evaluation of new alternatives in policy.

Each of the emphases specified for appropriate comprehensiveness and selectivity in focus may be briefly developed.

1. *A Balanced Emphasis Upon Perspectives and Operations*

Our recommended theory will, as indicated, characterize law as including both perspectives and operations, without exaggerated emphasis upon either technical rules of law (ambiguously assumed to describe perspectives) or bare physical operations (what decision-makers can be observed to do). A central focus will be sought explicitly upon *decision,* as including both perspectives (the subjectivities attending choice) and operations (the choices actually made and enforced by threats of severe deprivations or promises of extreme indulgences). Inquiry will be directed in balanced emphasis toward the patterns in subjectivities and operations, and the interrelations of these patterns, which prevail in a continuous flow of decision.

By this emphasis the formal, manifest content of the perspectives expressed in conventional rules of law may be pierced for detailed examination of the choices in fact made through their invocation and application. Yet perspectives may still be studied, perhaps even more realistically, as among the several factors importantly affecting choice.

It will be observed that in a pluralistic community,[37] such as ex-

37. For illustration of the complementarity in legal principles, *see* B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE (1928); Oliphant, *A Return to Stare Decisis,* 14 A.B.A.J. 71, 159 (1928); I. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935).

hibited in most organized groupings of men and even in the largest earth-space community, technical rules of law are commonly created in sets of complementary opposites to express all pluralistic interests, and that the quality of the public order a particular community achieves is determined by the aggregate flow of the specific choices by which such complementary rules are related to specific instances. Inquiry which would be consequential must extend beyond mere concern for the complementary rules alone to identification of the factors that affect the detailed relation in specific instances and to evaluation of the consequences of alternative choices.

2. *Clarity in Conception of Both Authority and Control*

Our recommended theory will characterize law, further, not merely as decision, but as *authoritative* decision, in which elements of both authority and control are combined. By authority we mean participation in decision in accordance with community perspectives about who is to make what decisions and by what criteria; the reference is empirical, to a certain frequency in the perspectives of the people who constitute a given community. By control we mean effective participation in decision-making and execution—that choice in outcome is realized in significant degree in practice. When decisions are authoritative but not controlling, they are not law but pretense; when decisions are controlling but not authoritative, they are not law but naked power.

Our recommended theory will make inquiry about perspectives of authority both establishing certain decision-makers (who is authorized to make what decisions, with respect to whom, and by what procedures) and indicating appropriate criteria for decision, relating to the scope, range, and domain of the values authorized to be affected and to the detailed shapings and sharings of values regarded as appropriate for particular contexts. It will observe whether these conceptions are empirically or transempirically grounded, whether regarded as a part of the social process or transcendent of the social process, and whether presented as demand or non-demand. When the perspectives of authority observed are demand conceptions (formulated in terms of the volition or preference of participant conceiving them), it will be noted whether they relate to social process values, asserted "autonomous oughts" of legal prescription, the lessons of history, consistency in logical or syntactical operations, ethical norms, or other undefined rectitude norms.

Our recommended theory will regard control as a function of many interrelated variables and will project empirical inquiry about

the factors which in fact affect decision. It will be concerned with traditional notions of "obligation" and "binding" only insofar as these notions realistically reflect the subjectivities of participants in an arena. It will systematically investigate the role of non-official groups, including political parties, pressure groups and private associations.

In this conception, it is not necessary to stipulate some single ratio of coincidence of authority and control as necessary for "law." When different ratios are discovered, they can be compared with one another for scholarly and policy purposes. The critical task is not to fix upon a preferred ratio but to ascertain the patterns in the relation between authority and control that have occurred, probably will occur, can be made to occur, and are recommended to occur in particular contexts.

By these emphases, both authority and control can be subjected to systematic and disciplined inquiry through employment of all the techniques of modern science.

