LEGAL FORMALITY*

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> And in this law of Nature, consisteth the Fountain and Originall of JUSTICE. For where no Covenant hath preceded, there hath no Right been transferred, and every man has right to every thing; and consequently, no action can be Unjust. But when a Covenant is made, then to break it is *Unjust*: And the definition of INIUSTICE, is no other than *the not Performance of Covenant*.[1]

1. My first purpose in this essay is to clarify that version of the liberal theory of justice which asserts that justice consists in the impartial application of rules deriving their legitimacy from the prior consent of those subject to them. I will try to show that we can increase our understanding of this argument by recasting it in the form of what I will call the model of formality.

2. In particular, the model of formality is helpful in dealing with the best known of the specific manifestations of the problem of justice in the liberal state, that of the relations between a democratic legislature, an independent judiciary, and private litigants. Take it as a premise that the state may legitimately coerce an individual only if the state action represents the will of a legitimate legal sovereign. Take it as another premise that legitimate legal sovereignty can reside only in a government that is representative of the fundamentally independent and often conflicting wills of the citizenry, "representative" being used here to include both pure majoritarianism and more complex constitutional systems, but with no suggestion of the precipitation of a "general will." Then the fact that in the liberal state it is judges,

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[1] Thomas Hobbes, Leviathan 74 (Rhys ed. 1914).

not legislative bodies or elected executive officers, who are in charge of the application of state force to the citizens presents a problem. The version of liberal theory with which I am concerned in this essay attempts to resolve this problem through the idea that the legitimate legal sovereign, representing the citizenry, should make *rules* applying to the various situations in which state coercion might be used. Judges should then apply those rules, acting as agents of the sovereign. According to the theory, legal coercion will then be legitimate, or at least as legitimate as the political process that defines sovereignty.

3. My approach to this doctrine is through an integrated body of postulates and arguments designed to make the best possible case that judges ought to conceive themselves as rule appliers doing the will of law makers postulated to be legitimate. I mean to use the concept of formality to bring together three main strands in liberal theory. These are the contractarian political doctrine of Hobbes and Locke,[2] the tradition of legal positivism from Bentham and Holmes through H.L.A. Hart,[3] and the welfare economic analysis of writers like J.S. Mill and Coase.[4] My conception of the argument in favor of rule application has also been influenced by recent theories of judicial function and judicial role,[5] and by the attempts of scholars to plumb the

[2] Thomas Hobbes, *supra* note 1; John Locke, The Second Treatise of Civil Government, in Two Treatises of Government (Peter Laslett ed. 1960); The Federalist Papers (Rossiter ed. 1961); C. B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke (1962).

[3] Jeremy Bentham, Theory of Legislation (R. Hildreth, trans. 1864); Oliver Wendell Holmes, Jr., The Common Law (1923), and The Path of the Law, 10 Harv. L. Rev. 457 (1897); 2 Max Weber, Economy and Society: An Outline of Interpretive Sociology 641-900 (Guenther Roth & Claus Wittich eds. 1969); David M. Trubek, Max Weber on Law and the Rise of Capitalism, 1972 Wis. L. Rev. 720; Hans Kelsen, Pure Theory of Law and Analytical Jurisprudence, 55 Harv. L. Rev. 44 (1941); Friedrich Kessler, Natural Law, Justice and Democracy: Some Reflections on Three Types of Thinking about Law and Justice, 19 Tul. L. Rev. 33 (1944); Richard A. Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification (1961); H. L. A. Hart, The Concept of Law (1961); Charles Fried, Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test, 76 Harv. L. Rev. 755 (1963). See also Note, Civil Disabilities and the First Amendment, 78 Yale L.J. 842 (1969).

[4] John Stuart Mill, Principles of Political Economy (Winch ed. 1970); Lionel C. Robbins, An Essay on The Nature and Significance of Economic Science (2d ed. 1935); William J. Baumol, Welfare Economics and the Theory of the State (2d ed. 1965); Johannes de v. Graaff, Theoretical Welfare Economics (1967); R.H. Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960); Mancur Olson, The Logic of Collective Action; Public Goods and the Theory of Groups (1965); Frank I. Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Guido Calabresi, Transaction Costs, Resource Allocation and Liability Rules—A Comment, 11 J. Law & Econ. 67 (1968); A Mitchell Polinsky, Probabilistic Compensation Criteria, 86 Q.J. Econ. 407 (1972).

[5] Louis L. Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239 (1955); Henry M. Hart & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (Tentative ed. 1958); Herbert Wechsler, Toward Neutral

mystery of formalism in the law of contracts.[6] I have found the critics of liberalism[7] as helpful as the proponents, and have tried to use their insights to make the theory as rigorous and complete as possible.

4. The model of formality is *not* a description in the usual sense: it consists solely of postulated concepts and logical connections between them. Throughout this essay, I label the parts of the model in such a way as to facilitate its use in analyzing the problem of the relations between a legislature postulated to be legitimate because somehow "representative," judges, and litigating private parties. But the same model, with the parts relabeled, is useful in analyzing the other specific manifestations of the underlying dilemma of the liberal theory of justice. For example, the problem of formalism in contract law can be conceived as that of the relations between parties who have unanimously agreed to a set of rules, a judge, and those same parties appearing to challenge or defend the rules as they have worked out in practice. Likewise, one can approach the institution of "procedural formalism" (the writ system, the Roman *formula*) and "formalities" (the seal, the Statute of Wills, recording statutes) as attempts to deal with the same fundamental problem of legal order. Much of the exposition of the model of formality is a generalization of earlier theoretical work provoked by these particular instances.

5. My second purpose in this essay is to contribute to the critique of the

Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959); Jan G. Deutsch, Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science, 20 Stan. L. Rev. 169 (1968); Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals (1960), and On Reading and Using the Newer Jurisprudence, 40 Colum. L. Rev. 581 (1940); Charles E. Clark & David M. Trubek, The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition, 71 Yale L.J. 255 (1961); Lon L. Fuller, The Morality of Law (1964), and The Anatomy of Law (1968); Ronald M. Dworkin, The Model of Rules, 35 Chi. L. Rev. 14 (1967).

[6] Rudolf von Ihering, L'Esprit du Droit Romain §§ 50-55 (Meulenaere trans. 1877); Samuel Williston & George J. Thompson, A Treatise on the Law of Contracts (1936); Karl N. Llewellyn, What Price Contract?—An Essay in Perspective, 40 Yale L.J. 704 (1931); George K. Gardner, An Inquiry into the Principles of the Law of Contracts, 46 Harv. L. Rev. 1 (1932); Lon L. Fuller & William R. Perdue, Jr., The Reliance Interest in Contract Damages, I, 46 Yale L.J. 52 (1936); Lon L. Fuller, Consideration and Form, 41 Colum. L. Rev. 799 (1941); Arthur T. von Mehren, Civil Law Analogues to Consideration: An Exercise in Comparative Analysis, 72 Harv. L. Rev. 1009 (1959); Friedrich Kessler & Edith Fine, *Culpa in Contrahendo*, 77 Harv. L. Rev. 401 (1964); John Calamari & Joseph Perillo, A Plea for a Uniform Parol Evidence Rule, 42 Ind. L. Rev. 333 (1967). See also F. W. Maitland, The Forms of Action at Common Law (1936); S. F. C. Milsom, Historical Foundations of the Common Law 1-85 (1969).

[7] John R. Commons, Legal Foundations of Capitalism (1957); Georg Lukacs, Reification and the Consciousness of the Proletariat, in History and Class-Consciousness (Rodney Livingstone trans. 1971); E. B. Pashukanis, The General Theory of Law and Marxism, in Soviet Legal Philosophy (1951); Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630 (1958); Roberto Unger, Knowledge and Politics (unpublished manuscript, Harvard Law School). See also the works of Lon L. Fuller and Ronald M. Dworkin cited *supra* at note 5.

version of the liberal theory of legal justice represented by the model of formality. My argument is that a distinction between rule making and rule applying cannot be made to legitimate the coercive power of judges because a theory based on this distinction cannot deal in a satisfactory way with the contingent in History. In other words, this version of liberal thought has been unsuccessful in the attempt to use a theory of rules to transfer the postulated legitimacy of decision based on consent to the judicial administrators of a body of legal rules. I concede for the sake of the argument that rules are at least sometimes perfectly clearly applicable to particular situations, so that the judge cannot in good faith hesitate as to what the theory requires of him. My assertion is that *even under these most favorable conditions* the judge cannot legitimately conceive of himself as a rule applier. The argument is interesting, if it is valid, because it is quite distinct from and more general than the familiar criticisms of positivism, rule utilitarianism, and judicial restraint.

6. My third purpose is to show that while various familiar criticisms of judicial formalism have led American legal thinkers to restate the theory of the judicial role, none of the reformulations manages to evade the fundamental dilemma set out in the second part of this essay.[8] This I attempt to demonstrate through a brief review of prevalent attitudes toward judicial power, emphasizing the ways in which they transform without salvaging the underlying structure of formality.

I. The Theory of Formality

> The professional philosopher, who has no understanding of the peculiar technical interests and needs of law, can see nothing in formalism but . . . a clear derangement of the relationship between form and content. Precisely because his vision is directed to the core of things, . . . this anguished, pedantic cult of symbols wholly worthless and meaningless in themselves, the poverty and pettiness of the spirit that inspires the whole institution of form and

[8] For example, it is a common position that formality denies the judge his proper role as a *non-legislative rule maker*. The theorist then puts forward a set of rules about what kinds of decision are apt for judicial (as opposed to legislative) law making, and urges upon us that so long as the judge *restricts himself within the limits set down*, he can forget about the dilemmas of the mechanical rule applier. Here the theory of formality is driven from the battlefield of substantive law but appears to survive in the maquis of "institutional competence."

> results therefrom—all this, I say, must make a disagreeable and repugnant impression on him. . . . Yet we are here concerned with a manifestation which, just because it is rooted in the innermost nature of law, repeats itself, and will always repeat itself, in the law of all peoples.[9]

A.

7. As I will use the term here, a formal system is one that takes it as a premise that there are only two processes of decision a theorist need take into account when he sets out to build a theory of social order. These are rule application and decision according to purposes, or substantive rationality. Decision according to rule means, in the ideal typical case, the application of *per se* rules, that is, decision by the selection of one (or very few) easily identifiable aspect of the situation, and the justification of the decision uniquely by appeal to the presence or absence of that element. An example of rule application is the dismissal of a suit on an uncontested oral promise on the ground that the Statute of Frauds required a writing.[10] At the other pole, *ad hoc* or substantively rational decision making involves an identification of purposes and then an assessment or weighing by the decision maker of all those aspects of the situation which he feels have some bearing on the achievement of those purposes. Some cases are those of a regional planner

[9] Rudolf von Ihering, 2 II Der Geist das Romischen Recht 478-79 (1883) (A. von Mehren trans.).

[10] This essay is concerned with the activity of judges deciding lawsuits, and the rules discussed are directives to the judge about how to do this. "If such and such facts are found, then do thus and so." As I use the term, it is part of the definition of a rule that it is "absolute" within its scope: if the judge finds such and such to be the case, he either applies (or follows) the rule by doing thus and so, or the rule is no longer in force. It is likewise a matter of definition that rules can only be administered "mechanically," if by this is meant that the judge, as a rule *applier*, must proceed like a machine to do thus and so once such and such are established. See note 15 *infra*. There is, however, no necessity that the rule the judge applies be in any sense "general." When a judge decides a contract case, he may have to establish whether or not a particular named party did or did not do particular acts with regard to a single transaction in named goods. The contract in this situation operates as the factual predicate of a rule the judge administers, although it is hard to imagine a less general prescription. See Ronald M. Dworkin, *supra* note 5, at 22-29; Hans Kelsen, *supra* note 3, at 54-57; H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 614-15, 623-24 (1958) (although Hart's concept seems to require *some* generality); Max Weber, 2 Economy and Society, *supra* note 3, at 653-54 (rule application is "law-finding"); French Civil Code, Art. 1134: "Agreements legally formed have the force of law over those who are makers of them."

On the relationship between rules as thus conceived and principles, policies, equity, standards, presumptions and discretion, see note 11 *infra*.

deciding where to locate a dam, a Congressman deciding how to vote on a tariff proposal, or a court deciding a nuisance case.

8. The cases of substantively rational decision that will concern us here are those in which the purposes (values, ends, goals, interests, desires) of the decision maker are in conflict. When this is the case, rational decision involves a comparison of the possible outcomes in terms of some measure more general than any of the conflicting purposes. The decision making process consists, first, of bringing together these heterogeneous purposes on the same plane, within a common field, and, second, of identifying, by means of an objective standard, the outcome that "maximizes" the more general measure by achieving the best "mix" of purposes.[11]

[11] This footnote deals with the question of the role in the theory I am describing of discretion, principles (*e.g.* no one should profit by his own wrong), policies, equity, standards (*e.g.* due care, good faith), and presumptions (*e.g.* one is presumed to know the normal consequences of one's acts). The theory of legal formality consists of the working out of a model; thus it is based on the notion that we will get further with the enterprise of understanding, designing and justifying legal practices if we begin by making some very powerful "simplifying assumptions." The most important of these is that all decisions in the system consist either of rule application or of a substantively rational weighing of purposes, or of some mixed form. Principles, discretion, policies, equity, standards and presumptions are thus dispensed with as distinct elements in the analysis—either they are assimilable to one of the ideal types of decision (or a mixed type) or the theory is simply *not about them*. Consequently, none of them is mentioned in the exposition of the theory in Part I of this essay.

Of course, theories tend to try to expand their scope to cover as much of reality as possible, and the theory of formality is no exception. A basic strategy of the theory is to identify substantively rational decision with discretion, and then to assert that principles, policies, standards, equity and presumptions are all simply technical terms for grants of discretion by the rule maker to the rule applier. Thus the theory assimilates each of the concepts without any revision of the fundamental postulate.

First, standards, etc., are clearly not rules in the sense of the term used here, since they do not identify small groups of easily determined factual aspects of situations as the triggers for the mechanical application of official sanctions. Principles and standards may be asserted to be a part of the bases of decision although taken as a body they are highly contradictory; while rules either fully determine the situations to which they apply or are "no longer in force," a particular principle may be "in force" in some sense even though the result it suggests is rejected in most of the cases to which it is relevant. Even their strongest advocates claim only that principles and standards "guide" (as opposed to "controlling") decision. See Ronald M. Dworkin, *supra* note 5.

But that principles, etc., are not rules does not mean that they are necessarily merely indicators of grants of discretion—of a power to make substantively rational determinations in terms of the purposes of the decision maker. It is possible that they represent processes of decision whose psychological reality is fundamentally different from that of the maximizer or interest balancer. And if this special decision process (or processes) accounts for most of what is important in the law, then the choice of simplifying assumptions on which it is built may have rendered the theory of formality trivial or irrelevant from the very outset.

I think this the most convincing of the objections to the postulates of formality. In note 65 *infra* I mention some of the rather powerful counterarguments. See also note 41 *infra*. In the text, however, I simply assume that the theory of formality can deal with principles, policies, standards, equity and presumptions, either by assimilating them to discretion or by excluding them altogether.

