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LEGAL VALUES AND JUDICIAL DECISION-MAKING

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One important aspect of the question "What is law?" concerns the nature of the reasons which can justify a judicial decision.[1] A specific and very contemporary instance of the recurring theme in legal philosophy of the appropriate relationship between law[2] and morality is the problem of how a judicial decision may legitimately be justified. To what extent is it possible to distinguish between legitimate "legal" standards to be used in adjudication and illegitimate "policy" arguments, and what are the criteria available for this purpose?

Several contrasting views about these issues can be elicited from the literature. One extreme view, often attributed to the adherents to legal positivism, suggests that judgments according to law must and should be the mere application of standards that have been authoritatively enacted elsewhere, prior to the instant case. The judge makes a decision according to norms that are already *valid*[3] components of the legal order, without regard to his ideas about their fitness for the social problems raised by these

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[1] Compare Dworkin, Does Law Have a Function? (1965), 74 Yale L.J. 640 with Miller, The Power of the Supreme Court in the Age of the Positive State, [1967] Duke L.J. 273, at p. 276.

[2] One of the classic examples of this debate, at both levels, is Hart, Positivism and The Separation of Law and Morals (1958), 71 Harv. L. Rev. 593 and Fuller, Positivism and Fidelity to Law (1958), 71 Harv. L. Rev. 630.

[3] The notion of "legal validity", central to the positions of such positivists as Kelsen, Ross and Hart is admirably elaborated in Christie, The Notion of Validity in Modern Jurisprudence (1963-64), 48 Minn. L. Rev. 1049.

facts. The nature and meaning of the applicable legal rules are determined by the conventional linguistic connotation of the words that they contain. There are specific legal techniques, such as the notion of the *ratio decidendi* of a case, or the canons of statutory interpretation, for determining when, and in what terms, a specific rule has proceeded from a "legal source".

Of course, no important legal philosopher would agree that all judicial decisions can be arrived at in this manner. The inherently ambiguous or vague character of existing rules, together with the development of new social situations not explicitly disposed of by them, necessitates judicial creation of new rules. However, this activity cannot be accurately described as judicial fidelity to law, nor can the criteria used in the penumbral area of the rules be deemed legal. The open quality of rules demands that judges legislate on occasion, and then on the basis of rational social policies.[4]

The contrasting view of legal realism suggests, at its extreme, that judgment according to law is meaningless and that, instead, the judicial decision is the law.[5] Those cases which go to court are rarely, if ever, within the *core* of meaning of the applicable legal rule. If they were, the result would be obvious and this would preclude any lawyer taking it to adjudication. Hence judicial innovation, or judicial policy-making, must be the legitimate and staple fare within the penumbral areas with which judges must customarily deal. If this is so, only a self-consciously "teleological" view of judicial decision-making can be accepted as the primary focus of the judicial role.[6]

A more moderate view of judicial policy-making does stress its incremental character. By this is meant the necessity of judges adhering to the legal status quo until change is proved necessary, and making changes only a few at a time, sufficient to ameliorate the immediate situation.[7] However, even this view finds the rationale for limiting judicial activism in the policy-making task itself. The judge can legitimately use the occasion of a specific dispute to inject into the legal system those policies he feels most appropriate, basing his activity on the same kinds of extra-legal considerations relevant to other political actors.

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[4] See Hart, *op. cit.*, footnote 2, at pp. 614-615; also Hart, The Concept of Law (1961), p. 132.

[5] Jerome Frank appeared to approach as closely as any recent writer to this position in his Law and the Modern Mind (1930), and Courts on Trial (1949).

[6] See Miller and Howell, The Myth of Neutrality in Constitutional Adjudication (1960), 27 U. of Chi. L. Rev. 661.

[7] Shapiro, Stability and Change in Judicial Decision-making: Incrementalism or Stare Decisis (1965), 2 L. in Trans. Q. 134. Among other things, Shapiro attempts to show how this same method of analysis is necessary for all policy-makers, including non-legal or non-judicial decision-makers.

There are problems with each of these conceptions of the judicial role. It appears both unlikely and undesirable that the mechanical application of the words of a legal rule can dispose of even the easy or obvious cases which appear for adjudication. The fact that legal rules are purposive instruments, impregnated with social values, and that private disputes in court almost always find reasonably plausible arguments on each side, requires the exercise of delicate judgment in making the inference from the general rule to the specific[8] case. Some sense of the social significance of the rule is necessary in order that this task be rationally performed.

Further, even lawyers who accept the value-laden aspect of legal rules intuitively feel that judicial decisions must be rationally justified in order that they be legitimate. The most obvious sense in which this is true is the requirement of a written opinion which deals honestly and completely with the issues raised and arguments made by each party, and honestly states a process of reasoning the judge will accept as an explanation of his decision. Not only is this reasoned decision not expected from legislative bodies, it is probable that it could not logically be satisfied by them, given the variety of competing considerations which produce such political decisions. The problem raised, then, is whether judicial decisions, which do not flow immediately from enacted rules validated by the legal system, can be logically derived through a communicable process of reasoning. If not, much of the paraphernalia of adjudication, and our expectations concerning it, become an irrelevant facade.[9] Given the presently dubious philosophical state of argument about value, we appear driven to choose between the alternatives of legal realism or legal positivism, or some *ad hoc* combination of the two.

I do not propose, in this article, to try to formulate any full or definitive answer to this conundrum for legal philosophy. What I am going to attempt, though, is an elucidation of a point of view from which I think it might most fruitfully be investigated. In the light of this statement of how the question might best be posed I shall suggest certain considerations, and a way of analyzing them, which I feel will be a part of any final answer to our dilemma.

I. *How Should the Problem Be Stated?*

The question, what are the appropriate standards for justifying a judicial decision, is, at its roots, an essential practical or moral query. Not what *is*, but what *ought to be*, the relationship between

[8] See Gottlieb, The Logic of Choice (1968).

[9] This thesis is developed in great detail in my earlier article, Two Models of Judicial Decision-making (1968), 46 Can. Bar Rev. 406.

law and policy in adjudication (as in the legal order generally) is the most adequate statement of our problem. Neither empirical investigation of patterns of judicial behaviour, nor conceptual or phenomenological analysis of the implications of our intuitive judgments about the institution, are sufficient inquiries towards the answer. There is no natural necessity that either a system of adjudication, or a legal order, use certain criteria indicating the legitimate standards for decision within it.

It is true that every legal system does embody a certain consensus about how it is to operate. This consensus forms the content of the expectations which define the behaviour of the participants, give stability to the institution, and furnish the bases for evaluating the reasoning within it. However, this consensus about the kind of legal order that exists, and the kind of institutions which operate within it, is itself accepted because it is believed more desirable than the alternative. There are reasons which can be offered for preferring law as a mode of governmental control, and adjudication as a form of decision-making, within any area of social life. If persuasive, on balance, these reasons will lead to the adoption and continued acceptance of each within the political community. The expectations or standards which define the appropriate roles of actors within the institution must then reflect the very reasons which warrant the existence of the latter.[10]

To come to our specific problem, it is often asserted that certain forms of judicial decision-making behaviour are, or are not, acceptable or compatible with the role of judge. The definition of this role, though, must be related, at its roots, to certain practical reasons why adjudication should be carried on at all, and in any particular way. When we come to the question, what should be the appropriate relationship of law and policy in adjudication, we can only formulate an answer if we look to these "legal values" justifying the process as a whole. I believe that both the legal positivist and legal realist answers can best be understood as based on a particular practical orientation. Any attempt to deal more adequately with the same problem, and with the logical conundrum I have suggested, must be justified, ultimately, in the same fashion. The resulting theory will state an attitude or mood, rather than a precise formula for action. However, it should have sufficient content to give substantial direction to the mode of judicial action.

Before going into it in detail, I might summarize the argument generally. First, there is a *prima facie* value in having a legal order with a high substantive quality and eliciting the collaboration of

[10] An interesting book which is relevant to this very sketchy account of an extremely complex problem is Berger, The Social Construction of Reality (1966).

judges in achieving this goal. Moreover, the judge, by reason of his peculiar institutional position, has a particularly vital role to play in this respect in certain cases. On the other hand, there are good reasons for imposing limitations on the judge's concern for the substantive content of the law he applies. There are values inherent in the existence of a legal order, and a limited role for adjudication within it, which will be offended by overly active judicial policy-making. These values are of varying relevance, though, depending on the particular problem with which the judge is faced. When the judge asks himself whether judicial innovation is legitimate in a close case, attention to these values will be one of the most helpful steps in delimiting the reasons the judge can use in justifying the decision he will make. In particular, it will indicate the legitimate scope which he can afford in his argumentation to a concern for the policies imbedded in the rules he proposes to use.

II. *Role of Court and Legislature in Law Reform.*

The first issue which I will deal with is the case that can be made for creative judicial collaboration in law reform. In legal terms, this role is substantially defined by what Hart calls "secondary" legal rules or principles. The status of legislative, administrative, or judge-made legal rules is by no means self-evident and is not always readily furnished to a judge adjudicating a dispute. Rather a judge is required to assess for himself those proposed "primary" rules in the light of doctrines of precedent, canons of interpretation, constitutional principles of federalism and the separation of powers, administrative law theories of jurisdiction, delegation, and so on. These doctrines are not, and should not be, treated as automatically applicable rules which furnish a type of litmus test for the validity of the rules the court is asked to apply. Instead, like any legal rule, they are purposive instruments, embodying generally accepted principles of political theory and social policy, in the light of which they should be used. My objective now, is to develop a position in the light of which these ambiguous, even inarticulate, doctrines can best be elaborated.

As we shall see, two contrasting fallacies often underlie discussions of the role of a court in developing the law in a society where a representative legislature exists. The first stems from a simplistic theory of the separation of powers, in particular, the distinction between the legislative and the judicial power. The latter function involves the disposition of individual cases by the application of established rules, the former the creation of these very rules. The fallacy here consists in the identification of the role of the courts with this judicial function, defined as narrowly as above.

The opposite view, while correct in showing that courts are not, ought to be, and cannot be confined to purely "judicial activity" in this sense, tends towards the opposite fallacy of "institutional fungibility".[11] By the latter I mean the view that every actor in the legal system, no matter what the institution within which he is operating, ought to be acting primarily with the aim of advancing certain substantive social goals in deciding which rules he will accept and act upon. This other extreme view fails to perceive the truth that underlies the first theory, that actors in different institutional positions should rightly be expected to base their decisions on different appropriate criteria. The argument I will make flows from two assumptions: first, judges and legislators (as well as administrative officials, and so on) should act as partners in a collaborative effort to enhance the quality of our legal order; second, their joint efforts should proceed on the basis of a rational division of labour, each concentrating on the job he is best capable of performing. What is best for each is determined by an intelligent evaluation of differing, relevant, institutional characteristics.

The most obvious distinguishing characteristic between legislature and court is the representative, elected characteristic of the former. By this I do not mean simply that the means of selection of a judge and legislator differ as do appointment and vote. Much more important is the fact that judges do not campaign for office on the basis of a programme of action after they are selected. Nor are they answerable to those affected by their decisions, as a legislator is when a term of office comes to an end and he seeks another. This sheltered, tenured, apolitical manner of appointment is one of the main reasons why it is felt inappropriate for judges to implement into law policies that appear desirable to them. Judges simply are not as capable of registering and reflecting the sentiments of a majority of citizens which, it is believed, should be the prime determinant of the social policies embodied in our laws.

On the other hand, this very quality in our courts may be a good reason for a particularly appropriate creative role for judges. The very factors that make legislators representative may cause irrational distortions in the rules they create. In the first place, certain powerful minority groups may be well placed to lobby on behalf of their own special interests and obtain favourable treatment that is unjust to those who must bear the burden of it. This is particularly effective in blocking or delaying popularly-accepted reforms.[12] Second, even a majority sentiment may crystallize

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[11] Dworkin, *op. cit.*, footnote 1. at p. 640.

[12] See Peck, The Role of the Courts and Legislatures in the Reform of Tort Law (1963), 48 Mich. L. Rev. 265.

around a policy which unfairly infringes on certainly extremely important minority interests, in freedom of speech, for instance.[13] In such a case, its very isolated and neutral character may be the means by which are protected values that are of profounder significance than democratic "majoritarianism".

