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Working Conceptions of "The Law"

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1. PREFATORY NOTE

This exploratory essay is an admixture of amateur psychology, moral theory, and jurisprudence. It grows out of seminars I have given for judges, and reflects that focus.[1] Co-theorists will now see some of what I have been telling practitioners. And error in my story may be exposed. But one can have no qualms about this. It is especially important to have things put right for judges.

2. INTRODUCTION

I will consider the work of judges in civil law cases, and will begin with one of *many* possible examples. In 1809, English judges decided a now famous case, one with extraordinarily wide-ranging influence. The full original report of the case reads as follows:

Butterfield v. *Forrester*
(1809) 11 East 60 (KB)

This was an action on the case for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down with his horse, and injured, &c. At the trial before *Bayley J.* at *Derby*, it appeared that the defendant, for the purpose of making some repairs to his house, which was close by the road side at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. That the plaintiff left a public house not far distant from the place in question at 8 o'clock in the evening in *August*, when

[1] Several ideas in this essay were presented in June 1978 to judges in seminars at Madison, Wisconsin, and at the Harvard Law School. I am indebted to these judges for comments. I am grateful to Professors David Lyons and Roger C. Cramton for helpful criticism. I also wish to thank Mr Leigh Kelley and Mr Erik M. Jensen, Cornell Law School classes of 1980 and 1979, respectively, for valuable research and editorial assistance.

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they were just beginning to light candles, but while there was light enough left to discern the obstruction at 100 yards distance: and the witness, who proved this, said that if the plaintiff had not been riding very hard he might have observed and avoided it: the plaintiff however, who was riding violently, did not observe it, but rode against it, and fell with his horse and was much hurt in consequence of the accident; and there was no evidence of his being intoxicated at the time. On this evidence *Bayley J.* directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant: which they accordingly did. [The plaintiff moved for a new trial.]

Bayley J. The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of *Derby*. If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault.

Lord Ellenborough C. J. A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorise another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. [New trial denied.]

As interpreted by most subsequent judges (though not without some license), the foregoing precedent stands for the so-called "complete bar" rule to the effect that if a plaintiff is contributorily negligent, he may not recover *any* compensation from a defendant whose negligent act or omission also contributed to the plaintiff's loss. (There are qualifications but we need not go into them here.)

Now consider a second case (my summary of the report):

Maki v. *Frelk*
Supreme Court of Illinois, 1968
239 N.E.2d 445

Decedent was killed in an auto collision at an intersection. The plaintiff was administratrix of the decedent's estate and was suing the defendant, driver of the other car, for wrongful death. In counts one and two of the complaint,

the plaintiff alleged that the decedent exercised due care for his own safety (was *not* contributorily negligent), and that the defendant negligently caused the accident by driving too fast, failing to keep a proper lookout, failing to keep his car under control, and operating a car without adequate brakes. In the third count, the plaintiff did not allege the decedent's own freedom from contributory negligence, but did allege the defendant's negligence, and alleged that if there was any negligence on the part of the decedent, the plaintiff could still win because the decedent's negligence, if any, "was less than the negligence of the defendant, when compared."

The trial judge granted the defendant's motion to strike this third count on the basis of Illinois case law following *Butterfield* v. *Forrester*. The intermediate court of appeals reversed, and thus repudiated *Butterfield* v. *Forrester*. However, on appeal to the highest court of Illinois, the trial judge's ruling was affirmed.

Thus, in 1968, a majority of judges of the Illinois Supreme Court in *Maki* v. *Frelk* purported to follow *Butterfield* v. *Forrester* and its progeny faithfully.[2] Yet one of the acknowledged leaders among American scholars of tort law had already called the "complete bar" rule the "harshest doctrine known to the common law,"[3] a characterization that may be justified especially since the doctrine precludes even a slightly negligent plaintiff from recovering anything from a grossly negligent defendant. In 1945 the English had abandoned this precedent by a statute apportioning recoverable damages in accord with estimates of each negligent party's share of responsibility for the loss.[4] By 1968, several American state legislatures had followed suit.[5] Subsequently, the highest state courts of a few American states (e.g. Florida, 1973

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[2] One justification the judges offered for this course of action was that, in their view, any change should come from the legislature. I cannot go into this complex issue here.

[3] L. Green, 'Illinois Negligence Law', *Illinois Law Review* 39 (1944): 36.

[4] See generally Glanville L. Williams, 'The Law Reform (Contributory Negligence) Act, 1945', *Modern Law Review* 9 (1946): 105–186.

[5] Victor E. Schwartz, *Comparative Negligence* (Indianapolis: Allen Smith, 1974), pp. 12–15.

and California, 1975) acted on their own to abandon the complete bar rule.[6]

What explains *Maki* v. *Frelk*? The various factors that influence judges are numerous and complex, and they vary somewhat from judge to judge. For my purposes, however, it is not necessary to try to offer a comprehensive account. There are at least four possible explanations for the Illinois court's refusal in *Maki* v. *Frelk* to abandon the "harshest doctrine known to the common law": (1) the judges believed (what, in my view, would be mistaken) that only the Illinois legislature had power to modify the "complete bar" rule, or (2) the judges simply failed to reason through the conflicting considerations as they should have and decided against the plaintiff, even though, according to the allegations, the defendant was partly responsible, or (3) the judges, in deciding the case, were unduly influenced by a particular *working conception* of "the law," and this led them to uphold the harsh doctrine, or (4) some combination of the foregoing.

