The High Court: Final...But Fallible

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To effectively maintain the Supreme Court's role in our legal system as final arbiter of constitutional meaning, Professor Lewis sets forth his thesis that the craftsmanship and judicial technique employed in the Justices' opinions must be improved. In developing his thesis, the author initially discusses factors affecting judicial decisionmaking, competing approaches to the law, sources of Supreme Court power, judicial limitations, and other juridical accoutrements which are then evaluated to determine the necessary attributes of an "ideal" opinion. Conceding that such a zenith of perfection can neither be adequately defined nor fully attained, Professor Lewis does demand at least minimal compliance with standards of clarity and consistency — a compliance which he has found lacking in many Court decisions. Utilizing the second part of the article to present specific examples of contradictory and incomprehensible rules fashioned by the Court, the author highlights his analysis with numerous case sequences illustrating the incoherence caused by the Court's activism. Professor Lewis concludes that, much to the perturbation of the general public, the Court has evolved into a legislative body, minus the administrative accessories and democratic recourse usually restraining such a body in our governmental system. As the author indicates, to enhance its prestige and maintain its role, the High Court must successfully cultivate both public and professional confidence by more diligently focusing on improved craftsmanship.

I. INTRODUCTION

UNDoubtedly, Supreme Court Justices agree with the prevailing view that perceives law as an instrument for attaining socially desired ends. Yet, questions and criticisms frequently arise concerning the Justices' performance with that instrument, prompting the author to analyze and discuss in this article the validity of such questions and criticisms. Throughout this panoramic discussion we shall see that some of the Justices are veritable virtuosos at manipulation of hairsplitting machines and dialectic-hydraulic interpretation presses, which are

* Illustrations by Edward S. Freska.

1 A functional approach to law is of course nothing new. In 1921, Mr. Justice Cardozo noted that "[f]ew rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end." B. Cardozo, The Nature of the Judicial Process 98 (1921). Rules no longer tend to persist by "blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897); see Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935). See also note 54 infra.
unfortunately available even outside of Von Jhering's heaven of legal concepts.4

Professor Kurland suggests that the Court should stick to the piano rather than attempting to emulate a one-man band, while also reminding more vehement critics of the advice printed on frontier saloon wall plaques: "Don't shoot the piano player. He's doing his best."5 After viewing the Court's performance, however, the inescapable conclusion and the thesis presented here is that the Court is not doing its best. Thus, unless the Court improves its technique, the difficult music placed on its stand by contemporary societal demands will remain beyond its competence, which will result in its playing to an increasingly unreceptive audience.

The resulting dilution of the Court's effectiveness ironically would clash with its avowed functional approach and desire to transmute constitutional law-in-books into law-in-action, or living law.6

2 See, e.g., Cooper v. California, 386 U.S. 58 (1967), in which the Court used California statutes to establish the relation of the alleged unconstitutional search to the crime for which the defendant was convicted, thus distinguishing a contrary precedent, Preston v. United States, 376 U.S. 364 (1964). The Court then ignored the fact that the search was made in violation of California statutes, holding that "when such state standards alone have been violated, the state is free . . . to apply its own state harmless error rule to such errors of state [constitutional] law." 386 U.S. at 62. State law is relevant to determine whether a search is reasonable, but violation of State law is irrelevant to that inquiry. The ultimate result — hairsplitting par excellence!

3 In United States v. Seeger, 380 U.S. 163 (1965), the Court was confronted with the question, inter alia, of whether an agnostic was relieved from combatant service in the military forces under the Universal Military Training and Service Act, 50 U.S.C. § 456(i) (App. 1964). The provision exempts those who are opposed to war because of their religious training and belief, defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation but [not including] essentially political, sociological, or philosophical views or a merely personal code." Id. The Court injected into the provision the following test for a religious belief: "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption . . ." 380 U.S. at 176.

4 See Von Jhering, Im Juristischen Begriff Schimmel, in SCHERZ UND ERNST IN DER JURISPRUDENZ (1884).


6 See Brandeis, The Living Law, 10 ILL. L. REV. 461 (1916). The quest for compatibility between living law and legal doctrine was emphasized by Eugen Ehrlich who disapproved of development of "lawyers' law" without reference to the needs and practices of the people. See E. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 466 (W. Moll transl. 1936). Karl Llewellyn found the same error in the "formal" period of American law when the law "tended in lawyers' minds more and more to coincide until it substantially coalesced with 'the law' as discussed by lawyers in court: the mere rules of law." K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 186 (1960) [hereinafter cited as COMMON LAW TRADITION]. Instead, the law should "fit the ways of life" of the people and its observance
That desire was explicitly enunciated in *Griswold v. Connecticut*,\(^7\) in which Mr. Justice Douglas, speaking for the Court, stated that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."\(^8\) These penumbral or peripheral rights constitute the rules that are "necessary in making the express guarantees fully meaningful."\(^9\) In recent decades, the Court has implicitly adopted this approach in numerous cases. The most evident examples involve criminal prosecutions,\(^10\) but the penumbral rights principle has also been frequently applied in civil rights cases.\(^11\) How incongruous that the Court, apparently dedicated to breathing life into the Constitution, is not willing to expend the time and effort necessary to construct artistic opinions that will maintain and enhance the prestige and power of the Court — the very institution that promulgates the rules that are necessary to make constitutionally guaranteed rights fully meaningful. An examination of particular cases demonstrating that the Justices often deliver opinions reflecting less than the highest standard of craftsmanship is undertaken in the second half of this article. Unfortunately, the major

\(^7\) 381 U.S. 479 (1965).

\(^8\) Id. at 484.

\(^9\) Id. at 483.


difficulty in selecting cases is knowing where to stop, since instances of contradictory and incomprehensible opinions abound.

A. Necessity and Significance of Sound Judicial Craftsmanship

A brief survey of the reasons why the craftsmanship reflected in a Justice’s opinion is significant will provide us with some criteria for evaluation. It will demonstrate also the complexity of the relationship between the legal and social systems, evidencing how little solid knowledge exists concerning the nuances involved.

To begin, the tremendous power exerted by the Court, through its written opinions, over the norms, mores, and behavior of the general public must be noted. Even now there exists a popular tendency to equate what the Court considers constitutional with that which is moral and right. The Court is still perceived by the public generally as “commanding what is right and prohibiting what is wrong,” for, in the religion of constitutionalism, the Court wears the priestly robes and administers the sacred rites. The prestige and almost reverential diffidence of a substantial segment of the population for the Constitution and the Court as its guardian permits the Court to play a rather significant role in legitimating democratic goals, such as the egalitarian principles of equal treatment and opportunity. This prestige and veneration enables the Court to obtain grudging acceptance of unpopular decisions.

The Court is apparently quite unconcerned about winning pop-

13 1 Blackstone, Commentaries *43.
14 The Court is viewed as the protector of the Constitution which is treated as venerable or even sacred by a large segment of the American public. This is not true in many other countries, such as the republics in South America where there exists no constitutional “myth” or “even a decent respect” for their constitutions which are treated with contempt or indifference. See K. Wheare, Modern Constitutions 114 (rev. ed. 1964). Justice Black’s view of our Constitution is not atypical: “[The] Constitution is my legal Bible; its plan of our government is my plan and its destiny my destiny. I cherish every word of it, from the first to the last, and I personally deplore even the slightest deviation from its least important commands.” Address by Justice Black, Columbia University Law School Carpenter Lectures, Mar. 20, 21, 23, 1968.
15 Legal philosophers have written almost too much about the influence of societal attitudes and community morality on the content of law’s prescriptions and have given too little attention to the ways in which the maintenance of law powerfully influences community attitudes and institutions. Whatever the merits may be on the long-standing jurisprudential debate concerning the supposed “separation” of law and morality, the imperatives of the legal order carry at least prima facie ethical rightness to most members of the community. Jones, The Creative Power and Function of Law in Historical Perspective, 27 Vand. L. Rev. 135, 138 (1963).
ularity contests, frequently promulgating constitutional rules that are met with hostile public reaction.

The Supreme Court in recent years has been the prime mover in a social and political reordering of enormous proportions which was opposed by many diverse and powerful political interests. It has brought about a complete reapportionment of the states' legislatures against the wishes of conservatives in both national parties. It has pushed the Negro revolution at a rate far faster than the political groups would have permitted. It has completely changed the administration of criminal justice and brought the Constitution into the police stations all across the country. It has offended conservative church and religious groups by its treatment of school prayer.¹⁶

The Court's active role in many areas is under constant fire from various disgruntled groups.¹⁷ Even though an enfilade of


strictures has been directed at the Court from its inception through the present decade, some suggest that now criticisms are not directed only at the merits of the decisions, but at "the competence of [the Court] . . . to decide at all." Thus, in "light of recent Court activism, and the resulting chorus of complaints and proposals for change, it seems that the time is upon us to undertake the task, before such complaints produce hasty and disruptive changes." While the Court is in no real danger of experiencing an excision of its constitutional powers since the consensus generally supports its actions, it is probable that lack of craftsmanship in constructing opinions detracts from its public image and effectiveness.

with current political fashions, the Court is necessarily out of step with the Constitution. The basic document, framed in 1789 and 1791, and the Fourteenth Amendment, framed in 1866, were enacted to reflect the political philosophy of those days, not ours." VIRGINIA COMM'N ON CONSTITUTIONAL GOVERNMENT, THE SUPREME COURT OF THE UNITED STATES: A REVIEW OF THE 1964 TERM 58 (1965). See generally L. DOZELL, THE WARREN REVOLUTION (1966).

Penhallow v. Doane's Adm'rs, 3 U.S. (3 DalI.) 53 (1795), evoked a commentary to the effect that the case involved "the most unjust demands that ever disgraced the annals of our Nation.... By this decision the sovereignty of New Hampshire is completely annihilated, its right of legislation controverted, and properties of its subjects invaded .... " New Hampshire Gazette, May 26, 1795, cited and quoted in 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 123 (1922). President Franklin D. Roosevelt's famous attempt to control the Court by enlarging its membership is presented in great detail in J. JOHNSEN, REORGANIZATION OF THE SUPREME COURT (1937). See also C. HYNEMAN, THE SUPREME COURT ON TRIAL 84-93 (1963); L. PFEFFER, THIS HONORABLE COURT 15-18 (1965).

As a reaction to Baker v. Carr, 369 U.S. 186 (1962), the Council of State Governments proposed three constitutional amendments that would have drastically curtailed the jurisdiction of the Court and would have subjected its decisions to review by a "Court of the Union." After the public became aware of the proposal it "evoked such widespread popular condemnation that it was speedily buried. It was quite clear that notwithstanding the unpopularity of some of its decisions, the American people would sanction no tampering with the Supreme Court." L. PFEFFER, supra note 18, at 425.

Bennett & Quade, supra note 16, at 97.

Id. at 108.

"So long as [the Court] ... does not arouse effective opposition from both of the other branches of the national government at the same time, it is in no serious danger of being curbed." Kurland, supra note 5, at 175. "In the immediate future, the only real threat to the Court's power is the possibility of a political victory for the forces who conscientiously affirm extremity in defense of liberty and oppose moderation in pursuit of justice." Id. at 176.

Craftsmanship has undoubtedly played a role in what has occurred in the resolution of commercial conflicts in New York. The business community, finding judges not expert enough in commercial matters, the delay in settlement too great, and the rules of evidence a burden, has brought increasingly fewer cases before the New York courts. Instead, arbitration is used extensively. "There could be no more obvious sign of a serious procedural flaw in our legal system, than the prospect of citizens disdaining to bring their disputes before the courts for settlement. Yet this practice is becoming more and more customary among businessmen." NEW YORK JUDICIAL CONFERENCE, FIFTH
Certainly, the Court through its opinions fosters the impression that it is merely another legislative body. Therefore, the people may appropriately ask what justifies the potential frustration of the majority will in a democracy by an appointed body of nine men who hand down edicts from on high. Everyone knows that whatever the Court thinks the Constitution demands, even implicitly as in the case of penumbral rights, becomes essentially a constitutional provision, subject to formal revocation only by resort to the cumbersome process of constitutional amendment. If the opinions of the Court do not provide visible evidence that reasoned elaboration, rather than personal predilections of the Justices, dictated the decision, why then should people dance to its tune? If the people respect the Court as an institution because it is composed of competent, impartial, and learned men who arrive at their decisions by rational and just application of principles transcending personal views, they will dance even though they dislike the particular tune, because they respect the skill of the musicians. The Court's skill is manifested in written opinions, too many of which are masterpieces of cacophony rather than a harmonizing of principles. Hence, the Court's image is degraded and its effectiveness is diluted, as becomes even clearer when the sources of the power and authority of the Supreme Court are considered.

B. Sources of Supreme Court Power

(1) Grants of Power Emanating from the Constitution and Statutory Enactments. —It is first necessary to briefly comment on several obvious sources of judicial power, such as constitutional provisions and statutory enactments, which explicitly vest subject matter jurisdiction, i.e., the power of certain tribunals to hear and decide specific types of cases. In the federal system, courts established under article III ("constitutional" courts as distinguished from "legislative" courts vested with power by Congress under arti-

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24 U.S. CONST. art. III.

exercise and are limited to jurisdiction granted by article III of the Constitution. Closely related is the power to interpret the Constitution and legislative enactments. In this regard the significance of Mr. Chief Justice John Marshall's contributions are too well known to require discussion, except to note that Marbury v. Madison not only stated the case for judicial review but also built on "political conceptions which had already gained some measure of general support.”

It is not especially surprising to see that the Constitution establishes the Court as the protector of fundamental rights and in certain respects as an antidemocratic institution, since the Constitution itself expressly sets out areas not subject to simple majority control. For example, the Constitution attempts to place forever beyond the amending power the right of each State to "equal suffrage in the Senate."

[Constitutional] . . . provisions set the boundaries of each federal department's power vis-a-vis that of the others, of federal power vis-a-vis that of the states, of governmental power vis-a-vis that of the individual. The Constitution commands that these powers may not be exceeded by simple majority will; that a special marshaling of the people's forces is required to alter the boundaries, i.e., to amend the Constitution. Our written Constitution establishes certain "enduring general values," ultimately subject to democratic modification, but only if the "buffer zone" of the

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27 Thus, the federal courts can hear only justiciable cases or controversies. See C. Wright, supra note 26, §§ 12-15.
28 The Supreme Court very early assumed the power to interpret the Constitution and strike down State statutes inconsistent with the Constitution, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), or inconsistent with treaties, Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796), to set aside State court decisions inconsistent with the Constitution, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), and to vitiate acts of Congress that do not square with the Constitution, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
29 5 U.S. (1 Cranch) 137 (1803).
31 U.S. Const. art. V. For similar attempts to place constitutional provisions outside the scope of the amending power, see H.L.A. Hart, The Concept of Law 243 (1961).
amending process is crossed. This "buffer zone" — the difficult requirement of action by majorities of two-thirds and three-fourths — protects these enduring values against hasty, ill-considered, emotion-ridden action and demands sober, deliberative, reflective consideration.32

Actually, the Court's historical power to decide cases or controversies in a way antipodal to prevailing sentiments was in some measure justified by the notion that the process was one of discovering the law (the declaratory theory, discussed below) and the "true" interests of society. Hamilton could thus contend in The Federalist papers that "[w]hen occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardian of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection."33 The rationale was not that "judicial review is the people's institutionalized means of self-control,"34 although we must admit that it does serve that function. Nor was the basis for justification that judicial review "fulfills popular desire."35 Instead, judicial review was justified as an "impersonal enlightened search for the law,"36 a view manifested as late as 1936 when Mr. Justice Roberts wrote:

It is sometimes said that the Court assumes a power to overrule or control the action of the people's representatives. This is a misconception . . . . When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy.37

(2) Power Evolving from the Conception of the Supreme Court as a Unique Institution. — Another source of power, often overlooked, rests on the awareness that the Court performs functions

33 THE FEDERALIST No. 71, at 465 (Modern Library ed. 1937) (Hamilton).
35 Id. at 117.
36 See text accompanying notes 47-61 infra.
for which "elected institutions are ill fitted," such as maintaining enduring social values and meeting other functional prerequisites for maintenance and survival of our society, including conflict resolution and integration of the component segments of a highly specialized and splintered society. The enlightened recognition of the necessity of maintaining institutions to perform activities required for the survival and maintenance of a going society ought to provide a source for judicial power. On reflection, it is also clear that whatever functions are served by a legal system generally, the Supreme Court is a unique institution with special

38 A. Bickel, supra note 11, at 27, quoted and discussed in Choper, supra note 32, at 38.


40 Talcott Parsons suggests that there are four principal functional imperatives that a society must meet to survive: pattern maintenance, goal attainment, adaptation, and integration. Parsons, supra note 39, at 38. Although the law is relevant to all four, it is the means of achieving integration, which concerns the mutual adjustments of [the relatively autonomic units and sub-systems of society] ... from the point of view of their "contributions" to the effective functioning of the system as a whole. This, in turn concerns their relation to the pattern-maintenance problem, as well as to the external situation through processes of goal-attainment and adaptation. Id. at 40.


41 Karl Llewellyn lists six basic juristic tasks:
[1] There is first of all the cleaning up of those grievances and disputes which societies secrete as surely as babies produce a diaper problem. [2] Intimately related, but distinct, is the problem of channeling conduct in situations fraught with potential tension and conflict, so that, negatively, grievances and disputes are avoided, and positively, men's work is geared into team play. [3] In any mobile society, the needed rechanneling along new lines is hardly less important. [4] The fourth great job centers around allocation of that say which in case of doubt or trouble is to go, and around the procedures for making the say a binding and official say. [5] The fifth altogether too little studied as a job of law, has to do with producing a net organization and direction of the work of the whole group or society, and in
functions imposed by the needs of our federal system. Although these functions vary with time, minimally they include acting as umpire of the federal system, interpreting federal statutes, and construing or creating (depending on how one views it) the Constitution, all in the process of deciding justiciable cases or controversies. To the extent that Court decisions protect the rights of minorities, freedom of expression, and the democratic process, Dean Rostow contends that they also maintain the pluralistic equilibrium of our society, thereby inhibiting revolutionary or other violent means of attempting social change. Obversely, the Court fosters a national free economy within which the pluralistic society functions. To achieve a proper balance within the federal system, the Court has had to

call upon a people to achieve a unity sufficient to resist their common perils and advance their common welfare, without undue sacrifice of their diversities and the creative energies to which diversity gives rise. [Federalist values] ... call for government responsive to the will of the full national constituency, without

a fashion which unleashes incentive. [6] And, as the last ... the job of juristic method, that of building and using techniques and skills for keeping the men and machinery of all the law-jobs on their jobs and up to the job. Llewellyn, supra note 6, at 253.