The danger in giving too much power to a non-responsible body such as a court is increased when we reflect on the relatively uninformed character of judicial legislation. Legislatures are ordinarily composed of men of varying backgrounds and connexions. Judges are always lawyers. Legislative action is fuelled by departmental investigations, committee hearings, or even full-scale Royal Commission enquiries, in any of which expert knowledge of various kinds is brought to bear. Judges act, in a more or less passive fashion, in reliance on arguments made to them by lawyers, with largely the same background as their own. Legislatures often can make a preliminary legislative proposal, give it a first reading, and then listen for the informed reaction of interested and affected groups. Judges are deprived of meaningful "information feedback" by the rules of finality and *functus officii* in the individual case, and the episodic and sporadic quality of adjudication in the general area of any legal problem.

Again though, there is no total dichotomy here between court and legislature in this respect. True, bench and bar are composed of lawyers, but then, all of the problems with which we are concerned are, at least partially, "legal". In fact, certain problems may be more amenable to a lawyer's expertise than any other, from the rule against perpetuities to freedom of speech under a Bill of Rights. Judges and lawyers can themselves draw on expert writings or Royal Commission findings for their decision, and transmute it into new law in the same way as an often lawyer-dominated Parliament.[14] More important, a court can often rely on the very judgment of Parliament in this area, expressed in incomplete reforms, as attesting to the validity and acceptability of the policy ideas it proposes to implement.[15] If its own reform efforts prove to be misguided, the legislature is still available as a supreme court of review to reverse the judicial decision.

Even more significant though, is the distinction between a legislature which acts in a more or less systematic way to enact, all at once, an abstract, generalized reform and a court which makes an *ad hoc* incremental change in the law in the context

[13] See Shapiro, Freedom of Speech (1966), pp. 34-39.

[14] A very interesting recent example is the trend by certain American courts to adopt the new standard in the Model Penal Code, proposed by the American Law Institute, in developing the insanity defence from the old McNaghten rules. See *U.S.* v. *Freeman* (1966), 357 F. 2d 606 (2nd Cir.).

[15] The classic statement of this proposal is Landis, Statutes and the Sources of Law, in Harvard Legal Essays (1934), p. 213.

of a concrete case embodying the very problem with which it purports to deal. The virtues in reform which follow an over-view of the whole relevant problem-area, and which are enacted once and for all, are obvious. However, such an institution necessarily sacrifices the competing values in adjudicatory advances.[16] The court sees the human implications of the very change it proposes to make represented in the litigants between whom it must decide. It can confine itself to changes in the specific type-situation with which it is faced and thus any mistakes in the policy can be minimized, especially as regards the marginal cases which cannot be foreseen. Finally, the fact that individual situations are dealt with in discursively-written opinions leaves the future development of the law fluid and flexible, not frozen in an abstract blueprint of statutory language. This creates the possibility of a continuing dialogue impelling the development of the law, as new examples throw into sharp relief the original policy assumptions with which one started. Whatever be the devices of information open to them, legislators are as humanly open to error, and unable to foresee much of the future, as any other legal actor. Unlike courts, though, it is a major undertaking to bring them to reconsider a problem with which they may have dealt in an imperfect fashion.

One key defect in judicial innovation is the serious limitation on the number and quality of legal instruments open to their selection. By and large, they are confined to the statement of general, self-applying norms of conduct, the sanction for which are private suits for damages or specific orders, or, occasionally, the device of nullity for purposes of a judicial proceeding (for instance, the exclusionary rule). For various reasons, the courts have generally come to deny themselves the independent power to enlarge the incidence of the criminal law.[17] For institutional reasons, it does not have available to it the very important devices of administrative enforcement, licensing, economic rewards, and so on. Of course, a court can play a significant marginal role in developing the law in areas where the legislature has already created this means of enforcement. On the other hand, a court has open to it a peculiarly important device which is neither customarily nor legitimately used by a legislature, to wit, the retrospective operation of its improvements in the legal system. Only if the court is willing to grant a remedy to the "one-man lobby" who asks that the previously-established law be brought into line with contemporary expectations of justice and appropriate standards of conduct will this be of benefit to those already injured by the breach. To deprive this person of his remedy simply because a

[16] The best development of these values is in Fuller, Anatomy of the Law (1968), pp. 89-99.

[17] See Brownlie and Williams, Judicial Legislation in the Criminal Law (1964), 42 Can. Bar Rev. 561.

legislature might do a better job generally (as it still might) is rarely defensible.

All of these institutional considerations coalesce in a general line of delineation between the legislative and judicial responsibilities for improving the quality of our legal order. Legislatures are best capable of major reviews of the problems in a certain area, where the relevant, available expert knowledge is explored, a systematic programme is implemented, compromises between important competing interests are registered, the popular acceptability of the basic scheme is monitored, and sophisticated legal techniques for implementation are devised. Courts (or like bodies) are most competent at rationally developing the implications of a scheme of social policy already adopted for society (in our day, almost always by the legislature).[18] Within this framework of legislated values, a court can protect the claims of fairness and equality by elaborating in a coherent way the demands of these values for concrete situations to which they are applicable. The court deals with problems individually, at retail as it were, with each competing interest having no more favourable position than the relevant principles deem proper. The results of impersonal unravelling of the established policies become available to individual litigants when they really need it, after they have already been hurt.

It is obvious that the lines of judicial restraint suggested are not capable of precise, objective, and easily applicable statement. However, I believe there is a sufficient core of content that its honest acceptance by the courts would make a real difference in the scope of judicial action. And full occupation of their proper area of activity would have real benefits to society, both in the quality of judge-made law and the saving of legislative energy for more appropriate objects.

III. *What Are the Legal Values?*

Assuming that it is true that courts should be limited by legal or procedural values in the pursuit of substantive goals, what is the precise nature and justification of each of these limiting principles? They can be summed up by saying that a court acts as an *adjudicator* of disputes arising within a *legal* order. It is because we desire the successful fulfilment of the legal enterprise, and the adjudicative role within it, that we should not be solely concerned with the substantive desirability of individual decisions within the judicial process.

Law has been defined as the enterprise of subjecting human

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[18] See Landis, *op. cit.*, footnote 15; also Gelhorn, Contracts and Public Policy (1935), 35 Col. L. Rev. 679.

conduct to the governance of rules.[19] Rules are significant because they furnish general standards of conduct that are applicable in recurring kinds of situations. Although rules are amenable to varying degrees of generality, they are essentially distinguishable from individual *ad hoc* orders issued from some authority or another. This distinction shows the obvious reasons why rules or general standards are valuable, at least in principle. From the point of view of the governors, it is impossible, in any kind of sophisticated society, to implement a programme, requiring control of the conduct of a substantial number of people, simply through concrete face-to-face instructions at every step of the way. From the point of view of the governed, the desirability of replacing the costly, cumbersome, and overly obtrusive process of individualized orders by general instructions which they apply to their own proposed conduct, and in the light of which they orient their own behaviour, is also evident, or so I believe.

It may seem to be labouring the obvious to suggest that rules are necessarily incidental to the successful functioning of any social system, organization, or bureaucracy. The same may be true of the preference for the more impersonal submission to general standards of behaviour, when this is voluntarily chosen, even if through fear of a later sanction for disobedience. However, I do not believe this to be true. There has been a substantial reaction in recent years against what might be called the ideology of "legalism", in both legal and ethical decision-making.[20] This has taken two forms. Some have argued that because of the inevitable ambiguity of general statements, together with the psychology of decision-making, the process of actual administration of rules will inevitably reflect human attitudes rather than abstract directions on paper. Others, building on this, have suggested that such a condition is positively desirable, to the extent that it legitimates a self-conscious pursuit of the best substantive consequences of official decisions. I do not mean to go to the other extreme and argue the absolute validity of rule-oriented conduct in every sphere of human activity. What I do mean to suggest, and with some specific detail, is that social control through general rules is both a possible and a valuable pursuit in some such spheres.

There are six different general reasons why adjudication according to established rules is *prima facie* a preferable form of decision-making.[21] In the first place, it helps maintain the legal system as a means of channelling human conduct along socially-

[19] Fuller, The Morality of Law (1964), p. 122 *et seq.*

[20] See Skhlar, Legalism (1964); compare Coons, Legalism in Law Making and Law Enforcement (1966), 19 J. of Leg. Ed. 65.

[21] I am elaborating here on the discussion in Hart and Sacks, The Legal Process (tent. ed., 1968), pp. 587-588 and Mishkin and Morris, On Law in Courts (1965), p. 77 *et seq.*

approved avenues. Second, it enhances the likelihood of private settlement of disputes when these do occur. Third, it enables the institution of adjudication to exist as a viable social process, thus eliciting private participation within the adversary context. Fourth, it enables a court to make its own peculiar contribution to the quality of our laws, because it can focus on the marginal issues left undecided within the rules, while assuming the wisdom of those issues already decided elsewhere. Fifth, decisions according to rule manifest at least *legal* justice, if not substantive justice. They fulfil the expectation that disputes will be decided even-handedly on the basis of the rules as they existed at the time of action and preclude arbitrary discrimination between litigants for irrelevant and undisclosed reasons. Lastly, the acceptability within the community of both a specific decision and a general court-initiated development in the law flows out of the perceived legitimacy of judicial conformity to the legal order.

Each of these values must be examined realistically, first as to when it is meaningful in principle and second, to what extent it justifies real limitations on a court pursuing what it believes to be correct substantive social policy. Why and when does judicial respect for established rules in litigation affect the efficacy of the legal system in controlling purely private activity? The answer is that there must be a real relation between the law as enforced officially, and as promulgated for private obedience, in order that those who might disobey be deterred or encouraged by the official consequences and that those who would obey voluntarily be protected from those who would not. Only if the same rules are used to assess conduct when a dispute arises, as could reasonably have been expected at the time the decision to act was made, is there any real incentive to orient this conduct in accordance with these announced rules.

Yet it should be noted that we are now talking about purely private activity, undertaken before a dispute occurs. In order that we perceive a connexion between this activity and judicial decision-making, we must postulate two preconditions at the time of the conduct, first, knowledge of rules administered in court, and, second, a real influence of possible judicial action on the choice of conduct. We do not know much now about what impact legal rules have on private behaviour but we do know that each of these preconditions is problematic. In many cases private actors just will have no knowledge of the legal rules discussed at the appellate court level and in many more cases the legal rights and duties under these rules will be of little significance to a person deciding what to do. Of all the reasons judges should respect legal values when the established rules conflict with popular standards of reasonability, the argument from private expectations may be the weak-

est. Yet we also know that when a person goes to a lawyer to plan his estate, the kind of will drawn up may be substantially affected by the knowledge available concerning the use of the rule against perpetuities in the courts.

Even if officially-administered law is not a more significant factor in determining private conduct and channelling social activities than are popular expectations about appropriate behaviour, the situation may be quite different as regards private activities directed to solving and settling disputes after they have arisen. Since the vast majority of tort actions, criminal prosecutions, and so on are privately negotiated and settled, and the continuance of this practice is absolutely essential to staving off the breakdown of the judicial system, we cannot afford to do anything which lessens the incidence of such private settlements. The theory is that the best way to ration the costly process of adjudication is to allow private individuals to decide rationally that the likely gains are outweighed by the likely costs. Only if there is a substantially accurate awareness of the standards the courts will use will such prediction and negotiation be rational.

Yet there are a sufficient number of factors involved in a judicial decision which do not involve the objective, predictable application of a legal rule that we can be somewhat dubious about the absolute necessity of the latter. The relative uncertainty in predicting findings of fact, evaluations under legal standards, the quantum of damages, the form of sentences, and so on, has not significantly detracted from the incentive to avoid the risks, costs, and delays in litigation. We might venture the opinion that the occasional change in, or deviation from, a rule is less important in this regard than the existence of ambiguous standards in fields of great social conflict.[22]

When the decision has been made to litigate, and we then are concerned not so much with prediction of what a judge *will do* as with preparation of an argument which will persuade him as to what he *ought* to do, legal rules are substantially more important. The existing institution of adjudication is an adversary process where the facts are adduced and the arguments are made by lawyers representing the private litigants themselves. Leaving aside the reasons why this institution may be preferred to available alternatives,[23] its viability depends on a shared consensus between lawyers and judges about the standards which will be used by the latter in reaching a decision. If such a consensus does not obtain, a relevant factual record cannot be produced, intelligent legal ar-

[22] Compare the treatment in Friedman, Legal Rules and the Process of Social Change (1967), 19 Stan. L. Rev. 786, at pp. 827-828 of the constitutional rules dividing prohibited obscenity from freedom of speech.