3. *Comprehensiveness in Conception of Processes of Authoritative Decision*

Our recommended theory will, in still further detail, extend its focus beyond occasional or isolated authoritative decisions, to the whole continuous *process* of authoritative and controlling decision by which a community shapes and shares its values.[38] In any community, this process of authoritative and controlling decision, as an integral part of a more comprehensive process of effective power, can be seen to be composed of two different kinds of decisions: first, the decisions which establish and maintain the most comprehensive process of authoritative decision and, secondly, the flow of particular decisions which emerge from the process so established for the regulation of all the other community value processes. The first of these types of decision may be conveniently described as "constitutive," and the second as "public order."[39]

For the comprehensive and economic description of a process of

38. The notion of law as a process of decision is found in H. M. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958). What we would add is a more comprehensive conception of processes of authoritative decision and the systematic relation of such processes to their context in social and community processes.

39. To be completely homogeneous we would say "other public order," since the protected features of power processes, as of other value processes, may be conveniently regarded as a component of a community's most comprehensive public order. It is this most comprehensive sense of "public order" which we contrast with "civic order."

decision, as of other social processes, it is necessary to employ some systematic set of terms (the precise words do not matter if equivalences can be made clear) to refer to the participants in the process, their perspectives (demands, identifications, expectations), the situations of intersection, the base values at the disposal of participants, the strategies employed in management of base values, and the immediate outcomes and long-term effects achieved.

In the terms we find convenient, the "constitutive process" of a community may be described as the decisions which identify and characterize the different authoritative decision-makers, specify and clarify basic community policies, establish appropriate structures of authority, allocate bases of power for sanctioning purposes, authorize procedures for making the different kinds of decisions, and secure the continuous performance of all the different kinds of decision functions (intelligence, promotion, prescription, etc.) necessary to making and administering general community policy.

In complementary terms, the "public order" decisions of a community may be described as those, emerging in continuous flow from the constitutive process, which shape and maintain the protected features of the community's various value processes. These are the decisions which determine how resources are allocated and developed, and wealth produced and distributed; how human rights are promoted and protected or deprived; how enlightenment is encouraged or retarded; how health is fostered, or neglected; how rectitude and civil responsibility are matured; and so on through the whole gamut of demanded values.

It will be obvious in any community that an intimate relationship exists between constitutive process and public order. The economy and effectiveness of the constitutive process a community can achieve vitally affects the freedom, security, and abundance of its public order, while the quality of the public order a community attains, in turn affects the viability of the constitutive process it can maintain. By distinguishing, however, between these two different types of decisions, and seeking systematic coverage of both, inquiry may avoid destructive fixation upon the mere application of allegedly given rules and vacuous controversies about the differences between "political" and "legal" decisions, and may appropriately extend its concern to all relevant features of the processes by which law is made and applied and their consequences for preferred public order.

The conventional description of the different phases in authoritative decision which we describe as "authority functions" is in such terms as "legislative," "executive," "judicial," and "administrative," but these terms would appear to refer more to authority structures than functions. Inquiry seeking both greater precision and comprehensiveness in describing authority functions might distinguish the following (or their equivalents):

Intelligence:	Obtaining information about the past, making estimates of the future, planning.
Promoting:	Urging proposals.
Prescribing:	Projecting authoritative policies.
Invoking:	Confronting concrete situations with provisional characterization in terms of a prescription to concrete circumstances.
Applying:	Final characterization and execution of a prescription in a concrete situation.
Terminating:	Ending a prescription or arrangement within the scope of a prescription.
Appraising:	Comparison between goals and performance.

Careful delimitation of the flow of decision in social process may enable the scientific observer and the decision-making participant to distinguish between two interacting realms of social order, the *public order* and the *civic order*. The total public order, as the analyst can make explicit, includes the relatively stable features of the power process (the constitutive patterns) and the protected and encouraged features of all value-institution processes other than power. Since public order is characterized by severely sanctioned commitments (in expectation and realization), civil order is the realm of milder sanction. Irrespective of the terminology employed, equivalent distinctions must be made articulate in a theory that is adequately fashioned to meet the issues pertinent to a comprehensive system of jurisprudence.