42 See Freund, The Supreme Court in Contemporary Life, 19 Sw. L.J. 439, 440 (1965).

43 "By standing ready to adjudicate suits between states over such conflicts as boundaries, the apportionment of interstate waters, and the escheat of intangible property, the Court has served ... as a substitute for diplomacy and war." Id. at 439.

44 [T]he historian Charles Warren cautions us not to forget that, "however the Court may interpret the provisions of the Constitution, it is still the Constitution which is law and not the decisions of the Court." The Constitution itself, Justice Frankfurter declares, is the "ultimate touchstone of constitutionality." Against all such reminders stands Charles Evans Hughes blunt assertion of 1907, "the Constitution is what the judges say it is." "The Supreme Court," Professor Frankfurter used to tell his law students, "is the Constitution." A. Mason & W. BeaneY, The Supreme Court in a Free Society 1 (1959).

45 See Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193 (1952). It is true that the Court has produced an awareness of rights and possible alternatives to privation among the Negro and other minorities which perhaps contributes to acts that border on the violent in that insurrections occur only when there is some hope of success. As Leon Trotsky once stated: "In reality the mere existence of privations is not enough to cause an insurrection; if it were, the masses would always be in revolt." C. Brinton, The Anatomy of Revolution 33 (rev. ed. 1965). During the transitional decades ahead it is important for society to appreciate that certain dislocations, tensions, and conflicts will necessarily be produced. See J. Stone, supra note 40, at 375. This is not to justify rioting and disregard for the rights of others, but rather to recognize that any reordering of societal norms and patterns of behavior produces dysfunctional conflicts "as surely as babies produce a diaper problem." Llewellyn, supra note 6, at 253. But see M. Janowitz, Social Control of Escalated Riots 7 (1968).
loss of responsiveness to lesser voices, reflecting smaller bodies of opinion, in areas that constitute their own legitimate concern.46

(3) Power Resulting from the Supreme Court's Charisma. — The bases of judicial power discussed thus far rest on notions of legality, tradition, and reason. But there is a very important basis that is relatively nonrational — what Max Weber termed “charismatic.”44 Tradition, legality, and reason are relevant to nonrational charismatic sources of power, but additional irrational variables combine to produce an aura of wisdom and infallibility ascribed to the Court by the “cult of the robe.” Two myths — the declaratory theory and the notion that judges are entirely ob-

46 Freud, supra note 42, at 439. See generally Wechsler, Political Safeguards of Federalism, in SELECTED ESSAYS ON CONSTITUTIONAL LAW 1938-1962, at 185-86 (E. Barrett, N. Nathanson, E. Brown, G. Gunther, P. Kurland, M. Merrill & F. Ribble eds. 1963). The fact that the proper balance has not been achieved and that we are now in a “God-awful state” is not entirely the Court's fault.

Exponentially viewed, it will not be long before the earth's surface is packed solid with humans, the whole mass standing in individual refrigerated capsules on a thick layer of immovable automobiles. Babies will issue from this mass in a constant stream to stand on the shoulders of their parents. Suddenly, atomic fusion is achieved by the central computer which runs this horror and the mass dissolves into a small exploding universe of positive and negative electrons, neutrinos and antineutrinos, baryons and leptons, all moving apart at relativistic speeds. Before this, of course, we shall have all killed one another off by the exponential rise in the crime rate, by radiation diseases, and, lacking all exercise, by dying shortly after birth from the ultimate pollution, namely, the inability to move away from our own excrement.


47 Tradition as Max Weber uses the term, refers to the fact that a particular policy is in harmony with historic practice [legality] . . . [and] consists of an appeal . . . to a rational set of rules which have been given the force of law in a community. [Charismatic factors are involved where individuals] . . . govern by the force or sanctity of their personalities rather than by applying traditional or legal rules. W. Murphy & C. Pritchett, COURTS, JUDGES, AND POLITICS: INTRODUCTION TO THE JUDICIAL PROCESS 160 (1961).

Eugen Ehrlich stressed the importance for the law of usage, which means "the custom of the past shall be the norm for the future." E. Ehrlich, supra note 6, at 85. W.G. Sumner would agree that usage provides the impetus for the "pattern of culture" of a primitive society. "If asked why they act in a certain way in certain cases, primitive people always answer that it is because they and their ancestors always have done so." W.G. Sumner, FOLKWAYS 3 (1906). It is now common knowledge that in primitive societies men consider, as Jellinek says, any state of affairs that is established as morally right or justified. Within the limits dictated by the minimal order required for survival of an ordered society, the customs developed by a primitive society may be as diverse as the stimuli that are effective in conditioning behavior patterns. This was true of early European law as well as that of contemporary primitive tribal societies. M. Smith, THE DEVELOPMENT OF EUROPEAN LAW 68 (1928). Vinogradoff apprises us that: "In rudimentary unions, in so-called barbaric tribes, even in feudal societies, rules of conduct are usually established not by direct and general commands, but by gradual consolidation of opinions and habits." P. Vinogradoff, CUSTOM AND RIGHT 21 (1923).
jective — are chiefly responsible for the tremendous charisma that surrounds the Court.

(a) The Declaratory Theory. —The declaratory theory, which we have noted was in ascendancy at the time of the Constitutional Convention, was popularized by Blackstone who believed that it was the duty of courts "not . . . to pronounce a new law, but to maintain and expound the old one [and] . . . if it be found that the former decision is manifestly absurd and unjust, it is declared, not that such a sentence was bad law, but that it was not law." 8

Under this approach, judges discover rather than create the law. 49

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." 50

Professor Mishkin, who has dealt extensively with the symbolic role of the declaratory theory, persuasively contends that:

Despite . . . its shortcomings as a description of reality, the "declaratory theory" expresses a symbolic concept of the judicial process on which much of courts' prestige and power depend. This is the strongly held and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance. It is easy enough for the sophisticated to show elements of naiveté in this view — and no more difficult to scoff at symbols generally. But the fact remains that symbols constitute an important element in any societal structure — and that this symbolic view of courts is a major factor in securing respect for, and obedience to, judicial decisions. If the view be in part myth, it is a myth by which we live and which can be sacrificed only at substantial cost; consider, for example, the loss involved if judges could not appeal to the idea that it is "the law" or "the Constitution" — and not they personally — who command a given result. 51

50 Norton v. Shelby County, 118 U.S. 425, 442 (1886). The Supreme Court qualified its endorsement of the declaratory theory in 1940 when it noted that the existence of a law, prior to a decision finding it unconstitutional, "is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects." Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940). Chicot held that where a party had an opportunity to attack the subject matter jurisdiction of a federal district court, and failed to do so, res judicata barred a later collateral attack even though the statute creating such jurisdiction had been declared unconstitutional. See Restatement of Judgments § 10 (1942).
51 Mishkin, Foreword: The High Court, The Great Writ, and the Due Process of
The declaratory theory has been largely discredited, thereby annulling much of the original justification for judicial review and detracting from the charismatic foundation of the Court's prestige. The law is no longer regarded as "a brooding omnipresence in the sky."

Today we all realize that "judges do and must legislate ... [even if] only interstitially." Supreme Court Justices themselves view the law functionally as "a body of ideals, principles, and precepts for the adjustment of the relations of human beings and the ordering of their conduct in society." This change in attitude is partially responsible for the shift in the Court's position concerning the application of federal common law in diversity cases — from Swift v. Tyson, to the Erie Railroad v. Tompkins doctrine — since federal courts during the ascendency of Swift followed the same practice in equity cases, even though section 34 of the Rules of Decision Act by its terms was not applicable in equity actions. Under Swift, State law was binding on federal courts in diversity cases except

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54 R. POund, Law FINDING THROUGH EXPERIENCE AND REASON 1 (1960). In a study conducted by the author in the summer of 1967, a questionnaire was submitted to all the State and Federal Supreme Court Justices and judges requesting that they indicate which of a series of definitions of law most adequately exemplified their view of the concept of law, which was least adequate, and the additions or corrections they would make to the definition selected. Approximately one-third of the judges and justices completed the questionnaire, and of them, 75 percent selected a functional definition of law, while an additional 14 percent chose H.L.A. Hart's language: "[Law consists of] ... (i) rules forbidding or enjoining certain types of behaviour under penalty; (ii) rules requiring people to compensate those whom they injure in certain ways; (iii) rules specifying what must be done to make wills, contracts or other arrangements which confer rights and create obligations ... ." H.L.A. HART, supra note 31, at 3 (1961). In the quoted language, actually Hart was discussing the essential elements of a legal system, and added: "(iv) courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid; (v) a legislature to make new rules and abolish old ones." Id. Hart views a fusion of primary and secondary rules as "the most fruitful way of regarding a legal system," id. at 114, but he never explicitly defines law. See King, The Basic Concept of Professor Hart's Jurisprudence, 21 CAMBRIDGE L.J. 270, 271 (1963).

65 41 U.S. (16 Pet) 1 (1842).

66 304 U.S. 64 (1938).

67 At the time of Swift and Erie the statute provided that "[t]he laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92. Subsequently the statute was amended to apply to
insofar as the law of the state on a particular matter was common law in what was considered to be its more general aspect, as where it dealt with contracts or torts or commercial transactions — [the "general law" concept of Swift] . . . — a federal court deemed itself as competent as a state court to "find" and "declare" the legal principle applicable to the case.58

Naturally, the discrediting of the declaratory theory removed this basis; thus, Professor Hill correctly concluded that "the difference between Swift v. Tyson and Erie R.R. v. Tompkins reflects essentially a changed jurisprudence rather than a changed view of the Constitution."59 The same "changed jurisprudence" apparently accounts for the prospective overruling cases,60 although the relationship is not as clear as in the case of the Swift-Erie shift.61

The work of the realists62 and the behavioralists63 has not

59 Id. at 443. See also Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va. L. Rev. 201, 224 n.72 (1965).
61 See text accompanying notes 339-402 infra.
62 Early studies characterized as realist oriented by Garlan specifically relating to constitutional law include Corwin, The "Higher Law" Background of American Constitutional Law (pts. 1-2), 42 Harv. L. Rev. 149, 365 (1928); Hale, Our Equivocal Constitutional Guarantees, 39 Colum. L. Rev. 563 (1939); Llewellyn, The Constitution as an Institution, 34 Colum. L. Rev. 1 (1934); see J. Stone, supra note 40, at 68-69.
63 [The behavioral approach] . . . calls for an effort . . . to advance hypotheses about relationships, to discover uniformities or regularities or laws, and to suggest theories; the higher the level of generalization, the better. At the same time [there is] . . . an insistence that the generalizations be verified or verifiable. Normative propositions are avoided; the object is description, including explanation and descriptive statements about normative attitudes. If prescriptive statements are made, their normative component falls outside the realm of science. The requirement that the generalizations be verified or verifiable calls for empiricism — for reliance on observation and refusal to rely on alleged a priori truths. It also calls for precision in the definition of concepts, clarity in the formulation of hypotheses, and, in effect, restraint about calling a generalization anything other than a hypothesis until it has been demonstrated to be true. In addition to generality and verifiability, the notion of a scientific purpose connotes system; that is, the object is to develop a set of verified generalizations that fit together in a coherent system — a coherent interlocking network — giving a comprehensive description and explanation of the realm of behavior in question. V. Van Dyke, Political Science: A Philosophical Analysis 159 (1960).
only devastated the declaratory theory but the myth of objectivity as well. In fact, some fear that attitudinal studies will reveal that judges are nothing but "glorious rationalizers" of their own predilections, thereby destroying their image as objective and rational decisionmakers. Mendelson categorically states that the thrust of behavioral studies of the United States Supreme Court is that "all of the Justices are frauds or fools."

(b) Does Judicial Objectivity Exist? —With our increasingly sophisticated knowledge about the judicial process, the declaratory

Jurimetric studies reflect behavioralist goals. Even in electronic data retrieval projects, hypotheses concerning regularities in judicial behavior are made. For example, when full text encoding is used, legal material is retrieved on the basis of word frequencies, the hypothesis being that "the more often a certain word appears in a document the more it becomes representative of the subject matter treated by the author." Luhn, Auto-Encoding of Documents for Information Retrieval Systems, in Modern Trends in Documentation 45, 47 (M. Boaz ed. 1959). The high level of generality sought is perhaps best exemplified by attitudinal studies such as that of Spaeth, in which he analyzed 155 business regulation cases decided during the 1953-1959 Supreme Court terms, and concluded: "The scaling of the business regulation cases, and the confirmation that these are a subset of the larger variable of economic liberalism, provides further evidence that the great bulk of the Court's decision-making may be reducible to a small number of attitudinal variables." Spaeth, Warren Court Attitudes Toward Business: The "B" Scale, in Judicial Decision-Making 79, 100 (G. Schubert ed. 1963). The stress placed on verification is also readily discernible in jurimetric studies. "The conclusions of jurisprudence are merely debatable; the conclusions of jurimetrics are testable." Loevinger, Jurimetrics: The Methodology of Legal Inquiry, 28 Law & Contemp. Prob. 5, 8 (1963). Unless reliable predictions are made, it is argued, a scientific explanation of judicial behavior is lacking, for "how can one be certain of understanding behavior, unless he is willing to make predictive judgments?" Eldersveld, Theory and Method in Voting Behavior Research, in Political Behavior: A Reader in Theory and Research 267, 273 (H. Eulau, S. Eldersveld & M. Janowitz eds. 1956). See also Schubert, Introduction to Judicial Behavior 1, 4 (G. Schubert ed. 1964); Krislov, Theoretical Attempts at Predicting Judicial Behavior, 79 Harv. L. Rev. 1573 (1966). On the problems of defining behavioralism, compare Easton, Introduction: The Current Meaning of "Behavioralism" in Political Science, in The Limits of Behavioralism in Political Science 1, 7 (J. Charlesworth ed. 1962), with Davis, Behavioral Science and Administrative Law, 17 J. Legal Ed. 137, 138-41 (1965).

That it is a myth is argued persuasively in Miller & Howell, Myth of Neutrality in Constitutional Adjudication, 27 U. Chi. L. Rev. 661, 664-83 (1960).


theory and notion of total judicial objectivity are dead and not likely to be resurrected. Nonetheless, there remains some truth to the view that judges in a sense "find" the law, and that they are relatively objective in arriving at decisions.67

The millennium of judicial behavioralism has not yet arrived. Glendon Schubert has noted that just as most sciences have moved from speculation (theory without facts), to empiricism (facts without theory), to maturity (theory empirically verified), so too jurisprudential analysis of judicial behavior has passed from the traditional approach, i.e., philosophical, analytical, historical, and sociological jurisprudence (theory without facts), to legal realism (facts without theory), to judicial behavioralism.68 Sociological jurisprudence has long evinced an interest in both theory (the law-in-books) and facts (the law-in-action).69 None of the traditional schools of jurisprudence, however, have attained an organization and classification of knowledge about judicial behavior on the basis of a systematic and coherent set of principles constituting a scientific explanation, i.e., an "explicit formulation of determinate relations between a set of variables in terms of which a fairly extensive class of empirically ascertainable regularities can be explained."

67 [E]ven the highest courts, in the most novel cases, may properly be viewed as subject to the law, if "the law" is seen not simply as composed of rules and doctrines but in terms of institutions and processes of which rules and doctrines are merely a part. Judges — including Supreme Court Justices — in fact do not have completely unfettered choice, even as to issues clearly within their province. The choices they do have, though substantial and important, are still necessarily conditioned by traditions, processes, and institutions of law. Mishkin, supra note 51, at 63; see Krindle, The Law Making Process, 2 Manitoba L.J. 167 (1967).

It is relevant to note that judges tend to have less discretion in societies with a democratic political organization than in those with a dictatorial political organization. See Nagel, Culture Patterns and Judicial Systems, 16 Vand. L. Rev. 147, 154 (1962).


70 Nagel & Hempel, Symposium: Problems of Concept and Theory Formulation in the Social Sciences, in 1 Science, Language and Human Rights 159-60 (1960).
When scientific explanations of judicial behavior are finally offered they will not necessarily prove that judges are biased rather than disinterested and competent decisionmakers who engage in reasoned elaboration in resolving the issues in the cases before them. The fact that judges are influenced by their subconscious, their beliefs, their political and religious affiliations, and their socioeconomic class membership, must be weighed in


72 Ranyard West proposes that Mr. Justice Black forgot to robe prior to delivering the opinion in Bridges v. California, 314 U.S. 252 (1941), because the logical inference of the holding of Bridges is that judges are in general to be treated as other men. R. WEST, CONSCIENCE AND SOCIETY (1945). For a proposal to psychoanalyze judges, see Schroeder, The Psychologic Study of Judicial Opinions, 6 CALIF. L. REV. 89 (1918). See also Kessler, The Psychological Effects of the Judicial Robes, 19 AM. IMAGO 35 (1962).

73 "[T]he directions taken by analyses of specific intellectual problems are frequently if subtly controlled by the expressed or tacit beliefs philosophers hold concerning the over-all nature of things, by their views on human destiny, and by their conceptions of the scope of human reason." Nagel, Naturalism Revisited, in LOGIC WITHOUT METAPHYSICS 3, 5 (1956). There is no such thing as an immaculate perception, for even what one perceives and recalls is influenced by his beliefs. See, e.g., Levine & Murphy, The Learning and Forgetting of Controversial Material, 38 J. ABNORMAL & SOCIAL PSYCHOLOGY 507 (1943); Postman, Bruner & McGinnies, Personal Values as Selective Factors in Perception, 43 J. ABNORMAL & SOCIAL PSYCHOLOGY 142 (1948).


light of the emphasis our legal system places on conscious and rational decisions. Indeed, American judges immersed in legal doctrine feel strongly that they must conform to the rule of law. Justice Traynor of the California Supreme Court has remarked that "[t]he great creative judges have been men of outstanding skill, adept at discounting their own predilections and careful to discount them with conscientious severity." Regardless of the strength of personal attitudes and attributes that affect the judge's perception of his role and the case before him, Traynor's conclusion that judges consciously discount their own predilections is valid because the attitude of impartiality and the rule of law is incorporated into the judicial process at every level. Karl Llewellyn stressed that judges are law-conditioned officials, pointing out that the adver-

basis is a variable in a class contiguous to the variable to be predicted. Thus, attitudinal variables are the best basis for prediction of judicial decisions or attributes, attribute variables are best for prediction of attitudinal or cultural variables, and cultural variables for attribute variables. Schubert, supra note 63, at 5; Schubert, Introductory Note to Chapter V, in JUDICIAL BEHAVIOR 443, 447 (G. Schubert ed. 1964). Schubert contends that the success of investigators who base their predictions of judicial decisions on content analysis of relevant opinion precedent, see, e.g., Kort, Content Analysis of Judicial Opinions and Rules of Law, in JUDICIAL DECISION-MAKING 133 (G. Schubert ed. 1963); Kort, Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases, 51 AM. POL. SCI. REV. 1 (1957), is due to the fact that they were really working with the attitudinal variable since "an examination of their work makes it clear that the relationship they were investigating was judicial perception of facts." Schubert, Introductory Note to Chapter V, supra. This suggests that the content analyst is working with an intervening variable more remote from the hypothetical construct attitude than the behavioralist using scaling techniques. See MacCorquodale & Meehl, On a Distinction Between Hypothetical Constructs and Intervening Variables, 55 PSYCHOLOGICAL REV. 95 (1948).