9. The assertion that substantively rational process is as much a characteristic of social systems as of individual psyches is a vital step in the construction of the theory of formality. The conflicting desires of the individual have their equivalent in the conflicting interests of the group members, and rules like majority vote or money bid take the place of notions like the maximization of utility. Some examples of systems that we commonly conceive as designed to produce substantively rational decision in the sense adopted here are: a market for goods, the "marketplace of ideas," a legislature, interest groups in a pluralist democracy, and two parties negotiating a contract.[12]

10. We are accustomed to think of each of these systems as permitting the reflection (or expression, or representation) of each of a set of conflicting purposes in an outcome that is *controlled* by none of them. Everything depends on the force (power, weight, influence) of the competitors, and this, in turn, is determined by the factual situation within which the system exists. Thus the outcome is neither "natural" in the sense of being altogether beyond anyone's control, nor "deliberate," in the sense of being decided in advance by a manager or dictator. Someone sets up the system (except perhaps in the case of the psyche), and whoever performs this constitutional function is, in one sense at least, responsible for the results. But each decision reflects

[12] See Kenneth J. Arrow, Social Choice and Individual Values (2d ed. 1963) and James M. Buchanan & Gordon Tullock, The Calculus of Consent, Logical Foundations of Constitutional Democracy 11-62 (1962). It is a paradox of some interest that substantively rational decision in the presence of conflicting ends or interests cannot be conceived without reference either to the opposed concept of decision according to rule or to that of a natural harmony of ends or interests. This is the "formal" element in the model of substantive rationality. See *id.* and also H. L. A. Hart, *supra* note 10, at 603; Lon L. Fuller, *supra* note 7, at 638-41. First, unless natural harmony produces unanimity, the interaction of "raw interests" is in itself incapable of generating any resolution or common will. Out of the clash of interests (ends, desires, wants, objectives) can come only the fact of conflict. Cf. C. B. Macpherson, *supra* note 2, at 93-94. In order for the clash to have a larger significance—to represent an "outcome"—an "objective," "external," "dis-interested" rule or standard must intervene to assess or measure or evaluate what has happened. Second, unless some natural harmony spontaneously defines its boundaries, a substantively rational decision process implies some criteria that permit us to decide that it *is* in fact a process, rather than just a conflict of randomly colliding forces. These criteria take the form of rules defining those interests that are to be counted or included at the moment when we apply our objective rule of outcome determination (*e.g.*, if the institution of substantively rational decision is a legislature, rules come in both to indicate what number or combination of votes is required for decision and to decide who can vote). Finally, the notion of a decision *process* implies some stability over time, and therefore either a natural harmony that preserves the process from transforming itself into another process, *or* some rules having that effect, such as those forbidding the competing interests from adopting particular tactics thought to be destructive or destabilizing. The remainder of this essay simply assumes that a legitimate and stable substantively rational legislative process is in existence, sustained by some combination of rules and harmonies. The question addressed is whether such an institution can transfer its postulated legitimacy to its judicial agents. See §§ 1, 2. As to whether the rule applying pole of the dichotomy is not as dependent on substantive rationality as substantively rational decision is on rule applying, see note 14 *infra*.

the natural "surround" that determines the force of the competing values or interests, rather than the specific intention of a particular actor.[13]

11. *Formality* consists in the attempt to accomplish substantively rational results—*i.e.*, to achieve outcomes that "maximize" a set of conflicting purposes—through the substantively rational formulation and mechanical application of rules rather than directly through substantively rational decision processes. *Legal formality* is a characteristic of any legal system that can be described in the following way: (a) the purpose of the system is to serve the

[13] The *internal structure* of the concept of substantively rational process I develop here is that of the neoclassical economist's model of action as rational choice and of the psychological model of the self as the passive locus of appetites and aversions. For economics, see generally Lionel C. Robbins, *supra* note 4; Erich Roll, A History of Economic Thought 368-414 (3d ed. 1954). For psychology, see, *e.g.* Kurt Lewin, The Conceptual Representation and the Measurement of Psychological Forces, 1 Contributions to Psychological Theory, No. 4 (1938); Neale E. Miller, Experimental Studies in Conflict, in 1 Personality and the Behavior Disorders 431 (J. Hunt ed. 1944); Mathilda Holzman, Theories of Choice and Conflict in Psychology and Economics, 2 J. Conflict Resolution 310-20 (1958). This psychological/economic model is intimately related to the ontological postulates of liberal theory concerning facts and values. See §§ 17-20. Something very close to my distinction between substantive rationality and rule application is implicit in Lon Fuller's distinction between the "economics of marginal utility" and the "economics of exchange." See Lon L. Fuller, The Morality of Law, *supra* note 5, at 28. See also the discussion of interest balancing as a technique of judicial decision in §§ 72-78.

The name "substantive rationality" and its place in the theory of formality derive not from the tradition of political economy and behaviorist psychology but from Weber. Throughout *Economy and Society*, Weber emphasizes the opposition between processes he calls "substantively rational" (or "value rational") and those he calls "formally (or instrumentally) rational." Substantive process is associated with direct application of systems of values to particular situations, with concern for the achievement of outcomes rather than with the following of procedures, with the actual distribution of values rather than with efficiency in allocation of resources, and with flexible "administration" as opposed to legalistic "adjudication." Formal rationality, in the domain of law, is associated with the process of formulating and applying rules in the sense of the term used here (see note 10 *supra*). See 1 Max Weber, *supra* note 3, at 85-86; 2 *id.* 645-58, 809-15, 880-95; 3 *id.* 976-80. See also David Trubek, *supra* note 3, at 730, 733-34, 736, 744, 749. In all of these respects, my approach is identical to that of Weber.

Nonetheless, substantive rationality and rule application as I define them *differ radically in their internal structure from Weber's concepts.* Substantively rational process as I define it involves conflicting values whose application to particular circumstances is determined by an objective standard, an "ordering principle," or, in other words, a *rule*. See *supra* note 12 for a full discussion. As a consequence, this process is, *in Weber's terms*, inherently "formal." 1 Economy and Society 26. Weber's concepts of value rationality (*id.* at 24-25) and of substantive rationality in economics (*id.* 85-86) and law (2 *id.* at 657) are not employed in this essay.

Finally, Weber's conception of formal rationality in legal thought (*id.* at 656-57) includes a body of premises about the way in which rules should be developed and related to one another (*e.g.*, gaplessness, logical subsumption) as well as the notion of mechanical rule application I develop here. See *supra* note 10. It is an important aspect of the theory of formality that it excludes all such notions about how rules ought to be developed from the account of why judges should be rule appliers. See §§ 15, 16. Thus Weber's opposition of the substantive to the formal in modern law bears little relation, as far as the *definition of concepts* is concerned, to that of this essay.

conflicting ends of a legitimately representative lawmaker; (b) a substantively rational law-making process produces a body of rules designed to achieve these ends; (c) rule appliers apply the rules to cases presented to them by disputing private parties.

12. The essence of rule application, as I defined it above, is that it is *mechanical*. The decision process is called rule application only if the actor resolutely limits himself to identifying those aspects of the situation which, *per se*, trigger his response. He must *never* ask whether giving this particular response, in light of the total situation including *but not limited* to the *per se* elements, is best. The minute he begins to look over his shoulder at the *consequences* of responding to the presence or absence of the *per se* elements he has moved some distance toward substantively rational decision.[14] So long as he refuses to look over his shoulder, then from the point of view of anyone concerned with the particular consequences, anyone for whom this particular act of adjudication has a purpose, his action will—barring a providential arrangement of the universe not to be considered here—occasionally have effects on the litigants just the opposite of those desired. For example, the Statute of Frauds was intended to prevent the manufacture of evidence, but occasionally works as an escape hatch for a shady operator dealing with a legal neophyte.[15]

[14] Per se rules come to the judge as verbal formulas; it is up to him to fit the mass of facts the case presents into the categories that indicate what action he should take. This "fitting" of facts to categories can only be accomplished, within the framework of liberal psychological premises, through some process of "balancing" or "weighing" of cognitive stimuli some of which suggest one classification and some another. The definitions of the words that are used in per se rules are not "given" by nature, but constructed by man on the basis of experience. The rule applier participates in this social process of definition each time he confronts stimuli that might be characterized in more than one way. Furthermore, the theory of definition dominant within liberal thought is that the rule applier can choose between classifications only by reference to the *purposes* that the distinction in question serves for the community that makes it. This theory asserts that difficulties of definition arise when conflicting purposes suggest different resolutions of a classificatory ambiguity. It is therefore possible to imagine cases in which the rule applier's action in choosing one definition from among a number suggested by the press of conflicting ends or interests differs little from a legislator's decision as to what rule should govern particular facts. See Lon L. Fuller, *supra* note 7, at 661-69. Of course, it is also possible to imagine the problem obviated by the existence of a profound cultural harmony among men concerning the definitions that best serve their ends. It follows that rule application balances precariously between substantive rationality on the one hand and natural harmony on the other, much as rational decision balances between natural harmony and rule application (see note 12 *supra*). Do rule application and rational decision, the two processes whose polar opposition structures the Liberal Theory of Legal Justice, then collapse into one another? It seems best to delay consideration of this problem until the basic dichotomy between the factual-objective and the normative-subjective has been introduced in §§ 17-20, trusting in the meanwhile to the reader's grasp of what is, after all, a commonplace distinction usually made without difficulty.

[15] *Cf.* Bourke v. Callanan, 160 Mass. 195, 197 (1893) (Holmes, J.):

"We are aware that by our construction . . . the statute of frauds may be made an

13. Yet around this "absolutism" of the rule applier, his perverse self-denial, his refusal to have any purposes outside the application itself or to regard the consequences of his action, cluster many of the deepest and most intense emotions associated with legal as opposed to other kinds of process. Witness the passion aroused by legalism, bias, impartiality, fairness.[16] Why, then, do formal systems exist? Why would a person or a group attempt to achieve substantively rational results, accomplish purposes, through the formulation and application of rules?

> One way of interpreting the Hobbesian sovereign is as an agency added to unstable systems of cooperation in such a way that it is no longer to anyone's advantage not to do his part given that others will do theirs. By

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instrument of fraud. But that always is true, whenever the law prescribes a form for an obligation. The very meaning of such a requirement is that a man relies at his peril on what purports to be such an obligation without that form."

All rules, in the conception employed here, have the characteristics Ihering ascribed to the rules prescribing specific forms for the legally effective expression of intention:

"The law may have many purposes, for example, securing of proof, avoiding rash action, overreaching, and so on. It is irrelevant whether the purpose can actually be achieved through the form, whether it can also be reached in another way, even whether the party has actually reached the purpose in another way: the legislator did not wish to leave the problem of reaching this goal to the insight and free decision of the party [or of the judge charged with administering the form—D. K.]; instead, the legislator took the matter in hand and made exclusive and necessary the way of reaching the result that seemed good to him."

Rudolf von Ihering, *supra* note 9, at 475 (same passage may be found at 3 L'Esprit du Droit Romain, *supra* note 6, at 162). See also 1 *id.* at 51-56.

[16] "The function of the judiciary is simply, is it not, to administer justice? . . . The judges and the jury must be impervious to considerations of state or to howls for blood. The accused may be politically noxious; the victim may have been a popular figure. No matter. Every person, however high or low, where life or liberty is concerned, is to be judged by the known law, pursuant to the due observance of the established rules for the law's enforcement. And in the private law—the law of *meum* and *tuum*—the objectives are the same. No person, public or private, if he unlawfully injures my person, or fails to fulfil his obligations, or takes my property, shall escape the disinterested judgment of the law. . . ."

Louis L. Jaffe, English and American Judges as Lawmakers 11-12 (1969).

"Let us listen to the ethical complaint against formalism. What an ignoring of moral feeling on the part of law to declare that the given word does not bind because of the smallest formal defect, to leave the most extreme abuse of confidence not merely unpunished but even without criticism, to create a safe hiding place through form for evil and deceit! What a corrupting influence this daily spectacle must have upon the people's feeling for law. Does not silencing the voice of this feeling amount to destroying it? Does not the treatment of form as alone decisive amount to undermining the basis of intercourse, good faith?"

Rudolf von Ihering, *supra* note 9, at 490-91 (same passage may be found at 3 L'Esprit du Droit Romain, *supra* note 6, at 175).

> keeping watch and enforcing sanctions, the sovereign acts to inhibit violations and to restore the system when violations occur; and the belief in the sovereign's efficacy removes instability of both kinds.[17]

B.

14. Liberal theory intimately links formality with the notion that, given human nature, men living in a world without a state, *and dependent on one another for good and ill*, will find themselves constantly at odds. Men, therefore, band together and create a State, which uses force governed by rules to control conflict. But perhaps the single most important ambiguity in liberal thought is that concerning the process by which rules are supposed to perform this function of control.

15. In very general terms, the two divergent conceptions are as follows:

(a) Much social conflict is illusory, arising from the peculiar structure of unregulated social life as a game of "Prisoner's Dilemma," in which each individual behaves badly (destructively of others' satisfactions) because afraid that if he behaves well the others will take advantage of him. Specific rules of conduct backed by sanctions for misbehavior can transform this perverse structure of social life so that everyone is better off than he would be if left to his own devices. The rationale for the State is that it makes everyone better off (and so is entitled to everyone's obedience) precisely by promulgating and enforcing these specific rules. Rules thus transform much conflict into harmony, the remaining conflict being irreducible but not serious.[18]

[17] John Rawls, The Sense of Justice, 72 Phil. Rev. 281, 290-91 (1963).

[18] On Prisoner's Dilemma, see R. Duncan Luce & Howard Raiffa, Games and Decisions: Introduction and Critical Survey 88-113 (1957). On the notion that the state should be conceived as a device for dealing with the underlying problem of "externalities" or "public goods" (of which Prisoner's Dilemma is a dramatization), see William J. Baumol, *supra* note 4; Mancur Olson, *supra* note 4. In this conception, the paradigm of state action is the enforcement of contract, which permits the cooperative "solution" of the game of Prisoner's Dilemma. See Robert Birmingham, Legal and Moral Duty in Game Theory: Common Law Contract and Chinese Analogies, 18 Buff. L. Rev. 99 (1969).

This conception does *not* treat the state as an alternation of substantively rational decision between conflicting ends and rule application. Rather, it takes the rational working out of the implications of the *shared* end of making everyone better off as the key to state action of all kinds. The sharp opposition of legislative and judicial functions dissolves since both institutions are seen as capable of this kind of rationality. Chief Justice Shaw gave classic expression to this view in Norway Plains Co. v. Boston & Maine R.R., 67 Mass. (1 Gray) 263, 267-268 (1854):

"It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common

(b) Conflict for scarce goods is the fundamental fact of social life, a product of the inherent insatiability of human desires rather than of any perverse structure. The problem of social life is to order the waging of this conflict so that society does not dissolve into a perpetual struggle to the death. The means to this end is the substantively rational arrangement of compromises, always unsatisfactory to all interests represented, but accepted as a lesser evil than the unrestrained struggle that is the only alternative. The rationale for the State is that it is a useful instrument for the negotiation and implementation of such compromises, which will be honored only to the extent that they are enforced. Rules, whose content is contingent on the interplay of the particular interests compromised rather than determined by the application of reason to the structure of the situation, are important on two counts. First, they are a convenient administrative technique for carrying out the underlying compromises. Second, their observance prevents the State apparatus (as opposed to the postulated legitimate legislative body) from becoming an actor with its own interests generating as much conflict with the citizens as it suppresses between them.[19]

16. The notion that we can adequately account for most of the legal order by an appeal to common ends and reason, which together generate a specific body of conflict-eliminating rules, is an important one. I mean in a later essay to examine its late nineteenth century and contemporary expressions. Still, the dominant modern view seems to be that as soon as we get beyond a few elementary legal institutions (some very crude form of property, contract and tort) the body of specific rules represents not reason but the compromise of conflicting interests. Here, I will limit the discussion to this second conception of rules, in order to show that in its strict positivist version[20] formality is incapable of offering a stable solution to the problem of justice in the liberal

law consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy modified and adapted to the circumstances of all the particular cases which fall within it. . . ."