The working conception most likely figuring here in an explanation of the third possible kind is easy enough to identify: "The law" governing an issue to be decided consists of a pre-existing rule[7] – the "complete bar" rule of *Butterfield* v. *Forrester*. Judges unduly influenced by this working conception would vote to uphold the harshest doctrine known to the common law. Of course, such a working conception does not itself *require* this result. It is only a *working* conception, and judges not obsessed with it would not give it an undue or disproportionate place in their thinking. Instead, they would vote to overrule a case like *Butterfield* v. *Forrester* (unless they rightly believed that the matter should be left only to the legislature). In voting to overrule,

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[6] *Li* v. *Yellow Cab Co.*, 13 Cal.3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); *Hoffman* v. *Jones*, 280 So.2d 431 (Fla. 1973).

[7] The most influential of American Judges, Oliver Wendell Holmes, Jr., once put it this way: "My job is to play the game according to the rules." (L. Hand, 'Address', in *Continuing Legal Education for Professional Competence and Responsibility* (Philadelphia: Joint Committee on Continuing Legal Education, 1959), p. 119.)

these judges would be abandoning, for this case, "the law" that their working conception had put them on to and would be turning to other normative phenomena of "the law" that should here have primacy. These other phenomena include (1) the law's commitment to the reassessment of precedent in light of reason and (2) the discretionary power of common law judges to overrule unsound precedent.

In this essay, I will concentrate on the roles of working conceptions in judicial decisions. I will not try to prove that this factor actually helps explain the decision in *Maki* v. *Frelk*. Nor, of course, will I try to establish the general extent to which judges are influenced by their working conceptions. But from my reading of opinions over many years, and from numerous discussions with judges, I have concluded that such conceptions do play important roles, both for good and for ill. They can facilitate sound decision making. Indeed, one would hope that this is the usual result. Some judges, however, become preoccupied with their working ideas of "the law." And there is evidence that this sometimes affects outcomes. These conclusions should surprise no one. Working conceptions are useful (in ways I will try to explain). Indeed, they are pragmatic necessities for most judges. That some proportion of judges will become preoccupied with such conceptions seems more or less inevitable.

It would help if judges were more conscious of the possible adverse effects of becoming preoccupied with a working conception of "the law," and I offer this essay partly to that end. Judges conscious of the limits of their working conceptions will be far less likely to become imprisoned in them. I also offer this essay as a partial account of what it is for a judge to have a philosophy of law. But my main purpose here is to explore whether there is an alternative working conception that might be better than the influential notion that law consists of pre-existing rules – better in that (1) it would be a more serviceable working conception as such; or (2) its normative effects would be preferable; or (3) the consequences of judicial obsession with it would be less untoward; or (4) some combination of the foregoing. I believe there is a

better alternative working conception, and it is one in which morality plays a major part.

3. THE NATURE OF A WORKING CONCEPTION

I must first discuss what I take a working conception to be, and I will continue to use the notion of "law as pre-existing rule" for illustrative purposes.

As I conceive it, a working conception is not the same as what Professor Hart has called a "criterion of legal validity."[8] Such a conception might specify a feature required for a form of law to be valid within a system, but it need not. Thus a criterion of legal validity within a society might, for example, be that the law, whatever form it happens to take, must be promulgated by Rex. And judges might have a working conception of the law as "rules made by Rex." Yet judges in this society might hold a working conception of the law devoid of any reference to Rex, too. Virtually all all of them might conceive of "the law" simply as pre-existing rules (and there might be few other social rules). Furthermore, as I conceive it, a working notion of the law is not as such *binding* upon a judge, whereas a true criterion of legal validity is.

A working conception is not the same as a working hypothesis as to the likely actual substantive content of relevant law.[9] Rather, it is "prior" to any such hypothesis. It is a kind of conceptual schema, and it *may* be one that can accommodate almost any particular substantive content.

Nor is a working notion necessarily the same as an "ideal type" of law.[10] It is possible to imagine, for example, an ideal type of a

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[8] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), chapter 6.

[9] Similarly, it is not the same as a "hunch" as to the right result in a case. See Joseph C. Hutcheson, Jr., 'The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision', *Cornell Law Quarterly* 14 (1928/9): 274–288.

[10] I refer here to Weber's notion of an "ideal type." See his 'Religious Rejections of the World and their Directions', in *From Max Weber: Essays in*

legal rule – one that is precise, clear, prospective, and in still other ways formally ideal. A notion of "the law as pre-existing rule" could, however, qualify as a working conception even if the concept of a rule embodied in it did not have such features.

My notion of a working idea is one in which "the law" is conceptualized in terms of one, or at most two types of recurrent normative phenomena of "the law." These phenomena may also be thought of as "justificatory resources"; they are themselves varied and complex, and, in Anglo-American systems, include:

(a) pre-existing rules,
(b) actual reasons for those rules,
(c) equities between the parties outside any relevant rules,
(d) discretionary judgment (including that involved in the overruling or modification of precedent),
(e) the bearing of ideas of justice and the common good characteristically found in some forms of law,
(f) the general dictates of reason, including "goal" reasons and "rightness" reasons, relevant to the justification of judicial decisions, and
(g) fiat.