77 See R. WEST, supra note 72, at 169-70; COMMON LAW TRADITION, supra note 6, at 46. Gordon Allport's view seems more appropriate than classic psychoanalytic theory insofar as the judicial process is concerned. "[M]otives are contemporary [and] . . . whatever drives must drive now . . . . [T]he 'go' of a motive is not bound functionally to its historical origins or to early goals, but to present goals only. . . ." Allport, Motivation in Personality, Reply to Mr. Bertocci, 47 PSYCHOLOGICAL REV. 533, 545 (1940). On the development of the concept of the rule of law, see E. GRISWOLD, THE 5TH AMENDMENT TODAY 31-52 (1955).


80 See COMMON LAW TRADITION 19. Judges are conditioned to a tradition of decision embodying at least three indispensable elements: first, that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful "day in court"; second, that deciding officers shall be independent in the full sense, free from external direction by political and
sary system tends "powerfully both to focus and to limit discussion, thinking, and lines of deciding." Justice Traynor's conscientious, independent judge frequently will take as his point of departure the written and oral arguments presented by counsel, perhaps even confining himself to the issues raised by counsel. The case method and general approach of American law schools condition lawyers, who later become judges, to search for cases analogous to problems presented to them and to subject the problem-case to traditional forensic techniques.

administrative superiors in the disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; and third, that day-to-day decisions shall be reasoned, rationally justified, in terms that take due account both of the demands of the general principle and the demands of the particular situation. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 145 (1958).


**82** Mr. Justice Brennan confesses that "often my whole notion of what a case is about crystallizes at oral argument . . . Often my idea of how a case shapes up is changed by oral argument." HARVARD LAW SCHOOL, PROCEEDINGS IN HONOR OF MR. JUSTICE BRENNAN 22 (Occasional Pamphlet No. 9, 1967). Mr. Justice Brennan's experience is consistent with the finding that if a "problem is stated verbally the meaning which the words convey is the starting point for the solution." E. GLASER, *AN EXPERIMENT IN THE DEVELOPMENT OF CRITICAL THINKING* 26 (1941). And even though arguments of counsel are countered by memoranda of the judge's law clerk, the order of presentation and correlative mental set is a variable of appreciable effect. See Bruner & Postman, *Perception, Cognition and Behavior*, 18 J. PERSONALITY 14 (1949); Hall, Peirceiving and Naming a Series of Figures, 2 Q.J. EXPERIMENTAL PSYCHOLOGY 153 (1950). The role of the law clerks is significant. Mr. Justice Clark has expressed his high regard and appreciation for law clerks "to whom [judges] . . . are so indebted both for intellectual stimulus and practical collaboration." Clark, "Practical" Legal Training an Illusion, 3 J. LEGAL ED. 423, 424 (1951); see Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 Ore. L. Rev. 299 (1961).


**84** If the law school fails to emphasize the social context and consequences of the legal process, the probability increases that the lawyer and judge so educated will not take into account, or even recognize, the total array of pertinent social issues and ramifications embedded in the case presented for decision. *See Barnhart, The Law School's Relation to General Education: Observations on Legal Education*, in THE LAW SCHOOLS LOOK AHEAD 157, 158 (Conference on Legal Education, Ann Arbor, Michi-
These factors, and others, lend predictability to the judicial process and credence to the view that rules of law do play a part in judicial decisionmaking and that judges are relatively objective. As a criterion for deciding cases, rules of law or legal doctrines are clarified by viewing the judicial opinion as a device for justifying judgments, thereby conveying the impression that rationality is the key to the decision. By writing opinions demonstrating that the judgment is the result of principled and reasoned decisionmaking — not a mental toss of dice — judges retain and exhibit their objectivity, enhancing the prestige of the legal process and reinforcing the consensus of legitimacy, the main source of power for courts in a strong legal system, i.e., a legal system that is "the product of a... substantial consensus and... willing obedience" rather than the product of coerced submission. In our

85 See COMMON LAW TRADITION 19-61.
87 "Briefly put, the requirements for principled decision are: (1) that a reason for the case be given; and (2) that the case be so decided because it is held to be proper to decide cases of its type in this way." Golding, Principled Decision-Making and the Supreme Court, 63 COLUM. L. REV. 35, 41 (1963).
88 "Reasoned" decision is more inclusive than decision "on principle" and has more meaning in administrative context. We forget sometimes that "arbitrary" action can be either an unjustified departure from general policy or an undiscriminating and unjust application of general policy to a concrete situation within its letter but not within its spirit. Jones, supra note 80, at 145 n.5.
89 The requirement of apparent rationality is often overlooked. Justice must not only exist, it must be visible and apparent to the governed. Judge Bridlegoose, Rabelais' man on the bench, decided cases by the toss of dice, large ones for easy cases and small ones for the more difficult cases. Yet the litigants respected and abided by his decisions because his method was apparently rational. See RABELAIS, excerpts from GARGANTUA, in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 440 (M. Cohen & F. Cohen eds. 1951).
90 An authoritative act asserts a claim to obedience, and the reach of that claim determines whether and to what extent a legal system exists. A weak legal order rests on a narrow base of consent, yet it may be able to mobilize very
country, coercion is available to enforce judicial decrees, but ordi-
narily "education, symbolism, and the appeal to reason,"\textsuperscript{91} are suf-
ficient.

The difficulty in maintaining the appearance of impartiality
and objectivity is that although legal doctrine does play an impor-
tant role in the judicial process, a decision is not "worked out like
mathematics from some general axioms of conduct."\textsuperscript{92} "Rules of
law, alone, do not, because they cannot, decide an appealed case
which has been worth both an appeal and a response."\textsuperscript{93} If judges
could arrive at decisions by deduction from preexisting rules, the
conclusion might be that a computer fully programmed with all
statutes, precedents, rules of adjudication, and other relevant ma-
terial, could provide "an accurate, composite view of the current
case in light of previous decisions and modern circumstances" and
an "objective" decision unadulterated by the "humanness" of
judges.\textsuperscript{94} A quest for the just and rational decision in rules of law
alone is reminiscent of the inebriate who, having lost his house
key, continued to search for it in vain on the sidewalk around a
lamppost because, in his words, "it's light here."\textsuperscript{95} Analogously,
it is easier to search for justice in books than in life. How does
one capture the nuances of justice and imprison them in the bow-
els of a computer, to be egested on command? If justice is the
product of a system of rules, then a computer might replace falli-
bile hairless biped judges that blush, empathize, and engage in vari-
ous similar "subjective" activities. But how do you program a me-
chanical idiot-savant to take into account equality of treatment,

\textsuperscript{91} Selznick, supra note 90.
\textsuperscript{92} O.W. Holmes, The Path of the Law, in Collected Legal Papers 180 (1920).
\textsuperscript{93} Common Law Tradition 189; see Llewellyn, Some Realism about Realism
—Responding to Dean Pound, 44 Harv. L. Rev. 1222 (1931).
\textsuperscript{94} Bartholomew, The Supreme Court and Modern Objectivity, 33 N.Y.S.B.J. 157
(1961).
\textsuperscript{95} The analogy of the drunkard's search was suggested by A. Kaplan, supra note
68, at 11.
due regard for the particular case, just desert, respect for human dignity, proper restriction of governmental functions, and fulfillment of reasonable expectations? How do you tell a computer that it is "just" for Negroes and whites to receive equal treatment before the law, but that the State is under no affirmative legal duty to bring about an actual equality of opportunity? Explain to it why it is "just" that the physician is afforded higher status and income than the laborer, that children and the insane are not held to the same standards of conduct as others, and that "justice" is giving each man his due. It is possible that "justice" subsumes a complex of ineffable ideas and interrelationships incapable of expression in linear form, such that just as the contrapuntal harmony of a Bach fugue can never be rendered on a solo bassoon, justice cannot issue full-grown in computer output. Professor Stone, with his characteristic verve, discounts the idea that decisions result from mere application of a preexisting rule, stating that judges, by linking instant cases with precedents, and elaborating, by resort to rhetorical arguments, [produce] fresh solutions in single cases. In these parts the legal system is "open," in the sense that it does not offer mechanical keys to determinate solutions. This does not mean that choice is at large, or that decisions may not command some degree of conviction springing from their anchorage in the \textit{topoi}, the truths taken as common grounds for the time being.

No matter how well a doctrine is explicated, the judge will reach his decision as the result of a number of factors, although a doctrine is, perhaps, the only one expressed. Felix Cohen has

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96 This sentence reflects Edmund Cahn's catalogue of some of the most significant elements of justice. See \textit{E. CAHN, THE SENSE OF INJUSTICE  AN ANTHROPOCENTRIC VIEW OF THE LAW} (1949).

97 Stone, \textit{Reasons and Reasoning in Judicial and Juristic Argument}, 18 \textit{RUTGERS L. REV.} 757, 775 (1964). The importance of rhetorical argumentation and \textit{topoi} for the law is stressed by Tammelo as well as Stone. See Tammelo, \textit{Syntactic Ambiguity, Conceptual Vagueness, and Lawyers Hard Thinking}, 15 J. LEGAL ED. 56, 58 (1962). Kuhn has applied the concept of \textit{topoi} to scientific advances: "In a science ... a paradigm is rarely an object for replication. Instead, like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions." \textit{T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS} 23 (1962).

98 See notes 72-76 supra \& accompanying text. Actually many more variables are involved than mentioned herein; in fact many of the factors that influence behavior are so subtly extensive that they resist identification. See Rosenthal, \textit{Unintended Communication of Interpersonal Expectations}, 10 \textit{AM. BEHAVIORAL SCIENTIST}, Apr. 1967, at 24. Smart Nagel has proposed a fairly detailed and comprehensive scheme based on a mediational S-R model for relating variables that influence judicial decision. See Nagel, \textit{A Conceptual Scheme of the Judicial Process}, \textit{AM. BEHAVIORAL SCIENTIST}, Dec. 1963, at 7.

99 "Behind the logical form lies a judgment as to the relative worth and impor-
described a judicial decision as "a product of social determinants and an index of social consequences." These social determinants and consequences, although not easily ascertained, inevitably must influence the legal process, for in our dynamic society law "cannot be stable, in any effective sense, if it stands still."

The more one elaborates on the requirements and factors that enter into judicial decisionmaking, the more apparent it becomes that the actual process is so complex that it is not going to yield to simplistic theories or traditional behavioralist techniques. The most elegant jurimetric project published as yet, Glendon Schubert's The Judicial Mind (1965), was evaluated as treating "the most complex questions of constitutional adjudication, not as delicate problems of weighing competing considerations, but as a test of whether a justice is for or against civil liberties, or whether he prefers big business; nothing explains a justice's vote except his ideology." One suspects that the "law of the instrument" is
distance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding." Holmes, The Path of the Law, 10 HARV. L. REV. 457, 466 (1897).

Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 843 (1935). Ehrlich believed that it is the duty of legal science "to examine the origin, nature, effect, and value of the tendencies that become apparent in legal decisions, and thus to furnish a picture of what is going on in the administration of justice and what the case thereof may be." Ehrlich, Judicial Freedom of Decision: Its Principles and Objects, 9 MODERN LEGAL PHILOSOPHY SERIES 47, 78-79 (1921).

Although Mr. Justice Story wanted to strengthen the impairment of contract clause, see Dowd, Justice Story, The Supreme Court, and the Obligation of Contract, 19 CASE W. RES. L. REV. 493 (1968), in the Dartmouth College case, he stated that as to the power of the State over corporations "If the legislature mean to claim such an authority, it must be reserved in the grant." Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 712 (1819). The States thereafter accepted this suggestion — thus frustrating Mr. Justice Story's goal. See A. MASON & W. BRaney, THE SUPREME COURT IN A FREE SOCIETY 200 (1959). See discussion at note 228 infra.


Whether the computer here employed, "Glendon Schubert," might be rehabilitated, or whether warped indoctrination has been so intensive as to be incurable, is not clear. As of now, the human students of the Court obviously have nothing to fear from computer competition . . . Un fortunately, the resounding failure of The Judicial Mind, the most ambitious effort of its kind thus far, may postpone for a considerable time the possibility of any further attempts. Id. at 451.
the motive-force for much of the work labeled "jurimetric." None of the methods appears sufficiently sophisticated to shoot the rapids between the behavioral Scylla and Charybdis of reification and reductionism.

Thus far, the discussion has spoken of "the Court" and "the Justices." "The Court" is composed of Justices, who after all are really human beings not radically different from most men. But membership on "the Court" alters the behavior of men who are transformed into Justices with unique social relationships. Neither "the law" nor "the Court" exists except in the minds and artifacts of men, but the perceived role of each is of vast import for judicial

105 "Give a small boy a hammer, and he will find that everything he encounters needs pounding." A. KAPLAN, supra note 68, at 28.

106 Donning the judicial robes, however, may change an individual's conception of his role and thus may drastically alter his personality. See Lake, Book Review, 19 CASE W. REV. 804 (1968). The fact that the opinions of the Court are written by individual Justices and not by the Court is the reason why Reed Lawlor draws a distinction between traditional and personal stare decisis. He notes that

[one of the syndromes of personal stare decisis at the pinnacles of our legal systems exists in the frequent appearance of dissenting opinions of individual justices, especially where justices cite their own prior dissenting opinions in support of their current dissenting opinions. . . . It sometimes seems that many judges assume that they are entitled to their own opinions, especially if they are not required to account to a higher court. Lawlor, What Computers Can Do: Analysis and Prediction of Judicial Decisions, 49 A.B.A.J. 357, 341 (1963).

See also Lawlor, Personal Stare Decisis, 41 So. CAL. L. REV. 73 (1967); Lawlor, Foundations of Logical Legal Decision Making, 63 M.U.L.L. 98 (1963). Concerning prediction of judicial decisions, see Mermin, Concerning the Ways of Courts: Reflections Induced by the Wisconsin "Internal Improvement" and "Public Purpose" Cases, 1963 WIS. L. REV. 192, 205-237; Mermin, Computers, Law and Justice: An Introductory Lecture, 1967 WIS. L. REV. 43, 72-87. Mr. Justice Frankfurter was well aware of personal stare decisis:

"The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions. But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. Such shifts of opinion should not derive from mere private judgment. They must be duly mindful of the necessary demands of continuity in civilized society. A reversal of a long current of decisions can be justified only if rooted in the Constitution itself as an historic document designed for a developing nation." Graves v. New York, 306 U.S. 466, 487-88 (1939) (Frankfurter, J., concurring).

Perhaps it was the desire to emphasize the congruence of personal and traditional stare decisis concerning the edict of Brown v. Board of Educ., 347 U.S. 483 (1954), that motivated the Court to publish the opinion of Cooper v. Aaron, 358 U.S. 1 (1958), in the following form: "Opinion of the Court by The Chief Justice, Mr. Justice Black, Mr. Justice Frankfurter, Mr. Justice Douglas, Mr. Justice Burton, Mr. Justice Clark, Mr. Justice Harlan, Mr. Justice Brennan, and Mr. Justice Whitaker." Id. at 4. This form does, unfortunately, tend to give the impression that it is the personal views of the Justices that are crucial, rather than the law. See Mishkin, Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 HARV. L. REV. 56, 63 n.7 (1965).
behavior. "There is," says Hanson, "more to seeing than meets the eyeball."106

(c) Ideal Opinions. — That judicial behavior cannot scientifically be explained, does not restrain us, however, from describing the process by which a judge ideally should decide a case. Face-to-face, after a judicial decision is rendered, a judge who deviates from the ideal could be punished,107 thereby tending to make the actual congruent with the ideal. Karl Llewellyn starts us down the path to judicial virtue with the advice that a judge ought to make

(1) the effort to diagnose the significant problem involved, and
(2) the effort to mark out the life-situation which gives rise to the problem. Distinct from either is (3) the effort to determine an, or the most, appropriate line of solution or treatment, and then (4) the specific prescription which may be called for.108

106 N. HANSON, PATTERNS OF DISCOVERY 7 (1958).
107 This is what the French try to do. The French Civil Code provides:
"'A judge who refuses to decide a case, under pretext of the silence, obscurity or insufficiency of the law, may be prosecuted as being guilty of a denial of justice.'
'Any judge or tribunal, any administrator or administrative authority, which, under any pretext, even of the silence or obscurity of the law, refuses to render justice to the parties, as is his duty, after having been so requested, and who perseveres in his refusal, after warning or order of his superiors, may be prosecuted and punished by a fine of 48,000 francs minimum and 120,000 francs maximum, and by being prohibited from exercising public duties for from five to twenty years.'
'Judges are forbidden to decide cases submitted to them by way of a general and rule-making (réglementaire) decision.'
See also the following Articles of the Law of August 16-24, 1790:
Art. 10. 'Courts may not take part directly or indirectly in the exercise of legislative power * * * on pain of forfeiture.'
Art. 12. 'They may issue no rules (règlements), but must address themselves to the legislative body whenever they believe it necessary either to interpret a law (une loi) or to make a new one.'" R. DAVID & H. DE VRIES, THE FRENCH LEGAL SYSTEM 20 an. 5 & 6 (1958).
108 COMMON LAW TRADITION 450 (emphasis added). This theme was often repeated by Llewellyn:
The wise place to search thoroughly for what is a right and fair solution is the recurrent problem-situation of which the instant case is typical. For in the first place this presses, this drives, toward formulating a solving and guiding rule; and to address oneself to the rule side of the puzzle is of necessity both to look back upon the heritage of doctrine and also to look forward into prospective consequences and prospective further problems — and to account to each. . . . [T]he immediate equities fall into a wider, paler frame which renders it much easier both to feel and to see how much and what parts of them are typical and so are proper shapers of policy, how much and what part on the other hand is too individual for legal cognizance or appeals rather to sentimentality than to the sensitivity and sense proper to a legal-governmental scheme. Id. at 44.
"Every legal concept represents . . . in [the] first instance an effort at diagnosis of a recurrent social trouble of some particular kind." K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY 42 (1941).
The Court ought to "see and weigh first the relevant problem-situation as a type, holding meanwhile so far as may be in suspense its reactions to the fireside equities or to other possibly unique attributes of the case in hand."\textsuperscript{109} The result should be a case fairly decided, as demonstrated in an opinion expressing a rule of "singing reason," wearing "both a right situation-reason and a clear scope-criterion on its face [yielding] . . . regularity, reckonability and justice."\textsuperscript{110} And since the law is viewed instrumentally as a means for achieving socially desired ends, the judge must both settle the dispute and provide a guide to positive action in the future.\textsuperscript{111} So viewed, the social consequences of decisions are the criterion by which the utility of legal doctrine is measured.\textsuperscript{112} As Mr. Justice Cardozo observed in 1921: "Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end."\textsuperscript{113}

The preceding paragraphs may convey the impression that there is an ideal way to arrive at a judgment and write an opinion. Probably, most judges do tend to believe in an "ideal" method, and that cases are like puzzles\textsuperscript{114} for which there is "one single right answer,"\textsuperscript{115} — presenting simply a variation on the declara-

\textsuperscript{109} COMMON LAW TRADITION 268.