[23] Which I have discussed in detail in *op. cit.*, footnote 9, at pp. 412-414.

guments cannot be made, and the whole sense of the institution, and the kind of participation it affords, is lost. At this stage, popular attitudes about what is right, or patterns of judicial behaviour which must be avoided, have to become transmuted into established, reckonable legal precepts in order that adjudication as we know it be successfully operative.

Another important factor supporting the practice of decisions according to established rule is efficiency in the decision-making process itself. We have seen that judicial adherence to rules known beforehand can filter out many cases through private settlement and also allows private preparation of the materials for decision. These standards, however, also form a framework which facilitates the reasoning of the judge himself. When each rule was established (in a precedent, for instance) it was (or should have been) the product of a concerned evaluation of its relative merits. It is true that the rule may well be wrong, and to rely on authority for its wisdom might be to perpetuate error. On the other hand, there is no certainty that continued reflection and re-evaluation would result in any improvement. We are sure, though, that such re-thinking does have substantial costs. Not only does it delay the final decision to have to review all the legal points possibly at issue, it also diverts scarce judicial time and energy from those marginal problems left unsolved in the previous law.

This suggests something of prime institutional importance in an assessment of judicial decision-making. As we have seen, the peculiar value of judicial creativity stems from the fact that it considers general issues in concrete situations. It can focus on very specific problems with a heightened awareness of the human, practical consequences of whatever rule is adopted. We might rationally expect a higher quality of law to result from this kind of institution, where important questions are not decided in the abstract, or even by happenstance. However, a necessary condition to this ability to focus on a very specific issue is a framework of established principles which isolates the unsolved problem, disposes of other relevant issues, and allows time and attention to be directed at the open, marginal questions. Such a framework is produced by a theory of decision-making which counsels reliance on previous decisions which have established rules for issues there in dispute. In the long run, the most effective policy-making, in a substantive sense, flows from an incremental process, one issue being isolated and settled at a time. and then used as the basis for similar attacks on matters as yet unresolved.[24]

Substantive efficiency, of course, is not the only desideratum in the judicial process. Justice is traditionally considered a necessary

[24] This is closely paralleled to Shapiro's argument in favour of incremental decision-making, *op. cit.*, footnote 7.

concomitant to the "Rule of Law" administered in the courts. It is obviously true that decision according to rule is not an exhaustive and sufficient definition of justice, since the rules themselves may be unjust. I suggest, though, that following a known rule may well be a necessary condition to the just exercise of authoritative, judicial power.[25]

Justice, or fairness, is concerned with the implementation of the value of equality.[26] In this context, legal justice demands uniformity of decision from different judges, for different litigants, at different times. Of course, any legal decision involves differentiation of result for those variously affected. What is expected is equality of result for those in equal positions. Equality of position, or the relevance of differentiating factors, is determined by the content of the legal rules which are being administered. Of course the legal rules do change through time and so do the results in adjudicating disputes within this area of social problem. Legal justice, however, implements the value of satisfying private expectations that one's conduct, and that of others, will be evaluated in accordance with the rules that existed at the time of action. The distribution of expectations and interests according to these rules will not be interfered with by *ad hoc*, arbitrary, unexplained, and perhaps unconscious infringement of the demands of these rules. Of course legal justice itself depends on our assumption that rules themselves are desirable and that there should be real limits on adjudicative changes in these rules. Within these assumptions it does furnish us with a distinctive perspective, the desirability of objective, impersonal and uniform application of known rules in legally disposing of disputes arising within the legal system.

The final and perhaps most important value that is served by judicial adherence to rules is the enhancement of the acceptability of the results. Judicial decisions, as almost any legal precept, must be largely self-enforcing to be an effective influence on private behaviour. Only if the vast majority of those affected by judicial elaboration of the legal order voluntarily decide to obey will there be the leverage that is needed to coerce the potentially deviant minority.

There are two necessary conditions to the attainment of this voluntary obedience. First the new, authoritative policies must be embodied in a *legal* form, a viable generalization which is capable of being translated by many different individuals in diverse situations into a specific directive as to what they are to do. If the rules are continually being changed or ignored by the courts, the structure of the legal order will be deprived of the stability which

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[25] Fuller, *op. cit.*, footnote 19, p. 157.

[26] A good general discussion of the notion of justice is contained in Hart, The Concept of Law (1961), pp. 150-163.

is necessary for meaningful impact even upon those who want to obey. This is the other side of what we said above, that although a legal order can be an extraordinarily efficient way of channelling private conduct from above, there are instrumental limitations placed on the means used to achieve this.[27]

Even if this condition is satisfied, and it is possible and meaningful for individuals to orient their behaviour in accordance with authoritative legal rules, this does not mean they will necessarily choose to do so. We have learned enough in recent years about the problematic character of legal sanctions to know that there can be a great gap between the "law in books" and the "law in action". There is also a substantial body of opinion that most people obey legal rules, when they do, because they feel they should, consciously or habitually.[28] What is yet hotly contested is the primary basis for such an acceptance of promulgated rules. Does it stem from an approval of the substantive content of the rule or from a belief that the law has proceeded from a legitimately authoritative source?[29]

Suppose the assumption is correct that people will obey a rule about whose substantive content they are neutral or even disapproving; that this is true in a significant number of cases; and that the countervailing force is a perceived legitimacy in the rule: if so the preservation of the latter is an important value worth preserving, or at least weighing in a calculus of decision-making. The further assumption is plausible that legitimacy is accorded to decisions, or even newly-developed rules, proceeding from a non-elected and narrowly-informed body such as a court, because of a belief that they are products of a more or less neutral, objective, impersonal elaboration and application of an established legal order. If so, then the maintenance of such a belief among those affected by the rules, especially key influential decision-makers within a society, is imperative. Finally, it is likely that such a belief can only be maintained in the long run if it is an approximately correct description of the intentions and efforts of the judges. In any event, it should be considered unfair to deprive affected citizens of a correct knowledge of how their governmental system actually operates. From these assumptions, we can see that this is one of the main reasons why the scope of judicial inventiveness must remain limited.[30] There is a great deal of substance which underlies the expectation that judges will operate with due regard for the confines of a legal order. I suggest that even if the

[27] These limitations are elaborated in Fuller, *op. cit.*, footnote 19, Ch. II, in his discussion of the "morality that makes law possible".

[28] *Cf.* Packer, The Limits of the Criminal Sanction (1968), p. 41 *et seq.*

[29] I have discussed this in greater depth in the article cited, footnote 9, at p. 462 *et seq.*

[30] See Cox, The Warren Court (1968), *passim.*

arguments which justify this expectation prove lacking in persuasiveness, the fact that the expectation exists, and determines the legitimate range of judicial activity, means that it cannot be infringed without a risk that judicial power within this range will be attenuated. Judges can neither limit their own range of creativity rationally, nor be restrained by effective professional criticism, without a stable framework of rules delimiting the direction of their enquiries.

I must hasten to add some qualifications to the previous argument. First of all, each of the enumerated legal values, or reasons for judicial respect for established legal rules, is of varying significance in different areas of the law. Second, and connected to this, is the fact that sometimes these same values are best furthered by changing the rules in order to bring them into line with established standards of conduct and expectations of just treatment. If this is true, the mandate to the judge that he respect the law must be adjusted and interpreted with due regard to the fact that this mandate's underlying purposes have different implications in diverse circumstances.

If we are concerned with the impact of judicial discretion on the effectiveness of a legal order as a means of social control, we must also take account of the likelihood that unreasonable legal rules may cause more harm to this goal than explicit judge-made changes. When legal rules are perceived to be blatantly unreasonable, unfair, and out of line with community beliefs, there is a natural impulse to litigate about their results. Judges who share the same belief about the content of the rules will be torn between the desire to be sensible and the wish to respect the law. Some may succumb to the former, others may adhere to the latter. The result will be an unstable situation, seemingly fixed legal rules riddled with exceptions that are difficult to rationalize or justify. This produces the same kind of uncertainty and unnecessary litigation which it is the purpose of legalism to avoid. In this case, a quick, honest, and open change in the relevant legal regime will be the most effective way of enhancing the ability of law to channel private conduct therein.[31]

In the same way, the values in efficient, interstitial and incremental judicial elaboration of the law may sometimes best be advanced by judicial concern for, and development of, the policies underlying the rules in question. If the controlling law is conceived of as incorporating the purposes which gave rise to it, the best way to take advantage of the peculiar qualities of the judicial process is to develop the law in a rational manner in the light of these purposes. Only by exposing the values underlying

[31] One of the best examples of this is described in Halbach, Stare Decisis and Rules of Construction in Wills and Trusts (1964), 52 Cal. L. Rev. 921.

the rules adopted in particular cases can we really have a dialogue between lawyers, lower court judges and various appellate courts, a collaborative articulation of shared purposes over an extended period of time. If we believe step by step development of the law through adjudication entails a powerfully rational structure of analysis, we must be willing to accept the implications of such a reasoning process, even when it does come in conflict with certain, specific, established rules.

Similarly, if justice within an objective structure of law is our goal, then adherence to established rules may sometimes itself conflict with this demand. We assume that individuals feel that they should have an equal right to evaluation of their conduct, or that of others whose conduct affects them, in the light of standards which they could reasonably and justifiably expect to have applied to them at the time they acted. However, sometimes established legal rules are not capable of being organized into a rationally defensible structure and someone enjoys the benefit of an anomalous rule that we now see is unjustified. Similarly, the law may be lagging behind developing cultural standards of behaviour concerning which the community has evolved a consensus. In each case, to apply the law as it previously stood would be to defeat the very objective we pursue of equal treatment of cases in the light of relevant standards. We better attain the goal of legal justice by enabling the "one-man lobby" to petition the institution of adjudication for redress that it justifies by the elaboration of those more profound and accepted principles within which it operates.

Finally, when we are concerned with the impact of the legal order, its acceptability to those who could meaningfully frustrate its implementation, we see the same qualification to the value of legalism. If adjudication comes to represent the wooden, mechanical application of rules without regard to the sense they are supposed to embody, people will lose their respect for the legitimacy of these decisions and, perhaps, for the system of which they are a part. There is enough evidence of a turning away from the common law to systems of private business practice, arbitration, Ministerial discretion, and so on, to support the view that the law must incorporate some semblance of justice or reasonableness to be effective as law. One can achieve *real* order, as opposed to *paper* order, only when one strives for *good* order.[32]

IV. *Principled Decision-Making: Legal Rules and Principles.*

We seem to have arrived at the following conclusions: first, judges may legitimately perform a creative role in developing and chang-

[32] *Cf.* Fuller, *op cit.*, footnote 2, at p. 657.

ing the law, a role which reflects the peculiar advantages and insights open to their institutional position; second, the courts' concern for the substantive policy of the rules they accept must be limited by attention to, and respect for certain legal values which limit the pursuit of utilitarian ends; third, not only are these legal values often unaffected by judicial activism, but they often can only be implemented if the law is changed to bring it into line with prevailing community standards of reasonableness. The conclusion we arrive at is that courts must play a *limited*, but *creative*, role in improving the quality of our law. The decision as to when a particular innovation may be legitimate cannot be controlled by any form of general, objective standard; instead, each instance must be analyzed in terms of a calculus of substantive policy gains and institutional losses.

Can anything more definite be said, though, about the criteria to which a court should look in determining the occasions for judicial law-making? We believe that more can be said, something that is best understood by contrasting this position with the opposing views of legal positivism and legal realism. As we have seen, legal positivism conceives of a legal system as a set of specific, posited rules, validly enacted by various authoritative sources within an organized hierarchy of decision-making. A judicial development either fills in a gap in this system or overrules a precept already validly established. Legal realism, on the other hand, conceives of a legal system as a flow of decisions from various authoritative policy-makers. Each of these decision-makers operates according to an essentially common or undifferentiated style of analysis or argument, advancing those substantive goals that are preferred and are capable of political success at the moment.