4. *The Relation of Law to Social Process*

A theory about law which would even approximate relevance will relate authoritative decision not merely explicitly, but systematically, to the larger social process that envelops such decision. It is changes in the distribution of values in social process, when values are conceived as demanded relations among human beings, which stimulate claimants to appeal to processes of decision and invoke the prescription and

application of authoritative policy. Every phase in the processes of authoritative decision is affected both by the past distribution of values and by the perspectives (demands, identifications, and expectations) of participants about future distribution. The outcomes of processes of authoritative decision, in turn, not only directly affect the future distribution of values among the claimants and others but, in total impact and in the long run, determine and secure a community's public order.

For comprehensive and precise description of the social process context of decision, any categorizations of values and institutional practices which can be given detailed operational indices in terms of specific, empirical relations between human beings can be made to serve the purposes of policy-oriented inquiry. The most general conceptualization we recommend is in terms of eight value-institution categories made familiar by contemporary social science:

Power:	government, law, politics.
Wealth:	production, distribution, consumption.
Respect:	social class and caste.
Well-being:	health, safety, comfort arrangements.
Affection:	family, friendship circles, loyalty.
Skill:	artistic, vocational, professional training and activity.
Rectitude:	churches and related articulators and appliers of standards of responsible conduct.
Enlightenment:	mass media, research.

When these or equivalent value-institutional categories are employed, in appropriately detailed phase analysis, to describe the events in social process which precipitate claims to authoritative decision, the claims which participants make about such precipitating events and relevant policies in their appeals to decision, and the choices which the established decision-makers actually make in their prescriptions and applications of policy, then effective comparisons can be made through time within single communities, and across the boundaries of communities, for study of the factors that affect decision and of the public order consequences of decision.

5. *The Relation of Law to Its Larger Community Context*

A completely contextual, configurative theory about law will recognize that today mankind interacts on a global, and even earth-space

scale. In the sense of interdetermination with respect to all values, the whole of mankind presently constitutes a single community, however primitive. One component of this largest community is a process of *effective* power in the sense that decisions are in fact taken and enforced, by severe deprivations and high indulgences, which are inclusive in their research and effects. Similarly, within this comprehensive process of effective power, may be observed an integral, transnational process of authoritative decision in the sense of a continuous flow of decisions made from perspectives of authority—that is, made by the people who are expected to make them, in accordance with community expectations about how they should be made, in established structures, and by authorized procedures. This transnational process of authoritative decision, like its embracing transnational social processes, is maintained at many different community levels and in many different interpenetrating patterns of perspectives and operations, in affecting and being affected by, the value processes in all the component communities of the larger earth-space community. A global public order, thus, affects the internal public order of its many constituent communities and the internal public order of each constituent community, in turn, affects the global public order.

Unintimidated by monists who posit an as yet non-existent universality, or dualists who insist upon an impossible separation of national and transnational law, or neo-realists who suggest that international law is a form of fraudulent moralizing of little consequence, proponents of a relevant theory about law will seek an accurate empirical account of the reciprocal impact or interaction, in the distribution of inclusive and exclusive decisions and in consequences for values, of the interpenetrating processes of national and transnational authority. Inquiry will be directed not toward hierarchies of normative-ambiguous rules but toward the interdeterminations of communities and value processes of many differing degrees of geographic reach, including the contemporary emerging regional communities. Inclusive and exclusive decisions will be conceived not as dichotomous absolutes but as expressing a continuum in degrees of shared participation in the making of decisions, with reference not only to the number of participants but to degrees of sharing in all detailed phases, including clarification of common interests, access to arenas, control over base values, management of strategies, and determination of outcomes. All important arenas, whether external or internal to particular communities under observation, will be brought within inquiry. Special consideration will be given to appraising, in terms of their consequences for preferred

values, the contentions of rival systems of public order, of incompatible value orientation, aspiring toward completion on a global or earth-space scale.[40]