\textsuperscript{110} Id. at 183.

\textsuperscript{111} See note 41 supra. "The judge in deciding cases is not merely laying down a system of minimum restraints designed to keep the bad man in check, but is in fact helping to create a body of common morality which will define the good man." L. FULLER, THE LAW IN QUEST OF ITSELF 137 (1940).

\textsuperscript{112} "It is true that a participant in decision may refuse to consider probable consequences — but if this be neutrality it cannot be distinguished from irresponsibility." Lasswell, Interplay of Economic, Political and Social Criteria in Social Policy, 14 VAND. L. REV. 451, 469 (1961). "[B]efore any particular decision is deemed to have been truly justified, the rule upon which its justification depends must be shown to be itself desirable, and its introduction into the legal system itself defensible." R. WASSERSTROM, supra note 86, at 173. But, "it cannot be gainsaid that once such factors [social and economic antecedents and consequences] are introduced into a study, the research technique closest to the heart of the lawyer — documentary collection and interpretation — become painfully inadequate." Derber, What the Law Can Learn from Social Science, 16 J. LEGAL ED. 145, 147 (1963).

\textsuperscript{113} B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98 (1921).

\textsuperscript{114} Llewellyn seems almost to suggest this when he writes "and to address oneself to the rule side of the puzzle is of necessity . . . to look back upon the heritage of doctrine. . . ." COMMON LAW TRADITION 44 (emphasis added). Weldon believes also that easy cases are puzzles to which one must find the solution. See T.D. WELDON, THE VOCABULARY OF POLITICS 75-83 (1953). Mr. Justice Cardozo too observed that "the cases that come before the court in which I sit, a majority . . . could not, with semblance of reason, be decided in any way but one." B. CARDOZO, supra note 113, at 164. But most cases that reach the Supreme Court pose difficult problems, for which there are any number of possible solutions.

\textsuperscript{115} COMMON LAW TRADITION 24. The effect of this is to encourage "taking the
Adlai Stevenson was fond of telling the story of the youngster who, after telling his mother he was drawing a picture of God and receiving her frank revelation that no one knew what God looks like, gave the assured response: “Now they will!”

For a variety of reasons, we know that we do not know what the ideal opinion looks like. That does not mean we cannot recognize the absence of craftsmanship anymore than in “order to judge what is bad in human conduct, we must know what is perfectly good.”

It is submitted that the Justices frequently display egregious lack of craftsmanship which, if it persists, will inevitably first seemingly workable road which offers, thus giving the more familiar an edge up on the more wise.” Id. at 25. There is in this also “a certain sound economic quality of thinking. The expenditure of intellectual labor which undoubtedly is always involved in seeking norms for decision can often be avoided by rendering a decision according to a norm which has already been found.” E. Ehrlich, supra note 69, at 132. Drawing on G. Tarski, THE LAW OF LIMITATION (E. Parsons transl. 1903), Mr. Justice Holmes put it thus: “Most of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them ... The reason is a good one, because our short life gives us no time for a better, but it is not the best.” O.W. Holmes, supra note 92, at 468. And John Dewey stated: “It is practically economical to use a concept ready at hand rather than to take time and trouble and effort to change it or to devise a new one.” Dewey, Logical Method and Law, 10 CORNELL L.Q. 17, 20 (1925). “If asked why they act in a certain way in certain cases, primitive people always answer that it is because they and their ancestors always have done so.” W.G. Sumner, Folkways 5 (1906). See also M. Smith, THE DEVELOPMENT OF EUROPEAN LAW 68 (1928); P. Vinogradoff, Custom & Right 21 (1925).

116See discussion notes 48-66 supra & accompanying text. Natural law lawyers are guilty of a similar fallacy of reification when they seek “to offer absolute answers where only the tentative or relative would serve.” E. Cahn, supra note 96, at 12; see Kelsen, Plato and the Doctrine of Natural Law, 14 VAND. L. REV. 23 (1960); Nielsen, An Examination of the Thomistic Theory of Natural Moral Law, 4 NATURAL L.F. 44 (1959).


118L. Fuller, THE MORALITY OF LAW 10 (1964). So too we may not know what is just, although the unjust is quite discernible. J.S. Mill believed that justice “is best defined by its opposite.” Mill, Utilitarianism, in THE GREAT LEGAL PHILOSOPHERS 365, 371 (C. Morris ed. 1959). Edmond Cahn finds that where “justice is thought of ... as an ideal mode or condition, the human response will be merely contemplative ... But the response to a real or imagined instance of injustice is something quite different; it is alive with movement and warmth in the human organism.” E. Cahn, supra note 96, at 13.
dilute the Court's effectiveness. Whether the Justices write great opinions is left for others to discuss.\(^\text{119}\) We ask rather, in Part II, do they meet the minimal standards required for effective maintenance of the Court's role in our legal system?

C. Juridical Limitations

Before turning to specific examples of poor craftsmanship, in fairness to the Court, one must admit that the fault is not entirely that of the Justices. Presenting the appearance of neutrality and objectivity — what Hart calls "characteristic judicial virtues"\(^\text{120}\) — is quite different from making the optimal or rational decision that

\(^{119}\) For the task of great judging Ehrlich suggested that the genius, "the more highly developed man in the midst of the human race that has remained far behind him," would be the best judge. E. EHRLICH, supra note 69, at 207. Llewellyn desires judges who are right-minded, learned, careful, wise, to find and voice from among the still fluid materials of the legal sun the answer which will satisfy, and which will render semisolid one more point, as a basis for a further growth. And the certainty in question is that certainty after the event which makes ordinary men and lawyers recognize as soon as they see the result that however hard it has been to reach, it is the right result. COMMON LAW TRADITION 185-86. But, "often a trial judge cannot state all his 'real reasons,' since some of them, especially as to the facts, are 'reasons' of the 'heart,' the promptings of inexpressible, incommunicable intuitions — at their best, poetic insights, moral insights." Frank, Both Ends Against the Middle, 100 U. PA. L Rev. 20, 41 (1951). On the role of intuition and creativity in judicial decisionmaking, see COMMON LAW TRADITION 293-94; Frank, What Courts Do in Fact, 26 ILL. L. Rev. 645 (1932); Hutcheson, The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision, 14 CORNELL L.Q. 274 (1929). See also D. JOHNSON, THE PSYCHOLOGY OF THOUGHT AND JUDGMENT 167 (1955); THE CREATIVE PROCESS, A SYMPOSIUM (B. Ghiselin ed. 1952).

\(^{120}\) H.L.A. HART, THE CONCEPT OF LAW 200 (1961). "These virtues are: impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision." Id. Does this not subsume Professor Wechsler's criterion for a principled decision, based on neutral principles: "A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. Rev. 1, 19 (1959); see notes 87, 88, 107 supra. For reaction of Wechsler's plea for application of neutral principles, see T. BECKER, POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE: A WORKING THEORY AND STUDY IN JUDICIAL DECISION-MAKING (1964); Black, The Lawfulness of the Segregation Decisions, 69 YALE L.J. 421 (1960); Hart, Foreward: The Time Chart of the Justices, 73 HARV. L. Rev. 84 (1959); Lewis, The Meaning of State Action, 60 COLUM. L. Rev. 1083 (1960); Miller & Howell, The Myth of Neutrality in Constitutional Adjudication, 27 U. CHI. L. Rev. 691 (1960); Pollak, Constitutional Adjudication: Relative or Absolute Neutrality, 11 J. PUB. L. 48 (1962); Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. PA. L. Rev. 1 (1959); Shapiro, The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles, 51 GEO. WASH. L. Rev. 587 (1963); Deutsch, Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science, 20 STAN. L. Rev. 169 (1968).
will result in the best course of action in any given set of specific circumstances. First, it is far easier to analyze the language of cases and statutes than to determine the impact of a judgment on the behavior and values of those affected, even though long ago it was known that "wonderful results [could] . . . be achieved" by making such a determination. Policy decisions evolve as little more than fortuitous unless knowledge is obtained concerning the present state of law and fact, along with the consequences and cor-

121 See Ackoff, Towards a Behavioral Theory of Communication, 4 MANAGEMENT SCI. 218, 233 (1958). Modern decision theory itself constitutes "an attempt to find criteria for selecting 'optimal' decisions among a set of alternative actions — where optimality is based . . . on some measure of the values of various outcomes that may result from selecting each of the actions." Churchman, Science and Decision Making, 23 PHILOSOPHY SCI. 247 (1956). The difficulty (impossibility?) involved in defining rationality is illustrated by Mukerjee: "Rationality . . . consists in selecting and consciously striving for more adequate, enduring and harmonious values." Mukerjee, Values in Social Science, in A NEW SURVEY OF THE SOCIAL SCIENCES 221 (G. Varma ed. 1962). But why are some values more adequate, enduring, and harmonious than others? Because they are rational? One ought to act in a rational manner, and rationality consists of acting as one ought to act. Ergo, one ought to act as one ought to act. Rapoport views rationality operationally: "[I]f a man is faced with N mutually exclusive alternatives, we will assume that if he is rational, he is able to arrange the alternatives in the order of preference, allowing, perhaps for indifference among alternatives." Rapoport, Introduction to 1 DECISIONS, VALUES AND GROUPS xiv (D. Willner ed. 1960). But is the ordering rational? See generally C. CHURCHMAN, PREDICTION AND OPTIMAL DECISION (1961).

122 "Evidence is hard to come by. In order to recognize it, you must think. In order to collect it, you must work. It does not flow automatically through the doors of the senses into the mansion of the mind." Miller, Book Review, 3 CONTEMPORARY PSYCHOLOGY 241, 243 (1958).

123 Page, supra note 69, at 58.

124 In 1957, Gordon Patric commented that "in all the vast literature on [the Supreme Court] nothing significant appears which sets out in detail what impact a Court decision has. No empirical study devoted to assessing the influence of a Court statement exists." Patric, The Impact of a Court Decision: Aftermath of the McCol- lum Case, 6 J. PUB. L. 455 (1957). This lack of decision-impact data may be due to legal research's problem-orientation with "the emphasis on cases as the unit of study and instruction, the facility of publication of articles dealing with a single problem, the problem-solving nature of law practice, the pragmatic temper of modern common-law ideology." Brown, Legal Research: The Resource Base and Traditional Approaches, AM. BEHAVIORAL SCIENTIST, Dec. 1965, at 5; see note 84 supra. Patric's impact study was followed by similar projects, e.g., studies cited in Jones, Some Current Trends in Legal Research, 15 J. LEGAL ED. 121, 125-27 (1962). See generally Miller, On the Need for "Impact Analysis" of the Supreme Court Decisions, 53 GEO. L.J. 365 (1965). Even without impact studies it is clear that the

most creative, driving, and powerful pressures upon our law emerged from the social setting. Social environment has two aspects. First, it is what men think: how they size up the universe and their place in it; what things they value, and how much; what they believe to be the relations between cause and effect, and the way these ideas affect their notions of how to go about getting the things that they value. Second, it is what men do; their habits, their institutions. J. HURST, THE GROWTH OF AMERICAN LAW 11 (1950). For impact studies, see generally 1 LAW & SOC'y REV. (1966); 2 LAW & SOC'y REV. (1967).
relative possibilities which flow from selection of possible alternatives.

Professor Adolf Berle has proposed creation of a “Council of Constitutional Advisers” to advise the executive, legislative, and judicial departments in matters of constitutional law. The council would consist of from three to five omniscient members who, “as a result of training, experience, and attainment, [are] exceptionally qualified to analyze and interpret constitutional developments, to appraise programs and activities of the federal government and of the states, and to formulate and recommend policies to promote the effective realization of constitutional rights.”

The council would, in addition to other duties, “make and furnish such studies, reports, and recommendations with respect to constitutional rights as the Supreme Court may request, and, upon its request, . . . act as master for the purpose of determining and making recommendations as to decrees.”

The constitutional issues raised by such potential delegation of judicial power are beyond the scope of this article, but will undoubtedly be the subject of subsequent analysis in the law reviews. Common sense dictates that if the Court is to judiciously legislate, it needs some institutional means of obtaining the requisite information and “feel” for public sentiment. The Court has extremely limited resources for determining such data and implementing its decisions. Time itself is a scarce resource:

\[\text{[Footnotes]}\]

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129 Id. at 62.
130 Contrast the Court’s resources with those of Congress, such as: the Legislative Reference Service, see G. GALLOWAY, THE LEGISLATIVE PROCESS IN CONGRESS 407-09 (1953); E. GRIFFITH, CONGRESS: ITS CONTEMPORARY ROLE 87 (3d ed. 1961); the Office of the Legislative Counsel, see G. GALLOWAY, supra at 409; Jones, Bill-Drafting Services in Congress and the State Legislatures, 65 HARV. L. REV. 441, 444-45 (1952); Lee, The Office of the Legislative Counsel, 29 COLUM. L. REV. 381 (1929); the Coordinator of Information, see GALLOWAY, supra at 409-10; the Committee Staffs, see id. at 410; E. GRIFFITH, supra, at 86-89; GROSS, THE LEGISLATIVE STRUGGLE 421-22 (1953); and the General Accounting Office, see G. GALLOWAY, supra at 42-43; N.Y. Times, July 8, 1962, at 42, cols. 3-5. New Jersey Chief Justice Weintraub has also asked that the judiciary, when acting as a policymaker [quasi-legislature], have some of the aids afforded to a legislature. See Weintraub, Judicial Legislation, 81 N.J.L.J. 545 (1958).
131 The limitations on judicial policy capabilities which stem from inadequate resources include those of problem detection and legitimacy, but they also include (a) lack of adequate information on which to base broad policy judgments, (b) lack of means to control the actions of all parties to a particular problem, (c) lack of effective devices for implementation, (d) lack of capacity for continuous surveillance of policy impacts and effectiveness, and (e) lack of capacity to absorb policy feedback and make corrective ad-
The volume of work of the Court is staggering. When one adds to that the factual complexity, the intellectual and legal intricacy of many of the questions, the public importance of the problems, and the difficulties inherent in reaching mutual understanding in any group of nine men, the burden seems to me to be insupportable, and to be a fair explanation of the source of some of the problems that some thoughtful persons have found in the work of the Court in recent years.129

Walter Murphy, in his excellent text, Elements of Judicial Strategy (1964), takes into account these limitations when he discusses the tactics and strategies employed by various Justices to achieve a particular array of policy objectives. Commenting on the model constructed on the basis of his research, Professor Murphy concludes:

Thus a policy-oriented Justice in this model acts much like the rational man of economic theory. He has only a limited supply of such resources as time, energy, staff, prestige, reputation, and good will, and he must compute in terms of costs and revenues whether a particular choice is worth the price which is required to attain it.130

Second, given the facts, "they do not evaluate themselves."131
The truly demanding task is evaluation of the case having due regard for the ethical, legal, and moral complexities of life. The inscrutable face of justice has already been illustrated and the criteria for evaluation could be endlessly generated. Is the hierarchy of values and solutions ascertained by resort to some synoptic method, such as Bentham’s felicific calculus? Should the criterion be “to satisfy at all times as many demands as we can?” Or is it to provide “as much as we may of the total of men’s reasonable expectations in life in civilized society with the minimum of friction and waste”? Or is the choice dictated by natural law and “man’s natural and initial inclination to the good”?

& McNaughton, Evidence and Inference in the Law, 87 DAEDALUS 62 (1958). “Naturally, the facts exist only as contemplated by [the judge] . . . and are unavoidably colored by the reception given.” Miller & Howell, supra note 120, at 680-81. 138 See D. BRAYBROOKE & C. LINDBLOOM, A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS (1963). Messrs. Braybrooke and Lindblom reject synoptic methods as fictions and suggest that policy analysts actually can realistically attempt no more . . . than to understand the respects in which various possible states differ from each other and from the status quo. . . . [The policy analyst] concentrates his evaluations on what we call margins or increments, that is, on the increments by which value outputs or value consequences differ from one policy to another. He need not ask himself if liberty is precious and, if so, whether it is more precious than security; he need only consider whether an increment of the one value is desirable and whether, when he must choose between the two, an increment of one is worth an increment of the other. Id. at 85.

This method of analysis is termed “the strategy of disjointed incrementalism.” See id. ch. 5. For a direct application of this concept to the law, see Lindblom, The Science of “Muddling Through,” 19 PUB. ADMIN. REV. 79 (1959).

133 James, The Will to Believe and Other Essays, in POPULAR PHILOSOPHY 205 (1898).

134 Pound, The Role of the Will in Law, 68 HARV. L. REV. 1, 19 (1954). Earlier Pound sounded more like William James: “Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust, [and] . . . to give effect to the interests that weigh most in one civilization with the least sacrifice of the scheme of interest as a whole.” Pound, A Survey of Social Interests, 57 HARV. L. REV. 1, 39 (1943).