The distinctive view which I am explicating agrees with legal realism that the legal order is best conceived of as a process of development over time, a collaborative enterprise. On the other hand, it would agree with legal positivism that this enterprise must manifest a certain degree of structural stability. There must be some relative differentiation of role among the various authoritative actors. The flow of judicial decisions must be channelled within certain established, impersonal, and relatively fixed points of reference in order that we can properly call the system a legal order. Unlike the positivist theory, this view holds the source of stability within the legal order to be certain institutionally-accepted principles and purposes, underlying the more or less ephemeral rules or precepts on which legal positivism focuses.[33]

[33] *Cf.* the statement in Witherspoon, Administrative Discretion to Determine Statutory Meaning: The Middle Road (1962), 40 Tex. L. Rev. 753, at p. 827 *et seq.*

As we shall see, the counsel to judges that they adhere to these principles does not state a precise formula for action. There is always the risk of abuse, of judicial usurpation, as the positivists fear. However, they do give sufficient content to the attitude or mood of judicial restraint suggested earlier, that a judge is honestly and objectively able to follow the probable implications of principle, even when they are in opposition to his own personal values and policy preferences.

We begin with the assumption that individual legal rules are both less, and more than, what they say. The words originally used in the rule are inevitably less than what is required for a full understanding of its scope. Legal rules always require elaboration or qualification as they come to be applied to unforeseen situations. The body which is assigned the task of applying the rule must play a complementary role in drawing out the implications of what was originally intended. On the other hand, rules must be conceived of as larger than their original statement, since they are purposive instruments, laden with objectives or policy choices. They are not enacted as ends in themselves, in the air as it were, but rather because of their supposed help in attaining certain social goals in the real world in which the law seeks to make a difference. These purposes form the approved basis for judicial elaboration of the original rule-statement, a judicial activity which can honestly be termed *interpretation* of the original efforts.

These value-choices embodied in the law are legitimately described as part of the existing law—"the law as it is". It is philosophically incorrect to speak of the legal rule as something contained in the core of conventional meaning inherent in the words in which it is expressed. The latter view leads to the conclusion that such rules are necessarily incomplete, because of the necessary vagueness or ambiguity of language in its penumbral application. In such a penumbral area, the judge would exercise a discretion to create new law, hopefully in the rational advancement of correct social policies.[34]

Such a theory must be rejected for several reasons. First, it is impossible to differentiate a core area of interpretation of conventional linguistic meaning from a penumbral area of judicial legislation in the light of social policies. Even in the easy cases, the correct interpretation is based on an appreciation of the purposes of the rule and the relevance of the immediate situation to that purpose. Second, these same purposes underlying the rule are those by which a judge must be bound in the elaboration of the role in areas of more uncertain application. He does not have the discretion to ignore what he probably would judge to be the policies approved by those who created the original rule and then

[34] See Hart, *op. cit.*, footnote 2.

to legislate in the penumbral areas in the light of policies he believes more rational for society. The obligation of the judge can be described as intelligent "legisputation",[35] if his role is to be oriented towards such legal values as reckonability, objectivity, and deference to other policy-making institutions in society.

Two recent examples can be given of judicial deference to the purpose of a rule, instead of its literal wording, one involving the interpretation of a statute, the other the elaboration of a common law rule. In the first case, *Sidmay Ltd.* v. *Wehttam Investments*,[36] the Ontario Court of Appeal was faced with the problem of what to do about a mortgage given to a company which, allegedly, was carrying on the business of lending money in breach of the Loan and Trust Corporations Act. There were two separate issues: first, was the mortgage the illegal conduct of business under the Act in question; second, if it was, what was the effect if any of such illegality on the mortgage, the loan, and the land?

I am concerned here only with the first question which involved the interpretation of the statutory provision that "loan corporation means an incorporated company . . . constituted . . . *for the purpose of lending money on the security of real estate*". There was no doubt that this transaction, one of many such within the main business of this corporation, involved, literally, the loan of money on the security of real estate. The corporation was not incorporated and registered under the Act as required, such steps being necessary for the legal conduct of the business of a "loan corporation". In a beautifully reasoned judgment, Mr. Justice Kelly interpreted the statute as not applying to this kind of transaction carried on by this kind of company.

First of all he looked at the legislative history of the statute which showed that it stemmed from governmental concern for building societies, friendly societies, loan corporations, and so on. The common factor which all of these had is suggested by the regulatory scheme designed by the statute in question. In the words of Mr. Justice Kelly:

> . . . [T]he purpose of that Act was to exercise a form of control over the incorporation and operation of corporations which lend to the public funds drawn from a wide clientele of depositors, debenture holders and other persons in a creditor relationship to the corporation to the end that some measure of protection may be offered to those who entrust, or are exposed to solicitation to entrust their funds to the corporation. In seeking for a legislative purpose for bringing such diverse operations under the same umbrella, the recognizable common denominator is the intention to protect the money of the public, de-

[35] Cohen, Judicial Legisputation and the Dimensions of Legislative Meaning (1960-61), 36 Ind. L.J. 414.

[36] (1967), 61 D.L.R. (2d) 358.

> posited with, loaned or entrusted to or invested in the corporations made subject to the provisions of the Act for the purpose of enabling the corporation to lend such money mainly on the security of mortgages on real estate. The provision with respect to minimum capital, limitation on borrowing powers fixed by relation to paid-up capital, restriction on the type or size of loans entitled to be made, provisions for the furnishing of financial information, description of the type of security to be accepted for loans, are indicative of an intention to afford protection to those whose money, in one form or another, comes into the hands of a corporation which proposes to invest that money, in its own name and which holds itself out as engaged in the business of lending that money.[37]

The company which had made the mortgage in question here was a private company, which did not and could not sell shares and securities to the public, and which invested its own money, not that of a wide range of depositors or small investors. The kinds of protection provided by the legislation just did not make sense if they were sought to be extended to the investors and shareholders in this company. *A fortiori*, invalidating the transactions of such a company, even if it should have been registered, would defeat the whole purpose of the legislation, since it might deprive the investors of the very money which had been loaned, and confer this windfall on the borrower, for whom none of the statutory protections was designed. Kelly J.A. thus decided that the definition section had to be interpreted in the light of the object of the statute as a whole and, when this was done, it must be read to exclude the corporate transaction at issue here.

A similar quality of judicial reasoning was exhibited by Lord Pearce of the House of Lords, in the recent decision of *Myers* v. *D.P.P.*[38] The question here was whether or not the evidentiary rule excluding hearsay should be applied to a particular form of business record. Apparently when automobiles were manufactured a small number was affixed by a workman who then recorded the number on a card. The cards were entered into the company records and then destroyed. In the case in question, the evidence of the company records, testified to by someone in charge of them, conclusively demonstrated the guilt of the accused. As Lord Pearce recognized, though, they might have had the opposite result, and the hearsay rule would apply in both situations, or none.

According to its common interpretation, the hearsay exclusion would apply here. The evidence of the witness was a statement about what another person, the workman, had written. The truth of the latter statement was at issue and, under the conventional rule, only the maker of the statement could testify as to its truth, not some other party who had heard him make it. As Lord Pearce

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[37] *Ibid.*, at p. 373.
[38] [1964] 2 All E.R. 881.

showed, though, this formalistic reasoning ignored both the rationale for such an exclusionary rule and the reasons for the creation of the various exceptions to it. In his own words:

> My Lords, the evidence whose admission is the ground of complaint was fair, clear, reliable and sensible. The question is whether the court was bound by a technical rule to exclude it. No one doubts that the general exclusion of hearsay evidence, subject to exceptions permitted where common sense and the pursuit of truth demand it, is an important and valuable principle. But it is a disservice to that general principle if the courts limit the necessary exceptions so rigidly that the general rule creates a frequent and unnecessary injustice. . . .
>
> Hearsay evidence has been defined by Professor Cross as "a third person's assertation narrated to the court by a witness for the purpose of establishing the truth of that which was asserted". (Evidence, 2nd ed., p. 3. The underlying reasons for its exclusion are discussed at pp. 380-384.) In *Lejzor Teper* v. *The Queen*, Lord Norman said, "The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost. Nevertheless, the rule admits of certain carefully safeguarded and limited exceptions". In the present case, if the anonymous workman who copied down the number could be proved to be dead, the records would be admissible as declarations in the course of duty. Since we do not know whether he is dead or not, the court, it is argued, cannot inform itself from the records. But in this case the fact that he is not on oath and is not subject to cross-examination has no practical importance whatever. It would be no advantage, if he could have been identified, to put him on oath and cross-examine him about one out of many hundreds of repetitions and routine entries made three years before. He could say that to the best of his belief the number was correct; but everybody already knows that. If he pretends to any memory in the matter, he is untruthful; but, even if he is, that in no way reflects on whether he copied down a number correctly in a day's work three years before. Nor is it of any importance how he answers the routine question in cross-examination: "You have made a mistake?" Everybody knows that he may have made a mistake. The jury knew it without being told, the judge told them so at least once, and both counsel told them so, probably more than once. The only questions that could be helpfully asked on the matter were whether the particular system of recording was good and whether the particular system had been found to be prone to error in practice. The questions could not be answered by the individual workmen but they could be dealt with by Mr. Legg if the defence wished to probe into the matter. He and not the workmen would know how efficient the system had been found in practice and how often, if at all, it had been shown subsequently that mis-recordings must have occurred. The evidence produced is therefore as good as evidence on this point can be; it is the best evidence, though it is, of course, subject, like every other man-made record, to the admitted universal human frailty of occasional clerical error. . . .
>
> There are on balance strong grounds for admitting the evidence in this case. The evidence is clear and cogent on a vital issue in the case. It is the *best* evidence. There is no authority directed to this point which

> binds your Lordships to exclude it. The basic principles which have found expression in other sets of circumstances clearly justify it and demand expression in this class of case also. The admission of this evidence is in accordance with a certain degree of practice which is fair and sensible. Its admission cannot disturb or offend any existing legal principles. In so far as the admission throws up by contrast some exclusion in some other class of case as being anomalous, that is no disadvantage. The development of this branch of the law has always been sporadic.[39]

Unfortunately, in this case, his opinion was in the minority.[40]

In both of these cases, the judges ignored what might be described as the natural reach that could be ascribed to the rules in question, if only the ordinary meaning of the language was considered. However, if the language is looked at as simply an instrument, a means for expressing and achieving the objectives the rules were designed for, the two judges could not be said to have deviated from the natural or appropriate reach of the *rule* itself, insofar as it is authoritative. Nor would it be fair to say that they have substituted their own values for those expressed in the rules and, in this sense, stepped outside their proper judicial role. Instead they assumed that the important aspect of any legal rule is the purpose and basic structure which it establishes, and that this must take precedence over imperfections in its wording. Only a legalistic, formalistic philosophy of law would find it unusual for a judge to recognize and act on this assumption.

V. *The Importance of Principle.*

Underlying the specific value choices embodied in rules are certain established principles and policies.[41] These are more general statements of accepted social purposes and standards which shape the direction of particular decisions and warrant new developments or changes in the old. Such principles are properly called "legal" when they become accepted as proper materials for legal argumentation. This occurs when the weight and orientation of specific legal rules in a certain area of the law suggests such a principle as the rationale for its existence and development, in the judgment of those who participate in the legal process. Not all

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[39] *Ibid.*, at pp. 894-895.

[40] A very interesting opinion was delivered by Lord Reid, always one of the most imaginative and creative Law Lords, who concurred in the majority result, largely because he thought major surgery was needed for the hearsay rule, and this was a job for the legislature, not a court. For reasons I will develop at length later, I think he could not have been more wrong.

[41] On the difference between principles and rules see Dworkin, The Model of Rules (1967), 35 U. of Chi. L. Rev. 14 and Hughes, Rules, Policy, and Decision-making (1968), 78 Yale L.J. 411. I have considered the same issue from a somewhat different perspective in the article cited in footnote 9, *supra*, especially at p. 428 *et seq.*

policy statements can be characterized as legal principles, as institutionally accepted grounds for judicial reasoning which may justify the overruling, limitation, or extension of specific rules which conflict with the rational implications of such a principle.