C. The Performance Of Intellectual Tasks

The intellectual tasks for whose performance provision must be made in a relevant jurisprudence have already been indicated to extend, beyond traditional exercises in derivational logic and even the activities designated by more restrictive conceptions of "science," to a whole complex of interrelated activities, indispensable both to effective inquiry and to rational choice in decision. The tasks we recommend include the clarification of goals, the description of past trends in decision, the analysis of conditions affecting decision, the projection of future trends in decision, and the invention and evaluation of policy alternatives. It is believed that this itemization is comprehensive in that it embraces all the necessary tasks, and economic in that it excludes or deemphasizes wasteful or unnecessary tasks, such as derivational exercises with syntactic or transempirical or other ill-defined premises. Similarly, it is designed to avoid the confusion and inefficiency inherent in the normative-ambiguity of conventional legal concepts which purport in one undifferentiated stroke simultaneously to serve all relevant tasks.

By this emphasis upon the deliberate, systematic, and differentiated performance of each of a comprehensive set of intellectual tasks, it is not our suggestion that these different tasks can be economically performed in some set order or in complete isolation from each other. It is rather our recommendation that all tasks be employed configuratively, in relation to specified problems in context. The rational employment of any particular task requires both the disciplined location of specific problems in their larger context and the systematic testing of the formulations and findings achieved in the performance of that particular task against the formulations and findings achieved by the other tasks with respect to every significant feature of the context. The performance of all tasks must, thus, relate to the same events and in measure go forward concurrently, but with clear discrimination in purpose of observation and particular skill employed.

It remains briefly to indicate what is involved in each of the recommended tasks.

40. These recommendations are developed in detail in McDougal, Lasswell and Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L. L. 188 (1968).

1. *The Clarification of Community Policies*

The most relevant clarification will explicitly and deliberately seek the detailed specification of postulated goals, whatever the level of abstraction of their initial formulation, in terms which make clear empirical reference to preferred events in social process. To the degree that economy permits, every choice in alternatives recommended will be related to its larger community context and to all important community interests which may be affected. The time dimensions of clarification will be made explicit by distinguishing immediate or short-term, middle-range, and long-range objectives. The most secure clarification will build upon the concurrent and systematic performance of all the other relevant intellectual tasks and employ the knowledge so acquired about past trends in decision, past conditioning factors, future probabilities, and possible alternative solutions.

2. *The Description of Past Trends in Decision*

The most relevant description of past trends in decision will be, not anecdoctal in terms of isolated tidbits of doctrine and practice, but rather systematic in terms of degrees of approximation to clarified policies for constitutive process and public order. For the more effective comparison of decisions and their consequences both through time and across community boundaries, the events which precipitate recourse to authoritative decision, the detailed claims which participants made to such decision, the factors which appear to condition decision, and the immediate and longer-term consequences of decision for the participants and others will all be categorized "factually" in terms of value-institution processes, including all the different detailed phases of such processes. In supplement of the conventional summaries of complementary rules and concepts, comprehensive maps in value-institutional terms will be designed for both constitutive process and other protected features of public order, and the flow of decision will be observed in relation to specific, detailed types of claims. Procedures will be devised for relating specific types of claims to their total context and for appraising the responses by authoritative decision-makers to such claims in terms of their conformity to clarified policies.

3. *The Analysis of Factors Affecting Decision*

In policy-relevant performance of the scientific task, inquiry will be made for the interplay of the multiple factors affecting decision, and overwhelming importance will not be ascribed to any one factor or category of factors, such as those relating to wealth or to "taught tradition" or the rectitude perspectives. Comprehensive theories about

the factors affecting decision will be formulated and tested by the appropriate procedures of contemporary science. Formulations will be inspired by the "maximization postulate" that all responses are, within the limits of capabilities, a function of net value expectation and emphasis will be placed upon both predispositional and environmental variables. The significance of factors deriving from culture, class, interest, personality and previous exposure to crisis will be explicitly examined. Rigor will be sought in theoretical models, but not by an over-emphasis upon the importance of mathematical measurement or experiment. Many different vantage points and both extensive and intensive procedures will be employed in data gathering and processing.