135 See T. AQUINAS, Summa Theologica, in SELECTED POLITICAL WRITINGS 123 (d’Entreves ed. 1948). For a different view of natural law see Goldschmidt, , Preface to KRITIK DES ENTWURFS EINES HANDELSGESETZBUCHS, KRIT. ZEITSCHR. F.D. GES. RECHTSWISSENSCHAFT, Vol. 4, No. 4 cited in COMMON LAW TRADITION 122 n.155. See also F. NORTHROP, THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE 13 (1959). The choice, it appears, is dictated by the cultural base. [E]thical concepts, no matter how detached they are felt to be in consciousness, have cultural roots and cultural functions, and their meaning is to be found in the offices they perform. And criteria [H.L.A. Hart’s “critical morality”] would seem to have a similar character. The criteria in any evaluation of virtues, goals, ideals, needs, and so on, are other virtues, goals, ideals, needs, more abstract or more concrete, which have become enlisted on behalf of the ethical concepts to carry out their office in the given context. M. EDEL & A. EDEL, ANTHROPOLOGY AND ETHICS 226 (1959); 108
bility and change, collectivism and individualism. The general rule and the unique case, order and freedom — these and other conflicting demands in difficult cases present polycentric problems that are perhaps not even amenable to resolution by a process of reasoned elaboration.

The prevailing functional approach to judicial decisionmaking requires judges to take into account that "unruly horse," public policy, which "when once you get astride it you never know where it will carry you." No matter how unruly the horse, however, judges are obliged to ride as well as they can. As early as 1853 Lord Chief Baron Pollock, in *Egerton v. Brownlow*, queried: "am I not justified in saying that, were I to discard the public welfare from my consideration, I should abdicate the functions of my office?" This idea that judges, in rendering decisions, are under

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A problem is "polycentric" when it involves a complex of decisions judgment upon each of which depends upon the judgment to be made upon each of the others. Such problems characteristically present so many variables as to require handling by the method either of ad hoc discretion or of negotiation or of legislation. H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 669 (tent. ed. 1958).


That animal has proved to be a rather obstreperous, not to say blundering, steed in the law reports. . . . And at times the horse has looked like even less accommodating animals. Some judges appear to have thought it more like a tiger, and have refused to mount it at all . . . . Others have regarded it like Balaam's ass which would carry its rider nowhere. But none, at any rate at the present day, has looked upon it as a Pegasus that might soar beyond the momentary needs of the community. Winfield, *supra* at 91.


141 Id. at 419. He later adds: "It may be that judges are no better able to discern what is for the public good than other experienced and enlightened members of
an obligation to ascertain and apply public policy, which is essen-
tially a "principle of judicial legislation or interpretation,"142 was
forcefully presented by Mr. Justice Holmes in 1897, when he ad-
monished that

the judges themselves have failed adequately to recognize their
duty of weighing considerations of social advantage. The duty is
inevitable, and the result of the often proclaimed judicial aver-
sion to deal with such considerations is simply to leave the very
ground and foundation of the judgements inarticulate, and often
unconscious.143

In further inquiring as to how the Court is to determine rele-
vant public policy, Mr. Justice Cardozo thought that the judge

must get his knowledge just as the legislator gets it, from expe-
rience and study and reflection; in brief, from life itself. Here,
indeed, is the point of contact between the legislator's work and
his. The choice of methods, the appraisement of values, must in
the end be guided by like considerations for the one and for the
other. Each indeed is legislating within the limits of his compe-
tence. No doubt the limits for the judge are narrower. He legis-
lates only between gaps.144

Truthfully, however, the Court has few reliable means of de-
termining public sentiment. On occasion, due process is delineated
by reference to the values expressed or implied in federal and
State constitutions and documents, federal and State court deci-
sions, and the relevant norms and values of other countries.145
Where a statute is in point, then of course "public policy in such a
case is what the statute

ept the community; but that is no reason for their refusing to entertain the question, and
declining to decide upon it." Id. at 421.

142 Winfield, Ethics in English Case Law, 45 HARV. L. REV. 112 (1931).
143 Holmes, supra note 99, at 467. To the same effect, see Hand, The Speech of
144 B. CARDozo, supra note 113, at 113.
145 See Kadish, Methodology and Criteria in Due Process Adjudication — A Sur-
U.S. 436 (1966), the Court pointed out that the roots of the privilege against self-
incrimination "go back into ancient times." Id. at 458-59. The Court supported
this assertion with the following:

Thirteenth Century commentators found an analogue to the privilege
grounded in the bible. "To sum up the matter, the principle that no man
is to be declared guilty on his own admission is a divine decree." Maimon-
ides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the
Sanhedrin, C. 18, § 6. Id. at 458 n.27.
146 United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 340 (1897). The
basis for this policy is that

the immediate representatives of the people in legislature assembled would
seem to be the fairest exponent of what public policy requires as being
most familiar with the habits and fashions of the day, and with the actual
for ascertaining public sentiment, a powerful electronic data retrieval system [E.D.R.S.] might have an enormous impact on the evaluation phase of the judicial process.¹⁴⁷

[An] . . . interesting possibility was first conceived of by Heck (1932), who regarded legal norms as value judgments or pronouncements as to which one of the conflicting interests of opposing social groups shall prevail over the other, or whether the interests of both must yield to the interest of third groups or to the community as a whole. The results of these value judgments are expressed in statutes and judicial precedents. Heck contended that 

the task of legal science to discover these value judgments and to develop a method of applying them to “new” cases. If the E.D.R.S. retrieves all generic levels embodied in legal material, then these value judgments would be available to judges. Whether they would then merely interpolate on the basis of these prior value judgments is speculative. Perhaps a differentiation might be made on the basis of legislative as opposed to judicial value judgments. In any case, the ideal E.D.R.S., for that matter any practical E.D.R.S., will have a far reaching impact on value determinations, a potential impact that deserves more attention than it has yet received.¹⁴⁸

No basis exists for predicting that an ideal E.D.R.S. will appear on the scene in the near future, or that behavioral scientists will provide the Court with solid estimates of relevant values, or that such an inquiry is practically feasible.¹⁴⁹ Probably,

major dependence for guidance . . . will of necessity continue to be . . . [common sense, folk wisdom, and amateur experimentation]. Yet, there are weaknesses in such informally derived generalizations. . . . Because any principle derived from common sense has its roots in a traditional value system and loosely generalized undefined experience, there is a very good chance that whatever validity it may possess has relevance to some other time, place, social system or purpose than the one immediately at issue."¹⁵⁰

considerations of commerce and trade, their consequent wants and weaknesses. That legislation is least objectionable, because it operates prospectively, as a guide in future negotiations, and does not, like a judgement of a court, annul a contract already concluded. McNamara v. Gargett, 68 Mich. 454, 460-61, 36 N.W. 218, 221 (1888).

The prospective overruling cases negate a blanket retroactive operation objection. See text accompanying notes 339-402 infra.


¹⁴⁸ Id. at 24; see Heck, *Jurisprudence of Interests*, in 2 *Twentieth Century Legal Philosophy Series* 31 (1948).


II. THE CRAFTSMANSHIP OF THE SUPREME COURT

Granted the above limitations, the question remains as to whether the Justices do what is expected of craftsmen, that is, do they write opinions that enhance the Court’s prestige and effectiveness, as well as that of our legal system. It is interesting that among the instruments of judicial power, Professor Murphy includes the rhetoric of the opinion and the prestige of the Court. Both are related, one to the other, and to the efficacy of the law generally. Naturally, if the law is not efficacious, i.e., if the law is not generally obeyed by the populace, almost everyone would agree that we would not have simply “a bad system of law [rather] ... something that is not properly called a legal system at all.”

It would seem fair, then, to require the Court to decide cases in such a way as to meet at least the minimal standards required to maintain the legal system. Professor Lon Fuller in his provocative little book, *The Morality of Law* (1964), sets forth the

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151 Murphy lists five instruments of judicial power: (1) the adjudication of the case; (2) the rhetoric of the opinion; (3) the power to issue writs; (4) the contempt power; and (5) the prestige of the Court. W. Murphy, supra note 130, at 18-19. For his discussion of limitations on that power, see id. at 19-28. Some of the methods used to effectuate the goals of a Justice or bloc of Justices are discussed id. at 37-78. On the significance of a court’s prestige for its influence, see Mott, *Judicial Influence*, 30 AM. POL. SCI. REV. 295 (1936).


153 Llewellyn maintains the “job of juristic method [is] that of building and using techniques and skills for keeping the men and machinery of all the law-jobs on their jobs and up to the job.” Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 253 (1942).

following eight ways in which these standards are not met:\^{165} (1) absence of rules; (2) lack of promulgation; (3) an excess of retro-
active legislation; (4) incomprehensible rules; (5) contradictory rules; (6) rules impossible to perform; (7) too frequent alteration of the rules; and (8) lack of congruence between the law-in-books and the law-in-action. Other requirements could be generated, but there exists a longstanding agreement among jurists that these eight are significant.\^{166}

In considering the Supreme Court's craftsmanship in constructing opinions, six of the above elements are especially pertinent:

(1) The lack of congruence between the law-in-books and the law-in-action. Since the task of trying to attain this congruence is endless the element is put under the rubric of the "Ixion ploy."\^{157}

(2) Rules impossible to perform. The "Danaides ploy" appropriately describes this element.\^{168}


\^{165} See L. FULLER, supra note 118, at 39.

Fuller's eight elements were set forth either explicitly or implicitly in T. AQUINAS, SUMMA THEOLOGICA (circa 1250). Aquinas emphasized: the rule element, "law is a rule and measure of acts, a rule of reasons," Aquinas, Summa Theologica, in THE GREAT LEGAL PHILOSOPHERS 56, 57 (C. Morris ed. 1959); promulgation. "[I]n order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force," id. at 60; and, by implication, the need for comprehensible and consistent rules, see id. On too frequent changes in the law he noted:

[H]uman law is rightly changed, in so far as such change is conducive to the common weal. But, to a certain extent, the mere change of law is of itself prejudicial to the common good: because custom avails much for the observance of laws . . . . Consequently, when a law is changed, the binding power of the law is diminished, in so far as custom is abolished. Wherefore human law should never be changed, unless, in some way or other, the common weal be compensated according to the extent of the harm done in this respect. Id. at 77.

On the possibility of performance Aquinas states: "Wherefore laws imposed on men should also be in keeping with their condition, for . . . . law should be possible both according to nature, and according to the customs of the country." Id. at 74. Finally, we can infer that Aquinas believed that the law-in-action should comport with the law-in-books, since he stressed that "it is better that all things be regulated by law, than left to be decided by judges." Id. at 71.

\^{157} Ixion was chained to a wheel that forever rolled down an endless road as punishment for murdering his father-in-law and displaying disrespect for the gods.

\^{168} The Danaides, the daughters of Danaës, as punishment for murdering their husbands, were forced to attempt to carry water in a sieve.
(3) Too frequent alteration of the rules. For obvious reasons this is termed the "Tantalus ploy."\(^{159}\)

(4) Contradictory rules. Since inconsistent rules look in different directions, the relevant cases shall be considered illustrative of the "Janus ploy."

(5) Incomprehensible rules. In honor of Robert Hutchins' creation, Dr. Alexander Zuckerkandl, an Adlescent from the country of Adle, the relevant cases shall be considered Zuckerkandlites, the products of the "Zuckerkandl Syndrome."\(^{160}\) Dr. Zuckerkandl's chief goal in life was to reduce communication to the minimum. Former President Eisenhower provided us with a typical Zuckerkandlite when he replied to questioning concerning school integration in the South by saying: "However, when the Federal Court gets into the thing, you have got a judicial thing, or I mean a legal thing, that I have gone as far as I know the answer."\(^{161}\)

(6) Lack of promulgation. Again, for obvious reasons this element is characterized as the "Caligula ploy."

As shall be illustrated, the Court's failure to perform any of the enumerated elements gives rise to the valid conclusion that it is not a virtuoso in execution of juristic method.

A. The Ixion Ploy

"A slow sort of country!" said the Queen. "Now, here, you see, it takes all the running you can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that."

LEWIS CARROLL
THROUGH THE LOOKING-GLASS

The Court cannot, and does not, ignore the relationship between law and behavior. As already shown, the Court has attempted to transmute the Constitution into living law by pro-

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\(^{159}\) Tantalus was punished for murdering his son by being forced to stand in water up to his chin. Above his head was fruit. Tortured by hunger and thirst, when he reached for the fruit it moved from his grasp, and when he attempted to sip the water it always receded.

\(^{160}\) See Hutchins, Living Without Guilt, 18 CENTER DIARY 37 (May/June 1967).

\(^{161}\) Id. at 38.
pounding whatever ancillary rules are necessary to make express constitutional rights "fully meaningful."\textsuperscript{162} On the other hand, the Court cannot impose rules too disparate from the existing norms of society. Mr. Justice Cardozo put it this way:

The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties and harmonize results with justice through a method of free decision . . . . [The judge's] . . . duty to declare the law in accordance with reason and justice is seen to be a phase of his duty to declare it in accordance with custom.\textsuperscript{163}

In 1913, Eugen Ehrlich wrote:

A limitation exists . . . beyond which the judge must not go. [His] . . . decision must be in harmony with the principles of the existing valid law and of juristic science . . . . The power of the judge is not sufficient to overcome the enormous powers of resistance inherent in society on a new foundation by means of a judicial pronouncement; and a judge requires knowledge of the world sufficient to be able correctly to estimate these powers of resistance as well as his own power.\textsuperscript{164}

The Court may alter social norms,\textsuperscript{165} but without the concurrence of other social forces, law would be futile. It would not be "right" law, for "right law which touches people must live \textit{in} them. If law does not so exist, it goes first technical; it then goes formal and remote. Remote law is not law to love, but law to dodge, or to use . . . ."\textsuperscript{166} The necessity of a concurrence of social forces to constrain behavior is wonderfully exemplified by the limerick about

\begin{quote}
the young lady named Wilde
Who kept herself quite undefiled
Through thinking of Jesus
\end{quote}

\begin{footnotes}
\item[162] See notes 9-11 \textit{supra} \& accompanying text.
\item[163] B. Cardozo, THE GROWTH OF THE LAW 16, 106 (1924). Mr. Justice Cardozo also observed that "[s]ooner or later, if the demands of social utility are sufficiently urgent . . . . utility will tend to triumph . . . . Jurisprudence has never been able in the long run to resist successfully a social or economic need that was strong and just." \textit{Id.} at 117-18, \textit{quoting} E. Ehrlich, GRUNDELUNG DER SOZIOLOGIE DES RECHTS 346 (1913). Dissatisfaction with the law is generally due to "its failure to conform to contemporary conceptions of social justice." Brandeis, \textit{The Living Law}, 10 ILL. L. REV. 461, 463 (1916). \textit{See also} T. Weldon, THE VOCABULARY OF POLITICS 67 (1953).
\item[165] See note 15 \textit{supra}.
\item[166] Llewellyn, \textit{supra} note 153, at 263.
\end{footnotes}
And social diseases
And the dangers of having a child.¹⁶⁷

In a democratically oriented society it is reasonable to assume that legal norms comport with social norms and the consensus of the governed.¹⁶⁸ All too frequently one finds sociologists viewing law as "a device for inculcating appropriate habits by compelling appropriate behavior."¹⁶⁹ Such statements bring to mind the imposition of the governors' law during the ascendency of the Third Reich. Hitler had decided that the law must be truly representative of the Volksgeist (Volk limited to Aryan). The Nazis were enraptured with Savigny's Volksgeist concept that law is "something living in the blood and at the same time something lived by a people,"¹⁷⁰ but in actuality little attention was paid to the cus-

¹⁶⁷ Quoted in A Symposium on Morality, 34 AM. SCHOLAR 347, 360 (1965).
¹⁶⁸ The basis of all our law—rules of conduct, whether legislative, judicial, or administrative in origin—behind which is the coercive power of the state—is consensual. We are willing and ought to be willing to pay a limited price only in coercing minorities, and whenever, therefore, a minority is sufficiently large or determined or strategically placed we are not quite in a position to have law on whatever the subject may be on which the minority is constituted and situated as I have described it. We resort, then, to other methods of social action—methods other than law, methods of persuasion and inducement, by appeal not only to reason but to interests, not only to material but to political interests, rather than methods of attempted coercion. It is especially true of judge-made constitutional law, and ought to be, . . . that both its basis and its effectiveness are essentially consensual. A. BICKEL, POLITICS AND THE WARREN COURT 11 (1965) (emphasis added).

What does this imply? One hypothetical possibility probably has already occurred to the reader: the 100-socket, 600-electrode human being controlled by a transistor-timed stimulator worn, perhaps, in the form of a lapel pin by men and of a jeweled brooch by women. Each individual's program would be pre-set and tailored to assigned functions and duties, but it could be changed instantly by overriding radio signals sent out by local (75-socket) controllers, who would be controlled by a Master Controller (no sockets) who, in his wisdom, would control the behavior of everybody. LIFE, March 8, 1962, at 104.


¹⁷⁰ Jones, The Nazi Conception of Law, 21 OXFORD PAMPHLETS ON WORLD AFFAIRS 3, 32 (1959).
toms and beliefs of the people during this period, the law in Nazi Germany being what the Führer decreed.171

The totalitarian state's most ominous aspect is its ability to obtain complete compliance with its doctrines — justifying infliction of death and extreme invasion of individual freedom and integrity as necessary for the "good of society." Unfortunately, the atrocities that were committed on this basis are recalled too clearly. At the Nuremberg trials, counsel for defendant Gebhart attempted to justify inhuman medical experiments performed on prisoners by contending that

the experiments to test the effectiveness of sulfanilamide were necessary to clarify a question which was not only of decisive importance for the individual soldier and the troops at the front but above and beyond this care for the individual, it was of vital importance for the fighting power of the army, and thus for the whole fighting nation. All efforts to clarify this question by studying the effect of casual wounds failed.172

The "father knows best" doctrine has been most recently practiced in Russia and in her satellites.173 Professor Berman writes:

The implication of the Soviet concept of . . . [law] is that people in general do not know their rights and duties but must be taught them, and that these rights and duties are not something which they possess, but rather are instruments used by the state to in-

171 Reference was had to public opinion, at least theoretically, in some cases. For example, in the criminal law, if the court "could find no statute directly in point . . . [the object was] still to convict, if the accused's act . . . [seemed] to be covered by the general idea underlying some statute and ought to be punished according to sound popular sentiment." Jones, supra note 170, at 30. See also Dickman, An Outline of Nazi Civil Law, 15 Miss. L.J. 127 (1943). In West Germany today, however, the "danger of a judge acting through personal notions unrelated to prevailing views or atypical of them is largely eliminated by the duty imposed upon him to examine the actual behavior of the community, coupled with the plurality of judges in German Courts." J. Gough, The Role of Usage in German Law 82-83 (1950). See also Von Mehren, The Judicial Process: A Comparative Analysis, 5 Am. J. Comp. L. 197 (1956). On the situation in East Germany, see Kirchheimer, The Administration of Justice and the Concept of Legality in East Germany, 68 Yale L.J. 705 (1959).