On the other hand, principles are quite a peculiar form of legal proposition whose significance is understandably understated by a theory such as legal positivism. They have no specific application to individual cases, demanding one result rather than another. Instead, they operate in conjunction with other principles to warrant the probable legal correctness of a new legal rule, which is then applied to the facts to justify a specific decision. Next, legal principles have the dimension of weight, something that follows from the fact that they do not logically require certain results. Principles do not contradict each other and become overruled. Instead, they have greater or lesser significance or importance to the professional audience, and gradually grow in effectiveness or fade from view. Finally, legal principles are never specifically enacted, at one point of time, by an authorized body or procedure. They make their appearance over a period of time, as lawyers, judges, and scholars begin to appreciate the impact of a course of specific decisions or new rules. Their period of gestation is always characterized by uncertainty as to whether they will successfully emerge into the status of a legitimate tool in the judicial armoury.[42]

Recent opinions in the House of Lords have exemplified this concern for basic legal principle. For instance, in *Warner* v. *Metropolitan Police Commissioner*,[43] the question at issue concerned the requirement of some form of *mens rea* for a conviction for unlawful possession of dangerous drugs. In a dissenting opinion on this point, Lord Reid traced the history of the doctrinal problem and found a consensus that, in cases of any forms of serious crime carrying a stigma attached to conviction, blameworthiness is prerequisite to guilt. He marshals both authoritative statements and reasoned arguments for his conclusion that such a principle is established in the law. In the light of this basic principle of the criminal law, which has become established as a legitimate presumption of statutory interpretation, he was not ready to make this an offence of strict liability without a clear and explicit statement from Parliament.

What is the significance of Lord Reid's judgment for our abstract formulation of a legal principle. In it he demonstrated that there had been a course of doctrinal development in the area

[42] An example of current interest is the development of a full-fledged doctrine of fault as the basis of tort liability and the hints of a change towards enterprise liability as the fundamental theory for the future.

[43] [1968] 2 W.L.R. 1303.

over a long period of years, one which had always assumed a more basic rationale. Quoting from numerous opinions, statements and decisions, he was able to conclude that the principle of *mens rea* had assumed much greater weight and significance in recent years, in the area of "true" crimes. However, the principle was not a rule, requiring the automatic conclusion of the applicability of the *mens rea* doctrine. There was a somewhat ill-defined exception, in the case of "public welfare" offences, whose continuance Lord Reid was ready to admit. This attitude towards the relevance of principle in the normal case is aptly illustrated by this passage:

> Normally the plain, ordinary, grammatical meaning of the words of an enactment affords the best guide. But in cases of this kind the question is not what the words mean but whether there are sufficient grounds for inferring that Parliament intended to exclude the general rule that *mens rea* is an essential element in every offence. And the authorities show that it is generally necessary to go behind the words of the enactment and take other factors into consideration.[44]

VI. *Legal Principles and Legal Reasoning.*[45]

When the legal system is viewed as a process carried on within a framework of accepted "legal" principles and policies, those which are considered by the relevant professional audience to be proper materials for argumentation, several interesting conclusions arise of particular concern here. The fundamental problem in the philosophy of judicial decision-making is how a court's concern for legal values can be reconciled with its attention to the quality of the law to be administered. Almost every respectable scholar admits the existence of sufficient ambiguity in either the common law or statutory rules that an intelligent judge can rationalize almost any decision in the light of previous authorities. This varies, of course, depending on the court on which he sits and the attitude of the judge to *stare decisis*, canons of interpretation, and so on. However, if a variety of techniques exist for interpreting and assessing cases, most possible conclusions can be stated in the language of existing legal materials. If this is so, is there any way in which a judge can, objectively and communicably, exercise his responsibility to subject his own policy preferences to the demands of his judicial role?

The answer which is suggested to this dilemma holds that a judge is limited by his obligation to develop the law, in specific type-situations, with reference to the demands of relevant legal principles. Although it may be legitimate for a judge to rework the authoritative legal materials so as to state a more acceptable and sensible legal rule for his case, he does not have discretion to

[44] *Ibid.*, at p. 1316.

[45] This is intended to be an elaboration of some ideas tentatively expressed in the article cited at footnote 9, *supra*, at p. 426, *et seq.*

choose any alternative he prefers or to justify this decision by any argument he believes relevant. Instead, he is obligated to consider, honestly and openly, the developing principles and policies in the relevant field, those which have been accepted as authoritative by the participants in the field. He is similarly obliged to evaluate these principles, and other authoritative materials, in the light of accepted standards and techniques for determining their importance and weight. He is then required to make the inference as to which legal conclusion is most probably demanded by such a reflective examination of the developing forces within the law, whether or not he personally likes the result.

Now obviously, such a theory of the justification of a judicial decision leaves ample room for the judge who does not feel responsible for any legal restraints on his role to disguise what he is doing in a more or less effective way. Although troublesome, this fact does not affect the point I am trying to make. I suggest that the conscious and open adoption of such a theory of judicial reasoning will enable a court to engage in active improvement of the quality of our law, while still retaining the benefit of the legal values I have previously described. It does so by limiting both the immediate range of alternatives open to such a court and the pace at which new alternatives can become legitimate. If a court is willing to consult doctrinal materials to see whether developments of principle suggest the viability of a new resolution of a legal problem, and to weigh the substantive values in such a change against the "legal" costs, then the same process of reasoning is available to the practising bar, without regard to changes in personnel and political attitudes on the bench.

Lawyers, in counselling towards or drafting an agreement, negotiating about or preparing litigation, and, finally, arguing to a judge, will be able to participate vicariously in the latter's probable process of reasoning. They will be able to consult the same doctrinal materials, to perceive the same force-fields of developing principles, to assess the weight and significance of these principles in reference to the instant case with the same kind of professional "feel" as the judge, and thus to work out the same solution to this legal problem as would a judge using the skills common to the craft. Obviously the exercise will not be totally objective and communicable since elements of tacit, inarticulate, artistic skills are involved. However, it should be sufficiently impersonal that those who must predict the decision can do so within a sufficiently narrow range for their purposes. Similarly, there can be adequate communication between judge and professional legal critic such that the former's activities are substantially restrained by his obligation of fidelity to the law.

In conclusion, judges can pursue justice in their decision-

making without sacrificing law, when the latter is conceived of as a fluid process stabilized by a concern for legal values.

The theory which I am sketching is one which advocates that lawyers and judges *should* share this concern about the proper mode in which judges should administer and develop the law. I am not assuming at all that judges and lawyers necessarily do share a common belief about what constitutes a good reason for a judicial decision, nor that they do in fact accept this theory in Canada. Quite to the contrary, especially as far as the latter point is concerned. However, if legal argument is conceived of in this way by bench and bar, the legal system can work as a self-improving but structured process, serving the sometimes conflicting, sometimes concurrent ends of law and policy. Such a conception must be shared in order that lawyers be able to divine in the ongoing system certain trends in the law, expressed in principle. Because they can anticipate the techniques of judicial craft as applied to the field of law in question, lawyers can predict how judges will assess the principles and, equally as important, argue meaningfully about how judges should use them.

The currently popular alternative to this theory, that of the judge as political actor,[46] should not be caricatured as advocating aribitrary, *ad hoc*, and totally unprincipled decision-making in individual cases. Rather, it argues that judges should try to implement new, preferred social policies in the law, with universal intent, to be applied consistently and non-arbitrarily. However, it does entail the thesis that judges should adopt these new policies on the basis of their own value-attitudes, subject to political calculation about their likely success. Hence judges are not said to be limited, either as to the occasion for innovation or the criteria for selecting the type of policy change, by any concern for a consistent, objective, and reckonable development of existing law. Judges are not in the same position as all political actors of course; they are not usually worried about getting elected or re-appointed (although perhaps they are about promotion). However, this theory does not recognize that judges are under any "legal" obligation to "empathize" with what decision might be expected on the basis of established authorities, because of a possible concern for surprising, retrospective applications, for instance.

In my opinion, most political science discussions of the judicial process fail to assess the *real* implications for a legal system and the adjudicative institution of a theory legitimating sporadic policy changes effected by courts. We must remember that the membership in a court is constantly changing, as also will be the majority's political attitudes. Moreover, it is much easier to have a small group come to a decision to make a policy change if the judges assume

[46] See my article cited at footnote 9, *supra*, at pp. 437-471.

they are not limited by the legal values in a practice of *stare decisis*. It is impossible to isolate a few examples of change and say these are exceptions which will not really harm the institution. Such changes will not be made except in the light of a conception of the judicial role that confirms their propriety. Presumably an honest court would apply this theory of its role consistently. If citizens think judges will act on the basis of substantive policy rather than established law in cases that do reach the court, they have no reason to settle cases on the basis of this law or to adhere voluntarily to policy seemingly implemented in earlier law. To avoid this, we must be able to anticipate when judges will change the substantive policy in the law. This means that the process of change must be impregnated with legal values of reckonability, objectivity and communicability.

Our concern here is not with some mythical ideology of the Rule of Law and judicial objectivity. The legal values of which we speak have immediate practical worth. Legal officials may want to allow people to plan their affairs free from concern for litigation, or even to encourage them to follow some general line of activity. If we state these goals in general rules in the light of which private citizens are to orient their conduct, we must assure the latter that the rules will not be changed retrospectively. It would be simply disastrous if reform-minded judges adopted most of the Carter *Report on Taxation* in their adjudication of cases arising before them. Legislators need not feel similarly constrained.

Again, we are talking about important matters of institutional practice if we emphasize the absolute necessity of keeping the vast majority of potential litigation out of the courts, through private settlement. Yet we want these bargains to be consistent with the fair implications of previously-enacted policy. This can only be true if the parties can predict what a court, whatever be its composition, would do generally in such a case, at least within a narrow range of alternatives. By the same token individual parties, via their counsel, can prepare cases, and, with the judge, focus efficiently on the real issue over which the dispute is joined, only if there is a consensus about most of the law that is applicable. It cannot be reiterated too strongly that most judges function by relying on private research into a problem. The judicial process would have to be changed drastically if judges had to rethink all questions, and had to do so by themselves without the aid of the parties.[47]

Finally, there has to be some kind of objective and communicable control on official activity, especially individualized dispute-

[47] There is obviously a vast difference between insight offered by the process of Royal Commissions, legislative hearings, *etc.* and the quality of an investigation which is possible through the adversary process of adjudication.

settlement. If the rules are continually changing, varying according to the political attitudes of the judges, people are not going to have their fair expectations of the law respected. More important, they may become subject to uncontrollable, arbitrary, albeit unconscious, abuses of official discretion.

VII. *Prospective Overruling.*[48]

A response to this kind of argument has been developed in recent years, one whose popularity makes it worth assessing, especially for the light it throws on the implications of the theory. When judges overrule decisions, they should do so prospectively, rather than retrospectively, in cases where the reliance interest in the previous law may be a deterrent to intelligent judicial law-making. A recent example is *Spanel* v. *Mounds View School District,*[49] where the court overruled centuries' old decisions creating governmental immunity from tort liability for its negligent servants. However, it refused to apply the new rule in the instant action for injuries suffered in a defective kindergarten slide because of the possibility of reliance on the earlier rule by the defendant school district. Such reliance might have taken the form of failure to obtain liability insurance or to investigate the accident for a possible tort claim. The court in fact said that the new rule would become operative only after the end of the next legislative session, when it could be assessed by the legislators.

There are obvious virtues in such a device. It enables theorists to demonstrate their rejection of the supposed Blackstonian theory that reversing a precedent does not change the law, but merely shows that the court has now discovered what it really is. Such a practice recognizes and frankly embraces the overtly legislative quality of judicial law-making by expressing it in the prospective form common to legislatures, rather than the retrospective form that is almost universal for courts. Finally, it removes the deterrent which usually exists to judicial innovation—whether or not the latter requires overruling an earlier precedent—of the unfairness of applying a new rule to people who acted on the basis of the old law. Under the new technique of purely prospective change, we can have the benefits of judicial concern for policy-implementation without significant costs to the legal value of certainty or predictability in the law.