A working conception, however, leaves things out; it is only a partial schematization. Thus, for example, judges who adopt a working conception of "the law" as pre-existing rules adopt a notion that leaves out the foregoing other important normative phenomena of the law that may also be relevant to issues for decision. (Many judges who hold a rule conception also incorporate the reason or reasons for the rules, too.)

But that a particular conception leaves out important phenomena of "the law" is in itself not a criticism of that notion as a *working* conception. In my view, to be serviceable to the usual judge, such a notion must be partial and selective. Only the ablest

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Sociology, edited by H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), pp. 323–359. The editors of this volume also discuss Weber's notion at pp. 59–61 of their Introduction.

judge could wield a working conception *qua* working conception that encompasses all normative phenomena of "the law." (On this, more later.) Furthermore, a conception that meets the five threshold requirements of a viable working conception (soon to be set forth) will, *on its own*, serve a judge well in a substantial proportion of cases. That is, he will not have to resort to other phenomena of the law to dispose of these cases appropriately. Indeed, this is one factor that accounts for the widespread judicial resort to a rule conception. The phenomena of the law relevant to decision just do consist, in a significant proportion of cases, of pre-existing rules (and the reasons therefor). Thus in all such cases the inevitably partial nature of a working conception can hardly be prejudicial or dysfunctional. Indeed that characterization may be thought of as part of the very "beauty" of a viable working conception. Of course, even in the cases to which a working conception readily applies and which would lead to an analysis that ought to be determinative, it is still possible for judges to go wrong. A working conception is not a *guarantee.*

It does not follow, however, that if a judge brings a serviceable working conception to an issue for decision this judge must, ought to, or will decide that issue solely in light of the general feature or features of phenomena of "the law" embodied in that conception. On the contrary, the judge *ought* to decide in light of phenomena of the law that emerge as relevant and appropriate bases for decision, even when these phenomena turn out, in the circumstances, *not* to be incorporated in his working conception. And, on my account, the judge who is not unduly influenced by his working conception will generally so decide. After all, his conception is only a *working* idea.

In my view, a viable working conception of the law is, however, a *pragmatic* necessity for the usual judge. When performing intellectual operations with the law, this judge needs *some general notion* of what he is performing them on, and for. A working conception of "the law" is such a notion. Note that I do not claim that a working conception is a *conceptual* necessity. And some judges may get along without any such idea.

In a related way, a viable working idea of the law is functionally serviceable. One conception may be preferable to another on grounds of comparative serviceability. First, it might facilitate the identification of pre-existing law better than some other general idea. For example, in Anglo-American systems, a rule conception would more often lead judges to relevant authoritative materials than would an "unfettered discretion" notion of law. Second, one conception may put the judge on to a better interpretational method than another. Thus a notion of the law as a reasoned reconciliation of conflicting considerations would lead the usual judge to interpret statutes, for example, in accord with their rationales more readily than would a rule conception (at least if the latter itself omitted rationales). Third, one conception might, better than any other, facilitate the identification and resolution of issues calling for the creation of new law. It should be evident, for example, that the notion of law as pre-existing rule provides little sustenance to the judge who must decide a case of first impression. A working conception may be serviceable in still other ways, too.

Before a conception can be at all adequately serviceable in the foregoing ways, it must satisfy five "criteria of viability" which I will now sketch (and only that). Since the idea of law as pre-existing rule satisfies these criteria, I will illustrate each criterion with it.

First, an idea cannot qualify if not faithful to law's reality. Obviously, ideas of space exploration, or of the modern novel, are essentially foreign to law and thus cannot count as, or figure in, what I call a working notion of the law. Pre-existing rules, on the other hand, are not at all foreign to the law, and thus readily qualify. (Of course, this is not to say that the whole of the law consists of rules or that rules are law.)

Second, the notion must be sufficiently unitary. Otherwise, it cannot be serviceable as a working conception (at least for the ordinary judge). Again, the pre-existing rule idea qualifies, even if reasons for the rules are included. Such a conception would thus embody three related elements: rule, reasons, and pre-existence.

Of course, an unusually able judge might have a conception that is "total" and thus embodies all phenomena of the law. But any such all-encompassing conception could not be of service to the usual judge. It would be too complex, and thus too cumbersome for him to "wield all at once." And it would not be sufficiently "selective."

Third, since in our systems, law ranges over nearly every nook and cranny of social life, a serviceable working idea of "the law" must be widely applicable – not narrowly pocketed or restricted to specific varieties of social relations. Again, a rule conception qualifies. This is not to say that pre-existing rules exist for, or are justifiably applicable to, all, or even the overwhelming majority of, issues arising for decision.

Fourth, the phenomenon, or phenomena, of the law picked out by a working conception must be sufficiently represented or instantiated numerically within the totality of legal phenomena. Thus, a phenomenon that rarely recurs could not qualify. For example, the relation of circular priority in mortgage law could not. Nor could "adverse possession." But pre-existing rules could. Rules are ubiquitous in the law.

Fifth, the conception must not be vacuous or unduly indeterminate. The notion of law as pre-existing rules satisfies this criterion, too. (On this, more later.)

A *viable* working conception is one that is functionally serviceable. It facilitates the identification of relevant law, the adoption of sound interpretational method, the application of reason afresh when called for, and more. To be serviceable in such ways, a working conception must sufficiently satisfy the foregoing criteria of viability.