172 2 Trials of War Criminals 5 (1946).

173 See Berman, Soviet Justice and Soviet Tyranny, 25 Colum. L. Rev. 795 (1955); Kirchheimer, supra note 171, at 748-49. Mao Tse-Tung’s view is curiously democratic:

To link oneself with the masses, one must act in accordance with the needs and wishes of the masses. All work done for the masses must start from their needs and not from the desire of any individual, however well-intentioned. It often happens that objectively the masses need a certain change, but subjectively they are not yet conscious of the need, not yet willing or determined to make the change. In such cases, we should wait patiently. We should not make the change until, through our work, most of the masses have become conscious of the need and are willing and determined to carry it out. MAO TSE-TUNG’S QUOTATIONS: THE RED GUARD’S HANDBOOK (1967) (emphasis added).
culcate the legal and social psychology which the leaders believe to be proper.\textsuperscript{174}

For the Free World, with a jurisprudence and social ethos diametric to the Nazi and Soviet notion of inculcating appropriate behavior through law, Eugen Ehrlich's suggestion that law comport with the "living law," the inner ordering of society, is more apropos.

Mr. Justice Robert H. Jackson once remarked: "We are not final because we are infallible, but we are infallible only because we are final."\textsuperscript{176} In a very real sense the Court is not final, since it is subject to reversal by the Court of Public Opinion.\textsuperscript{176} Consider briefly the problem of equal treatment and opportunity for the Negro. To produce an enlightened attitude among both white and Negro citizens wherein individuals are evaluated on the basis of merit rather than ascription, requires more than the force of law.\textsuperscript{177} The major thrust will have to come from the family and public schools,\textsuperscript{178} and as greater equality of treatment becomes more pervasive and the expectations of disadvantaged minority groups grow, there will arise a correlative increase in the need for effective teaching by family, school, and court.\textsuperscript{178} In recent years,

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\textsuperscript{174} Berman, \textit{supra} note 173, at 803. Some Southerners may consider the doctrine extant in the United States A.B. (after \textit{Brown}).
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\textsuperscript{176} W. \textsc{Murphy} & C. \textsc{Pritchett}, \textsc{Courts, Judges, and Politics} 510 (1961).
\end{flushright}

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\textsuperscript{176} See notes 152, 163, 164 \textit{supra} \& accompanying text. Ibn Khaldun as early as the 14th century observed that reformers would have a difficult time overcoming the resistance of powerful social forces. See D. \textsc{Martindale}, \textsc{The Nature and Types of Sociological Theory} 132 (1960).
\end{flushright}

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\textsuperscript{177} The most potent comparison in this regard, that of prohibition to racial integration, is discussed in Marshall, Fasone & Dotson, \textit{Prohibition and Anti-Discrimination Legislation in Housing — The Moral and Pseudo-Scientific Approach in Legal Thinking}, in \textit{Open Occupancy vs. Forced Housing Under the Fourteenth Amendment} 216 (A. Avins ed. 1963).
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\textsuperscript{178} "[P]ublic school secularism is not just another among our many sects. It has cohesive national content. That is the whole of its content, and its function is unique. [The public school] . . . is the sole means by which the state is permitted to draw people to its schools and away from centrifugal [cultural influences] . . . ." A. \textsc{Bickel}, \textsc{Politics and the Warren Court} 203 (1965). Religious institutions have generally lagged behind the Court in demanding racial equality. See K. \textsc{Clark}, \textsc{Prejudice and Your Child} 105 (1955); F. \textsc{Loescher}, \textsc{The Protestant Church and the Negro — A Pattern of Segregation} (1948); \textsc{N.Y. Times}, Sept. 26, 1966, at 35, col. 1. Of course, until this century Christian churches were far from leaders in men's quest for freedom. Instead, they "authorized the persecution of Jews, infidels, heretics, dissenters, free thinkers. On principle they denied freedom of conscience, freedom of the speech and press, so long as they had power to do so." H. \textsc{Muller}, \textsc{Freedom in the Western World} 51 (1963).
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\textsuperscript{179} James Hamilton, Associate Director of the National Council of Churches, commenting on the reaction of churchgoers to the 1966 Civil Rights Bill, stated: "We've got a bill now that is affecting the whole country, not just one region. I've been amused by some of the people who were so enthusiastic in other years. Suddenly they don't have as much to say." Cleveland Press, Sept. 21, 1966, \S A, at 12, col. 1.
\end{flushright}
the Court has operated effectively as "an educational force in helping to mold a state of opinion far more sensitive to civil liberties than that which prevailed in the United States thirty or fifty years ago." Yet, in a different era such an approach would have been virtually impossible. The defiant statement of President Jackson comes to mind: "John Marshall has made his decision: — now let him enforce it!" Loren Miller contends that Mr. Chief Justice John Marshall and Mr. Justice Story "were conservatives with a strong bias in favor of property rights. Their recognition of constitutional tolerance of slavery carried with it a correlative belief that the property rights of slaveholders were paramount in a judicial determination of questions affecting slavery." But, if the decision in Worcester v. Georgia was unenforceable, how effective would the Court have been after it invalidated slavery? Mr. Chief Justice John Marshall was astute enough to appreciate the necessity of building a strong judiciary and national government. Although the slavery issue undoubtedly perplexed the great Chief Justice, "[h]e never had but one, and that a splendid, vision. The American Nation was his dream; and to the realization of it he consecrated his life." Mr. Chief Justice Marshall's opinions relating to slavery and civil rights must be viewed in the context of that era's social matrix and not as if the culture of the early 19th century was the same as that existing today. Apparently, he was acutely aware of the func-
tional prerequisites of an effective legal system, and his opinions reflect an interest in establishing the judiciary as an effective coordinate branch of the government. In cases involving the rights of Negroes, none of his opinions did more than apply and interpret the existing law — including the Federal Constitution — which recognized the institution of slavery and the right of individuals to own slaves. Scott v. Negro Ben is illustrative of Mr. Chief Justice Marshall’s disposal of these cases. Mr. Miller contends that in Scott, the Chief Justice circumvented a Maryland law which required any person bringing a slave into that State to prove “to the satisfaction of the naval officer or collector of taxes that such slave had resided three years in the United States,” by holding that such proof was adequate if offered at the trial of the suit for freedom. Mr. Chief Justice Marshall did not circumvent or ignore the law; he interpreted and applied it according to its manifest purpose, unquestionably a proper method for interpreting statutes. He correctly reasoned that the great object of the proviso certainly was to permit persons, actually migrating into the state of Maryland, to bring with them property of this description, which had been within the United States a sufficient time to exclude the danger of its being imported into America for the particular purpose [slavery]. This great object of the proviso was, that the fact itself should accord with this in-

186 Loren Miller cites and discusses a number of the cases involving rights of the Negro in which Marshall participated. See L. MILLER, supra note 183, at 29-42. Cases involving Negro rights not mentioned by Miller and decided by the Court during Mr. Chief Justice Marshall’s tenure, without a written opinion filed by him, include the following: United States v. The Schooner Sally, 6 U.S. (2 Cranch) 406 (1804); The Brigantine Amiable Lucy v. United States, 10 U.S. (6 Cranch) 330 (1810); The Emily and The Caroline, 22 U.S. (9 Wheat.) 381 (1824); The St. Jago de Cuba, 22 U.S. (9 Wheat.) 409 (1824); The Josefa Segunda, 23 U.S. (10 Wheat.) 312 (1825); Shelby v. Guy, 24 U.S. (11 Wheat.) 561 (1826); Mason v. Matilda, 25 U.S. (12 Wheat.) 590 (1827); United States v. Preston, 28 U.S. (3 Pet.) 57 (1830); Menard v. Aspasia, 30 U.S. (5 Pet.) 505 (1831) (a case that should be read in conjunction with Scott v. Sandford, 60 U.S. (19 How.) 393 (1856)); Lee v. Lee, 33 U.S. (8 Pet.) 44 (1834); Fenwick v. Chapman, 34 U.S. (9 Pet.) 461 (1835). Cases not mentioned by Miller in which Mr. Chief Justice Marshall wrote the opinion of the Court include Spiers v. Willison, 8 U.S. (4 Cranch) 398 (1808); Brent v. Chapman, 9 U.S. (5 Cranch) 358 (1809); Beverley v. Brooke, 15 U.S. (2 Wheat.) 100 (1817); Lagrange v. Chouteau, 29 U.S. (4 Pet.) 287 (1830). In none of these opinions can one discern more than an honest and reasonable effort to apply the existing law. The same is true of opinions written by Mr. Chief Justice Marshall while on circuit. See, e.g., Bond v. Ross, 3 F. Cas. 482 (No. 1623) (C.C.D. Va. 1815); Backhouse v. Jett, 2 F. Cas. 316 (No. 710) (C.C.D. Va. 1821); Byrd v. Byrd, 4 F. Cas. 947 (No. 2268) (C.C.D. Va. 1825).

187 10 U.S. (6 Cranch) 3 (1810).

188 L. MILLER, supra note 183, at 31.

In considering the attitudes of that time, an attempt to implement a higher law vitiating constitutional and statutory provisions supporting slavery would have been an exercise in futility. With a new social climate more hospitable to civil rights, the Court can now act vigorously and affirmatively on behalf of disadvantaged minorities. But even now, it is questionable how effective the law can be in elevating the condition of the Negro. Visible improvements are apparent: Negroes appear frequently in public activities and all communication media, their political power has grown enormously, prejudice and discrimination directed at the Negro in the South has decreased, and through it all the Supreme Court has steadfastly adhered to its proscription of all racial classifications inimical to the interests of the Negro if the State is involved to some significant extent. Actually, however, in many respects the Negro's position is probably worse now than in 1954, when the Court handed down Brown v. Board of Education.

190 In retrospect it seems that Mr. Chief Justice Marshall's interpretation of the 1783 Maryland statute was correct, since the superseding act clearly adopted his view.

Provided nevertheless, and be it enacted, that it shall and may be lawful for any citizen or citizens of the United States who shall come into this state with a bona fide intention of settling therein, to import or bring into this state, at the time of his or her removal into this state, or within one year hereafter, any slave or slaves the property of such citizen at the time of his or her said removal, which slave or slaves, or the mother or mothers of which slave or slaves, shall have been resident of the United States, or some one of them, three whole years next preceding such removal, and the same to retain as slaves. Act of Dec. 31, 1796, ch. 67, § 2.

191 The significance of the increased exposure of the Negro individual cannot be overemphasized. Such exposure is one of the primary means of eliminating commonly held stereotypes concerning the "inherent" nature of "the Negro." See Lewis, Parry and Riposte to Gregor's "The Law, Social Science, and School Segregation: An Assessment," 14 W. RES. L REV. 637, 676-77 (1963). There are social scientists who contend that Negroes are inherently inferior. An excellent discussion and refutation of "scientific racism" appears in I. Newby, CHALLENGE TO THE COURT: SOCIAL SCIENTISTS AND THE DEFENSE OF SEGREGATION, 1954-1966 (1967).


193 But see Southern Justice (L. Friedman ed. 1965). "White backlash" is reflected in a recent Gallup Poll that indicated that 52% of all adults feel that integration is moving at too fast a pace. In 1962, only 32% of all adults expressed the same opinion. N.Y. Times, Sept. 30, 1966, at 3, col. 3. On white backlash, see N.Y. Times, Sept. 19, 1966, at 1, col. 2; N.Y. Times, Sept. 20, 1966, at 1, col. 4; N.Y. Times, Sept. 21, 1966, at 1, col. 2. See note 195 infra.


195 See note 195 infra.

196 L. Brant Dozell voices a pessimistic view concerning the advisability as well as the effect of Brown:
computer revolution, automation, and other technological advances have combined to reduce sharply the demand for unskilled laborers. This reduction in demand, in conjunction with the annual increase during the 1960's of 1½ million individuals to the labor force, places a premium on skills and education, and on both counts Negroes are relatively deficient. In an era of exponential population growth and technological development, with a concomitant decrease in demand for, and increment in, unskilled Negro laborers, the Negro unemployment program can only become exacerbated. If the Negro is, as Loren Miller suggests, a ward of

Our experience with race conflict during the past decade speaks for itself. Before the desegregation decisions withdrew the problem from the organic processes, the country's practices by and large had kept abreast of the country's attitudes; the progress that had been made toward improving race relations was thus progress in depth, progress bound to endure because it was rooted in the consent and behavior of those directly concerned. After the decisions, the possibilities of consensual adjustment and accommodation were greatly diminished because of the wide gap between what was commanded and what was desired; and that gap inevitably became filled with hostility. Before the desegregation decisions, our society could respond relevantly to the concrete challenges that changing times produced: it could develop a living law on the race issue because the law, by definition, was attuned to the lives of the people. After the decisions, the people, Negroes and whites alike, were required to conform their lives to the prescriptions of ideology. Before the desegregation decisions, different sections of the country could deal with the race problem according to the capacities of their own districts which had been destined by history and geography to be disparate. After the decisions, dissimilars were treated as similars, diversity was expunged in favor of a superficial uniformity. Before the desegregation decisions, the country had approached the race issue as part of a multi-dimensional problem: there was not only the matter of giving the Negro his due, but also the matters of preserving the integrity of community life, of maintaining the country's federal political structure, of improving the country's schools, of maintaining the public order, of keeping the country's economic system flourishing, and so on. After the decisions, the issue became single-dimensional: all related problems became subordinate to the goal of satisfying the Negroes' claims. L. DOZELL, THE WARREN REVOLUTION 33-34 (1966).

In this regard, consider Professor Sovern's appraisal: Among all the varieties of racial discrimination in employment, racially closed training systems stand out for their perniciousness. They cut off hope, stifle growth, and block merit; and they lend specious credence to claims that Negroes can not do skilled work. In the building trades, where most of the nation's registered apprentices are to be found, unions are too frequently responsible for these wrongs. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 200 (1966).

For statistics comparing the educational and socioeconomic situations of Negroes and whites, see Lewis, supra note 191, at 660-71.

See note 46 supra. It appears that population is increasing more rapidly than gains in productivity. See N.Y. Times, April 1, 1966, at 1, col. 2; N.Y. Times, Sept. 21, 1966, at 21, col. 1. Therefore, to transfer jobs from whites to Negroes will only lead to greater dissension. More jobs and better living conditions must be achieved for all citizens, and the disparity between Negro and white, based on ascription and a caste system, must disappear.
the Court, it is society and not Mr. Chief Justice Marshall or the Court that has placed him in that posture. Certainly, the delay in offering affirmative protection is a product, at least in part, of the Court's awareness of the limitations placed on it by the attitudes and practices of the society upon which its precepts must act, and be acted on, if its decisions are to become living law.

It is largely because of this awareness that the Court adopted the “deliberate speed” formula in *Brown v. Board of Education*, a formula that resembles “poetry . . . and equity techniques of discretionary accommodation between principle and expediency, but which fits precisely one thing only, namely the unique function of constitutional adjudication in the American system . . . .”

On occasions, the Court in recent years has misjudged the effective limits of its power. A classic example is provided by the reversal, within the short space of 4 years, of *McCollum v. Board of Education* by *Zorach v. Clauson*. The *McCollum* case held invalid the Champaign, Illinois released schooltime program for religious instruction, whereas the *Zorach* case upheld the New York program even though the only distinction was the location of the place for instruction. The Illinois program, unlike the New York program, provided for conducting religious classes in public school buildings. Mr. Justice Black, who wrote the majority opinion in *McCollum*, dissented in *Zorach* and remonstrated: “As we

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199 U.S. 294, 301 (1955).
201 333 U.S. 203 (1948).
203 Mr. Justice Douglas, speaking for the Court, found this distinction significant: In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the *McCollum* case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion. *Id.* at 315.

It has been contended that coercion, rather than mere accommodation, was involved in *Zorach*, the decision being “clearly wrong in having refused to permit the plaintiffs to prove the coercive operation of the program.” W. Katz, *Religion and American Constitutions* 50 (1964). Professor Kauper believes that *Zorach* propounds a new theory (accommodation) and that the Court “was making a distinction based on the relative degree of involvement by the public school system in the program, finding that the involvement here [*Zorach*] was not too great when public school property itself was not used for this purpose.” P. Kauper, *Religion and the Constitution* 67 (1964).
attempted to make categorically clear, the McCollum decision would have been the same if the religious classes had not been held in the school buildings.\textsuperscript{204}

Mr. Justice Jackson, in a separate dissenting opinion, prophetically concluded:

The distinction attempted between that case [McCollum] and this [Zorach] is trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity. A reading of the Court's opinion in that case along with its opinion in this case will show such difference of overtones and undertones to make clear that the McCollum case has passed like a storm in a teacup. The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law.\textsuperscript{205}

The public furor following McCollum dictated the Zorach switch in time. Professor Kurland's critical comment constitutes an apt appraisal: "If it is not fair to say that the Supreme Court follows the election returns, it may nonetheless be true that there are times when some of its members may seem to anticipate them."\textsuperscript{206}

Are Ginzburg\textit{ v. United States}\textsuperscript{207} and Mishkin\textit{ v. New York}\textsuperscript{208} also examples of retreat in the face of public reaction and resistance? Is it possible that "not very far back in the justices' minds is an awareness of the danger in frustrating too often the conservative elements of the country in every area that concerns them? Why not throw them a bone once in a while? Who cares about Ralph Ginzburg?"\textsuperscript{209} Actually, Ginzburg and Mishkin propound principles that are really ancillary to the greater protection given to freedom of expression by the standard for obscenity enunciated in the prevailing opinion in \textit{A Book Named Memoirs v. Attorney General}.\textsuperscript{210} That this was not generally appreciated raises the per-

\textsuperscript{204} 343 U.S. at 316.
\textsuperscript{205} Id. at 325.
\textsuperscript{206} Kurland, \textit{Of Church and State and The Supreme Court}, 29 U. CHI. L. REV. 1, 73 (1961). Again, the Court is going against public opinion on the subject of religious exercises in public schools — an area where "feelings run deep and thoughts tend to be shallow." See the prayer cases cited note 16(4) supra.
\textsuperscript{210} 383 U.S. 413 (1966).
Hairsplitting
plexing question of how the Court can better communicate with its readers. Or perhaps the camouflage of Mishkin and Ginzburg presents judicial craftsmanship at its best with the Court preparing the public for the ultimate denouement of the sequel.\textsuperscript{211} In any event, the relationship between behavior and the Court's decisions is complex and, given the limited resources of the Court,\textsuperscript{212} in many cases really not amenable to empirical inquiry.