4. *The Projection of Future Trends*

In a policy-relevant jurisprudence, expectations about the future will be made as conscious, explicit, comprehensive, and realistic as possible. Developmental constructs, embodying varying alternative anticipations of the future, will be deliberately formulated and tested in the light of all available information. The simple linear or chronological extrapolations made in conventional legal theory will be subjected to the discipline of knowledge about conditioning factors and past changes in the composition of trends.

5. *The Invention and Evaluation of Policy Alternatives*

In a policy-relevant jurisprudence, creativity will be encouraged by demand for the deliberate invention and assessment of new alternatives in policy, institutional structures, and procedures. Every phase of decision process, whether of constitutive process or relating to public order, and every facet of conditioning context, will be examined for opportunities in innovation which may influence decision toward greater conformity with clarified goals. Assessment of particular alternatives will be made in terms of gains and losses with respect to all clarified goals and disciplined by the knowledge acquired of trends, conditioning factors, and future probabilities. All the other intellectual tasks will be synthesized and brought to bear upon search for integrative solutions characterized by maximum gains and minimum losses. Special procedures for encouraging creativity will be employed, including expansions and contractions of the focus of attention, alternation of periods of intensive concentration and inattention, free association, and experiment with random combinations.

D. The Explicit Postulation Of Basic Public Order Goals

A relevant jurisprudence will recognize that policy choices are ineradicable components of any process of authoritative decision and that there are today rival systems of public order aspiring toward completion both internally within states and on a global scale. For everyone concerned with inquiry about law, one insistent question must be: what basic policy goals is he, as a responsible citizen of the larger community of mankind and of various lesser component communities, willing to recommend to other similarly responsible citizens as the primary postulates of public order, infusing and transcending all particular communities?

We emphasize the postulation and clarification of public order goals in contradistinction to their derivation. Infinitely regressive logical derivations from premises of transempirical or highly ambiguous inference contribute litttle to the detailed specification of values, in the sense of demanded relations between human beings, which is required for rational decision. Peoples subscribing to very different styles in derivation have long demonstrated that they can cooperate for promotion of the values of human dignity, irrespective of the faiths or creeds which they employ for justification. Expressions of preference among different derivations can only divide potential coworkers, without contributing to creativity.

The comprehensive set of goal values which, because of many heritages, we recommend for clarification and implementation are, as already suggested, those which are today commonly characterized as the basic values of human diguity, or of a free society. These are the values bequeathed to us by all the great democratic movements of mankind and being very more insistently expressed in the rising common demands and expectations of peoples everywhere. As demanded in the United Nations Charter, the Universal Declaration of Human Rights, the proposed covenants on human rights, regional agreements and programs, national constitutions, political party platforms, and other official and unofficial pronouncements, these values are of course formulated at many different levels of abstraction and in many different cultural and institutional modalities. The basic thrust of all formulations is, however, toward the greatest production and widest possible distribution of all important values, and the appropriate task for both scholarly observers and authoritative decision-makers, who accept and seek to implement these rising common demands, is that of effec-

tively performing all the various intellectual tasks outlined above for the better relation of broad general preferences for shared power, shared respect, shared enlightenment, and so on to all the specific choices which must be made in different specific contexts in the prescription and application of law.

The basic goal values postulated for preferred public order cannot of course be representative only of the exclusive, parochial values of some particular segment of the larger community of mankind, but such values can admit a very great diversity in the institutional practices by which they are sought and secured. In different particular communities and cultures very different institutional practices may contribute equally to overriding goals for the increased production and sharing of values. When overriding goals are accepted, experiment and creativity may be encouraged by the honoring of a wide range of functional equivalents in the institutional practices by which values are sought.

It will be noted that the postulation of basic goal values we recommend differs from a mere exercise in faith. We do not expect to acquire new knowledge by postulation alone. It is only by the systematic and disciplined exercise of the various relevant intellectual skills that new knowledge can be acquired.