It does not follow, however, that a serviceable working conception. There are two basic forms that this can take in the case of trary, a judge may be unduly influenced by *any* working conception. There are two basic forms given this can take in the case of a judge who holds a rule conception. First, let us assume that the rule notion is *prima facie* applicable to the issue at hand (the issue *is* one to which some version of a pre-existing rule is actually relevant). Even so, it may be that in the end the particular rule

should not control; yet our judge may fail to see this. For example, reason may reveal that the rule is the harshest doctrine of the common law and require that it be overruled. Or, for example, it may be that equities between the parties have arisen in the particular case (for which the rule does not provide) and these ought to control.[11] Second, our preoccupied judge may fail to see that his working conception of the law as pre-existing rule is not even *prima facie* applicable to the issue at hand, for the case is a genuine case of first impression, or a statutory *casus omissus.* In these cases there is no pre-existing rule, yet our judge acts as if there were, by, for example, invoking a far-fetched analogy.

4. POSSIBLE WORKING CONCEPTIONS

I have already said that a conception of "the law" as pre-existing rule qualifies as one possible working conception and that many judges actually hold this idea. I have also said that some judges become obsessed with it, and that this helps account for some bad outcomes. But in my view, nothing inherent in the nature of law, or of the judge's role, requires that a judge hold this particular working idea. I will now consider whether certain other possibilities also satisfy the relevant qualifying criteria of viability. Among these are the following (each of which, except perhaps the first, has some actual subscribers among judges):

(1) The law is whatever the equities between the parties dictate in the particular case.

This possible working conception fails to qualify for lack of sufficient numerical significance (fourth criterion). In a very high proportion of cases, there are no relevant "equities" between the parties (or the equities are not appropriately determinative).

(2) The law is whatever the official organs of final application within the system say it is.

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[11] On the nature of such equities, see Robert S. Summers, 'General Equitable Principles under Section 1–103 of the Uniform Commercial Code', *Northwestern Law Review* 72 (1978): 906.

This candidate might be called the "unfettered discretion" or "free law" idea. Although popular in some jurisprudential circles, it cannot qualify either. At least in Anglo-American systems, it lacks the required phenomenological felicity (first criterion). The law in these systems is not (and never has been) a game of scorer's discretion. A judge is almost never free to take the view that the law is entirely "up to me."

(3) The law consists of certain characteristic substantive ideas of justice and of the common good.

Of course, we do have certain received ideas of justice and the common good, and some of these may even be more or less characteristic of the content of much law, at least in Anglo-American legal systems. But this candidate fails, nonetheless. The relevant ideas do not have sufficient range and bearing, given the diverse, and detailed, nature of the issues judges must face (third and fifth criteria). Moreover, some notions of justice and the common good have been (and are) more ideal than real and thus lack sufficient phenomenological felicity (first criterion). Laws applicable to blacks in the Southern United States until after World War II are perhaps most dramatically illustrative (within recent Anglo-American legal history).

(4) The law is a reasoned reconciliation of conflicting considerations.

Hereafter I will refer to the foregoing as the "reason conception" or as the notion of "law as reason" (not to be confused with that of Aquinas). Does this notion qualify as a viable working conception?

First, it is phenomenologically felicitous. Reasoned resolutions are not at all foreign to the law. Of course, this is not to say that these resolutions are always sound. Nor is it to say that reason properly rules all. Some role for fiat in the law is inevitable (as, for example, in determining the number of years required for an adverse possessor to get title).[12]

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[12] See generally Lon L. Fuller, 'Reason and Fiat in Case Law', *Harvard Law Review* 59 (1945/6): 376–395.

Second, a reason conception is sufficiently unitary.

Third, the scope and potential bearing of the notion of law as reason is sufficient. Indeed, it may be the most wide-ranging of candidates.

Fourth, the relevance of the idea of reasoned resolution is sufficiently recurrent to qualify as a working conception. That is, it would regularly "come into play."

Fifth, the notion of law as reason is not unduly indeterminate or vague. Over a wide range of issues, the weight of reason is often heavily on one side.[13] It is also possible to define and analyse the types of substantive reasons that rationally figure in deciding and justifying court decisions (something I have attempted elsewhere).[14] These types are twofold: "goal reasons" and "rightness reasons." A goal reason derives its justificatory force from the fact that, at the time it is given, the decision it supports can be predicted to have effects that serve a good goal. (The goal may or may not have been previously recognized in the law.) A good rightness reason does not derive its justificatory force from predicted goal-serving effects of the decision it supports. Rather, it draws its force from the way in which the decision accords with a moral norm of rightness as applied to a party's actions or to a state of affairs resulting from those actions. Most rightness reasons are past-regarding – they have to do with how the case *came about.* All goal reasons are future-regarding. (Of course, a goal reason may have to do with bringing about more rightness.) Judges know how to construct and evaluate reasons of both types. Thus, "reason" is not a vague and vacuous category that frees judges to import their own personal prejudice and bias in the guise of reason. Moreover, a judge committed to a working conception in the form of a reasoned reconciliation of conflicting considerations will be opposed to deciding cases on the basis merely of personal prejudice, bias, or idiosyn-

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[13] *ibid.*

[14] Robert S. Summers, 'Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification', *Cornell Law Review* 63 (1977/8): 707–788.

cratic views. It does not follow that such a judge will, by virtue of his commitment, always reach the best justified result in the case. Again, a working conception is not a guarantee.