[19] The first approach (§ 15a) I derive loosely from Locke and the traditions of natural law and welfare economics, while I associate the second with legal positivism and Hobbes. But nothing could be further from my intention than to continue the argument between these two schools. Quite the contrary, as I conceive them the positions sketched in § 15a and § 15b differ only in this: the first urges that common ends, Reason, and plausible empirical assumptions permit us to say a good deal *both* about the form of law and about its content; the second position, with which the rest of this essay is concerned, is that common ends and Reason compel a decision in favor of rules as the form of law but permit no conclusions about questions of content. The rest of this Part is an elaboration of the positivist argument for rules. It is based, exactly like the natural law arguments for, say, freedom of contract, on a combination of postulates, factual assertions, ethical or normative statements, trains of deduction, and what not. The argument *is* positivist, however, in that it insists on postulating a rigid ontological dichotomy of facts and values, as is explained at length in §§ 17-20. See also note 25 *infra*; cf. H. L. A. Hart, *supra* note 10, at 601 n.25, 622-24.

[20] For a discussion of the sense in which what follows is addressed to "positivism," see note 19 *supra* and note 25 *infra*.

state. This will involve a more detailed examination of the rationale of rules in the conception in question, and this examination must begin with a reference back to the fundamental premises of liberal thought.

17. For our purposes, the most important of these underlying premises or postulates is the opposition of facts to values, of the objective to the subjective, of nature to man. Values, wants, purposes, desires, ends constitute the domain of subjective existence, which is what defines the individual man in opposition to nature. Values, wants, purposes, desires, ends *exist*; they are no less real than stones or legs; but (whatever may at first appear) there is no way for one person to participate directly in another person's experience of them. This is crucial because the experience of values not only defines the state of being human, it also motivates all genuinely human action. In other words, it is a postulate of the theory that action is the product of (is powered by; is driven by) the value/desire/purpose dimension of existence. This is the root of the concept of man as a "maximizer," which means simply that behavior is the resultant of the interaction of conflicting values/desires/purposes. It is also the root of the notion of the insatiability of human desire, which is a tautology within the theory since the quest for satisfaction of desire through purposive action to attain values is the very definition of humanity.

18. It is an aspect of the nature of the subjective that because all values are inherently *arbitrary*, there is no possibility of rationally persuading another of the "correctness" or "justness" of any particular value or desire, no matter how much our agreement with others may suggest that we are dealing with something highly determinate. Thus the postulate that action is the product of value/desire/purpose implies that in relation to one another men are *indeterminate*; since we can neither participate in another's experience of values nor control him through reason, we must deal with his ultimate freedom to contradict our expectations, no matter how much we may believe we understand the "laws" of his behavior. Thus the theory postulates true lawfulness only of the opposed realm of nature.

19. According to the theory, everything that exists that is not a part of the domain of the subjective belongs to the domain of nature, or of "fact." Facts are homogeneous and *objective*, in the sense that (whatever may at first appear) people experience them through cognitive faculties that are common to humankind. Facts are "out there," and inherently identical with themselves no matter who is experiencing them. As a result, people tend to reach a consensus, through such techniques as measurement and rational argument, about what is and what is not true of the external world. Moreover, the objective, the world of facts, is inherently *orderly*; we operate on the assumption that everything that happens in it is the result of the operation of determinate physical laws, however much our inability to state those laws might suggest that we were dealing with arbitrariness.

20. Given these premises, the distinction between substantively rational

decision and rule application takes on a new significance. Substantive rationality involves the expression, interaction and measurement of values in conflict, and the assessment of the implications for those conflicting values of infinitely complex factual situations. As a result, theorists of formality consider it to be *inherently uncertain and unpredictable*. Rule application, in sharp contrast, involves the objective or "cognitive" operation of identifying particular factual aspects of situations followed by the execution of unambiguous prescriptions for official action. In short, according to the theory of formality, *it is inherently certain and predictable*.[21] Substantively rational processes are disorderly in that they simply reflect or express the blind force of the various interests or desires represented. Rule application is arbitrary from the point of view of the litigant, but highly orderly *as a process*, since it involves such operations as the measurement of facts and the working out of the logical implications of prescriptive statements.[22] The certainty and orderliness of

[21] The contrast of rule application and substantive rationality as decision techniques rests on the fundamental liberal distinction between facts and values. It should now be clear that to attack this contrast on the ground that rule application and substantive rationality merge into one another (see *supra* notes 12 and 14) is to attack the *premises* of the theory, rather than just a set of definitions. If we can only decide what the facts of the case are by reference to some purpose, then the domain of fact cannot have the ruled character predicated of it. Thus associationism—the doctrine that factual knowledge is built up through an objective, ruled, "scientific" process of unconscious induction from the raw data of the senses—becomes essential to the coherence of liberal theory. Without it, facts are indistinguishable from values. A doctrine like pragmatism—which denies the autonomous reality of both fact and value—therefore has threatening implications for the legitimacy of the liberal legal order, as the American legal realists quite clearly saw. Their opponents saw it as well: "[T]o insist on the distinction [between 'is' and 'ought'] is to emphasize that the hard core of settled meaning is law in some centrally important sense and that even if there are borderlines, there must first be lines. If this were not so the notion of rules controlling courts' decisions would be senseless as some of the 'Realists'—in their most extreme moods, and, I think, on bad grounds—claimed." H. L. A. Hart, *supra* note 10, at 614-615.

Yet the threat is not a serious one. In the absence of a theory of knowledge that establishes the objectivity of facts, liberal theorists turn to the alternative pillar of a natural harmony (see *supra* note 12). They point to the reality of very widespread consensus concerning a large class of non-abstract cognitions. *Some* factual judgments are anchored in the inherent stability of *culture*, of which law is only a part. The judge who is called on only to make choices about the classification of highly concrete aspects of the situation will find himself constrained simply because *no one* will find plausible his redefinition of all dogs as cats. See, *e.g.*, Louis L. Jaffe, *supra* note 5 at 239-46; Henry M. Hart & Albert M. Sacks, *supra* note 5, at 127-28; Ernest Nagel, Fact, Value, and Human Purpose, 4 Natural L. Forum 26, 35-36 (1959). Thus the validity of the fact/value ontology is less important to the theory than the assertion that there exists *some* body of potential predicates for rules that will guarantee certainty in judicial administration. When we recognize this as the crucial issue, the debate about formalism suddenly takes on a new aspect: it is essentially a debate about what sorts of things properly belong in the class of potential predicates for rules. See note 22 *infra*.

[22] Two interpretations of the concept of rule application, based on two interpretations of "the factual," are possible, according to whether or not psychic states (specific intent, malice, carelessness, good faith) are treated as distinguishable, for the purposes of the rule

rule application make it the ideal instrument for a liberal state conceived as a device for the negotiation and implementation of compromises of the conflicting insatiable desires of the citizenry.[23]

> [G]eneral rules are necessary to . . . any dispensation, whose object is to

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applier, from "value judgments" (this house is beautiful, this division is just). In one interpretation, the legislative ideal is a system of rules whose only predicates are *external* facts, determinable without reference to the testimony of any experient about his own subjectivity. Even where the theory of legal obligation or responsibility rests on a notion of intent or fault or some other psychic disposition, this approach requires that the actual rules embodying the theory speak in terms of "objective manifestations" or "external standards." See Oliver Wendell Holmes, Jr., The Common Law, *supra* note 3, at Lectures 2 and 3; Lon L. Fuller, *supra* note 6, at 808; Roscoe Pound, Individual Interests of Substance—Promised Advantages, 59 Har. L. Rev. 1, 25 (1945).

Within this conception, in turn, there are different degrees of rigor. At the extreme, one could insist that all legal rules having to do with the creation of obligation should have as their predicates the performance of acts prescribed by the legal system for that purpose and that purpose alone. The seal, recording statutes, the formalities of early Roman law and the civil law notarial act would then be models for all legal institutions. And the certainty of rule application in contrast to substantively rational processes would then quite clearly derive not from the ontological status of the "factual" predicates of the rules, but from a careful construction of agreed signs for the communication of legal intent. See *supra* note 21. The works cited in note 6 *supra* take this approach to formalities. In § 35 and note 40 *infra* I apply it to the regime of rules in general.

In the alternative view, judgments about particular psychic states are judgments of fact. Psychic states are treated as part of the physical, objective universe, even if particularly difficult to establish with certainty. In this conception, they are quite radically unlike the inherently subjective characteristics of otherwise indisputably objective entities (the beauty of houses, fairness of exchanges). The administration of justice would be compromised by a commission to make the latter kind of "political," "legislative," or simply "non-judicial" determination, but "the state of a man's mind is as much a fact as the state of his digestion." (Edgington v. Fitzmaurice, [1885] L.R. 29 Ch. Div. 459, 483 (C.A.).) This notion is fully consistent with the postulates of the liberal theory: the judge's mental operations are conceived as the cognitive ones of finding facts in order to apply pre-existing rules. It is only when the judge rejects this conception and asserts his own legitimate legislative power, or when he claims the role of mediator, or of Khadi doing justice after the fact without regard to rules, that we can speak of a truly non-formal theory of legal justice.

The best general discussion of this subject is 3 Rudolf von Ihering, *supra* note 6, at § 50, especially 158-164, 185-187, and 1 *id.* at 51-56. See also 2 Max Weber, *supra* note 3 883-85, 656-67; Lon L. Fuller, *supra* note 6; Stewart Macaulay, Justice Traynor and the Law of Contracts, 13 Stan. L. Rev. 812, 813-17 (1961).

[23] The distinctive characteristic of the theory of formality is exactly this linkage of the postulated dichotomies of rule application vs. substantive rationality and objective fact vs. subjective value. My view is that the four elements constitute a single complex, composite premise, rather than four distinct premises, or one or two premises with logical derivations therefrom, but I don't believe that for the purposes of this paper anything hinges on this issue. I certainly don't intend to make any arguments dependent on the logical relationship between the four concepts. It is enough that they "resonate" or reinforce one another, and together make the assertion that there are two radically different kinds of process more credible than it would be without the coincidence of the two dichotomies.

> influence the conduct of reasonable creatures.
>
> For if, of two actions perfectly similar, one be punished, and the other be rewarded or forgiven, which is the consequence of rejecting general rules, the subjects of such a dispensation would no longer know, either what to expect or how to act. Rewards and punishments would cease to be such—would become accidents. Like the stroke of a thunderbolt, or the discovery of a mine, like a blank or benefit ticket in a lottery, they would occasion pain or pleasure when they happened; but following in no known order, from any particular course of action, they could have no previous influence or effect upon the conduct.[24]

C.

21. The liberal state, in the conception we are concerned with here, exists solely for the purpose of preventing a disastrous tailspin into civil war. This objective the liberal state achieves by imposing a compromise on citizens each struggling for a maximum share of scarce satisfactions. Thus the state is conceived as an intervenor in an already established situation, that in which each individual engages in an unrestrained struggle for what he thinks valuable. The only purpose of intervention is the negative one of stabilizing the situation (value is *created* only by the activity of individuals consuming reality), and this purpose is one that *everyone* shares. Indeed, the premise that everyone wants security is as fundamental as (or perhaps it should be seen as an aspect of) the notion that human action is powered by effort to attain values. *No* values can be attained without some means of preventing civil war; there is no point in trying to avoid civil war except to maximize values, since all activity, once peace is established, consists in maximization.

22. But if everyone shares the objective of preventing civil war, why do we need the state to do it for us? The answer of the theory is that the state of nature is a situation in which no one can *trust* anyone else. What defines the individual human is the indeterminacy and arbitrariness of his will in the pursuit of value. No one can ever be sure that another's substantively rational calculation of his conflicting ends will result in a decision to recipro-

[24] William Paley, Principles of Moral and Political Philosophy bk. II, ch. 7 (1788).

cate one's niceness with niceness of his own. And given the fact of interdependence, as soon as you are nice, you make yourself vulnerable to the other's nastiness and create an incentive for him to betray you. The function of the state is to provide him a conscience—to make sure that he is not tempted by the hope of increasing his share to violate the terms of the compromise and so begin the downward spiral of violence.[25]

23. But while it is absolutely necessary that the state *somehow* perform the function of security, there are restraints that rule out a number of institutional possibilities.

(a) The complexity and uncertainty of the universe of fact make it impossible to imagine a complete one-time before-the-fact ordering that would finally assign everyone his share of every pot of values that might be created.

(b) For the state to engage in substantively rational after-the-fact *ad hoc* compromises of disputes as they arise would create intense uncertainty about how the state would intervene in conflicts over distribution; the result would be a flood of conflicts that would eat up all the time of the constituents of the state, so that no one would have a chance to engage in the private maximization that was the point of the enterprise.

(c) Delegating the function of substantively rational after-the-fact *ad hoc* compromise of disputes or of before-the-fact planning to agents would be equally self defeating, since the agents would then engage in maximizing *their* ends, with the result that some social interests would be strengthened (by acquiring access to state force) at the expense of others, and the level of conflict might well increase rather than decline.[26]

24. Formality is supposed to respond to this dilemma as follows.

(a) By a process of negotiation between the various interests represented in the postulated legitimate legislature, substantively rational processes

[25] Thus the conception of the state as a compromiser of conflicting interests has something in common with the state conceived as the promulgator of the natural law of cooperation described in § 15a above. At the root of both notions is the prisoner's dilemma situation in which everyone acts rationally but everyone ends up losing, unless some outside force makes it possible for the players to form binding agreements. See note 18 *supra*. The difference between the two conceptions lies in the degree to which they generalize the prisoner's dilemma idea to explain and justify the whole body of civil law. In the compromise conception, the rules can do no more in the way of eliminating conflict than restrain the slide into civil war. *Any* set of rules that will stabilize the situation takes men out of the prisoner's dilemma of the war of all against all, but *no* set of rules can do more than compromise the competition for values in stabilized civil society. In the natural law conception, the rules can do much more than simply prevent disaster: with the aid of Reason, men can design them in such a way that they will be individually just, fair and good for all men, as well as expedient for purposes of stabilization. The reason for this is that the basic problems that give rise to conflict are seen as essentially illusory; the state can make them disappear by rules that foster (i) trust, which causes (ii) such a large increase in everyone's well-being that (iii) what appeared a struggle to the death is reconceived as a brisk squash match. See note 19 *supra*.