[48] For general discussions of this problem see (1) Mishkin, Foreword: The High Court, The Great Writ and Due Process in Time and Law (1965), 79 Harv. L. Rev. 56; (2) Curran, Time and Change in Judge-Made Law: Prospective Over-ruling (1965), 51 Va. L. Rev. 201; (3) Fuller, *op. cit.*, footnote 16, pp. 99-105; (4) Levy, Realist Jurisprudence and Prospective Over-ruling (1960), U. Pa. L. Rev. 1; (5) Schaefer, The Control of Sunbursts: Techniques of Prospective Over-ruling (1967), 22 Record of N.Y.C. Bar Assoc. 394.

[49] (1962), 118 N.W. 2d 795 (S.C. Minn.).

When this issue is looked at in a more sophisticated way, though, several difficulties emerge. There are real institutional costs involved in prospective overruling, stemming from the same considerations that suggested a limited role for judicial law-making. Moreover there are better ways of reconciling the conflicting demands of legitimate judicial law-making and actual justifiable reliance in the few cases where this should really occur. Attention to these problems should tell us a great deal both about the limiting effect of legal values on judicial innovation and the scope for principled change.[50]

Prospective overruling is a classic example of the fallacy of "institutional fungibility". Although courts do make law, they do so in quite a different way than do legislators. Courts are designed to resolve disputes between private individuals arising out of the previous conduct of the parties. In the process of adjudicating these disputes, they can and should elaborate the relevant law in an intelligent fashion, insofar as it applies to the individual case. However, the level of rationality which judge-made law can attain is directly dependent on the quality of preparation and argument made by the parties. The main incentive to the parties (save for the exceptional, institutional litigant) is winning the individual case. If a new rule will be applied only prospectively, there is no incentive to a party who cannot benefit from it either to raise it or to argue it adequately. A variant of the prospective overruling practice, designed to overcome this defect, is the use of the new rule only in the case brought by the successful litigant, and then prospectively. However, this raises substantial problems about fairness to other litigants in the same position, and also to the defendants who are forced to subsidize incentives to judicial innovation when, on our assumption, they have justifiably relied on the earlier law.

The cause of these difficulties is obvious. An institution designed to dispose of disputes between individual litigants is being used to create new governing laws for society, an action which is irrelevant to the needs of the parties. Those who participate in the process are unaffected individually by the new rule, those who are affected by it do not participate in its creation. The question might be asked as to why the legislature is not used to perform this, its natural function, instead of a court, whose natural function is to spell out the law for the benefit of the parties who come to it. The ready answer is that it is not practically or politically feasible to achieve certain reforms in the legislature and recourse is had to the courts as the available alternative.

This raises the second problem inherent in prospective overruling. The legitimacy which is perceived in judicial decisions,

[50] I rely heavily here on the discussion in Mishkin, *op. cit.*, footnote 48.

that tends to make them acceptable even to those who do not like their substantive content, stems in large part from their more or less apparent "legality". It is obvious that fixing on the established law to be applied to a particular case entails a large amount of judgment in interpretation, and interpretation tends to shade over into development of the implications of settled principles. However, the range of alternatives open to a court is small and the resulting decision is believed to be the judge's perception of the correct result demanded by the law.

Such a quality of legitimacy inhering in the products of an institution has a substantial carry-over effect. It will be imputed to decisions which are not in fact reached by the kind of reasoning which furnishes the basis for continued popular acceptance of judge-made law. Needless to say, such an aura attaching to the latter is a wasting quality, one which should be carefully conserved by a politically astute court. Undue concern of the latter for the question of the effective date for its newly-enacted law, for the "newness" of what it is doing, tends to focus the attention of onlookers on the frankly legislative quality of the kind of innovation in question, rather than its adjudicative context.

The issue of prospectivity or not is a recurring one, and an extremely difficult one to resolve in marginal cases. It cannot be confined to issues of clear overruling because even new statutory interpretations or new common law developments, not previously raised give rise to exactly the same kind of problem. Nor may a court spell out in too great detail the kinds of situations in which changes in the law will be prospective because, in exactly these kinds of cases, there will tend to be a disincentive to adversary litigation directed to this issue. Constant and confusing argument directed to this question strengthens the hands of those who attack the institutional propriety of judicial activism. Any deterioration in the degree of acceptability and respect in which the court is held cannot be isolated and confined to just these unnatural kinds of judicial advances. It will spread and infect the prestige of the court as a whole, as well as the law it represents.

Does this matter one might ask? Surely the so-called symbolic impact of the law is purely mythical.[51] Courts are political bodies, wielding authoritative power to make value choices for society, and they should be busy exercising this power in the service of the right aims for the community. The sooner that mistaken theories of judicial passivity are exposed as fallacious, the better. Judges have substantial discretion available to them and prospective overruling is a useful device in minimizing the costs in using

[51] For a very forceful and effective statement of this position see Miller and Scheflin, The Power of the Supreme Court in the Age of the Positive State, [1967] Duke L.J. 273, 522.

this discretion in a forward-looking manner. One should not let some hypothetical, tenuous, and unproved effects of supposedly "unseemly" legislation inhibit judicial policy-making as long as the latter is intelligently in favour of the right values.

It is true that the supposed legitimacy of judicial decision-making, accruing because of the popular belief in judicial adherence to law, is sufficiently speculative that we may be sceptical about justifying judicial self-restraint on this account alone. Moreover, the device of prospective overruling does solve the problem of possible innovations in reliance on the earlier established law, more or less. However, these are only a small part of the legal values which a sophisticated theory of the unique and limited role for the judiciary deems important. The issue earlier discussed, of the impact of prospective overruling on the quality of adversary participation in a dispute-settling institution, remains unsolved. Even more important, the real reasons why popular expectations afford only a limited scope to judicial creativity are untouched by our scepticism about symbolic legitimacy. A court is a relatively uninformed, unrepresentative, and unaccountable institution. Its chief functional contribution to a high quality of legal development, the rational elaboration of accepted principles in concrete situations, depends on a stable framework of law isolating the marginal questions on which it can focus. All of these are good reasons why we should be very sceptical of the device of prospective overruling as a means of justifying a wider, undifferentiated, legislative role for courts.

What about the problem of prospective overruling from a different perspective—in cases of judicial innovation within the sphere where it is legitimate. For the very reasons why such a role is appropriate, solely prospective application of new rules should rarely, if ever, be necessary. Judges should be ready to elaborate basic principles within the legal order even if this requires the reversal of particular rules. Remember, though, that such creativity should be incremental, occurring in a step-by-step development, with many intimations of what is happening and the early exposure of the underlying values so that their implications may be foreseen. Substantial judicial changes should be confined to areas that are not the subject of sharp social dispute, or when there can be reasoning by analogy from legislative policy choices within the relevant legal field. If lawyers know that judges do conceive of the law as in a process of structured development, rather than as a set of specific, discrete, enacted rules, they should be quite capable of assessing the weight to be given to early judicial pronouncements and warning their clients away from danger areas. Reliance on such rules would be rare, it would almost always be unreasonable and unjustified if it did exist, and

it would be outweighed by the unfairness of depriving the litigating "one man lobby" of the results a fair reading of the established principles demands.

In the *Spanel* case[52] I mentioned earlier, the court justified its overruling of the immunity doctrine for several reasons: it is generally recognized now that the earlier rule had originated in a mistaken application of an English decision and that any reasons which might have justified it no longer obtained in an age of liability insurance; earlier opinions had frankly criticized the rule, qualified it severely, and called for its total reversal by the legislature; the legislature had responded with limited reforms evincing at least some agreement with the policy in favour of tort liability; courts in neighbouring state jurisdictions had overruled the doctrine in a pattern of recent decisions. In a legal system where a limited power of judicial law reform was recognized, it would not have taken much legal imagination to decide that the immunity doctrine rested on shaky foundations and that a client seeking to plan his affairs should be loath to rely on it. The reasons why we want to protect private expectations about the legal quality of their conduct do not extend so far as to safeguard the right of anyone to rely on the stability of the extreme boundaries of the letter of previously-stated law. This is particularly true when we compare this reliance interest with the expectation of the young litigant, or his parents, that an institution will stand behind its negligent but judgment-proof employees. The policy of legal justice, the fair and objective application of the law to those with equal positions under it, requires that such equality of result be afforded to those entitled to a decision based on the underlying policies and principles within the system, not their accidental statement in previously-announced rules.

In conclusion, the practice of retrospective overruling furnishes a kind of "bright-line" test of the propriety of judicial innovation, seen from two points of view. Can a litigant complain that he could be unfairly surprised by the application to him of a new rule, one which was not adequately and reasonably foreshadowed in the developing field of law which obtained at the time he acted? Could the other party complain that prospective overruling would unjustly deprive him of the benefits of a new rule which he could fairly expect to emerge from the process of adjudication, one he has set in motion as a "one-man lobby"? If the answer to the first of these questions is yes and to the second is no, a court attempting to respect the limits of its adjudicative role should look very carefully before it plunges ahead.

[52] *Supra*, footnote 49.

VIII. *The Problem of Application of the Theory.*

Up to now, this article has been concerned with the formulation of an approach to the delimitation of the judicial role. Of necessity, such a discussion must be carried on at a rather abstract level. I have suggested that the commitment of courts to the Rule of Law in their own activities should be visualized as the pursuit of legal values, the adherence to legal principles. It should be obvious that this cannot be the easy and automatic application of a pre-existing legal regime. Moreover, I do not contend that pursuit of legal values is an absolute principle, taking precedence over all conflicting substantive goals, however compelling the latter may be. Legalism is a desirable policy, to be assessed and applied in the light of its relative weight in individual situations. It should not become an ideology blinding its adherents to the limitations inherent in the very reasons which justify its acceptability.

A fruitful analogy is that of judicial sentencing. Decision-making here should, optimally, be carried out with some understanding of the objectives sought by the criminal law system. On the other hand there are no automatic standards controlling the exercise of discretion. The relevant objectives—incapacitation, deterrence, rehabilitation, retribution—are usually expressed at a very high level of abstraction. Intelligent pursuit of these objectives requires that we understand what is involved in each, why they are desirable, and what their likely relevance is to certain recurring kinds of situations.

Sometimes a particular objective is unimportant.[53] Sometimes all of the relevant objectives point, cumulatively, in the same direction.[54] Sometimes important objectives may conflict and we must utilize a standard about community priorities together with our judgment of the relative weight the instant facts have for each objective.[55] The task of the judge is to make a rational, albeit intuitive, assessment and evaluation of the marginal gains and costs in different solutions before his final selection of a course of action. Judgment must be rational in the sense that the judge brings to bear some theoretical and critical appreciation of the significant facts of the situation. Finally, though, it is intuitive—in a sense artistic—since the correctness of the final weighing process may not be open to objective, communicable demonstration.

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[53] For example, the rehabilitation of a businessman convicted of white-collar crime: see *R.* v. *Hinch and Salanski* (1968), 62 W.W.R. 205 (B.C.C.A.).

[54] For example, the need for probation and in-community treatment of a respectable and psychologically disturbed sex offender; contra *R.* v. *Jones* (1956), 115 C.C.C. 273 (Ont. C.A.).

[55] For example, the need for rehabilitation versus the need for incapacitation for community safety in *R.* v. *Roberts* (1963), 39 C.R.1 (Ont. C.A.).

I suggest that the task of the judicial innovator involves much the same kind of reasoning process. First, he must assess the substantive argument for change and ask himself whether the policy case for a new rule has been made out and, if it has, to what extent. He must then take *realistic* account of the legal values described above, as they apply to the instant situtation, and see whether they do conflict with the substantive value and, if so, to what extent. Again, the final answer must be reached through an intuitive, balancing process.

Implicit in what I have just said is that there are significant differences in the interaction of legal values and the social conduct to which the system relates. One of the tasks of the theory of judicial decision-making in the future is the systematization of our present, "common sense" understanding of what these differences are and what our reaction to them should be. I have room here for only a few preliminary remarks, indicating some of the relevant refinements that have been made.[56]

A very important area of distinction within the legal system differentiates primary conduct by private individuals, remedial conduct by these same individuals, and conduct by officials and other participants in governmental dispute-settlement, for instance, by adjudication. These three dimensions of human conduct are progressively more likely to have legally-trained and knowledgeable individuals involved. Moreover, they are progressively more likely to afford the leisure to obtain a legal opinion about proposed actions. In this sense the details of the law are likely to be more relevant to the third situation than the first. As regards private conduct undertaken without legal advice, it is probably more important that the law coincide with popular expectations than that it remain technically certain.