It may forestall misunderstanding if I stress once more that a judge who rationally depends upon a working conception does not, however, ignore phenomena of the law not embodied in his conception. Thus a judge who harbors a reason conception ought to abandon its dictates if reason and the legal materials relevant to the problem turn out to counsel as much. For example, such a judge may end up applying a pre-existing rule. Just because a judge typically thinks in the first instance of law as reason it does not follow that he cannot also believe in rules or the rule of law. Similarly, a judge who harbors a rule conception may even end up overruling a precedent that he in the end thinks goes beyond the bounds of reason (e.g., the complete bar rule of *Butterfield* v. *Forrester*). It is one thing to have a working conception and another to be unduly influenced by it. A judge who is not obsessed will depart from the dictates of his working notion as circumstances demand. A working notion is only that. It is only a partial and nonbinding schematization of the law, and the methodologically selfconscious judge will treat it as such. Generally, then, two different judges, one with a reason conception and the other a rule conception, will, if not obsessed, end up deciding the same issues in the same way.

Even so, there is still much to choose between if one is considering whether it is better for a judge to hold a rule or a reason conception.

5. THE "REASON" AND THE "RULE" ALTERNATIVES: SOME COMPARISONS

Given that the notion of law as a reasoned resolution qualifies as a possible working conception, the further question arises: Is the reason alternative better than the more widely held rule notion? I will, in this section, compare these alternatives on two grounds: serviceability, and normative "side effects."

A. Comparative Serviceability

It is not possible here to compare exhaustively the efficacy of the two main alternatives. I will treat efficacy for judges, and then only in relation to what I conceive to be three primary functions of a working conception. At this exploratory stage, my conclusions can be only tentative.

One primary function of any working conception is to facilitate the identification of relevant pre-existing normative phenomena (justificatory resources) of the law. It may be that the notion of law as reason can fulfill this function better than the rule idea. It caters for *more varieties* of pre-existing law than does the rule conception. In general, reason figures prominently in the law, including the content of pre-existing rules. It follows that when a judge seeks to determine relevant forms of pre-existing law he may safely assume these to be phenomena in which reason somehow significantly figures, except when fiat necessarily holds sway, or when predecessors have simply failed to bring reason to bear at all (and this is rare). These latter two exceptional varieties of law for which a reason conception does not cater in the processes by which judges determine relevant pre-existing law must be compared with varieties for which a rules notion does not cater. These latter varieties include: (1) law governing exercises of discretion in accord with substantive criteria not reducible to rule; (2) law in the form of "equities" between the parties in the particular case – equities themselves not specifiable in rules; (3) law in the form merely of case law "holdings" with accompanying reasons (not readily reducible to rule). Even if the rule notion is one that also incorporates the reasons behind the rules, it is not at all evident that it would then cater for the foregoing important varieties of "non-rule" law. In sum, the rule notion ranges over far less of the normative phenomena of the law than the reason conception.

Moreover, I believe that the reason notion "takes hold" in a *higher proportion of the total instances* of law identification than does the rule notion. To put this another way, the proportion of instances in which the pre-existing law to be identified consists of

fiat (necessarily) or of failed reason is far smaller than the proportion of instances in which pre-existing law does not consist of rules.

A second primary function of a working conception is to facilitate the sound interpretation of relevant pre-existing law once identified. Much pre-existing law requires interpretation. Yet there are basic alternative approaches to interpretation – the literal and the rationale-oriented.[15] Though I cannot go into this here, the latter is vastly superior. Thus a working conception that tends to put judges on to the rationale-oriented approach is, in my view, the more serviceable. I think the notion of law as a reasoned reconciliation of conflicting considerations does just this. It more or less naturally calls for a rationale-oriented approach, for the law itself is conceived mainly in such terms. A conception of law as rules, on the other hand, is *at best* more or less neutral as between the literal and the rationale-oriented, and a case can be made that the rule notion and the literal are far more congenial than the rule notion and the rationale-oriented. This is, I think, certainly true if the rule conception is one that does not also incorporate reasons behind the rules. And even if it does, some differences on this score may still remain.

A third primary function of a working conception is to facilitate the identification and resolution of issues calling for creation of new law. The rule conception presupposes that the law takes the form of a pre-existing rule. Thus when new legal needs arise, a judge must immediately turn away from this conception (except for such sustenance as it may provide by analogy). On the other hand, a judge who holds a reason conception will find that it, as such, stands him in good stead when new legal needs arise. It recognizes that much of the law is not "pre-existing" but must be made up in light of reason as we go along. The law is not something that simply "is the case" – a hard chunk of reality. Rather "the law" must often be argued for. Gaps in the law present themselves. Authorities come into conflict. Mistakes and misjudgments occur

[15] There is a vast legal literature on these two approaches.