[26] See, *e.g.*, John Locke, *supra* note 2, at § 13.

produce a set of rules for state action. These are based on an estimate by each participant of what the effect of each rule will be on him in the situations in which he expects it to be applied, and then a balancing off of the good results of the rules against the bad ones. The final legislative decision does *not* represent a substantive prescription of how everything should in fact be divided. Rather, the application of the rules to the pre-existing struggle for welfare changes that struggle, and indirectly brings about the agreed distribution. The process of choosing rules is very time consuming and uncertain, but it doesn't have to be done very often.[27]

(b) Rule appliers implement the compromise indirectly by following the rules that distribute goods, or structure the various situations in which the private parties themselves decide on their distribution. The certainty of the process of rule application controls those to whom the legislature delegates the task. They can't become an independent center of power because it is easy to review and correct their action when necessary.[28] The certainty of the process also drastically reduces litigation. The impulse to enlist the state on one's side in the struggle for welfare shifts to lobbying the legislature, where it belongs.[29]

[27] The rules with which this version of positivism is concerned are rules of *official* conduct. Of course, a particular rule, *e.g.* that murderers should be imprisoned, *may* have the effect of creating a rule of *private* conduct, for example refraining from murder. But the ruledness of private conduct is an *indirect* result of the application of rules of official conduct. Given the postulated freedom and indeterminacy of the individual human will, the most the state can *ever* do is to alter the structure of alternatives among which the individual exercises his inherent maximizing power of choice (see §§ 17-19). The significant point about this is that *norms*, meaning regularities of conduct based *both* on social sanctions and on the individual's sense of their intrinsic value or "oughtness," are radically dissociated from law (if, indeed, they can have any place at all in a theory postulating that human action is a mere resultant of desires in conflict). It is easy to slip into the habit of referring the notion of a rule to a maxim like "promises should be kept." But the type of rule I discuss in this paper is better illustrated by the precept: "In a contract lawsuit, the breaching promisor is made to pay the promisee expectation damages."

[28] "It has been frequently remarked with great propriety that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them. . . ."

The Federalist No. 78, at 471 (Rossiter ed. 1961) (Hamilton).

This may be usefully compared with the views of Chief Justice Shaw in Norway Plains Co. v. Boston & Maine R.R., *supra* note 18. H. L. A. Hart has remarked that those "responsible for the conception of the judge as an automaton, are not the Utilitarian thinkers. The responsibility, if it is to be laid at the door of any theorist, is with thinkers like Blackstone and, at an earlier stage, Montesquieu. The root of this evil is preoccupation with the separation of powers and Blackstone's 'childish fiction' (as Austin termed it) that judges only 'find,' never 'make,' law."

H. L. A. Hart, *supra* note 10, at 610.

[29] The most elaborate extant description of how a functioning system of rules works

25. Yet although formality seems to present an ideal response to the problem of the most efficient or convenient mechanism for implementing the legislative compromise, it has a number of characteristics that may surprise:

(a) The rules that emerge from the negotiations do not represent an attempt to determine the "right" or "just" solution to conflicts, but rather each is a piece of a larger puzzle accepted not for its own sake but in exchange for benefits or injuries received through other rules. The rules may include all kinds of things—price supports, restrictions on travel, etc.—besides the classic rules of property, tort and contract with their claims to representing reason rather than mere interest. It is only *as a whole* that they constitute an acceptable compromise. It is only as a whole that the legislature approves them. And it is only as a whole that they acquire whatever legitimacy the legislative action can bestow.[30]

(b) The duty to submit to the rules is, therefore, unrelated to their content. It derives from the legitimacy of the whole compromise rather than from that of the particular command. The proper response if one feels that the rule the judge is applying is unjust cannot be to disobey him; it must

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to accomplish the purposes of the sovereign is that of Professor Fuller, who employs the hypothetical case of a tyrant obliged by the necessities of government to embrace a "morality of law." The postulated legitimate legislature of the model of formality finds itself in a similar situation, and adopts a similar set of policies. There are two differences: in the theory of formality the legislature acts in a substantively rational fashion, with "morality" excluded altogether as a category, and once the system of rules is established, judges administer it in the "mechanical" and "absolutist" fashion described *supra* at § 12. See Lon L. Fuller, *supra* note 7, at 644-45; and his The Morality of Law, *supra* note 5.

[30] *Cf.* C. B. Macpherson, *supra* note 2, at 57-58.

"The possessive market model requires a compulsive framework of law. At the very least, life and property must be secured, contracts must be defined and enforced. The model also permits state action much beyond this minimum. The state may control land use and labour use, may interfere with the free flow of trade by embargoes and customs duties, may assist one kind of industry and discourage another, may provide free or subsidized services, may relieve the destitute, may require minimum standards of quality or of training, and may by these and other kinds of interference prevent prices (including wages) reaching the levels which an unregulated or less regulated market would produce. What the state does thereby is to alter some of the terms of the equations each man makes when he is calculating his most profitable course of action. But this need not affect the main-spring of the system which is that men do calculate their most profitable courses and do employ their labour, skill, and resources as that calculation dictates. Some of the data for their calculations is changed, but prices are still set by competition between the calculators. The prices are different from what they would be in a less controlled system, but as long as prices still move in response to the decisions of the individual competitors and the prices still elicit the production of goods and determine their allocation, it remains a market system. The state may, so to speak, move the hurdles to the advantage of some kinds of competitors or may change the handicaps, without discouraging racing. The state may, of course, deliberately or otherwise, by the same sort of intervention put racing out of business. But it need not do so."

rather be to go to the legitimate legislative body and pursue one's interest in a different rule to whatever conclusion, postulated to be legitimate, may emerge.[31] Likewise, the judge's duty to behave formally, to look only to rule application, does not derive from the legitimacy of the particular rule in question, but only from that of the body of rules as a whole. There is no basis for the judge to refuse to enforce a rule he thinks unjust because there is no requirement that particular rules *be* just; only that taken together they represent a legitimate compromise. The judge has no function but to execute this compromise as the servant of the legislature.

(c) The process of rule application itself has nothing to do with "justice" or "right." It is not only purely cognitive (fact oriented); it is merely a *cost*, an unfortunate necessity of the perverse structure of the state of nature, and can neither generate nor implement any value except the value of abiding by the results of the substantively rational postulated legitimate legislative compromise.

(d) Since state action via rules is purely instrumental—representing the best possible solution to the administrative problem of enforcing a compromise rather than any independent commitment to any particular rule or body of rules, or to the processes of rule formulation or rule application—there is no reason why the state can't act in a non-ruled manner, by direct legislative determination of disputes or by direct legislative redistribution of values, whenever that appears desirable.

> Freedom of Men under Government, is, to have a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it; A Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man.[32]

D.

26. Thus far, I have dealt only with the question of the role the state will assign to rules in its program to achieve its objective of preventing civil war.

[31] In this view, the rules simply restructure the alternatives open to the individual private actor (see notes 27 and 30 *supra*). The duty to submit is a duty either to obey or to pay the price. It is *not* a duty to accept the intrinsic rightness of the particular restructuring the legislature has accomplished. In this view, contract law, for example, does no more than create a choice between performance and paying damages. "[T]he immediate legal effect of what the promisor does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee." Oliver Wendell Holmes, Jr., *supra* note 2, Lecture 8, at 300.

[32] John Locke, *supra* note 2, at § 22.

The analysis proceeded under the constraint that the state could not use techniques that would make it impossible for its individual constituents to achieve their private objective of maximizing their welfare. The conclusion reached was that rules would be important, but that their particular content would not be, nor would there be any reason to use rules when other stabilization devices suggested themselves. But the state perspective—that of predominant concern with preventing civil war—is not identical with the social. Prevention of civil war is adopted by the citizens as a *means*—albeit indispensable—to the end of maximizing their respective welfares. No analysis of the place of rules in the liberal state is complete unless it takes into account this more general objective and asks what role rules play in the private maximization process. In short, it is necessary to reverse the approach of the last section: here we will consider the uses of rules for welfare maximization subject to the constraint of avoiding civil war.[33]

27. *The role of rules in the liberal state is to provide autonomy.* Freedom or liberty in liberal theory refers first to the postulated indeterminacy of the individual will, its arbitrariness in the choice of values to pursue. Second, freedom refers to the extent to which the individual is actually able to achieve the satisfaction of his desires (the realization of his values). In other words, the degree of freedom is identical with the degree of satisfaction or *welfare.* Autonomy, by contrast, does *not* refer to the degree of satisfaction, but to the *character of the circumstances on which satisfaction is dependent.* An individual has complete autonomy when he is dependent for the satisfaction of desire only on events ordered according to rules. So long as the only obstacles to the realization of his values are ruled facts, rather than arbitrary or indeterminate events beyond his control, his autonomy is complete, *even if he has no freedom at all because utterly unable to realize his values.* Conversely, one can have a great degree of freedom (high level of actual satisfaction of desire) without any autonomy at all (where the high level depends on the arbitrary, subjective wills of others).[34]

28. The concept of autonomy is not distinct from the concept of events ordered by rules. Autonomy *means* that the actor contends only with circumstances that are ruled. Thus the unknown in nature, the uncertain, the apparently random or arbitrary phenomena with which everyone must contend,

[33] The reader may find it helpful at this point to refer to notes 19 and 25 *supra* which discuss the relation of my argument to the traditional categories of positivism and natural law.

[34] The concepts of security, freedom and autonomy are very closely allied in liberal thought. I distinguish autonomy from security as more general: it refers to the degree of ruledness in general while security refers more specifically to rules restraining other men from forcibly depriving the actor of life, liberty or property (but see "security of transaction," which is identical to autonomy as I use it). Many liberal writers use the word freedom to denote the concept I call autonomy; my usage is intended only to avoid confusion with other common senses of the word.

reduce autonomy as much as the unknown in society. Objective fact is postulated in liberal theory to be ordered according to rule, but everyone recognizes that we do not have anything like the ability to predict exactly all factual events. Thus there may be only a little difference between the actual disorder of nature in our current state of knowledge and the actual disorder of private action, postulated to be arbitrary, indeterminate and uncertain, but subject to some degree of control by a state anxious to prevent the slide into civil war. And once private individuals have created the state, it too becomes a circumstance relevant to the satisfaction of desire, and the degree to which it acts according to rules becomes an element contributing to the autonomy or lack of it of its constituents. In short, from the point of view of the concept of autonomy there is no difference at all between the laws of natural phenomena, the civil laws controlling private activity, and the rule of law governing state action. All are alike in that to the extent that they are in force, individuals have autonomy, though they may have no freedom. To the extent that they are not in force, individuals have no autonomy, though their freedom be complete.

29. Autonomy is only desirable as a means to the end of welfare (the satisfaction of desire; freedom). As already shown, some degree of this means is necessary if men are to attain *any* of the end: men create the state to provide the minimum of autonomy they need if freedom is to have any meaning. In its absence, when I regularize my action I am vulnerable to your arbitrary and indeterminate response to the temptation offered by my exposure. Since this is true of everyone, no one will supply the good of ruled behavior. Autonomy of the kind necessary to prevent civil war is thus what economists call a public good, meaning that an individual cannot increase the supply of the good ruledness (*i.e.*, by acting according to rule) without conferring on others a benefit that they are not obliged to reciprocate. But when the citizens have created the state to provide the autonomy necessary to prevent civil war, they will have to decide on the *degree* of ruledness that ought to prevail in a stabilized society.[35]

30. For each participant in the negotiation of the compromise that constitutes the body of rules, there is a problem of balancing areas of constraint against areas in which he will be free to pursue his interests to the utmost. Other things being equal, each would like to have everyone else constrained to fixed rules, and then go freely about the maximizing of his satisfactions. In this ideal situation of total autonomy, he would never have to worry about arbitrary or uncertain interferences with his planned level of welfare.

31. But in order to assure himself that others can't destroy him, each participant finds himself obliged to agree to some restraints on himself. The particular complex of rules that emerges from this process of trading off one's

[35] See § 22 and notes 18 and 25 *supra*.

own freedom against that of others is a major element in the environmental structure within which private activity aimed at individual welfare takes place (other elements include the known laws of nature, ad hoc state action, and chance events). Thus the rules do much more than just prevent civil war: how each person ultimately fares in the competition not for survival but for welfare, *i.e.*, the actual freedom each person enjoys, is a direct function of the particular substantive provisions in force.[36]

32. The question of how the citizens will ever manage to create a compromise compact of this type, as well as that of the particular rules they will choose, is beyond the scope of this paper. In short, I ignore the whole problem of legitimate political action. What concerns us here is *not* the content of the rules, but the question whether the state may disregard rules altogether.

33. At first blush, this question appears much less problematic than that of what rules and how many to adopt. The state is different from its individual constituents whose bargaining produces the rules of distribution of scarce values. The *only* purpose of the state is the provision of security, and this can virtually always be achieved by rule making and rule application.[37] Subjection to the processes of rule making and rule application—as opposed to discretionary or ad hoc intervention—deprives those who control the state of an instrument for the pursuit of their private interests; it robs them of the chance to exercise their free will through its mechanisms; but *this loss does not count*. As *citizens*, there is no one who feels this deprivation as a loss to himself. *Indeed, every citizen has an interest, ceteris paribus, in the limitation and constraint of the state to action according to rule in all cases.* For this reason, the change from a discretionary state, or a state acting generally according to rule but with discretionary interludes or even just occasional aberrations, can be said to increase *social welfare*, if we define social welfare as increased when a change is made that makes everyone better off according to his own view of his own better-offness.

34. There are two aspects to this argument that deserve separate consideration. First is the treacherous *ceteris paribus* provision. The notion is that we can deal with the question of whether or not all state action should be according to rule on the assumption that all that matters is the effect of our decision on *the total of satisfactions before distribution*. The introduction of ruledness is compared to an invention that increases the number of shoes that

[36] It is important to keep in mind at this point that we are talking about rules of *official* conduct whose influence on private activity occurs indirectly through a restructuring of the alternatives open to private actors. The "restraints" consist in the adjustment of the network of official sanctions to encourage some kinds of activity and discourage others. See *supra* notes 27, 28, 30, 31.

[37] The whole doctrine of *raison d'état* nestles snugly within the phrase "virtually always."

two men working together can produce during a single day. The argument is that even though it is possible that the invention will somehow upset the balance of power between the two so that one of them will end up worse off than before, we can still say that the invention is desirable because we *could* use it to increase the welfare of each. In this case, the invention consists in the elimination of nonruled state action. Some nonruled action—mistakes—may have been harmful to everyone. But others helped some at the expense of others. The introduction of total ruledness will affect the balance of satisfactions among those who were helped and those who were hurt by the earlier unruled behavior. The argument asserts that at the point of introducing total ruledness we *could* compensate all the losers and still have enough new benefits left over to make at least some better off. For example, at the moment of transition we could arrange to negotiate a new body of rules for the nondiscretionary state to enforce, and grant each party a veto to protect him against any new set-up he thought worse than the old mixed rule/discretion situation.[38]

35. But what *are* these advantages of ruled state action that make it possible to benefit everyone? The answer is that the elimination of uncertainty about what the state will do means that by advance planning private parties can adjust their conduct so as to turn favorable intervention to maximum favorable effect, while minimizing the occasions of adverse intervention. Suppose that every conceivable situation affecting A and B is covered by a rule; whatever A may do or wish to do that affects B (*i.e.*, that has a relation to his purposes) is either required, permitted, permitted on pain of paying something to someone, or forbidden. If A and B *plan* their activities (both individual and collective) with the rules in mind, and if they are able to carry out their plans, *they will be able to control precisely and completely the part that the rule appliers and the rules play in their lives.*[39] Indeed, by

[38] There are other possible criteria of a desirable change which could also be used to justify the institution of formality within the context of liberal theory. For example, if one takes the maximization of a social welfare function as the only basis for action, one could argue that we should establish formality because over the long run everyone has a "positive *expected* payoff" from mechanical rule application, even though everyone may be worse off in the short run and some people will certainly be worse off in the long run as well. A contractarian might argue that an idealized legislature or group of contracting parties will choose a "welfare game" with formality as one of its rules because the efficiency of mechanical rule application is such that the total of positive rewards available for distribution among the players of a formal game will always be greater than those available in an otherwise similar informal game. On this general subject, see A. Mitchell Polinsky, *supra* note 4; and note 39 *infra*.