If court proceedings and constitutional limitations on the use of evidence at trial are involved the Court does have a direct means of determining the effect of its judgments. Thus, by 1961 the Court was able to discern that the application of the fourth amendment's prohibition of unreasonable searches and seizures to the States in 1949, in \textit{Wolf v. Colorado},\textsuperscript{213} was "to grant the right but in reality to withhold its privilege and enjoyment."\textsuperscript{214} But, in situations where the impact of the Court's rules is not directly observable, the behavioral and normative dimensions are largely unknown. Perhaps, in some instances the Court can state with assurance the consensus on a particular moral issue. In \textit{Cleveland v. United States},\textsuperscript{215} taking as a point of departure the premise that polygamy is "odious,"\textsuperscript{216} long "outlawed in our society,"\textsuperscript{217} a "return to barbarism,"\textsuperscript{218} and "contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world,"\textsuperscript{219} the Court, in an opinion by Mr. Justice Douglas, concluded that interstate transportation of plural wives by members of the Fundamentalist Mormon sect constituted a violation of the Mann Act, since transportation of a woman for polygamy was for an "immoral purpose."\textsuperscript{220} With all that has transpired since

\begin{itemize}
\item \textsuperscript{211} The Court later restricts Ginzburg and Mishkin to their facts and virtually vitiates what impact these decisions may have had. \textit{See} Bickel, \textit{Obscenity Cases}, \textit{New Republic}, May 27, 1967, at 15, 16; \textit{Redrup v. New York}, 386 U.S. 767 (1967), discussed notes 466-69 infra & accompanying text. \textit{See also} note 514 infra.
\item \textsuperscript{212} \textit{See} notes 124, 127-28 supra.
\item \textsuperscript{213} 338 U.S. 25 (1949).
\item \textsuperscript{214} \textit{Mapp v. Ohio}, 367 U.S. 643, 656 (1961).
\item \textsuperscript{215} 329 U.S. 14 (1946).
\item \textsuperscript{216} \textit{Id.} at 18, \textit{quoting from} \textit{Reynolds v. United States}, 98 U.S. 145, 164 (1878).
\item \textsuperscript{217} 329 U.S. at 18.
\item \textsuperscript{218} \textit{Id.} at 19, \textit{quoting from} \textit{Church of Jesus Christ of Latter-Day Saints v. United States}, 136 U.S. 1 (1889).
\item \textsuperscript{219} 329 U.S. at 19.
\item \textsuperscript{220} The Mann Act prohibits transportation in interstate commerce of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." 18 U.S.C. § 2421 (1964). \textit{Cleveland} seems especially striking in light of \textit{Mortensen v. United States}, 322 U.S. 369 (1944), where the Court held that the
1946, however, it is questionable whether Mr. Justice Douglas could approach even the Cleveland case in the same way today. Further, most cases require a resolution of conflicting values and norms for which no sound evidence of the community's moral sense is available; instead, the Court resorts to "conjecture, hunch or intuition." Studies that attempt to ascertain community norms and "to gauge the extent to which legal norms are in harmony or at variance with the moral sense of the community," do exist. Unfortunately, serious questions arise concerning the adequacy of such studies. Of special relevance to our discussion is the continuing dialogue between law and morality. Commenting on the Cohen, Robson, and Bates study, Professor Skolnick notes:

\[\text{[The study]} \ldots \text{asks the respondent whether he believes in his own mind that the law should allow parents to have complete supervision of the way in which the child spends his earnings? But this is very different from telling subjects that this is what the law states and asking if they agree or disagree with it. The point is not a quibble but is suggestive of an important concern — the opinion-creating force of law itself.}\]

Admittedly, "[c]omplete conformity of the value judgments of governors and governed would only exist in an ideally complete and homogeneous democracy — which never has existed," while above provision of the Mann Act was not violated when a husband and wife, who ran a house of prostitution, went on an interstate trip with several of their prostitute-employees, even though on the return trip it "was easy to argue that \ldots the girls were being transported \ldots for an immoral purpose." E. Levi, An INTRODUCTION TO LEGAL REASONING 47 (1949).


\[\text{222 Id. The study of Messrs. Cohen, Robson, and Bates is one example. See also K. BEUTEL, SOME POTENTIALITIES OF EXPERIMENTAL JURISPRUDENCE AS A NEW BRANCH OF SOCIAL SCIENCE (1957); Oikawa, Application of Beutel's Experimental Jurisprudence to Japanese Sociology of Law, 39 Neb. L. Rev. 629 (1960). See generally T. COWAN, THE AMERICAN JURISPRUDENCE READER 189-229 (1956). Four decades ago, Ehrlich outlined a project similar to that of Cohen, Robson, and Bates. See E. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 506 (W. Moll transl. 1936). His major interest, however, was in "the actual practice of the community, and not its abstract moral standard." Page, Professor Ehrlisch's Czernowitz Seminar of Living Law, 1914 PROCEEDINGS: AMERICAN ASSOCIATION OF LAW SCHOOLS 60.}\]

\[\text{223 Note 221 supra.}\]

\[\text{224 Skolnick, The Sociology of Law in America: Overview and Trends, in LAW AND SOCIETY 4, 31 (SOCIAL PROBLEMS Summer Supp. 1965).}\]

\[\text{225 Rheinstein, Sociology of Law. Apropos Moll's Translation of Eugen Ehrlich's Grundlegung Der Sozioologie Des Rechts, 48 INT'L J. ETHICS 232 (1938). Rheinstein considers it to be a "demand of political prudence that the norms for decision which are prescribed to the judges by the lawmakers (or by judges to lawmakers) conform to the value judgments held by the people whose controversies the judges decide." Id.}\]
at the same time it should be recognized that the governors can alter the values and behavior of the governed,\(^2\) although most often “legal rules are behind, but eventually catch up to social needs.”\(^3\) Courts may use legal propositions and rules as a lever for social progress (as determined by the courts). The danger lies in not knowing whether the weight of popular opinion constitutes too great a load for the lever to bear. Several strategies are available: the Court can (1) do nothing;\(^4\) (2) prepare public opinion by moving incrementally, step by step, “a sort of judicial inocula-

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\(^2\) A nation which fought to make the world safe for democracy, believed that German soldiers were bloody barbarians organized to rape women, fear athletes’ foot and pink tooth brush, knows that communism is against the will of God, and is satisfied that public ownership of utilities is a greater source of corruption than private ownership, offers little solace to one who wishes to argue that mass human actions are neither controllable nor predictable. There is no reason why the arts of propaganda, applied economics, and advertising, can rest on scientific data while the art of the lawyer must forever be founded on the occult mysteries of judicial hunch and professional dogma. Beutel, Some Implications of Experimental Jurisprudence, 48 Harv. L. Rev. 169, 176-77 (1934).

\(^3\) Skolnick, supra note 224, at 32. Professor Skolnick is here setting forth the view of Jerome Hall presented and documented in J. Hall, Theft, Law and Society (1952). Llewellyn identifies, as a plank in the realists’ platform, “[t]he conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports to serve.” Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222, 1236 (1931).

\(^4\) Doing “nothing,” however, may effectively result in making law. Thus, in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952), the Court’s conclusion that “it would be unwise to attempt to fashion new judicial rules of contribution [among mutual wrongdoers] and that the solution of this problem should await congressional action,” id. at 285, illustrates the “paradox of making law by refusing to make law.” H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 515 (tent. ed. 1958). In fact, Halcyon made law that was inconsistent with the inarticulate premise of the case. See Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 135 (1956) (Black, J., dissenting); H. Hart & A. Sacks, supra at 515-46. The Court may display “passive virtues” and deny certiorari as it has done frequently in cases raising de facto segregation issues, e.g., Addabbo v. Donovan, 382 U.S. 905 (1965); Downs v. Board of Educ., 380 U.S. 914 (1965); Balaban v. Rubin, 379 U.S. 881 (1964); Bell v. School, City of Gary Indiana, 377 U.S. 924 (1964); see A. Bickel, The Least Dangerous Branch (1962). It is generally agreed that denial of certiorari “imports nothing as to the merits of the case.” C. Wright, Federal Courts 431 (1963). But, in Ross v. State, 246 S.W.2d 884 (Tex. Crim. App.), cert. denied, 343 U.S. 969 (1952), where a Negro defendant was convicted by an all-white jury and Negroes were precluded, in effect, from participation as jurors by the prosecutor’s exercise of his peremptory challenges, the Texas Court of Criminal Appeals observed: “The identical question was decided adversely to the appellant in McMurrin v. State, Tex. Cr. App., 239 S.W.2d 632. This was also a case from Galveston County . . . . The Supreme Court of the United States refused writ of certiorari . . . . In our view their holding is conclusive against the contention in the instant case.” 246 S.W.2d at 886. See Harper & Pratt, What the Supreme Court Did Not Do During The 1951 Term, 101 U. Pa. L. Rev. 439, 444-46 (1953).
tion calculated to give the public a partial immunity to the affliction [soon] . . . to ensue;”

(3) increase the tensile strength of the lever. The latter requires, in our society, enhancing the prestige of the Court, which in turn is served by leading, but not by forcing, and by the Court's knowing the effective limits of its reach — a task that requires "right-minded, learned, careful, wise [judges who can] . . . find and voice from among the still fluid materials of the legal sun the answer which will satisfy, and which will render semisolid one more point, as a basis for a further growth,"

in short, a prescience greater than that we mortals generally possess.

It seems that the sensible approach is to move cautiously, by margins or increments, with corrective adjustments being rendered


230 COMMON LAW TRADITION 185.

231 See note 132 supra.

232 The Court upheld as constitutional a Louisiana statute requiring racial segregation in railroad passenger cars in Plessy v. Ferguson, 163 U.S. 537 (1896). The Court also held that the 14th amendment requires "absolute equality of the two races before the law," id. at 544, thereby giving birth to the invidious "separate but equal" doctrine. From its inception, this doctrine was a fiction. Initially, there existed virtually a conclusive presumption that facilities were equal. Given the basic fact of racial classification, the presumed fact of equality of facilities followed, evidence to the contrary being considered irrelevant. The next major step was to regard racially segregated facilities as only prima facie equal. Sweatt v. Painter, 339 U.S. 629 (1950). Finally, in Brown v. Board of Educ., 347 U.S. 483 (1954), it was held that racially segregated facilities are conclusively unequal. Thus, equality of facilities again becomes the point. "The sufficiency of Negro facilities is beside the point; it is the segregation by race that is unconstitutional." Watson v. City of Memphis, 373 U.S. 526, 538 (1963). A parallel incremental approach was used to develop the constitutional fiction that the term "citizen" in U.S. CONST. art. III includes corporations for purposes of federal diversity jurisdiction. A corporation was held not to be such a "citizen" in Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809). The next step: the members of the corporation are prima facie citizens of the State of incorporation, therefore allowing the corporation to institute actions in federal courts based on diversity of citizenship, unless it was shown that one or more members were citizens of the same State as that of the opposing litigant. Commercial & R.R. Bank v. Slocomb, 39 U.S. (14 Pet.) 60 (1840). Finally, it was conclusively presumed that the members of a corporation are citizens of the State of incorporation. Marshall v. Baltimore & Ohio R.R., 57 U.S. (16 How.) 314 (1853); see FED. R. CIV. P. Form 2. For the commerce clause sequence, see Note, An Appropriate Constitutional Provision for Dealing With Problems of Discrimination, 18 W. RES. L. REV. 964, 971-76 (1967). On the more recent, and much shorter, U.S. CONST. amend. XIV, § 5 sequence, see id. at 977-82.
in the process. On occasion, however, the Court takes giant steps unnecessarily. The clearest example is provided by contrasting *Gideon v. Wainwright* with *Douglas v. California.* Both cases were decided on the same day and both could have been disposed of on due process grounds. *Gideon* held that the due process clause of the 14th amendment "requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court." *Douglas,* instead of relying on due process, held that the equal protection clause of the 14th amendment was violated "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel . . . ." The Court in *Douglas* could have held that failure to appoint counsel to assist an indigent accused in his one and only appeal as of right was a denial of the due process clause of the 14th amendment. Application of the due process rationale to *Douglas* would have constituted only a step along a well-travelled path. The use of the equal protection clause was a leap into the unknown!

The unqualified right to counsel at the trial level was a long time in coming, but when that day finally arrived it may have found the Court in a most expansive — explosive, if you will — mood.

*[Douglas does not]. . . stop at discretionary review and post-conviction proceedings. Indigent persons may find that they also have been awarded absolute rights to assigned counsel in justice courts, juvenile proceedings, probation revocation hearings — everywhere a rich man may appear with counsel.

The case may signify that an indigent defendant is entitled to be furnished various forms of aid other than counsel.

The Supreme Court's use of broad principles, where narrower ones would suffice, has occurred in numerous other instances.

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235 372 U.S. at 340.
236 372 U.S. at 357.
237 Note, *Appointment of Counsel for Indigent Defendants in Criminal Appeals,* 1959 DUKL J.L. 484, 489-90. The Court also could have held that having provided an appeal, due process required the State to furnish the indigent accused with counsel to make the appeal meaningful. This is analogous to the holding of *Parker v. Gladden,* 385 U.S. 363 (1966).
239 In some circumstances, use of the equal protection clause constitutes an approach more moderate and restricted than other avenues open to the Court. Mr. Justice Jackson was sensitive to the value of using the equal protection clause to invalidate
The failure of the Court to fashion appropriate and precise rules, sufficiently differentiated for guidance in administrative law situations, led Professor Kenneth Davis to suggest:

1. The Court probably should write fewer general essays in its opinions and it should give more meticulous care to the ones it does write.
2. The Court should take greater advantage of the values of case-to-case development of law.
3. The Court should make further effort to reduce the frequency of contradictory holdings, and it should check its apparently growing tendency to indulge in easy generalizations that are misleading if read literally.
4. The Court should have greater respect for its holdings and for its own opinions; without restricting its freedom to overrule, it should restrict its freedom to violate its own doctrine.
5. The Court should inquire whether it is often too lighthearted about the manipulation of technical doctrine in order to produce desired substantive results in particular cases.

B. The Danaides Ploy

Alice laughed. "There's no use trying," she said; "one can't believe impossible things."

"I dare say you haven't had much practice," said the White Queen.

"When I was your age, I always did it for half-an-hour a day. Why, sometimes I've believed as many as six impossible things before breakfast."

LEWIS CARROLL
THROUGH THE LOOKING-GLASS

Equity judges have long respected the requirement that a decree is ineffective unless enforceable. Therefore, equity orders will not issue if impossible standards must be imposed or extraordinary court supervision is necessary for enforcement of the decree.


241 See W. DEFUNIAK, HANDBOOK OF MODERN EQUITY 165-69 (2d ed. 1956). Although it follows that equity will not affirmatively enjoin an opera singer to perform pursuant to his contract, a decree will issue prohibiting the singer from breaching explicit or implicit negative covenants in his contract by performing for others. Lumley v. Wagner, 42 Eng. Rep. 687 (Ch. 1852).
Usually, the law recognizes the requirement that it cannot command the impossible:

common sense [compels one to accept] ... the ruling, cited by Plowden, that the statute of 1st Edward II., which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, "for he is not to be hanged because he would not stay to be burnt." 242

The most notable exception is the M'Naghten standard which imposes criminal responsibility if a defendant, at the time of the criminal act, "had that competent use of his understanding as that he knew that he was doing, by the very act itself, a wicked and a wrong thing ... [and was] ... capable of distinguishing between right and wrong." 243 The criminal defendant whose cognitive facilities are relatively intact but whose volitional or affective apparatus is nonfunctional, and whose aberrant behavior cannot possibly be controlled, is criminally liable, and in fact, may be required to demonstrate beyond a reasonable doubt that he is insane. 244 If the justification for the criminal law and other restraints on our freedom is that the penalties imposed will deter antisocial acts and thus inure to the public welfare, then the M'Naghten standard is patently absurd. "Nothing can more strongly illustrate the popular ignorance respecting insanity than the proposition equally objectionable in its humanity and its logic, that the insane should be punished for criminal acts, in order to deter other insane persons from doing the same thing." 245

Of course, other grounds do exist for sustaining the use of the M'Naghten standard. 246 To satisfy substantive due process, State
laws must have a purpose reasonably related to some legitimate subject of governmental action, be reasonably adapted to the accomplishment of that purpose, and not be arbitrary or excessive. Statutes enacted to advance the public health, safety, morals, prosperity, welfare, or convenience are valid and constitutional, unless they attempt to achieve their purpose "by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." The M'Naghten test is reasonably related to a legitimate subject of governmental action — protection of society and its moral code. Whether it is too broad and invades an area of protected freedom — a peripheral or penumbral right emanating from the Bill of Rights — has not yet been determined by the Court.

This would reinforce the community values, rehabilitate the mentally ill "wrongdoer," and protect society, without requiring the sacrifice of a mentally ill individual. Of course, the vindictive element of the populace would be deprived of its satisfaction.

247 Ginzburg v. Connecticut, 381 U.S. 479, 504 (1965) (White J., concurring). Thus, even though one cannot demonstrate that exposure to obscenity results in antisocial behavior, see Cairns, Paul & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 MINN. L. REV. 1009 (1962); cf. note 444 infra, society may validly legislate against obscenity because it "offends[s] the moral concepts of the people as a whole, and the people have the right to establish codes of right conduct for literature as well as for other forms of community conduct." State v. Lerner, 81 N.E.2d 282, 289 (Ohio C.P. 1948). This basis satisfies the requirement that "[i]n a democratic state those who would justify ... [censorship], even as applied to seemingly worthless or offensive material, should be required to assume the burden of proving that regulatory action is necessary for the welfare of society." Note, Entertainment: Public Pressures and the Law, 71 HARV. L. REV. 326, 367 (1957).

248 NAACP v. Alabama, 377 U.S. 288, 307 (1964). The State can legislate what amounts to "a significant encroachment upon personal liberty ... only upon showing a subordinating interest which is compelling." Bates v. Little Rock, 361 U.S. 516, 524 (1960).