(as in the doctrine of *Butterfield* v. *Forrester*). Change brings new needs and renders old law obsolete. Interpretation itself imposes creative demands. Thus numerous issues of varying types arise for which pre-existing rules provide no, or only an inadequate, solution, and to which reason must be applied afresh. The superiority of a reason conception is evident, too, when it is recalled that frequently a sharp line cannot be drawn between pre-existing law and new law anyway. The rule conception requires that such a line be drawn.[16]

I should concede at this point that *for the ablest judges* it may be that neither alternative working conception is any more, or less, serviceable than the other in any of the foregoing three ways. These judges will be relatively less dependent on working conceptions, and may on their own readily identify relevant law, adopt preferred interpretational method, and come to grips with problems of making new law from scratch. (It may also be true that the ablest, and perhaps even the abler, judges will only rarely become obsessed with a working conception. On this, more later.)

B. "Normative" Side Effects

Pursuit of each basic alternative working idea has subtle normative implications for judges generally. The most general norm "implied" for other judges who learn that a judge is following a rule idea might be formulated: "Generally do things by well-made rule." Similarly, the norm "implied" by the reason notion would be: "Generally do things by sound reason." We may assume that the side effects of the former would include an increase in the proportion of well-formed rules within the system, and the side effects of the latter, more soundly reasoned resolutions than otherwise.

In moral and political terms, what might be the general comparative value of the two types of side effects, assuming that they

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[16] See further Robert S. Summers, 'Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law', *Harvard Law Review* 92 (1978/9): 433–449.

turn out to be roughly equivalent quantitatively? (This is a large assumption, but empirical study of relative quantity would be exceedingly difficult if not impossible.) I will begin by trying to put the case for the importance of rules as strongly as I can.

In a variety of ways it could be valuable for a given society to have more rules (and better formed ones) than it actually has.[17] Rules can restrict scope for official arbitrariness, secure that like cases (as marked out by the law) are treated alike, bring regularity and predictability, and facilitate "followability" of the law and "self-regulation."

Relatedly, rules are among the things that enable us to have confidence in officials. When citizens know that officials must follow known rules this diminishes an important source of insecurity. Citizens "know where they stand." And they also know it is at least harder for officials discriminatorily to victimize an individual under a régime of known rules, for rules apply to *all* who fall within their terms.

A requirement that officials proceed by known rule (where appropriate) may exert pressure for sound substantive content. At least demands for justification will be heard more often and with more focus under a régime of known rules than under a régime in which officials proceed *ad hoc*. Moreover, if officials address themselves only to particulars of the case at hand, they will not do as well at weeding out irrelevancy as they would if forced to formulate and follow general rules.

Further, procedural rules define features of legal processes required for the regular realization of "process values," e.g., fairness and participation.[18] Without a sufficient number of well-formed rules, this form of value realization would significantly diminish.

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[17] For a recent book devoted in major part to this theme, see Kenneth C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Urbana, Ill.: University of Illinois Press, 1971).

[18] See Robert S. Summers, 'Evaluating and Improving Legal Processes – A Plea for "Process Values",' *Cornell Law Review* 60 (1974/5): 1–52.

Rules also serve as *required* means, more or less, to substantive ends. A full articulation of how this is so would take us far afield. It is enough for my purposes to cite examples. Without known rules, a value of such importance as liberty would be far harder to secure, for rules demarcate boundaries with distinctive efficacy and thus enable citizens to plan and choose on their own within these boundaries. Without rules, the welfare state as we know it would be impossible, for it would be impossible to set up and run an effective system of taxation. Without rules, dispute settlement by adjudication (with its distinctive "process" and other values) would also be far less effective. Rules structure adjudicative processes to provide fair participation, and also establish standards for defining the issues and determining what is relevant.

Corporations, trusts, and other "legal inventions" are creatures of rules and thus could not exist without them. Indeed, centralized government itself would probably be impossible in a complex society without rules defining roles in the required division of legal labor. This is not only because in a sizeable society any such division must be elaborate and complex. It is also because the officialdom could not command legitimacy, for there would simply be no sufficiently *defined* governmental *set-up* to serve as the *object* of this legitimacy.

Rules also distinctively facilitate private ordering of affairs without official intervention. They can guide and induce private parties not to interfere with others, and enable private parties to coordinate their activities. Without firm and known rules, there would be far more interference with each other's plans, and far less effective social coordination. Elemental rules of the criminal law and basic rules of the road are aptly illustrative.

In sum, rules can help bring many values to social life. Resort to them is to be encouraged, as appropriate. When judges harbor and publicly act upon a working conception of law as pre-existing rule, they presumably encourage each other generally to resort to rules – and doubtless we end up with more (and presumably better formed) rules than we otherwise would have.

What of sound reason in matters legal? Well-formed rules may

even be evil in content. And sound content is widely called for in the law, not just in those provinces governable by rules. Except when reason peters out and fiat is necessarily called for, soundly reasoned content is always possible in law, too. Yet in a significant proportion of cases the content of American law, at least, is not sound. The "rule" of *Butterfield* v. *Forrester* that contributory negligence of a plaintiff is a complete bar to any recovery, though extreme, is only one of many examples (though it is now being overhauled).

If more judges were to adopt and publicly act upon a working conception of the law as a reasoned reconciliation of conflicting considerations, what would be the likely side effects? The corollary norm for legal actors that this behavioral shift would "imply" is: "Generally do things by sound reason." The side effects of thus promoting this norm would presumably include more soundly reasoned content than would otherwise exist.

It is not to me evident that the normative side effects of a working notion of law as reason would necessarily be less important to individuals and society than the normative side effects of a law as rules notion. Indeed, some theorists have even argued that a *system* of law would not be possible without a certain "minimal" core of soundly reasoned content.[19] To the extent that the normative side effects of a reason conception contribute to maintenance of this core of content, such effects would be of the most profound significance.