[39] Of course, A and B must contend with the fact that they may fail to control the non-legal components in the anticipated situations with the possible result that plans will go astray and A or B (or both) will find himself dragged against his will within the sphere of application of a rule he would rather have avoided. For each, the other and, to some extent, the self are non-legal components (see note 42 *infra*). Thus a party may

announcing which facts will provoke it to particular actions, the state has put itself at the disposal of the parties. They can use the factual predicates of the rules as a sort of language by which to communicate their intentions and command particular action.[40]

36. Now suppose that the rule system contains gaps. Situations arise in

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exert no control at all over the rule applier. The discussion in the text, however, assumes a perfectly certain universe, or at least one in which all possible future states of the world are knowable in advance, and transaction costs are low enough so that the parties can plan even for the most unlikely among them. In Part II of this essay, I examine the consequences of relaxing the assumption of certainty, the question being whether a judge called on to administer a formal regime under uncertainty can legitimately behave mechanically. In other words, I examine the question of permissible judicial attitudes to welfare games like that described in note 38 *supra*.

[40] A classic statement is that in 2 Theophilus Parsons, The Law of Contracts 1-2 (1855):

"The importance of a just and rational construction of every contract and every instrument, is obvious. But the importance of having this construction regulated by law, guided always by distinct principles, and in this way made uniform in practice, may not be so obvious, although we think it as certain and as great. If any one contract is properly construed, justice is done to the parties directly interested therein. But the rectitude, consistency, and uniformity of all construction enables all parties to do justice to themselves. For then all parties, before they enter into contracts, or make or accept instruments, may know the force and effect of the words they employ, of the precuations they use, and of the provisions which they make in their own behalf, or permit to be made by other parties.

"It is obvious that this consistency and uniformity of construction can exist only so far as construction is governed by fixed principles, or, in other words, is matter of law."

See also the following:

"The thing which characterizes the law of contracts and conveyances is that in this field forms are deliberately used, and are intended to be so used, by the parties whose acts are to be judged by the law. To the business man who wishes to make his own or another's promise binding, the seal was at common law available as a device for the accomplishment of his objective. In this aspect form offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention. It is with this aspect of form in mind that I have described the third function of legal formalities as 'the channeling function.'

"In seeking to understand this channeling function of form, perhaps the most useful analogy is that of language. . . ."

Lon Fuller, *supra* note 6, at 801. This view of the working of a system of formal rules is not limited to the law of contracts and conveyances. Speaking of "wills, gifts, contracts, marriages, and the like," H. L. A. Hart says that through the legal rules "the individual's choice is brought into the legal system and allowed to determine its future operations in various areas thereby giving him a type of indirect coercive control over, and a power to foresee the development of, official life." Punishment and Responsibility; Essays in the Philosophy of Law 45 (1968). In the same essay, Hart argues that rules of criminal law perform the same function. *Id.* at 22-24; 44-49. And Holmes made much of the importance of developing the rules of tort liability in such a way as to facilitate their use in the rational adjustment of private action to regular patterns of official legal response. See Oliver Wendell Holmes, Jr., *supra* note 2, at Lecture 3.

See notes 21 and 22 *supra* for a discussion of some of the problems that arise when the legislator attempts to formulate legal rules in such a way as make them effective in communicating the parties' intention to the judge, rather than simply relying on the postulated certainty of the factual predicates of rules in general.

which two inconsistent rules must be applied, if each is to be enforced according to its own definition of its sphere of application; other situations arise in which *no* rule is available.[41] Parties *may* be able to arrange their affairs so as never to fall within the area of uncertainty, albeit at some undefined cost in restriction of their freedom. But there now exists a class of situations into which they can enter only at the price of licensing someone—either the rule applier himself wearing another hat or some other *ad hoc* intervenor—to shape their relationship according to his arbitrary and inherently indeterminate view of the appropriate outcome. If we suppose that the repertoire of official behavior (*i.e.*, the possible state responses to the situation) does not change when an official acquires discretionary power, the parties become less well off. The situation may be compared to that of a group who live near the mouth of a volcano. So long as they have precise knowledge of when it will erupt and how violently, they may not suffer much, and may even benefit from its proximity. Without the ability to predict, they would have to choose between a drastic restriction of activities now become risky and moving to a less desirable but safer location.[42]

[41] Of course, all conceivable actual systems of rules *do* contain many gaps, inconsistencies, and ambiguities, so that it is inevitable that someone other than the legislature will have to exercise continuing "discretion" (*supra* note 11) in keeping the system in repair. This proposition is sometimes put forward as a criticism of the argument for formality. If all that is meant is that the formal system cannot operate in the absence of pre-established rules, then the objection is valid but uninteresting. The theory is designed to explain why we should strive for the *ideal* of a consistent, gapless and unambiguous system, mechanically operated; it does not assert that we can attain the goal. In a more sophisticated form, however, the argument has more bite. It may be asserted that gaps, inconsistencies, and ambiguities are so prevalent in any real system, and occur with such regularity precisely at the most important moments in a real system's history, that the theory of formality can be accepted as true but dismissed as trivial. This argument is closely connected with that for "principles" as representing a distinct process of decision (see note 11 *supra* and the discussion in Part III of the Third Way, §§ 79-85) and with that for the proposition that "facts" cannot be found without an assessment of "purposes" (see notes 14 and 21 *supra*). This is not the place to argue the merits of this objection to formality. For what it is worth, my feeling is that a vast amount of energy goes into the fabrication of gaps, inconsistencies, and ambiguities where the "real" objection is to the consequences of a formal system we can neither accept nor replace. It is for this reason that it seems important to press on with the critique of formality *on its own terms*. Cf. H. L. A. Hart, *supra* note 10, at 606-11.

[42] In Chapter II of Punishment and Responsibility (*supra* note 40), H. L. A. Hart constructs an argument for excuses in criminal law, and for such defenses as fraud, mistake, incapacity and duress in civil law, that both implicitly assumes and exactly parallels the defense of judicial rule application offered here. Hart argues that the aim of assuring private welfare through a predictable and responsive administration of justice is separate from that of achieving the substantive goals of criminal and civil law, and that the two goals can be conceived as to be maximized each subject to the constraint of the other (see *id.* at 245 (note)). He then shows how excuses and defenses increase the ability of parties to control the legal system because they decrease the chance of inadvertent triggering of an unwanted official response. The whole discussion assumes that judges are attentive *only* to these communications, *i.e.*, that they are rule appliers. See notes 39 and 40 *supra*.

37. To summarize, there are two reasons for a rule applier to steel himself to disregard every aspect of the situation other than that factual aspect he is directed to ascertain. First, if he considers the effects of his decision, whether on the litigants or on society at large, or allows himself to be swayed by considerations of fairness, right, justice or mercy, he has usurped the function of the postulated legitimate legislative body. He is then transforming himself into a private center of power, or putting himself at the disposal of some existing center, and this conduct threatens to destroy the precarious fabric of compromise that is civil order. Second, blind rule application promotes the general welfare. By acting formally, the judge does his part toward the "naturalization" of society, that is, toward increasing the ruledness of the social events the individual must deal with in his maximizing activities.[43]

II. The Critique of Formal Justice

> To the care of the soveraign, belongeth the making of Good Lawes. But what is a good Law? By a Good Law, I mean not a Just Law: for no Law can be unjust. The Law is made by the Soveraign Power, and all that is done by such Power, is warranted and owned by every one of the people; and that which every man will have so, no man can say is unjust. It is in the Lawes of a Commonwealth, as in the Lawes of Gaming; whatsoever the Gamesters all agree on is Injustice to none of them.[44]

A.

38. In this part I present a criticism of the theory of formality.[45] I have cast much of it in the form of an argument by the litigant to the judge for a

[43] "Law is at the same time a form of external authoritarian regulation in one aspect, while in the other it is a form of subjective private autonomy. In the one case, that which is basic and essential is the index of unconditional obligation and coercion from without; in the other the index of freedom, guaranteed and acknowledged within certain boundaries. Law comes forth at one time as a principle of social organization, and at another time as a means for individuals 'to be disunited, being in society.' . . ."
E. B. Pashukanis, The General Theory of Law and Marxism, in Soviet Legal Philosophy 111, 150 (1951).

[44] Thomas Hobbes, *supra* note 1, at 185.

[45] There are many others. See, *e.g.*, the works of Karl Llewellyn, Lon L. Fuller, and Ronald Dworkin cited *supra* note 5, Fuller's The Law in Quest of Itself (1940), and Llewellyn's, A Realistic Jurisprudence—The Next Step, 30 Colum. L. Rev. 431 (1930). Objections other than the one I develop here are discussed *supra* in notes 11, 12, 14, 21 and 41. In Part III, *infra*, I will discuss various formulations of the judicial role designed

reprieve from rigid rule application. The judge offers a series of justifications of his obduracy. It is important to be clear at the outset that the litigant is *not*, at this stage, arguing for victory on the merits of his claim against his opponent. He is only arguing that the judge should *hear* him on the merits. In the case of the Statute of Frauds, he is asking a chance to offer his proof that there *was* a contract, although unwritten. The minute the judge acknowledges that this offer of proof might have an effect on the outcome, the litigant has surmounted the barrier of formality, which consists exactly in refusal to consider such collateral factual aspects once it is established that mechanical rule application dictates a particular result. In other words, formality consists *not* in the activity of *following* rules, but in the process of their rigid application. The judge who reaches his decision by substantively rational processes is not acting formally, even if he follows the rule ninety-nine times in a hundred.

39. *Formality itself represents a compromise of conflicting claims: The heterogeneity of values and the multiplicity of factual situations, in a world of purposive actors, forces the group to admit an element of the arbitrary and irrational into its governance.* Suppose the group could, without sacrifice by each individual of the time he needs to devote to pursuit of his own objectives, and without creation of hopeless uncertainty, use its substantively rational legislative process to resolve all possible disputes in advance or preside over each quarrel as it arose. Litigants would have to accept the results as per se legitimate, since it is a postulate of the theory as I have been developing it that the group has evolved a legislative mechanism whose representativeness is of such a character that its decisions generate political obligation.[46]

40. The institution of formality represents the explicit abandonment of this ideal of adjudication. Under a formal regime, a person involved in a dispute expects to be within the power of an official applying a pre-existing body of rules; by the time the dispute has arisen, it is already too late for resort to the legislature, even were that body organized in such a way as to make it capable of handling more than a small fraction of the flow of contro-

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either to respond to criticisms like these or to replace formality altogether. I feel uneasy at this fragmented treatment of other objections than the one I present in this part, but have been unable to devise anything better.

[46] There is every reason to suppose that a legislature adjudicating disputes would assess the effects of basing its decisions on rules, and, if it did use rules, the effects of occasional relaxation or revision of rules in particular cases. In other words, the process of collective decision is distinguished from formality by the fact that it is the sovereign itself that decides, and so can adopt any approach that seems desirable, whereas formality means rule application by an official and nothing else.

Of course, in some nonpolitical sense the outcome even of legislative adjudication might be unjust. The losing party might have every reason to feel that malice or cupidity or stupidity or mendacity had clouded the judgment against him. But the postulate of legislative legitimacy means precisely that the citizen feels obliged to obey despite *this* kind of defect in the result.

versies. Formality therefore means that the litigant can gain nothing from a complete consensus of those represented in the political process that the rule in question, if applied according to its terms, will work an undesirable result. Even were he to convince the rule applier that not a single legislator, in a regime of legislative as opposed to formal adjudication, would vote for his opponent's position (*no one* applauds the sharp operator who uses the Statute of Frauds to evade an agreement with a legal neophyte), it would do no good. More: the litigant can gain nothing even though he convinces the rule applier that none of the parties to the compromise of which the rule was originally a part anticipated or desired the result the judge is about to bring about.

41. But if all this is true, why should the rule applier feel obliged to carry out and the litigant feel obliged to obey the formal mandate? The litigant claims that the substantively rational compromise to which he agreed in order to avoid civil war allotted him a greater share of the benefits of group living than he will receive if the rule is applied formally. The response is—silence. To each appeal to the substantive values the community was to achieve through the rules, the answer will be that the formal or processual values of judicial subordination and legal certainty forbid the rule applier even to *listen* to a plea that can be properly addressed only to a legislature everyone knows to be inaccessible.

42. How then, does the theory of formality claim to transfer the postulated legitimacy of legislative decision to the administration of the system of rules? In one version of the argument, the answer is that we should conceive the fractious litigant claiming entitlement to a legislative adjudication as reneging on an earlier agreement to forego such luxuries so that the group could get on with the business of private maximization. We are to suppose that when an individual joins the group he recognizes that he cannot conceivably, given the heterogeneity of values, the multiplicity of facts and the limits of existence in time, expect that disputes in general will receive anything like the "full treatment." We are to suppose that he therefore thinks it to his advantage to "contract" that neither he nor any other member of the community should be entitled to anything more than formal process.[47] It follows that the pathos I attempted to inject into the description of his plight before a stony rule applier and a busy legislature was altogether misplaced.

43. In another version, the social maximizer objects to the improper opposition of "substantive" to "formal or processual" values in adjudication. He points out that the decision to deny the litigant a hearing on the question of how we would decide his case, *if* values were homogeneous, facts uniplex

[47] See John Stuart Mill, *supra* note 4, at bk. II, ch. 1, § 2, for an illustration of this form of argument with reference *not* to formality in general but to a body of rules of property to be formally administered.

and time unlimited, is anything but irrational or arbitrary. Since the social maximum can *only* be achieved by sacrificing some litigants—*i.e.*, since processual costs are just as real as substantive ones—the sacrifice is not arbitrary but rather just. Indeed, a legal system that permitted this one litigant to be an exception to the general rule of denial of a hearing on substantive issues would be quintessentially unjust. And a society in which no one could achieve his objectives because everyone was constantly engaged in collegial resolution of the disputes that sprang up on all sides the minute the group rose from judgment would be quintessentially irrational.[48]

44. The rest of this part is devoted to showing, within the general framework already postulated, one of the limitations of these contractarian and utilitarian justifications of formality. My purpose is a vindication in the language of Reason of the pity and fear aroused in us by the image of a fellow human being at grips with institutions of formal justice.[49]

45. The objection to formality I will propose arises out of the very structure of formal institutions. That objection is that the formal system is already in decay at the moment the litigant protests against its arbitrary disposition of his case. It follows from the definitions of rule making and rule applying that rule making takes place under *uncertainty*. The making is based on a set of hypotheses or probabilistic judgments about how the total situation of the group will look if such and such rules are applied to such and such factual situations. The rules themselves, however, are by definition inflexible rather than probabilistic; once enacted, they must be enforced even if the non-legal components in the situations to which they are applied differ utterly from those the rule makers anticipated.