On the other hand, changes in the legal rules will be progressively less likely to involve injurious reliance on previously-established principles now sought to be changed. In the case of purely private conduct, it is much more important that parties be able to orient their conduct in the light of shared principles that avoid legal disputes. Once the dispute has arisen, and the lawyers are involved, the interest in predictability is not as great when the judges come to decide how they should dispose of the problem.[57]

[56] The following is based mainly on Hart and Sacks, *op. cit.*, footnote 21, pp. 124-126, adapted somewhat for my own purposes.

[57] For instance, after an accident has occurred and caused an injury, a dispute arises in the form of a tort action and the lawyers are concerned for future action only to apply "remedial" rules, such as those determining the extent of liability. The latter do not have any real influence on the conduct of people who have acted already with or without reference to the "primary" rules which define the basis of liability (and which, I surmise, are rarely influential in determining the actual course of conduct).

Finally, when the case is actually in court, and we are concerned with rules that determine the conduct of the process (for instance, hearsay rules of evidence), there is little or no value in preserving outmoded rules because someone argues that he may have relied on their continuance.

Other distinctions may be made within the various dimensions of conduct. As regards rules regulating primary conduct, some (such as criminal law) may involve the exercise of so drastic a form of state power that we feel it vitally important to give everyone a fair chance of avoiding it at the time he acts.[58] Other situations may normally include consultation with a lawyer, and a sequence of relationship over time, such that reliance on technical but clear legal rules is deemed vital.[59] Yet, the law of negligence may rarely involve conduct taken in actual cognizance of, and reliance on, legal rules. The legal regime may be concerned mainly with allocation of a loss after it has occurred in a way which fairly accords with popular expectations in our society. In such a case legal values may properly take second place to considerations of justice and social policy.[60]

Of course, it is fallacious to believe that the only relevant "legal" value is predictability. Equally as important may be the institutional needs of the courts, including both practical problems of work load and the sense of legitimacy that is extended to their products. For instance, in the abstract it might appear that better substantive results will flow from the application of a *standard* rather than a rule, one which takes account of all the relevant circumstances in the individual case. The difficulty is that standards may require a decision from a court much more often than rules, which can be self-applied by the parties with a greater accuracy of prediction as to what a court would do. Hence, in an over-all sense, the marginal gains in rationality from a "standard", or from changing rules, may be outweighed for society by the marginal increase of the costs of official settlement of disputes in this area.

In the same way, the legitimacy of policy-oriented judicial innovation is likely to vary quite radically within different areas of the legal system. Some questions may arise within technical lawyer's law, where there is a well-structured set of principles and rules from which a reasoned decision can be reached, and in which a new rule can fairly be said to be the neutral elaboration of shared purposes and expectations within the relevant part of

[58] See the discussions of the "void for vagueness" and "strict construction" rules, in Packer, *op. cit.*, footnote 28, p. 79 *et seq.*

[59] The usual example cited for this purpose is the law of property. A brilliant discussion which should shake this dogmatic assumption is Halbach, *op. cit.*, footnote 31.

[60] See Keeton, Creative Continuity in the Law of Torts (1962), 75 Harv. L. Rev. 463.

society.[61] On the other hand, an issue may come to court involving very complicated problems of social policy, where the relevant law that is available is just too ambiguous and irrelevant to point strongly in one direction rather than another, and where judicial innovation must involve the subordination of the deeply-felt interests of important groups within the society.[62] The implications of the legal and institutional values we should pursue are quite different as the problems vary along a spectrum from one of these extremes to the other.

What ought judges to do when they have analyzed along these lines a proposed change in the legal system? The mood of judicial technique is aptly characterized by Llewellyn's phrases "the law of leeways" or "the law of fitness and flavour".[63] What this suggests is that the maintenance of legal values is to be considered a distinctive and independently-valid aim, but not to be an absolutely overriding prerogative. Each problem is one where different solutions will have varying implications for legal values. As is obvious, the different solutions proposed (from maintenance of the status quo, through incremental, moderate or radical change) also have varying degrees of warrantable, substantive value. The task of the judge is to exercise his judgment, defended by a reasoned opinion, as to whether the substantive gains to be made are worth the varying institutional costs. The greater the anomaly in the law, and the more obviously right and acceptable the substantive solution, then the greater the degree of legal dislocation that is justified (and vice versa).

Several caveats are in order. Some substantive changes may not only be neutral as regards legal values but even be positively demanded by them (especially when the legal order is envisaged as encompassing legal principles and tenets, as well as static, specific legal rules). Second, it is always the duty of a court to minimize the dislocation to legal values in its opinion, and to maintain the legitimacy of its product, by relating what it is doing to the legal principles that have been established before. Finally, I do not suggest substantial gains in social policy (the end) can never justify overriding substantial interests in legal or procedural techniques (means). As long as what is being done is open and above-board, I do not as yet suggest that a judge is absolutely committed by his office to "legally" defensible reasoning.[64]

[61] A good example is the hearsay rule which was the subject of the decision in *Myers* v. *D.P.P.*, *supra*, footnote 38. This was precisely the wrong problem for which a legislature was preferable to a court.

[62] An example is the disastrously misconceived intervention of the House of Lords in labour management conflict in *Rookes* v. *Barnard*, [1964] 1 All E.R. 367. See aso the discussion of the *Hersees* case, *infra*, footnote 69.

[63] The Common Law Tradition (1960), p. 213 *et seq.*

[64] *Cf.* Sartorius, The Justification of the Judicial Decision (1968), 78 Ethics 171.

IX. *Two Examples.*

In the concluding portion of this article, I wish to deal in a little more depth with two recent examples of judicial innovation. One of these, I believe, falls within the proper scope of judicial creativity; the other, outside. The two cases illustrate the problematic, debatable quality of such judgments, but also show how the various abstract theories and principles gain content when used in particular situations.

The first example is the recent decision of *Maki* v. *Frelk*, dealing with the traditional common law rule that contributory negligence is a complete bar to tort recovery by a plaintiff. The Appellate Court for the Second District of Illinois abolished the common law rule and substituted for it a mitigated form of comparative negligence.[65] The Supreme Court of Illinois, over a vigorous dissent, reversed this decision, holding that "such a far-reaching change, if desirable, should be made by the legislature rather than by the court".[66] I would argue, to the contrary, that such a change is within the proper competence of a court.[67]

I assume, for purposes of this argument, that comparative negligence is a rule much preferable to the all-or-nothing theory of contributory negligence. The reason that this is so is the inconsistency of the latter rule with the more general principles of the basis of liability within the law of torts. The assumption of the latter is that it is both a necessary and a sufficient reason for shifting losses from one individual to another that the latter has been at fault. Fault here means that the defendant has been in breach of a standard of conduct established by society for the protection of others from injury. When someone is, avoidably, in breach of such a standard, and has caused injury to another, it is fair that the innocent victim be able to shift the burden of the loss to the one who is responsible for it—who could and should have prevented it occurring. When two individuals have shared responsibility for the occurrence of a loss, the same principles require that they share the burden it causes, and in some rational proportion to their relative degrees of responsibility.

The rest of the case for comparative negligence consists largely in refuting the rationalizations that have sprung up to justify a rule of contributory negligence which has always suffered from a lack of adequate explanation. The important point, though, is that

[65] (1966), 229 N.E. 2d 224 (Ill. App. 2nd Dist.).

[66] (1968), 239 N.E. 2d 445 (Ill.).

[67] I have relied heavily, although for my own purposes, on the various pieces in Symposium, Comments on *Maki* v. *Frelk* (1968), 21 Vand. L. Rev. 889.

The case is used as an illustrative example and I assume, without demonstration, many of the factual statements I make. Even if they are incorrect, this changes only the specific conclusion I draw for the substantive problem, not, I believe, the validity of the theory.

judicial change, as a substantive matter, is justified here by appeal to a basic principle that permeates the whole system and in the light of which the existing specific rule is an irrational anomaly. We can ascertain the existence of a principle that fault is the basis of tort liability and assess its weight by looking at the instances in which it is verified in the established doctrines. It may be that this principle is not as yet fully developed in the law or that it is presently being eroded by a theory of enterprise liability. I think it is a fair statement, that courts can find sufficient stability in the developing tort law process by appealing to this standard and elaborating its logic so as legitimately and objectively to eliminate anomalies like the contributory negligence bar.

The fact that courts can operate in this area by reasoning from an established consensus in the law that fault is the basis of liability is a good start in the case for judicial innovation, but not sufficient for the conclusion. However illogical at its roots, a judge-made rule may have become imbedded in the centre of complicated sets of doctrines which should only be changed in one systematic legislative reform. Private or official reliance on a clearly stated specific rule may have led to patterns of behaviour, organizational structures, and so on which judge-made rules cannot and should not try to change. The legislature may have tacitly accepted the rule for a long period of time, confirmed this by accepting it in certain specific contexts, and refused to enact the very changes the court now proposes to adopt.

What is the case for changes in the contributory negligence rule in face of such objections? The first objection argues that the court is not simply repealing an anachronistic doctrine because something must be substituted in its place, and the specific definition of the replacement is something complex indeed. The new rule must be either fully proportionate to degrees of responsibility, or operate by some formula such as equal responsibility, or comparative negligence if and only if the defendant was less to blame than the plaintiff. Responsibility must be a function of either fault or cause or a combination of both. Problems of set-off, multiple defendants, contribution between joint defendants, and so on must be dealt with. The application of the rule to cases of intentional misconduct, or assumption of risk, or guest passenger statutes, and so on must be determined.

There is no doubt that the issues involved in working out a comparative negligence regime are many and complicated. The argument would be that the sporadic process of appellate litigation of these issues would be too slow, uncertain, and irrational a way to develop the system. Systematic legislative review of all these questions and once-for-all adoption of a consistent scheme disposing of each of them is the preferable avenue of reform. In

this way a great deal of unnecessary "elucidating litigation" would be avoided in the development in this area of the law.

There are several difficulties with this argument. In the first place, it proves only that legislative reform can be better than the judicial variety. The trouble is that judicial reform in this area is necessitated by lack of legislative initiative. Proof that the legislature can do a better job than the courts does not entail the conclusion that judicial creativity is worse than the maintenance of the status quo. This is substantiated by the fact that almost invariably legislatures, when they have enacted this reform, have simply adopted the principle of comparative negligence and then left it to the courts to elaborate the details. The evidence does not indicate they have not done an adequate job here.

In fact, for reasons suggested earlier, it is very likely the opposite conclusion should be reached. We must be careful not to be overly romantic about the legislative process. The kinds of individuals likely to be involved in drafting a reform of this kind will probably be of no higher calibre than the judges and bar involved in appellate litigation of these problems. There are no esoteric policy arguments, requiring consultation with experts from different fields or lengthy factual investigations. The occasion for the judicial change will be a concrete dispute high-lighting the relevant factors in the type-situation. The arguments for and against different solutions will be focused on the specific issue and likely to consider it in much greater depth.

It is true that a sequence of changes can give rise to an irrational pattern of rules when one issue is considered in isolation from another to which it is related. On the other hand, an intelligent doctrine of *stare decisis*, especially one that meaningfully distinguishes the *ratio decidendi* and *obiter* dictum in an opinion, can solve most of these problems. The very fact that the issues do develop over time gives rise to a higher quality of law as many judges, lawyers, and commentators can reflect on what a rational and coherent pattern of law demands in the area.

What about the further objection, that however irrational and anachronistic it may be, there is a substantial reliance on the specific rule by those whose conduct is governed by it, and their expectations should not be defeated. The discussion earlier of the different levels of behaviour under a legal system is relevant here. The rule relating to contributory negligence is not one that has any significance for "primary private" activity. When someone drives his car or fails to shovel his walk, and does so in breach of normal expectations of reasonable behaviour, he does not do so in reliance on a rule that, if someone is injured, and that victim was himself negligent, he will not have to pay the injuries incurred. (Even if he did think about this, such is not the kind of reliance

we would feel justified.)