Rule proponents might argue that officials simply need more encouragement to make rules than they do to act by reason. Hence the likely normative side effects of following a rule conception are of greater value, and the case for this notion correspondingly stronger. Doubtless officials have often failed to make rules when they could and should have. But substantive content contrary to reason has been all too familiar in law, too. Indeed, in this century, as never before, laws of the most heinous kind have been operative within some societies for extended periods. Of

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[19] See H. L. A. Hart, *The Concept of Law*, chapter 9.

course, pre-existing levels could make a difference. A particular society might, for example, be greatly deficient in rules. In that event, the normative side effects of adopting and publicly acting upon a rule conception would be all the more desirable, for a time.

Thus far in this exploratory venture, I tentatively conclude: (1) that in terms of their comparative efficacy in serving the primary functions of a working conception, there is more to be said for "the law as reason" than for "the law as rules"; and (2) that in terms of the comparative value of their likely normative side effects, any claim that the rule conception has an edge is at best inconclusive.

6. THE "REASON" AND THE "RULE" ALTERNATIVES: CONSEQUENCES WHEN OFFICIALS BECOME PREOCCUPIED

Judges not merely hold and act on working notions of law in desirable ways; they also become obsessed with them, and this factor contributes to unwise decisions. It may be that one of the two basic alternatives is preferable on the ground that general preoccupation with it has less objectionable consequences. To map out such likely consequences would be no simple task. What I offer here must also be less ambitious.[20]

I will first review how judicial obsession may show itself in particular cases, and identify its main causes. A judge obsessed with a working conception will not abandon it when that is the wise course, but a judge who is not obsessed will readily turn to other phenomena of the law, as appropriate. For example, a judge preoccupied with a working notion of the law as pre-existing rule will be more inclined to tolerate even an exceedingly harsh rule (*Butterfield* v. *Forrester*) than he will be to overrule or modify that rule. This judge will also be less inclined to recognize a

[20] It might be that one of the two alternatives is preferable on the ground that those who hold it will simply be less likely to become obsessed with it in the first place. I cannot go into this here.

genuine case of first impression for what it is and instead will tend to cling even to a remote pre-existing rule "by analogy." Such a judge will want to "distinguish" conflicting precedent rather than confront the real choice at hand. Similarly, he will be disinclined to create exceptions (for this will not appear "law-like"). Further, a judge preoccupied merely with the idea that law consists of pre-existing rules will, in my view, be more likely to read statutes and case-law precepts literally rather than in light of their rationales, for he will think of the latter as somehow unfaithful to the wording of the real law. And our obsessed judge will be inclined to read case-law precepts and even statutes governing private consensual arrangements as if they always ousted general equitable principles that come into play in the particular case.

Similarly, a judge may become obsessed with a conception of law as the reasoned reconciliation of conflicting considerations. This might lead him, for example, to refuse to give a pre-existing rule its appropriate due, or to make new law without sufficient regard to how it harmonizes with existing law.

The foregoing examples are not exhaustive, but in each the judge fails to see that a working conception, however useful generally, has limits of its own. For a working notion of law is only a "partial" schematization of the law's justificatory resources that may have rational bearing. Thus there is more to phenomena of the law than rules: equities in the particular case, appropriate discretionary judgment, general ideas of justice and the common good, reason as such, and more. Moreover, pre-existing rules may simply not apply, and are thus limited in this way, too. Yet in relevant instances of prejudicial preoccupation, the judge "plays by the conception" – sticks to the idea of a pre-existing rule – even when that is quite inappropriate because the particular rule is inapplicable, or other facets of "the law" come into play (or both of these).

At the same time, there is also more to phenomena of the law than the reasoned reconciliation of conflicting considerations. Thus there are rules (with the reasons for them). There is even fiat. And more.

Why do some judges become obsessed with their working notions of law? First, if a given notion generally stands judges in good stead, this may lead them to over-use it. In such instances, judges fail to recognize that the conception, like any such idea, has its limits. Second, a few judges may mechanically substitute their working conception for close analysis of particulars. It thus becomes a crutch, and an anodyne for the pains of reasoning. Third, the *normative* influences of an adopted working conception may be direct, too, and not confined merely to side effects. That is, some judges may unconsciously take the conception directly as a standard for what "the law" always *ought* to be, e.g., a pre-existing rule, or some ideal of reason. Fourth, the working conception a judge has may lead him to lapse into a more or less habitual predisposition that influences his decisions without rising to the level of a normative influence.

Let us turn, then, to what a legal system as a whole would presumably look like if it were to go awry and if this were attributable to widespread preoccupation with one or the other of the two basic alternatives. I will take up the probable state of affairs under a pre-existing rule conception first. Again, I offer rationalistic speculation:

(1) "The law" would generally be "nailed down" in rules in advance, even when discretion or other forms of open-endedness would be more appropriate. This would bring more predictability and equality before the law.

(2) The general quality of the substantive content of the rules would decline, for predictability of outcomes under rules would be the primary qualitative concern. It would generally be thought more important to have predictable outcomes than to have rules otherwise good. Also, there would be a tendency to think that more issues are truly matters of fiat than would be so under a régime of "reason legality."