46. Consider a hypothetical case in which all the participants in the process of rule making, all the representatives of the conflicting interests to be maximized, share a single estimate of the probabilities of future events. On the

[48] See note 38 *supra*. I found the following suggestive as well:

"Both bona fide purchase for value after fraud, etc., and unwillingness to recognize economic duress, seem to me impregnated strongly with recognition that life and transactions must after all go on, upon whatever basis we have at the moment. The one stresses highly legitimate expectations; the other protects what may be conceived as illegitimate expectations; yet a solid common core they have. In less sophisticated law the same common core is again apparent, although coupled this time with the power of word-magic or form-magic. If you have sealed and delivered, you are bound. Unless you plead in words to the indictment, you simply cannot be tried. You can be put to the *peine forte et dure* (life must go on! ours, if not yours) but that produces neither trial nor conviction."

Karl N. Llewellyn, *supra* note 6, at 728, n.49.

[49] Rereading recently Llewellyn's great essay, "What Price Contract?," I came across the following: "One turns from contemplation of the work of contract as from the experience of Greek tragedy. Life struggling against form, or through form to its will—'pity and terror'—. Law means so pitifully little to life. Life is so terrifyingly dependent on law." *Id.* at 751.

basis of this estimate, they argue and negotiate toward agreement on a set of rules. The result is a compromise: the rules dispose of all situations that have a probability of arising, each particular rule being more or less satisfactory to each interest. If the joint estimate is accurate, the rule *appliers* then proceed to implement the compromise merely by carrying out their function of mechanical enforcement. Each interest receives its "due" in the form of an expected number of adjudications in its favor.

47. A first problem arises from the fact that we are unable to predict the future, and worse at prediction the farther we try to reach forward in time. In the beginning, even given uncertainty, the officials apply the rules to situations approximating those they were designed for, and at least approximately implement the compromise the rules represent. But with the cumulative working out of divergences the world comes finally to bear little or no resemblance to that anticipated. The interaction of the old rules with the new situation begins to generate anomalies, patterns of behavior quite different from those the rules were designed to induce, and distributive results that contradict and then transform everyone's expectations.[50]

48. According to the theory of formality, no matter how great the gap that has developed between the planned compromise of claims and the actual distribution the rules are bringing about, the litigant must accept the results mechanically administered him by the rule applier. He is to say to himself: "I gambled: the universe may differ from what I anticipated, and my share turned out smaller than all had thought it would be, but I assumed the risk." Or perhaps he is to say: "I am the egg society must break to make the omelette of welfare; the bad consequences of exceptions to the rules would clearly outweigh, in this case and in every other, any gains we might derive from attempts to preserve the contours of the original compromise."

49. The difficulty with insisting on these responses is that the logic of formality *recognizes no limits*. Extremism is at the very core of rule applica-

[50] There are a number of alternative ways to express the fundamental idea of the cumulative divergence of factual patterns from those anticipated. One formulation opposes the Order of History to the Order of Reason (or of Ideas), and asserts that the Order of History is *never* reducible to the Order of Reason (or of Ideas), so that every reasoned construction ultimately finds itself marooned in its own historical moment. A superficially less metaphysical formulation asserts that each of the expectations of the rule makers was *probabilistic*; over time, the actual unfolding of events shows some of the rule makers' gambles to have been losing ones; events that had been thought unlikely occur frequently, anticipated events fail to occur at all, and the impossible and inconceivable become actual. Each unexpected event has its own consequences reacting back upon the gambles that *did* pay off. There is no reason whatever to suppose that over time the various divergences will cancel each other out; indeed, such a natural balance of fortuity would be a fluke. As time passes, more and more events that were not or could not have been anticipated become possible and then actual. Eventually it comes to be flatly impossible or extremely unlikely, given what we know today, that tomorrow's events will have any resemblance at all to yesterday's predictions.

tion. Formality demands the same passive response of the litigant *no matter how radical the discontinuity of plan and reality.*[51] The litigant's hypothetical contract turns out to be a monstrous affair, a "naturalization" of the rule applier that makes him insensible by agreement to the worst distortions of the compromise he administers.

50. This is particularly clear when the parties to the substantively rational rule making process are capable of acting on distinct hypotheses about the circumstances to which the rules will be applied. The compromise represented by the body of rules may then be a false one, based on inconsistent expectations of those involved. It is then *inevitable* that from the perspective of those whose expectations are disappointed the rules will implement not what they thought they had agreed to, but something they thought had no chance of occurring. Yet given the premise of a formal order, the losers could proceed only on the basis of *some* estimate, so that no matter how great their loathing for risk they *had* to wager on the future. They took the risk without "assuming" it.[52]

> The Court is not unsympathetic to plaintiff's plight but "[s]tability of contract obligations must not be undermined by judicial sympathy." It has been the sacredness of contractual

[51] See §§ 12-13, and notes 10, 15 and 16 *supra.*

[52] "When all the people had assembled in the galleries, . . . the king . . . gave a signal, a door beneath him opened, and the accused subject stepped out into the amphitheatre. Directly opposite him, on the other side of the enclosed space, were two doors, exactly alike and side by side. It was the duty and the privilege of the person on trial to walk directly to these doors and open one of them. He could open either door he pleased. He was subject to no guidance or influence but that of the aforementioned impartial and incorruptible chance. If he opened the one, there came out of it a hungry tiger, the fiercest and most cruel that could be procured, which immediately sprang upon him, and tore him to pieces, as a punishment for his guilt. The moment that the case of the criminal was thus decided, . . . great wails went up from the hired mourners . . . .

"But if the accused person opened the other door, there came forth from it a lady, the most suitable to his years and station that his Majesty could select among his fair subjects; and to this lady he was immediately married, as a reward of his innocence. It mattered not that he might already possess a wife and family, or that his affections might be engaged upon an object of his own selection. The king allowed no such subordinate arrangements to interfere with his great scheme of retribution and reward. . . .

"This was the king's semibarbaric method of administering justice. Its perfect fairness is obvious. The criminal could not know out of which door would come the lady. He opened either he pleased, without having the slightest idea whether, in the next instant, he was to be devoured or married. . . .

"The institution was a very popular one. . . . [T]he thinking part of the community could bring no charge of unfairness against this plan; for did not the accused person have the whole matter in his own hands?"

Frank Stockton, The Lady or the Tiger?, in The Lady or the Tiger and Other Stories 4-6 (1908).

> obligations which has prevented courts of equity from imposing justice in many circumstances. Nevertheless, it is anticipated that ameliorative legislation . . . will shortly be a reality and perhaps this very case may provide the stimulus necessary to enactment. Copies of this opinion shall be sent to the appropriate legislative committees. The Court cannot legislate and is constrained to grant defendant's motion and deny plaintiff's motion despite the apparent inequities.[53]

B

51. The judge will be the more reluctant to accept the litigant's anti-formal arguments because they are almost wholly negative: they undermine the legitimacy of rule application without suggesting a valid alternative role for the judge. To begin with, how is he to decide that the actual situation is significantly different from that anticipated? The expectations of the participants are both highly subjective and quite possibly conflicting. Second, supposing that divergence is established or assumed, how is the judge to decide whether or not the actual distribution is, given the changes in circumstances, in harmony with the original agreement? The notion of an appeal to the "spirit" of the original compromise—that is, to its purposes against its manifestation in the form of rules—makes no sense because the rules, in the conception involved here, *have no spirit*. Particular rules have no purposes except as pieces in a larger compromise of interests. It was always contemplated that each rule would work adversely to some actors some of the time; the objective was to balance off these adversities in a whole acceptable to all. The only way to find out how the rules would have differed if they had been expected to apply to different circumstances would be to re-enact the legislative process. The litigant thus appears to be proposing that the judge foresake the secure and stable occupation of rule application for the obviously dangerous job of substantively rational arbiter of disputes about a constantly changing pattern of distributive justice and injustice.

52. The judge will be tempted to respond that it is precisely because things change that we have permanent legislatures. They may not help the individual litigant, but they do keep the overall compromise from disintegration or transformation. As a result, the rule applier should be just that and no more. The

[53] Division of Triple T Service, Inc. v. Mobil Oil Corp., 60 Misc. 2d 720, 733, 304 N.Y.S.2d 191, 204 (1969), aff'd without opinion, 34 A.D.2d 618, 311 N.Y.S.2d 961 (2d Dep't 1970) (citations omitted).

disappointed litigant *can* claim the honors of the sacrificial victim, but so long as the legislature exists he cannot claim he has been sacrificed arbitrarily to a now non-operative compromise. There is nothing "rule utilitarian" about a formal system; it is fully capable of evolving. If change cumulates so that the rules appear irrational, if it turns out that some good faith expectations were radically erroneous, the cure is at hand. The point is that evolution is the work of the legislature, not the rule applier.

53. But unless *some* time is allowed to pass between the establishment of the formal system and adjustments of it to take account of the actual working of the rules, we are not dealing with a formal structure at all. If every application of the rules can lead to a successful appeal for a substantively rational readjustment of the rule system in order to compensate for unanticipated consequences, then the group harvests none of the benefits of formality.

54. During this necessary interval between rule-making and readjustment, the uncertain interplay of actors within the structure of rules changes the community, the legislature, and the distributive functions the rules perform. The particular factual elements that evoke particular official responses still occur, but they occur with unexpected frequency or infrequency, and they appear embedded in larger factual situations no one had anticipated. As a consequence, rigid rule application begins to transform the relationship of the group members to one another. The pattern of production and distribution of valued objects, including production and distribution of power in the rule-making institutions, changes.

55. The process of change does more than prevent the rules from implementing the original compromise. It creates for them a whole new set of functions; they become bulwarks of a whole new set of interests. The formal system becomes an expression of a new constellation of forces it has itself blindly created. Each formal application of the rules takes the litigant and the rest of society farther and farther from the situation within which he thought he had secured, through formality, the position formality is now denying him.[54]

[54] "Law *must* grow fixed, in most of its parts, and relative to most of the ways of society apart from law. And the ancient problem must continue to recur. . . . [T]*o the extent of* such divergence between non-legal obligation and the legal obligation officially recognized on the same facts, the legal obligation . . . comes to function also as a *source of risk*. If the other party appeals to law, then to the extent that the obligation is viewed by layman and by law-man differently, I shall either get less, or be held to more, than the customary understanding calls for. And I repeat, such a divergence, such an incursion of risk, is a constant tendency as soon as legal technique becomes specialized, as soon as officials begin looking for their solutions not directly at the life before them, but indirectly at the deposits of their own or their predecessors' prior dealings with similar situations. . . . And surely it is obvious that as the law of contract thus constantly grows rigid upon its own premises and to itself ('certain and reckonable' or 'out

56. But one can grant that the litigant can never appeal to the same legislature twice, that he never gets a chance to redesign the original compromise so that it will work out in practice, and still defend formality. The postulate of legislative legitimacy implies that later legislative acts control earlier ones, so that one is never *entitled* to have a present situation disposed of in accordance with either the letter or the general sense of a previous legislative arrangement. Just as the legislature can legitimately repeal earlier rules and pass new ones, so it can legitimately maintain a body of rules in existence for reasons directly opposed to those that led an earlier legislature to enact them. It follows, according to the theory of formality, that so long as the postulated legitimate legislative process is in existence, there can be no validity to the charge that the actual situation diverges so far from the expectations underlying the rules that their formal application would be unjust. This brings us finally to the heart of the moral objection to formality: *The judge cannot claim that legislative acquiescence legitimizes his action because he himself creates, through his decision of particular cases, the situation from which will emerge an as yet indeterminate constellation of legislative power.*

57. Within the theory of formality there is no distinction between political and economic motives: all action is conceived as driven by the subjective and individual value/desire/purpose dimension of existence. All actors are conceived as bundles of interests in process of maximization, whether through private (*i.e.*, economic) activity within the structure of rules or through public (*i.e.*, political) activity within a legislative structure postulated to be representative. I have already pointed out that the content of the rules formulated in the public legislative sphere heavily conditions the outcome of the struggle in the private sphere. This private outcome in turn automatically reacts back upon the political struggle, in two ways. The private outcome creates interests in the continuation or modification of the rules that produced it, and distributes among those represented in the legislature whatever resources may be necessary to produce results in its substantively rational process. It follows that when the judge influences the private outcome he also influences the public outcome that will reflect it.[55] Granted that the

of date and over-formal'—the phrasing is immaterial) it offers the cautious and canny layman an advantage over his unschooled adversary."

Karl N. Llewellyn, *supra* note 6, at 713-14 (emphasis in original).

[55] This conclusion, which is implied in the premises of the model of formality, is also the starting point for modern liberal political theory. From Locke to the *Federalist*, it is a constant theme that representative institutions are inevitably the locus of factional disputes between groups defined in terms of economic interests. *Cf.* C. B. Macpherson, *supra* note 2; Charles A. Beard, An Economic Interpretation of the Constitution of the United States (1913). One modern equivalent is the theory of "interest groups," or "pluralism," which asserts that through the interplay of legislative bargaining (or "logrolling," which is the exact analytic equivalent of the institution

legislative decision *will be* legitimate, however it may dispose of the litigant's claim that the rules should be revised. The problem is that a judge who has a measure of influence over *what* that postulated legitimate decision will be cannot treat it as an external, objective factor validating whatever he may choose to do. He must justify his contribution to the legitimate response rather than be justified *by* it.[56]

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of contract in the private sphere) groups and potential groups safeguard their shares of welfare and assure an equitable distribution of new benefits. See, *e.g.*, David B. Truman, The Governmental Process; Political Interests and Public Opinion (1951); Robert A. Dahl, Who Governs? Democracy and Power in an American City (1961); Nelson W. Polsby, Community Power and Political Theory (1963); and the discussion in Mancur Olson, *supra* note 4, at 111-31 and Theodore Lowi, The End of Liberalism: Ideology, Policy and the Crisis of Public Authority 1-97 (1969). A distinct modern development is the attempt at an actual fusion of political and economic theory based on the rigorous application of the postulates described in §§ 17-20 above to political behavior. In this version, the process of logrolling is still the key, but we are offered an economic analysis of the conditions under which it will make everyone better off, at least by reference to his initial endowment of resources (derived from the outcome of private activity), and suggestions concerning the impact of the structure of the political process (*e.g.*, voting rules) on the outcome. See Anthony Downs, An Economic Theory of Democracy (1957); James M. Buchanan & Gordon Tullock, *supra* note 12; and the discussion in William J. Baumol, *supra* note 4, at 1-48. Finally, the most formal of all the approaches is that of "n person game theory," which generalizes to all kinds of bargaining conclusions such as the following:

"Everything that has been said . . . about the useful properties of equilibrium prices is *relative* to the initial commodity distribution. If that is unfair, no amount of economic and social 'efficiency' in the exchange mechanism will do more than make the best of a bad job . . . ."