The contributory negligence rule is essentially one relating to remedial law, the tort problem of extent of liability, and involves the reliance interests peculiar to this area. Cases that have already been decided or settled would not be affected by a change in the rules. However, some defendants who might have settled if they did not think contributory negligence was a defence may have gone to court, with its attendant expense, when they might otherwise not have done so. More important, insurance companies in settling the premium rates for liability insurance, may have relied on a certain incidence to tort recoveries under the old rule and find the level raised retrospectively by the change. Such arguments cannot be assessed in the abstract. The existence of a rule of last clear chance as an exception to the contributory negligence bar, and the practice of juries waiving plaintiffs' minor negligence or illegally proportioning negligence in fixing damage awards, are factors that are relevant to a realistic appreciation of the reliance interest. The actual statistical practices of insurance companies, the extent to which they take account of specific legal rules in settling premiums, their capacity to make adjustments in premiums over time to reflect changes in a relatively stable but predictably evolving system of tort law, are all relevant in testing the reliance of these the insurers.[68] Even if either or both of these legal values do turn out, on balance, to have some validity, we must still weigh their significance as a justification for stifling change in this area, or confining the court to prospective overruling.

A final argument might be made that the legislature has acquiesced in the long-standing common law rule by failing to overturn it and that this is enhanced by its refusal to adopt changes actually proposed to it. One might argue in the abstract that legislative failure to act, even its positive refusal to act, cannot constitutionally limit the power of the court to overturn its own creations especially since the legislature, if it feels strongly enough, can reverse the judicial reform. More realistically, we can look at the way a legislative body reacts to this kind of issue.

On the one hand, we have a rather diffuse interest in a technical legal rule which adversely affects unrelated individuals, and before they are moved to do anything about it. On the other side, there is a powerful lobby for the narrow interest in preserving a legal rule which keeps insurance premiums down to a more acceptable level. The dispute is not of the type that will function in an election programme or over which a political party or government will spend much time or energy fighting. Legislative change, if it is likely to come, will be primarily motivated by the same

[68] As to which see Morris, Enterprise Liability and the Actuarial Process: The Insignificance of Foresight (1961), 70 Yale L.J. 554 and Peck, *op. cit.*, footnote 12.

narrow strata of bench, bar legal writers, and so on who participate in judicial reform, functioning here through law reform commissions, bar associations, informal consultations with the Attorney General's Department.

This may be precisely the kind of issue where considerations of institutional justice require the isolation of competing interests as one-man lobbies in an adversary process, in a more or less equal appeal to established principles within the legal system, asking that the fair implications of this system determine the rule that should obtain in the particular context. It is not, perhaps, inconsistent with the values of democracy that, in some cases at least, individuals should prevail only through the force of their arguments, not through the political power they represent.

A contrasting case, one that I would argue falls on the other side of the line delimiting judicial creativity, is the Ontario Court of Appeal decision in *Hersees of Woodstock* v. *Goldstein*.[69] In this case the court established the rule that secondary picketing is illegal *per se*, under the common law. The problem is somewhat different from that of *Maki* v. *Frelk*,[70] because here there was no clear and long-established rule in Ontario that secondary picketing was legally permitted. Still, it was a fair inference from the authorities accepted as binding up to then that there was nothing peculiar about this form of union pressure which attracted legal liability.[71] None of the torts hitherto used to limit union conduct properly applied to the facts in the case. Although not unambiguously a case of judicial overruling of established doctrine, the case was clearly a judicial innovation.[72]

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[69] [1963], 2 O.R. 81 (Ont. C.A.).

[70] *Supra*, footnote 65.

[71] The earlier cases are analysed in Carrothers, Secondary Picketing (1962), 40 Can. Bar Rev. 57.

[72] That the court recognized this fact is perhaps shown by this statement of Mr. Justice Aylesworth: "But even assuming that the picketing carried on by the respondents was lawful in the sense that it was merely peaceful picketing for the purpose only of communicating information, I think it should be restrained. Appelant has a right lawfully to engage in its business of retailing merchandise to the public. In the City of Woodstock where that business is being carried on, the picketing for the reasons already stated, has caused or is likely to cause damage to the appellant. Therefore, the right, if there be such a right, of the respondents to engage in secondary picketing of appellant's premises must give way to appellants right to trade; the former, assuming it to be a legal right, is exercised for the benefit of a particular class only while the latter is a right far more fundamental and of far greater importance, in my view, as one which in its exercise affects and is for the benefit of the community at large. If the law is to serve its purpose then in civil matters just as in matters within the realm of the criminal law, the interests of the community at large must be held to transcend those of the individual or a particular group of individuals. I have been unable to find clear and unequivocal precedent for this principle in any of the numerous decisions at all relevant to the question, to be found anyhere in Canada. . . .

Despite, however, the inclusion in these cases of secondary picketing of

Another differentiating factor in this case, in my opinion, is that the substantive rule adopted is undesirable. This is not the time or place to debate the merits of such union conduct. Some indication of the complexity of the problem can be gleaned from the contrasting *Tree Fruits* decision of the Supreme Court of the United States.[73] This case, in almost an exactly analogous situation, held that a legislative provision regulating secondary picketing must have a strained exception read into it to legalize the union picketing because it may well have been an exercise of institutionally-protected freedom of speech. Secondary pressures can only be limited by close attention to such varying factors as the object of the appeal—consumers or employees, the tactic selected—picketing, hand-billing, boycott, the relationship of the secondary employer to the primary employer, the rules relating to continuance of operations at the primary plant during a lawful strike, and so on. It is highly unlikely, given the present state of collective bargaining legislation, that any blanket prohibition of secondary pressures can be justified. It is certainly true that the Court of Appeal did not begin to make, did not even see the necessity of making, any such justification.

The argument I wish to make, though, is that even if the court had been prepared to adopt a set of rules which I feel deal adequately with the issues and interests involved in secondary picketing, it would have been inappropriate on their part to establish these rules in our society. It would have seriously offended against certain of the important legal values which I have outlined earlier and which were also involved in the *Maki* v. *Frelk* problem.[74]

One such value which was not infringed by the decision, despite its retrospective application, was the value of reliable, reckonable rules governing prior conduct. Theoretically it might be said that this is a classic case of unfairness, since a person is made liable in tort to another for engaging in conduct at a time when he thought it legal (and the union may well have consulted counsel) and there was no good reason to believe it was seriously out of line with the community's standards of behaviour.[75] Realistically, though, there is no such infringement on the reliance interest

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the unlawful elements I have mentioned, I deduce therefrom a trend toward if not a positive statement of the principle I have enunciated. . . ." *Supra*, footnote 69, at pp. 86-87.

[73] *N.L.R.B.* v. *Fruit and Vegetable Packers* (1964), 377 U.S. 68, 84 S.Ct. 1063. The best discussion of secondary picketing is Lesnick, The Gravamen of the Secondary Boycott (1962), 62 Col. L. Rev. 1363.

[74] I have relied for much of what follows on a Comment on the Hersees case by my colleague, Harry Arthurs, in (1963), 41 Can. Bar Rev. 573.

[75] By contrast with the situation which was the subject of a real innovation in tort doctrine in *Hedley Byrne* v. *Heller*, [1963] 2 All E.R. 575. A very significant discussion of judicial creativity in the context of this case is Stevens, Hedley Byrne v. Heller, Judicial Creativity and Doctrinal Possibility (1964), 27 Mod. L. Rev. 121.

of the picketers since the new rule was not used for purposes of a tort suit for damages but rather as the basis for a forward-looking injunction against like future conduct.

Nor is the decision likely to endanger the efficient private settlement of cases, or the orderly disposition of litigation, by encouraging lawyers to ask for wholesale judicial changes of other accepted legal positions, either in the labour field or elsewhere. There were relatively few areas of union economic pressures left uncontrolled after this decision, in a way substantially out of line with its policy. Moreover the fact that it occurred in the context of labour relations seems to have been sufficient reason for both lawyers and judges to consider it somewhat an aberration in the Canadian judiciary's unthinking adherence to *stare decisis*. In any event, no great rush to the Ontario courts for judicial reform has been evident since the opinion was published.

There are three other reasons for judicial restraint which are infringed by this kind of development. All of them are tied to the fact that there was available to the court no established legal pattern of principle regulating economic conflict in collective bargaining. There was no consensus within the relevant community concerning the appropriate standards from which a court might reason with relative objectivity and assurance to the appropriate rule for the specific type-situation.

On the one hand, free collective bargaining seems to require, as a logical concomitant, an effective strike or lockout as the ultimate tactic in implementing a party's bargaining position. Secondary picketing is a tactic which is an aid to the effective prosecution of a strike by a union. On the other hand, it appears to widen unduly the boundaries of the conflict beyond the primary parties to the dispute, and to involve injury to innocent third parties. Yet the employer has enlisted the aid of others—substitute employees —in frustrating the primary strike. The secondary employer is helping in this endeavour by continuing to do business with him, to supply goods or services, or to transport or sell his finished products. It may not be legitimate for the union to enlist the aid of third parties, either consumers or other employees, to wage a more equal contest against an employer who maintains his operations. The secondary employer may be injured in this endeavour, but perhaps he is not innocent and uninvolved if he persists in doing business with the struck employer. In any event, it certainly cannot be the policy of collective bargaining law to insulate third parties from harmful effects of lawful strikes, as is obvious from a case where a primary strike is successful by itself in shutting down the primary operation.

Again I do not mean to assert that a case cannot be made for drawing some lines limiting the area of collective bargaining con-

flict and tactics. I do say that there is no consensus in our law or society concerning the standards which justify drawing the lines in one place rather than another. The factors that are relevant include an estimation of the relative bargaining power of unions and employers, the desirability of allowing an employer to continue operations during a legal strike, the relative significance of appeals to consumers or other employees, the legitimacy of the pattern of union demands and employer responses thereto, the unity of interest, if any, between primary and secondary employers, the necessity for special rules for industries such as construction or the garment trade, and the peculiar importance of transportation unions implementing "hot cargo" policies.

As to some of these factors, the expert factual knowledge which is available is not shared by courts and cannot be satisfactorily brought to their attention through the adjudicative process. To give a minimal rational basis to a pattern of legal control, the kinds of studies which can be made through task forces, legislative inquiries, and so on are necessary. It is true that adjudicative development of the rules may be necessary for marginal problems which cannot be foreseen by the legislature. However, this activity, which is more appropriate for an expert specialized administrative agency than a generalist court, can only follow legislative activity which lays down some systematic policy for the area, and for this policy there must be a more informed basis than can be gained in adjudication.

Many of these factors, though, do not turn so much on factual knowledge as on deeply-felt attitudes about unions, business, economic conflict, distribution of income, inflation, and so on. The legislative process is the appropriate vehicle for registering these varying sentiments, weighing the strength and acceptance of competing interests in the society, working out compromises of position which are not readily defensible in terms of rational principle, and producing a legal scheme which is more or less acceptable because its process of adoption is perceived to be legitimate.

Judicial innovation, on the contrary, is not only inadequately supported by factual studies and theoretical examination of the problem, it is incapable of producing an adequately political solution for an eminently political problem. Judges drawn from a narrow stratum of society, having undergone an even more narrowing socialization in law, and insulated from popular pressure while on the bench, must necessarily be insensitive to these widely varying attitudes to the problem. Because judges must, conventionally, produce a rule to solve a problem, and must try to justify this rule in terms of a broader principle, the result will be an attempted solution to the problem which does not represent an "illogical" compromise of group interests. The rule must substan-

tially favour one interest in a continuing economic struggle. It is imposed on the other side with the force of law without the latter having any real consultation or participation in the course of its creation and imposed by an unrepresentative body which feels no obligation to be responsive to an important segment of the society. The result can only be a denial of any legitimacy to the rules which have been created and an erosion in the position of the body which creates them.[76]

Conclusion

This study has been concerned with one facet of the general question, how does a judge justify a judicial decision? I have argued that a judge need not confine himself to the application of legal rules and that it is not only legitimate, but desirable that he take a wider view of his role in the developing legal system. However, his creative, innovative function must be carried on with some sense of, and deference to, the legal and institutional values which are associated with his distinctive position within the legal process. The meshing of these sometimes competing, sometimes concurrent, goals can best be achieved by a judicial philosophy which gives primary emphasis to *principle* rather than specific *rule*, but which requires that extra-legal, policy, or value considerations be reflected in *legal* principle before they become determinative in a judicial decision.

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[76] Something which I think it fair to say has occurred in the status of the judiciary in the eyes of much of the labour movement.