(3) There would be general unresponsiveness to desires for changes in existing rules, and the burden of proof would be heavily on advocates for change. As a result the rules would change relatively little, even when initially bad or later quite outmoded.

(4) Only in the most obvious cases would pre-existing common law rules be superseded by "equities arising in the particular circumstances," and such equities would almost never displace explicit statutory language, even when it deals with private consensual arrangements.

(5) Except for issues plainly political or ideological, few more or less wholly *new* rules would be introduced. Thus it would be widely assumed that novel cases of first impression and new statutory needs are rare. (After all, it would be thought in the very nature of law that it is something that pre-exists.)

(6) At least those judges who leave the reasons for the rules out of their working conceptions would generally interpret and apply law in accord with "plain meaning" and other literal methods rather than in accord with rationale-oriented methods, for it would be assumed that only the former are faithful to the true rules (especially their wording).

The foregoing might be called an "excess of rule legality." There might even today be legal systems that approximate the one I have sketched. And widespread preoccupation with a working idea of "the law" as pre-existing rule may significantly account for such a system.

What might a legal system look like that has gone seriously awry in circumstances in which this is significantly attributable to widespread preoccupation with a notion of the law as a reasoned reconciliation of conflicting considerations? My account here must be even more speculative, for, to my knowledge, nothing approximating such a system has existed, at least not in recent times. We do, however, know what it is like for a particular judge to be obsessed with a reason conception, and it is possible to extrapolate from this. In offering the account below of an "excess of reason legality," I will be *striving* evenhandedly to characterize an opposite polarity that is roughly the same "distance from mid point" as the polarity of excessive rule legality I have already characterized.

(1) Formulations of "the law" in terms of rules would generally be left to the future, "for then we would know more." Hence, less law would be "nailed down" in advance of specific occasions

for applying it, inasmuch as there would be a general desire to leave scope for the free play of reason, and what is rationally relevant (as well as its force) can be fully determined only in light of the details of actual cases as they arise.

(2) The quality of the substantive content of rules and other forms of law would be the primary concern in lawmaking, and predictability of outcome secondary. Thus, the general quality of the content of law would improve, but there would be some loss of predictability, and of evenhandedness.

(3) The existing law would tend to change more with mere changes in personnel. For example, new judges would stand ready to remake the law even though their notions of reason might not differ much from those of predecessors. Predictability would decline, and costly resources would be expended as well. Also, there would be losses in terms of evenhandedness – of equality before the law.

(4) There would be ready responsiveness to demands for changes in the law, especially demands rooted in new developments requiring that new ideas of reason be brought to bear. This, too, would generate some loss of predictability and would likewise entail investment of more resources in lawmaking. It would diminish official evenhandedness over time, too.

(5) In the application of law, any significant equities between the parties arising in the particular case would triumph over pre-existing rule far more often than under a régime of rule legality.

(6) Rationale-oriented modes of interpretation would generally be brought to bear when applying the law, and in the guise of these, judges and others would also sometimes bring in their own merely personal notions of reason to interpret the law.

The foregoing excesses of "reason legality" are (in my view) the main risks of widespread preoccupation with a working notion of law as the reasoned reconciliation of conflicting considerations. Are these *more serious* than the corresponding risks of widespread preoccupation with a working notion of law as pre-existing rules? I cannot here consider this issue at length. The biggest losses under the "régime of reason" appear to be losses in predictability, in

evenhandedness, in excessive diversion of resources into lawmaking activities, and in, perhaps, undue substitution by some judges of their own merely personal notions of reason. These strike me as, on the whole, less serious than the widespread losses likely over time under a "régime of rules," in terms of quality of substantive content.

I, for one, would rather live under a régime run by officials obsessed with reason than under a régime run by officials obsessed with rules. Of course, we need not choose between such extremes. I merely suggest that if called upon to live under one or the other, the reason régime seems less objectionable. The same would be true, *mutatis mutandis*, even if, as is far more likely, the society involved falls somewhere between the two extremes. Thus it will not do to say that if *some* preoccupation with a working conception is inevitable, it is better that this be with a rule rather than a reason conception. Again, the starting point could, however, make a difference. A particular society might be greatly deficient in rules, for example. In that event, widespread resort to a rule conception might be more desirable (for a time), even with the excesses of rule legality that the inevitable preoccupations of some judges would bring.

Given that many judges appear to hold a rule conception of "the law," and given that some more or less inevitably become obsessed with the law as pre-existing rule, this factor may well be one important explanation for the refusal of the court in *Maki* v. *Frelk* to overrule the harshest doctrine of the common law. In any event, it is almost certain that preoccupation with a reason conception would not have led the judges to their decision.

7. CONCLUSION

After hundreds of years in which a working conception of law as pre-existing rule seems to have held sway, might it not be time for judges generally to try reason as an alternative – for a few years anyway? In my view, the serviceability of this alternative as a working conception is superior. Also, the argument for a rule con-

ception based on allegedly preferable normative effects is at best inconclusive. Further, I believe the consequences of any obsession with a reason conception would generally be less untoward.

But working conceptions are not like hats of the wrong fit. They have to be unlearned, not merely removed. This kind of learning runs deep and becomes second nature. After a while, it may not be unlearnable without resort to methods that would not be acceptable. Thus the change I propose, even if desirable, is probably long off.

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