Peter Newman, The Theory of Exchange 122 (1965) (emphasis in original). See also Michael Leiserson, Game Theory and the Study of Coalition Behavior, in The Study of Coalition Behavior: Theoretical Perspectives and Cases from Four Continents (S. Groenning, E. W. Kelley & M. Leiserson eds. 1970).

In short, I think it fair to say that it is a postulate of liberal political theory in practice, as well as in the model of this essay, that the "natural surround" (see § 10) which conditions the outcome of a substantively rational political process is private economic activity within the structure of rules created by earlier phases of that same political process.

[56] My purpose in this section has been to present a logical property of the model of formality, rather than to put forward any particular historical thesis or hypothesis. The dilemma of the judge derives from the *possibility* that his action will have decisive redistributive effects, rather than from certainty about what those effects will be. Given the possibility, he cannot refuse the parties a hearing—and that represents *ipso facto* the abandonment of formality.

Nonetheless, some undocumented illustrations may be helpful. The most familiar and most spectacular is the case of reapportionment, where the mechanical application of an old formula often creates a distribution of political power bearing no resemblance at all to that the rules once reflected. All other examples are less clear because the link between the rules and political power is less direct. On a grand scale, it is often argued that the regime of free contract and free competition of the early 19th century, established by a nation of economic individualists to favor equality and initiative, became in the second half of the 19th century both the creator and the bulwark of a system of bureaucratic enterprise and monopolistic markets. A common interpretation of subsequent develop-

58. This justification can only take the form of a non-formal explanation of why it is that following the rule in question is better or worse than not following it. The judge is sworn to carry out the legislative will, but the legislature is perforce silent on the subject of what its will *should be*. Since he can claim neither that the rules implement the original compromise nor that the legislature will take care of the problem of distributive justice without regard to his action, he must confront his political obligation as a citizen, or his moral duty to his fellow man, or his religious duty, or his conception of his own self-interest, or whatever else it may be that is decisive for him when his duty as a public servant is no longer clear. Nothing could be further from the formal process of mechanical rule application.

59. Having followed the argument step by step to this point, it may be helpful to attempt a more general statement of the flaw in the logic of formality. The particular beauty of the theory as I laid it out in Part I derived from the coincidence of *two* purposes behind the practice of mechanical rule application. The rule applier both implements the compromise by which the community legitimately disposes of the problem of distributive justice, *and* provides a highly certain framework for private maximizing activity. The introduction of uncertainty into the model destroys this coincidence by creating the possibility that the rules will overthrow rather than execute the original compromise. The judge then faces a choice. He can declare his willingness at least to *consider* the possibility that he should disregard the rule and examine the question of distributive justice. In this case, he abandons formal process and overthrows the formal order, even if he ultimately decides to follow the rule in the particular case before him. Litigants

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ments is that these new interests came to control the legislatures to such a degree that they could shape the new regime of regulation in their favor rather than in that of the smaller enterprisers who raised such a hue and cry against them. See James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth Century United States (1956); Gabriel Kolko, The Triumph of Conservatism (1963); and James Weinstein, The Corporate Ideal in the Liberal State: 1900-1918 (1968). On a much smaller scale, the formal interpretation of the contracts between the automobile manufacturers and their dealers creates a situation in which the manufacturers' economic power, already great, becomes relatively even greater, making it all the more difficult for the dealers to achieve any meaningful impact, either through private bargaining or through the legislature, on those same contracts. See Stewart Macaulay, Law and The Balance of Power: The Automobile Manufacturers and Their Dealers (1966).

Finally, at an absolute minimum, the judge is *always* working some kind of distributive effect between plaintiff and defendant. If the parties are represented in the political process, and if their status in that process is a function of their successes and failures in the private maximization struggle, then their ability to achieve distributive justice for themselves as individuals will be affected. Even if this effect is *de minimis* in each case taken separately, the judge must contend with the fact that *taken together* a multiplicity of such rule applications define the most fundamental characteristics of the political system—*e.g.*, through the protection of private property. See, for example, Robert L. Hale, Force and the State: A Comparison of "Political" and "Economic" Compulsion, 35 Colum. L. Rev. 149 (1935).

will ever after have to contend with his substantively rational decisions as to whether or not they will receive the benefit of the rule.

60. The alternative is for the judge to find some way to dispose of his responsibility to implement a compromise distribution, and return to formal rule application with the single purpose of securing the certainty of the framework for private maximizing. The notion that the continuous existence of the legislature relieves the judge of any responsibility for distribution accomplishes just this result. If we could accept it, the judge could go back to mechanical rule application and simply forget about the question of what has happened to the original compromise. Unfortunately, the judge himself is a political actor in the creation of the legislative constellation of forces that supposedly legitimates his decisions. The litigant is therefore entitled to ask him to justify his decision as a citizen, and this he cannot do without abandoning formal process.

61. At this point in the argument, it is customary to propose that the legislature could relieve the judge of responsibility for distributive justice by *decreeing* that he act formally. Admitting that the judge will be unable to make up his *own* mind to apply the rules mechanically, the argument is that once the legislature makes a decision *for* him, his difficulties disappear. The proposition is complex and deserves a thorough hearing.

62. One of its meanings is that the judge should *presume* that the legislature intended him to go on applying the rule no matter how absurd or unjust its application might become, leaving it to future legislatures to make any necessary corrections. In this branch of the argument, the next question must be, "Why make such a presumption?" One sort of answer is that as a matter of fact legislatures intend that judges act formally, but this is beside the point. We are concerned here with how the state *should* be organized, not with how any particular legislature in fact conceives an ideal allocation of legal functions.

63. Another answer is the assertion that the legislature *ought* to decree that judges act formally. Given the "social maximizing" point of view, the argument must be that everyone will be better off if the legislature so instructs the judge. And this in turn is based on the claim that over the long run *any* judicial discretion is more dangerous than a mechanical procedure. The thesis is that informality cannot be restrained: once a little is introduced into the system, certainty begins to erode. The process of erosion stops only when the situation becomes an intolerable combination of the total denial of private autonomy with explosive litigiousness. Of course, the countervailing danger is that the set of rules mechanically applied to a changing background of private activity will end by working a de facto revolution that will overthrow the original compromise; but here at least there is some hope that the legislature will act in time to save the status quo.

64. The problem is that we cannot say the legislature *ought* to gamble on formality rather than putting its trust in a little judicial tinkering. Certainly it is possible to imagine a legislature deciding, rightly or wrongly, that a particular statutory scheme should be mechanically applied; but this is not an argument that will persuade the judge that the legislature should *always* be presumed to have so decided. In short, there is no basis for the position that the *theory itself* requires the legislature always to decree formality.

65. The other branch of the argument is much more modest. It asserts that if the legislature *has* decreed formality, the judge should obey. He should regard himself as the servant of the rule making body. If it is their desire to gamble on formality, he has no other duty than to roll the dice.

66. Yet the judge must ask exactly the same question about this rule as about any other that comes to him from the legislature. Its enactment represented a compromise of interests based on some set of quite possibly conflicting expectations about how its application would affect the future distribution of satisfactions. The theory behind enforcing it is that through rules the state implements the more general compromise necessary to preserve order while maximizing private autonomy within a stabilized civil society. But this particular rule, like any other, may have utterly lost its sense within the projected compromise and have become a threat to the original settlement. The judge's blind adherence to its command may so alter the balance of power that those who will benefit by its continued application will be able to block its repeal, while those who once favored it will find it threatening their most vital purposes. Where should the judge's loyalty lie? Loyalty to the rule is a decision for a particular political outcome; disregard of the rule threatens the very mechanism of order through compromise.

67. This dilemma is identical, at one remove, with that confronting the judge when the legislature leaves open the issue of formality and abandons him to his perplexities. An explicit enactment leaves him no better off than he was before, and on reflection this should not surprise. In the conception we are discussing, *all* laws are gambling contracts, as Hobbes saw long ago. *All* laws pose for judge and litigant the question whether they should accept a conception of the administration of justice as a mechanism for the collection of the resulting debts. It makes no sense to expect that yet one more gamble—a gamble on gambling—will make that problem go away.

68. Let me now try to state the dilemma of formality in terms of the model of welfare economics to which it owes much of its structure. The argument for mechanical rule application *as an aid to private maximization* is based on the concept of economic efficiency. The complete "naturalization" of the state was supposed desirable because the benefits that would result *could* be used to make everyone better off than they were when judges had a measure of discretion. Such a proposal provokes the question who is going to take care of the

consequences of the change for the *actual* distribution of welfare. The theory of formality proposes to the judge that this is the role of the legislature. Because it took all distributive effects into account in drafting the rules, he can apply them mechanically, thereby increasing the efficiency of private maximization. The objection to formality is that the enforcement process through which the judge achieves these allocative effects cannot be treated in isolation from the legislative mechanism that supposedly legitimates the distribution of welfare existing at any given time. Given the postulated representative character of legitimate political institutions, the analytic separation of allocation from distribution breaks down as soon as we relax the implicit assumption that all activities are either simultaneous or perfectly certain. The judge finds himself confronting the characteristic dilemma of the welfare economist who must choose between putting forward changes whose allocative advantages are legitimate only if unlikely redistributions are actually carried out, and restricting himself to less attractive changes whose actual distributive consequences are more likely to be acceptable to him.[57] The difference is that usually on a small scale, but *in fact*, the judge carries out operations the economist only proposes.

69. The contractarian is wrong to argue that we somehow assume the risks

[57] Calabresi's treatment of this issue in The Costs of Accidents: A Legal and Economic Analysis 31-33 (1970), is worth extended quotation for several reasons. It is an unusually precise and frank statement; it illustrates the *implicit* appeal to the legislature—the supposed proper instrument of redistribution (a "political" question)—as a technique legitimating a virtually exclusive analytical preoccupation with allocation (impliedly "nonpolitical"); yet it concludes that the welfare economist must eschew any formal rule of ignoring distribution, even supposing the existence of a legitimate legislature. The position of the judge differs from that of the Calabresian analyst, but not, I have tried to show, in such a way as to reduce his responsibility for the consequences of his acts.

"[P]eople have sought to use accident law as a means of reducing inequalities in income distribution, or of attacking problems of depression and unemployment. . . .

"Regarding these and similar goals, the fact [*sic*] is that we usually would do far better to attack the particular problem directly rather than through accident law. If subsidies to developing industries seem sensible, it is best to give them openly, with visible decisions as to who should pay, rather than through a system which removes some or all of the costs of accidents from the activities causing them and hides this subsidization by placing these costs on undefined or unrepresented groups.

"I do not mean to say that such "outside" goals can be totally ignored. . . . A system of accident law that exacerbates unequal distribution of income or favors monopolies will violate our moral framework, therefore seeming unjust. To this extent these outside goals remain relevant and will tend to prevent some systems from gaining acceptance. Whether this is a good result in any given case will depend not only on whether there are outside means for redressing the undesirable outside effects of the proposed system of accident law, but also on whether the undesirable effects will in fact be redressed if the system of accident law is adopted. If there are no readily available outside means for redressing the undesirable effects, . . . then it is proper to view these outside effects as costs of accidents and consider them in our analysis of such costs."

See also Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972).

of formal administration of our social compacts and so cannot demand of the judge that he hear our claims on the merits. The point is that our compromises, our agreements, our commitments, even our triumphs, if they attain concrete expression *only* in the form of rules, always lead us astray. The judge should let us try to explain what has happened and propose a way out before he makes the situation perhaps irreparably worse. In the end he may decide we do not deserve to be excused from rigid application of the rule. But we should reject the idea that he need not even *listen*. Nor should we accept the maximizer's bland assurance that the litigant's sacrifice is on the altar of the common good. It may be true that everyone, or almost everyone, derives some benefit from the initial establishment of a process of formal dispute resolution. But the point is that some grow fat on arrangements designed to promote equality, succeed by tactics thought so surely self-destructive there was no need to condemn them, while good faith and fair dealing bring others to the wall. The rules, once caught up in time, *may* still serve the common good; they *certainly* serve a congeries of private goods. The judge cannot escape his measure of responsibility for the character of social life by the plea that "The rules did it."

70. I conclude that it is always at least *possibly* true of an existing formal system that contingency has unraveled the plan of social order until the litigant denied more than formal justice can say, without a trace of sour grapes, that he has been, not sacrificed, but simply exploited. The judge must take responsibility himself for deciding whether that possibility has become actual in the particular case before him.

III. Making the Problem Go Away

> Let us not be impatient with our forefathers. "Discretion" is not of necessity "the law of tyrants," and yet we may say with the great Romanist of our own day that formalism is the twin-born sister of liberty. As time goes on there is always a larger room for discretion in the law of procedure; but discretionary powers can only be safely entrusted to judges whose impartiality is above suspicion and whose every act is exposed to public and professional criticism. One of the best qualities of our medieval law was that in theory it left little or nothing, at all events within the sphere of procedure, to the discretion of the justices. *They themselves desired*

> *that this should be so and took care that it was or seemed to be so. They would be responsible for nothing beyond an application of iron rules.*[58]

71. We have reached the stage not of solutions to the problem of formality but of what I will call "attitudes of repose," meaning to suggest that what counts is that they terminate a discussion whose perennial character must cause profound disquiet among legal thinkers committed *both* to democracy and to judicial creativity.[59] I will describe and summarily criticize two such attitudes that the reader should find familiar.

72. I will call "neo-positivism" the doctrine that deals with the dilemma of formality by recognizing a measure of legislative power in the judge while maintaining the basic intellectual structure of the earlier theory—the linked dichotomies of rule application vs. substantive rationality and objective fact vs. subjective value.[60] It is easy to state the fundamental difficulty facing all neo-positivist solutions to the problem of formality. Having conceded that judges must and should exercise legislative power, neo-positivists have to decide whether the *limits* of the area of discretion can be defined by rules. If the judge may act legislatively only with regard to subjects or questions or according to techniques delineated by rules, then he is open to the charge that he has reinstated formality as the guardian of the boundaries of discretion. If he concedes the discretionary character of the decision to exercise discretion, he is open to the charge that he has abolished all distinctions of jurisdiction between courts and legislatures, leaving the judge "at large."[61]

[58] 2 Frederick Pollock & Frederic William Maitland, History of English Law ch. 9, § 1, at 561 (1st ed., 1895) (emphasis supplied).

[59] "What then are the functions of the judiciary in a modern democratic state? This smooth-seeming question, a question which I am posing here in the bland terminology of a college text-book, is tearing at the vitals of the law faculties and the bar associations of America." Louis L. Jaffe, *supra* note 16, at 9. See also the remark of H. L. A. Hart quoted *supra* note 28.

[60] Holmes, in So. Pacific Co. v. Jensen, 244 U.S. 205, 221 (1916) (dissenting opinion), gave a classic statement of the neo-positivist stance:

"I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court."

Fuller suggests the response in his discussion of the case of a trial judge who must contend with an appellate court whose "decisions in the field of commercial law simply do not make sense." Fuller's judge needs guidance, but "it may be impossible for him to know whether his supreme court would regard any particular contribution of his as being wide or narrow." Lon L. Fuller, *supra* note 7, at 646-47.

[61] Some good examples of neo-positivism as I use the term here are Roscoe Pound, The Theory of Judicial Decision, 36 Harv. L. Rev. 641, 802, 940 (1923); Paul A. Freund, The Supreme Court of the United States, Its Business, Purposes and Performance (1961);

73. For example, it is common for neo-positivists to argue that there are whole subject matter areas within which social control should be "delegalized," or remitted to "administrative decision," or to the "case by case approach" or simply to discretion. Within these areas, according to the argument, a regime of rules, whether legislatively or judicially created, leads to rigidity and arbitrariness because *no* set of rules, no matter how often reformulated, can adequately protect the conflicting and confused social interests particular cases present. Depending on the writer, it follows that family law, rate regulation, sentencing of criminals, licensing, treatment of juvenile offenders, abridgments of the First Amendment in the interest of national security, determinations of negligence, or administration of protections for the criminal accused, should be left to unruled ad hoc decision. Other (or the same) writers argue that property, commercial law, the law of wills, the First and Fourth Amendments, antitrust, taxation, family law, and various other subjects, require a fundamentally different approach designed to protect the interest in "security."

74. But should the judge use *rules* to decide the proper categorization of a particular case or a particular subject matter? If so, how does he deal with the dilemma of formality? For example suppose a categorization of cases involving the formation of contracts as appropriate for formal treatment. Further suppose that sophisticated franchisors take advantage of the enthusiasm of potential franchisees and habitually induce substantial reliance before the parties have put anything in writing. Can the judge, perhaps using a confused version of the doctrine of promissory estoppel, create a new area of ad hoc, unruled, after-the-fact decision for certain types of contracts or contracting parties? If not, why not?

75. When a case falls within the area appropriate for formality, so that

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Richard A. Wasserstrom, *supra* note 3; Frank I. Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967).

The debate between "absolutists" and "balancers" in First Amendment law has evoked a number of interesting articles concerned with formality and neo-positivism. See, *e.g.*, Dennis v. United States, 341 U.S. 494, 524-25, 542-43 (1951) (Frankfurter, J., concurring); Laurent B. Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424 (1962); Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 1 (1964); Charles A. Reich, Mr. Justice Black and the Living Constitution, 76 Harv. L. Rev. 673, 736-44 (1963); Kenneth L. Karst, Legislative Facts in Constitutional Adjudication, 1960 Sup. Ct. Rev. 75; Wallace Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance, 50 Calif. L. Rev. 821 (1962); Laurent B. Frantz, Is the First Amendment Law?—A Reply to Professor Mendelson, 51 Calif. L. Rev. 729 (1963).

Antitrust law has produced its own far less elaborate version of the same discussion. See Robert H. Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 Yale L.J. 775 (1965); Derek C. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 295-98 (1960); Thomas E. Kauper, The "Warren Court" and the Antitrust Laws: of Economics, Populism and Cynicism, 67 Mich. L. Rev. 325 (1968).

resort to ad hoc decision is inappropriate, does the judge still have a measure of rule-making power? If he does not, the dilemma of formality applies in full force. If he does have rule-making power, how does he decide when to exercise it? If there are *rules* about when the judge can make law and when he must apply the legislative provision regardless of consequences, are they subject to exceptions? For example, suppose we concede that the area of criminal law should be governed formally. Further suppose that it is an area within which the rule-making power belongs to the legislature. Does it follow that judges should *never* do violence to the language of criminal statutes in order that they may achieve their manifest purpose?

76. Doubtless the reader familiar with modern styles in legal acadamese has noticed a "tension," a "balancing test," and the problem of "judicial attitude" peeking their heads over the horizon. The second attitude of repose in the face of the contradictions of formality consists in bringing those familiar characters into the foreground. The prescription to the judge is that in each case he should weigh the loss of the values of certainty and subordination to the legislature against the gains in the achievement of substantive social goals that will result if he disregards the existing rule.

77. Although processual and substantive values are thus placed in "tension" and must be "balanced," the judge is not conceived as *wholly* at large. If he is conscientious in carrying out this mental operation, carefully tallying all the bad consequences as well as the good, he will find himself constantly confronting *the dilemma of his own political power*. On the one hand, the rewriting of rules and the fashioning of ad hoc exceptions involve denying autonomy to private actors and assuming the power of choice among ends, a process postulated to be subjective, inherently arbitrary, and legitimate only when done democratically. Every act of judicial rule making is therefore in some measure an act of usurpation. On the other hand, the legislature may be corrupt or anaesthetized or simply overworked, and one of the parties may be attempting the legal murder of the other.

78. According to this view, there is nothing in our legal knowledge properly so called to help the judge with the "difficult and delicate task" of deciding whether or not to intervene. If one is a "passivist," the only guarantees of successful judging are the general attitude of humility, the recognition of the limits of reason, and the ability to tolerate uncertainty that go with "emotional maturity" (or perhaps "the tragic view of life"). If one is an "activist," the only guarantee of successful judging is the combination of real insight into social reality with passionate commitment to the ideal of justice. In short, the activist/passivist adopts not an attitude of repose but an expressive gesture: he throws up his hands (ironically, cynically, sentimentally or even sacerdotally) and places his faith in legal education and the political victories of his friends.

79. What I will call the Third Way is a construct of my own intended to show a unity in the work of Lon Fuller, Karl Llewellyn, and Hart and Sacks.[62] The Third Way differs most strikingly from neo-positivism in that it arises from a general critique of the postulates of formality drawn from the natural law tradition on the one hand and from pragmatism on the other. It represents a much more ambitious undertaking than neo-positivism, proposing a radical reconception of the situation of the judge rather than merely our reconciliation with the ruins of earlier intellectual accomplishments.

80. Yet the Third Way maintains a good deal of the structure of formality. Legal rules are still conceived as a backdrop against which, or as a structure within which, "private orderers" pursue their conflicting interests. It is still a postulate that the content of the body of law in force is indeterminate, a product of substantively rational compromises of interests in conflict rather than of reason. It is still a postulate that these substantively rational compromises can be legitimate only if created by a body representative of the conflicting wills of the citizenry, and that such a body is radically unsuited for the detailed administration of the rules it promulgates. The Third Way addresses precisely the central problem of formality: The institution to which the legislature delegates the task of directing the actual application of coercive power over the citizenry must somehow attain legitimacy for its actions. Finally, the solution the Third Way offers for this problem bears a distinct family resemblance to that offered by formality. The coercive power of courts is legitimate because exercised in a way that (a) clearly relates the application of force to the substantively rational compromises of the legislature, and (b) permits private parties to predict in advance how particular disputes will be decided.

82. Yet the Third Way is founded on a *rejection* of the formal solution, a rejection encompassing both the legal ideal of a gapless, fully defined system of rules and the notion that rule application is a desirable conceptualization of the judicial role. Like neo-positivism, the Third Way proposes in the place of formality a solution that accords the judge a measure of law-making power. Unlike neo-positivism, it challenges the notion that there are only two kinds of decision process. And it denies that *all* questions relating to the compromise of conflicting claims that is the legal order are equally resistant to judicial resolution. In short, the Third Way asserts that there is a judicial method distinct both from substantive rationality and from rule application, and that there are judicial questions peculiarly suited to resolution according to this method.[63]

[62] See the works cited *supra* note 5.

[63] The position of Hart and Sacks and of Llewellyn is quite closely connected with that described *supra* at § 15a. See also § 16 and notes 19 and 25. They differ from the classic natural law and welfare economics tradition (*e.g.*, Locke, J. S. Mill, Rawls,

82. Judicial method and judicial question are not really distinct concepts. The Third Way asserts that while a substantively rational legislature alone should make basic decisions defining fundamental social institutions and practices, the result of legislative action is a body of rules imbued with *intelligible purposes*. Judicial questions are those arising "interstitially," within the context of these basic arrangements. The judicial method—sometimes referred to as "reasoned elaboration"—consists in resolving judicial questions by reference to the purposes implicit in the pre-existing structure. Because reasoned elaboration requires the judge both to investigate and to extend creatively the purposes of the legislature, it lacks the mechanical certainty of rule application. On the other hand, the judge is working with legal arrangements that have objectively determinable purposes and practicing a body of known techniques within a highly developed professional tradition rather than attempting to create solutions out of whole cloth. The method should be far *more* certain than substantive rationality.[64]

83. There are two lines of criticism to which the Third Way is particularly open. First, there is the question whether the departure from the assumptions of formality can be justified. Can we distinguish judicial from legislative questions with any degree of certainty at all? Not if all rules are compromises, reflecting a temporary abandonment of the struggle of opposing forces, rather than the achievement of a harmony incompatible with the arbitrary character of human desires, values and purposes. But even supposing that we develop a way to tell the kinds of question apart, are there really two distinct methods of law making, so that the *way* the judges do things can be distinguished from the way legislatures do them? The proponent of formality is likely to respond

Coase) in that they recognize the existence of a set of questions concerning the fundamental legal institutions and rules of the society that are inherently "legislative," or "not amenable to Reason," and therefore beyond judicial competence. Thus they are advocates of "interstitial natural law," an attempted synthesis of the opposed traditions.

[64] It is characteristic of this position that its advocates teach their method of determining and then elaborating these common ends only by example, insisting that they can show how it should be done in particular cases even if they cannot tell us in general terms what it is they are doing. They make it clear only that they are speaking of an art, craft or skill, a prudential discipline that can be assimilated neither to the logic of the formalist nor to the discretion of the activist/passivist. See Karl N. Llewellyn, *supra* note 5; and Henry M. Hart and Albert M. Sacks, *supra* note 5, at 155-68. ("The technique of reasoned elaboration which courts pursue or ought to pursue in the effort to arrive at decisions according to law defies any facile generalization which will convey in itself a working understanding." *Id.* at 164.)

What gives this position strength, in spite of its inarticulateness, is that it appeals to our sense of the legitimacy of judicial gap-filling and contradiction-resolving. We expect and accept as natural, proper and indeed obligatory, although we cannot very adequately explain, that judges will make rules in such cases. We have no sense that by doing so they usurp the law making authority of the legislature. Moreover, we are far from feeling that the results of such judicial activity are inherently irrational, arbitrary or even extremely uncertain. The Third Way asserts that cases involving more obvious judicial initiative are amenable to a similar method.

that the burden of proof is on the Third Way to show that legal theory can produce a more precise model of *any* law making process than that of substantive rationality.[65]

84. But neither of these questions falls within the scope of this essay, which has all along assumed the validity of the basic postulates of formality,

[65] The nature of the criticism of these aspects of the Third Way will vary according to whether the proponent puts most emphasis on the technical aspects of the method—*i.e.* the appeal to purpose—or its existential or psychological aspect—*i.e.* the judge's commitment to finding *the* right answer. I can do no more here than sketch what seems to *me* the main outlines of the criticism.

First, with respect to the argument from purpose, both in the Hart & Sacks Legal Process materials (*supra* note 5) and in Llewellyn's The Common Law Tradition (*supra* note 5) my perhaps over critical eye finds constant equivocation about whether the purposes to be furthered are the very concrete partisan ends of particular constellations of legislative power, or some set of much vaguer purposes thought to be "inherent in the enterprise of social living" (or whatever). Since the choice of purposes to further will often be radically different according to the referent group chosen, the absence of principles of selection is crippling. Second, the notion of a hierarchy of purposes, ranging up from notions like "no man should profit from his own wrong" to "the law should not encourage wrongdoing" to "the law should attempt to maximize valid human satisfactions" fails to deal with the "ideological" character of explanations of legal rules. Most particular arguments about legal questions reflect larger arguments—moral absolutism vs. utilitarianism; the appeal to status vs. the appeal to contract; the ideal of atomistic competition vs. that of regulated bigness; the demand for business statesmanship and fiduciary attitudes vs. a faith in self-interest. If there are *any* decisions that are inherently "legislative," it must be those between these basic orientations. Yet once the decision at this level is made, the particular application is often obvious, so that "reasoned elaboration" is superfluous. *Cf.* Karl Mannheim, Ideology and Utopia, An Introduction to the Sociology of Knowledge (1936).

As for the psychological branch of the notion that there is a peculiarly judicial method, the first difficulty is that the basic tendency of modern legal scholarship seems to be to show that we can make sense of fundamental legal principles, such as "no liability without fault" or "promises should be kept" only by interpreting them as invitations to weigh the social costs and benefits of alternative outcomes. See, for example, Guido Calabresi, *supra* note 57, and Richard A. Posner, A Theory of Negligence, 1 J. Leg. Stud. 29 (1972), in torts, and Robert L. Hale, Bargaining, Duress and Economic Liberty, 43 Colum. L. Rev. 603 (1943), and Louis L. Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201 (1937), in contracts. No progress *at all* is visible in the attempt to deal with legal doctrine as a manifestation of particular psychological phenomena or of an obscure practice of moral argumentation quite different from utilitarian calculation.

A second kind of criticism asserts that the opposition of rules and substantive rationality exhausts the fundamental categories of decision processes, and that vague claims that there exists a third mode of decision are both wrong and dangerous. This argument is closely connected with the ontological postulates about facts and values discussed in §§ 17-20 above. The theory of legal formality is based on the notion that all "subjective" decision processes, that is, those based on the weighing of conflicting values as opposed to the identification of "objective" facts, share the essential characteristics of uncertainty and indeterminacy. Outside the realm of "fact," the results of decision can be neither justified nor invalidated otherwise than by an appeal to arbitrary and conflicting "value judgments." Does the advocate of the Third Way propose a different set of postulates? If so, one would like to hear them, and to compare them with earlier attempts, such as those described and criticized in Morton White, Social Thought in America: The Revolt Against Formalism (2d ed. 1957), and H. L. A. Hart, *supra* note 10, at 620-29.

the better to examine the logic of the system of thought those postulates produce. For us, the important thing is that the Third Way is no less dependent on rules, and thus no less vulnerable to the dilemma of formality, than the system it aspires to replace. It is implicit in the proposed justification of judicial power that:

(a) The judge must use *only* the judicial method of reasoning from the predetermined purposes embedded in the body of substantive law that frames a given dispute. If the judge uses substantively rational legislative techniques, his decision cannot be legitimate because it is not representative.

(b) The judge must decide *only* judicial questions, those amenable to solution by appeal to the purposes of the body of law within which they arise. If the judge decides a non-judicial question, he must either do so using a method unsuited to the task, or he must adopt a substantively rational method to which he has no legitimate claim because he is not representative.

85. These are classic examples of those injunctions the judge cannot apply mechanically, and so cannot honor except on the basis of his own investigation of the legal and institutional situation. And such an examination once commenced must cover exactly the range of considerations the legislature itself would canvass. The judge thus finds himself once again in his characteristic dilemma: he cannot avoid engaging in substantively rational decision making, but must do so without a theory that will legitimize his action.

86. If one feels, as I do, that the problems of formality persist in the face of all expedients to salvage it, one comes finally to question not so much rule application or rule making as the notion that the legal process must reduce itself to a staccato alternation between them. In short, the way is open to ask whether there may not be a conception of justice in which we demand of the judge, acting *as* a judge rather than as a legislator or administrator, that he decide the merits of disputes even though he is unable or unwilling to rationalize his action *either* in terms of the application of an existing rule or in terms of the formulation and application of a new one. I mean to explore this possibility in a later essay.