249 An argument can be made that the eighth amendment's proscription of "cruel and unusual punishments" bars conviction of the mentally ill, for "however insanity is defined, it is in end effect treated as a disease. While afflicted people may be confined either for treatment or for the protection of society, they are not branded as criminals." Robinson v. California, 370 U.S. 660, 668-69 (1962) (Douglas, J., concurring). In Robinson, the Court held unconstitutional as conflicting with the eighth amendment's ban on "cruel and unusual punishments" a California statute making it a misdemeanor punishable by imprisonment for any person to be "addicted to the use of narcotics." Mr. Justice Fortas, dissenting from a denial of certiorari in Budd v. California, 385 U.S. 909 (1966), observed:

Mr. Justice Stewart's opinion for the Court in Robinson makes it clear that a State may not constitutionally inflict punishment for an illness, whether the illness be narcotics addiction or "the common cold." [370 U.S. at 667] . . . Our morality does not permit us to punish for illness. We do not impose punishment for involuntary conduct, whether the lack of volition results from "insanity," addiction to narcotics, or from other illnesses. The use of the crude and formidable weapon of criminal punishment of the alcoholic is neither seemly nor sensible, neither purposeful nor civilized. This Court should determine whether it is constitutionally permissible, or whether, as the Court of Appeals for the Fourth Circuit [Driver v. Hinnant,
Closely related to the *M'Naghten* problem is the issue of strict liability. Although one acts with "due care and with an innocent intent," in certain instances liability is imposed. Although Professor Fuller believes civil liability without fault can be justified "by the economic principle that the foreseeable social costs of an enterprise ought to be reflected in the private costs of conducting that enterprise," he views criminal liability without fault as "the most serious infringement of the principle that the law should not command the impossible." The Court justifies strict criminal liability on public policy grounds:

The purposes of this legislation [Food, Drug and Cosmetic Act, 21 U.S.C. § 301-92 (1964)] thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. . . . The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct — awareness of some wrongdoing. In the interests of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.

The most appropriate response is that of Professor Sayre who warned:

> When the law begins to permit convictions for serious offenses of men who are morally innocent and free from fault, who may even be respected and useful members of the community, its restraining power becomes undermined. Once it becomes respectable to be convicted, the vitality of the criminal law has been sapped. It is no answer that judges convinced of the actual moral innocence of the defendant, may impose only a nominal punishment. The harm is wrought through the conviction itself . . . . For true crimes, it is imperative that courts should not relax the requirement of the *mens rea* or guilty intent.

At times the Court propounds rules that cannot be performed

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356 F.2d 761 (4th Cir. 1966) and four of the eight judges of the Court of Appeals for the District of Columbia Circuit [*Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966)] have held, it is cruel and unusual punishment — punishment in the absence of volitional fault, punishment which our Constitution forbids. 385 U.S. at 911-13.


251* Id. at 75.

252* Id. at 77.


because either they are incomprehensible\footnote{See notes 443-90 infra & accompanying text. If sufficiently vague the law may of course be declared unconstitutional. \textit{Keyishian v. Board of Regents}, 385 U.S. 589 (1967); \textit{Baggett v. Bullitt}, 377 U.S. 360 (1964).} or they set an impossible standard. A perfect example of the latter is the federal harmless error rule enunciated in \textit{Chapman v. California}.\footnote{386 U.S. 18 (1967), \textit{noted in} 19 \textit{CASE W. RES. L. REV.} 157 (1967).} 

\textit{Chapman} proclaimed that "the beneficiary of a constitutional error [must] . . . prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."\footnote{386 U.S. at 24. For purposes of criminal law, proof beyond a reasonable doubt is generally defined as "that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." \textit{Commonwealth v. Webster}, 59 Mass. 295, 320 (1850). This definition is adopted in 1 F. \textit{WHARTON, CRIMINAL EVIDENCE} § 12 (12th ed. 1955).} Rejecting a rule requiring reversal whenever federal constitutional errors are committed, the Court declared that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless, not resulting in the automatic reversal of the conviction."\footnote{386 U.S. at 22.} The Court apparently believes that in some instances comment on the failure of the defendant to take the stand to testify in his own behalf may constitute harmless error, even though the no-comment rule was applied to the States to make the fifth amendment's privilege against self-incrimination fully meaningful in \textit{Griffin v. California}\footnote{380 U.S. 609 (1965). One reason why the Court may have hesitated to find comment always harmful is that previously it held that "the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth" and applied the \textit{Griffin} rule prospectively. \textit{Tehan v. United States ex rel. Shott}, 382 U.S. 406, 416 (1966); \textit{see discussion notes} 339-402 infra & accompanying text.} in 1965. In \textit{Chapman}, which itself involved a \textit{Griffin} problem, the Court found harmful error since
prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions.260

Would it ever be possible for the State to demonstrate beyond a reasonable doubt that a Griffin proscribed comment was harmless?261 In the petition for rehearing, counsel for the respondent contended that the "beyond a reasonable doubt" standard in effect makes all constitutional errors harmful, necessitating an automatic reversal.262 The difficulty in demonstrating that a Griffin error is harmless is exemplified by the situation that arose in a recent Ohio case.263 An official booklet of the Court of Common Pleas of Cuyahoga County, entitled Information for Trial Jurors, prepared by the County over a decade ago, contained the following language: "Q. Should consideration be given to the failure of the defendant to take the stand as a witness? . . . [T]he failure of the defendant to testify may be considered by the Court and the jury and may be made the subject of comment by counsel."264 Each week the County distributed the booklets to prospective jurors prior to the time that they reported to various courtrooms for selection to serve on juries in specific cases. Therefore, it is not surprising that neither defendants nor their counsel were aware of the improper comment contained in the booklets,265 although they were in use at

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261 Mr. Justice Stewart in his concurring opinion in Chapman advocated an automatic reversal in Griffin situations since it "would seem best calculated to prevent clear violations of Griffin v. California." Id. at 45.
263 Lewis v. Janis, No. 17,880 (6th Cir. May 25, 1967). The jurisdictional basis for the petition for habeas corpus addressed to a federal circuit judge is of interest, but not directly relevant to this article, except insofar as to note that since no State remedies were effectively available to the defendants or petitioner for habeas corpus, see Ohio Rev. Code Ann. § 2953.21 (Page Supp. 1966); Lindsay v. Green, 9 Ohio St. 2d 102, 223 N.E.2d 913 (1967); Freeman v. Maxwell, 4 Ohio St. 2d 4, 210 N.E. 2d 885 (1965), cert. denied, 382 U.S. 1017 (1966), the federal habeas corpus action ought to lie since the Great Writ "has been over the centuries a means of obtaining justice and maintaining the rule of law when other procedures have been unavailable or ineffective." Parker v. Ellis, 362 U.S. 574, 583 (1960) (Warren, C.J., dissenting). Where "federal protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S. 678, 684 (1946).
264 CUYAHOGA COURT OF COMMON PLEAS, INFORMATION FOR TRIAL JURORS 16-17 (undated). OHIO CONST. art. I, § 10, as amended September 3, 1912, authorized such comment.
265 The submission of written instructions to the jury out of the presence and knowledge of counsel undoubtedly also violated the sixth amendment's guarantee of right to counsel, made applicable to the States through the due process clause of the 14th amendment in Gideon v. Wainwright, 372 U.S. 335 (1963). Is it possible for the right to counsel to be "fully meaningful" if instructions are given to the jury out
least as late as March 1967 (Griffin v. California was decided on April 28, 1965).\(^{266}\) (Can this be law-in-books transmuted into law-in-action?) Someone, however, did decide that the situation was improper and attempted to correct the error by drawing a line through the offensive language. Unfortunately, this action only served to draw attention to the quoted language, and thus to the failure of the defendant to take the stand — the error Griffin sought to eliminate.\(^{267}\) Assuming that the language in the booklet constitutes improper comment,\(^{268}\) it is incredible to believe that the State could prove beyond a reasonable doubt that it did not con-

of the presence of counsel under circumstances that result in counsel’s complete lack of knowledge of the giving of jury instructions or the substance thereof? This appears to be a more flagrant deprivation of the right to a fair trial than that involved in Parker v. Gladden, 385 U.S. 363, 364 (1966), in which a bailiff assigned to shepherd a sequestered jury had stated to one juror, "Oh, that wicked fellow, he is guilty," and to another juror, "If there is anything wrong [in finding him guilty] the Supreme Court will correct it." In reversing the defendant’s conviction for second-degree murder, the Court stated:

We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment. It guarantees that "the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [and the right to] be confronted with the witnesses against him. . . ." As we said in Turner v. Louisiana, 379 U.S. 466, 472-473 (1965), "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." 385 U.S. at 364.

In the situation presented by the use of the jury pamphlet, just as in Parker, counsel was afforded no opportunity to pass upon the validity of statements prior to their publication to the jury. The improper comment was never brought to his attention, so he could never have the opportunity to object to the statements. How evanescent is the right to counsel if the State may improperly instruct a jury with impunity so long as it does so in a way that will escape the scrutiny of counsel?

\(^{266}\) After April 28, 1965, the day Griffin was decided, it is difficult to conceive of a counsel so obtuse as not to automatically object to an instruction telling the jury that "the failure of the defendant to testify may be considered by the Court and jury and may be made the subject of comment by counsel." If such an instruction was given, in addition to moving for a mistrial counsel might request that the trial court charge the jury that they could not take into account the failure of the defendant to take the stand and testify in his behalf. The rationale of Bruno v. United States, 308 U.S. 287 (1939), combined with Griffin, would grant the defendant the right to such a charge, although the Court in Griffin expressly reserved decision on that point. Griffin v. California, 380 U.S. 609, 615 n.6 (1965).

\(^{267}\) See id. at 614-15.

\(^{268}\) Griffin does not spell out what constitutes "comment." See Note, Griffin v. California: Comment on Accused’s Failure to Testify Prohibited by the Fifth Amendment, 70 DICK. L. REV. 98 (1965); Annot., 14 A.L.R.3d 723 (1967). It is arguable that an unconstitutional comment would appear only if the booklet had stated that the jury could draw an inference of guilt from the failure of the defendant to take the stand. Although not explicit, that implication is apparent in the language actually used.
tribute to the conviction of a defendant in a case in which the booklet was used.269

Another aspect of the Chapman rule presents a masochistic inversion of the Danaides theme. The Court has probably imposed an impossible incubus on its collective nine shoulders, since the adoption of the rule commits it "to a case-by-case examination to determine the extent to which [it] . . . think[s] unconstitutional comment on a defendant's failure to testify influenced the outcome of a particular trial. This burdensome obligation is one that [it is] . . . hardly qualified to discharge."270 This is not the first time the Court has foisted on itself an impossible task. The rule for determining whether material is obscene and not within the purview of the first amendment embodies standards271 that require a case-by-case Supreme Court evaluation for meaningful protection.272 Thus, the Court is saddled with "the irksome and inevitably unpopular and unwholesome task of finally deciding by a case-by-case, sight-by-sight personal judgment of the members of this Court what pornography (whatever that means) is too hard core for people to see or read."273 One may agree that the Court has a duty to decide obscenity cases, while also urging that it fashion a rule

269 In the Ohio case illustrated, a determination on the merits has not yet been made. The federal habeas corpus action was dismissed on the ground that an unexhausted State remedy was available, which was true after newspaper publicity concerning the federal action brought the situation to the attention of interested defendants and their counsel. See note 263 supra.

270 386 U.S. at 45 (Stewart, J., concurring).

271 There are three independent elements, each of which must exist before matter is considered "obscene" and not protected by the first amendment:
(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. A Book Named Memoirs v. Attorney General, 383 U.S. 413, 418 (1966).

272 This is necessitated because the standards are so vague that they provide insufficient guidance for lower courts. See notes 443-90 infra & accompanying text.

273 Mishkin v. New York, 383 U.S. 502, 516-17 (1966) (Black, J., dissenting). We are told that the only way we can decide whether a State or municipality can constitutionally bar movies is for this Court to view and appraise each movie on a case-by-case basis. Under these circumstances, every member of the Court must exercise his own judgment as to how bad a picture is, a judgment which is ultimately based at least in part on his own standard of what is immoral. The end result is . . . a purely personal determination by individual justices as to whether a particular picture viewed is too bad to allow it to be seen by the public. Such an individualized determination cannot be guided by reasonably fixed and certain standards. Kingsley Intl Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 690-91 (1959) (Black, J., concurring).
that is operational without a full-time commitment by the Court. The problem is compounded when the Court propounds other rules that involve standards requiring case-by-case analysis. For example, in *New York Times Co. v. Sullivan*, the Court held:

> The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.275

In subsequent cases, the determination of whether the *Sullivan* standard was met has resulted in opinions discussing at length the evidence presented at the trial and the relative significance of the circumstances — opinions reminiscent of the search for the "special circumstances" of the *Betts v. Brady* doctrine.

[W]e are rapidly but surely getting ourselves in the dilemma we found ourselves in when we were compelled to overrule the ill-starred case of *Betts v. Brady* . . . in order that the state courts of the country might be able to determine with some degree of certainty when an indigent person was entitled to the benefit of a lawyer and avoid the spawning of hundreds of habeas corpus cases that finally raised questions that a lawyer could and would have raised at trial.278

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275 Id. at 279-80.


277 316 U.S. 455 (1942). No discernible consistency appears in the Court's decisions spelling out what special circumstances dictated that counsel was necessary to afford the defendant a fair trial. Suppose the Supreme Court had been aware of the behavioral analysis by Kort and Lawlor of the right to counsel cases that revealed a consistency in the applicable doctrine. See Kort, *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases*, 51 AM. POL. SCI. REV. 1 (1957). The assumptions and methodology of this first attempt were subsequently questioned in an article by Fisher, which concluded that the "circumstances which permit the legitimate construction of a perfectly predicting weighting scheme are precisely those under which all cases that arise present no new features and are covered by clear precedents [Cardozo's easy cases]." *Fisher, The Mathematical Analysis of Supreme Court Decisions: Use and Abuse of Quantitative Methods*, 52 AM. POL. SCI. REV. 321 (1958). See also Kort, *Reply to Fisher's Mathematical Analysis of Supreme Court Decisions*, 52 AM. POL. SCI. REV. 339 (1958); G. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1959). Hans Baade suggests that instead of overruling *Betts* in *Gideon*, the Court might have adopted the behaviorally consistent interpretation of existing doctrine. *Baade, Foreward, 28 LAW & CONTEMP. PROB. 1, 3 (1963).* But would mathematical or statistical consistency satisfy the need for apparent rationality and guidance?

The main reason for this quite contradictory action [reversal of Associated Press v. Walker (the companion case to Butts) and affirmation of Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)] is that the Court looks at the facts in both cases as though it were a jury. That seems a strange way to erect a constitutional standard for libel cases. In the final analysis, what we do in these circumstances is to review the factual questions in cases decided by juries — a review which is in flat violation of the Seventh Amendment.279

All such burdens are not totally self-imposed.280 Congress in the Employers Liability Act of April 22, 1908,281 extended workmen’s compensation to railroad employees who were injured while

279 Id. at 171.

That the evidence might support a verdict under New York Times cannot justify our taking from the jury the function of determining, under proper instructions, whether the New York Times standard has been met. The extent of this Court’s role in reviewing the facts, in a case such as this, is to ascertain whether there is evidence by which a jury could reasonably find liability under the constitutionally required instructions. . . . When, as in this case, such evidence appears, the proper disposition in this federal case is to reverse and remand with direction for a new trial. Id. at 174 (Brennan, J., concurring in part, dissenting in part).

Mr. Chief Justice Warren has suggested a similar approach to obscenity:

I would commit the enforcement of this rule [the “prurient interest” test of Roth v. United States, 354 U.S. 476 (1957)] to the appropriate state and federal courts, and I would accept their judgments made pursuant to the Roth rule, limiting myself to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made. . . . This is the only reasonable way I can see to obviate the necessity of this Court’s sitting as the Super Censor of all the obscenity purveyed throughout the Nation. Jacobellis v. Ohio, 378 U.S. 184, 202-03 (1964).

Mr. Justice Brennan, found this suggestion appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. [Except in Sullivan-type situations. See his language in Curtis, set forth supra.] Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only “obscenity” that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. . . . Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no “substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.” [354 U.S. at 498] 378 U.S. at 187-88.

280 When Congress imposed a similar burden on the Court to determine on the basis of the facts whether an injured railroad employee was involved in interstate commerce, it became “a source of jurisdiction both prodigal of the Court’s time and indifferent to the Court’s significance.” F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 209 (1928).

engaged in work in interstate commerce. The attempt to draw a line between interstate and intrastate commerce produced a plethora of cases, characterized by Professors Frankfurter and Landis as "the most copious and futile waste of the Supreme Court's efforts." 282 Measures were introduced in Congress to eliminate the duty to hear such cases, 283 and ultimately legislation was enacted "to save the Supreme Court from the voluminous futilities of employers liability litigation." 284 The obvious difference is that where the duty is self-imposed it is the Court that must revise its rules, just as in Gideon it overturned the Betts standard.

With the prior situations in mind, the next topic for consideration concerns whether "change" is desirable and instances in which "change" is too frequent.

C. The Tantalus Ploy

"Oysters, come and walk with us!"

The Walrus did beseech.

"A pleasant walk, a pleasant talk,
Along the briny beach."

LEWIS CARROLL
THROUGH THE LOOKING-GLASS

Several years ago, Professor Israel, in a persuasive and well-documented article, demonstrated that the Court frequently writes opinions in which prior cases are treated as "anachronism[s] when handed down" 285 and abruptly overruled when other techniques of overruling are available that would enhance the image of the Court as a "disinterested decision-maker applying those fundamental values reflected in the constitution." 286

282 F. FRANKFURTER & J. LANDIS, supra note 279, at 208.

283 [I]t was . . . . the decision of questions like these [interstate vs. intrastate] from which Congress sought to relieve this court by the Act of September 6, 1916 . . . . Of the cases on the docket for the preceding term of this court 37 presented the question whether the employee was engaged in interstate or intrastate commerce. Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 299 n.1 (1921) (Brandeis, J., dissenting).

284 F. FRANKFURTER & J. LANDIS, supra note 279, at 213. The legislation, 39 Stat. 726 (1916), 28 U.S.C. § 1257 (1964), also substituted discretionary for mandatory appellate review in a number of instances. See F. FRANKFURTER & J. LANDIS, supra note 279, at 211-14. The legislation was effective, although FELA cases "still evoke[d] needless certiorari." Id. at 214; see note 129 supra.


286 Israel, Gideon v. Wainwright: The "Art" of Overruling, 1963 SUPREME
A general willingness to adhere to precedent has always been an important aspect of this framework [that maintains the Court's image]. Certainly, the Court could not have maintained its role as the interpreter of a document that symbolizes continuity if its decisions had, as Justice Jackson once claimed, "a mortality rate almost as high as their authors." ... So too, the view of the Court as an impersonal adjudicator has depended to some degree on the assumption that the judge, unlike the legislator, is sharply restricted in relying upon his personal predilections by the necessity of following the decisions of his predecessors. ... [S]ome danger is inherent in almost every overruling decision, and each case that does emphasize the personal and temporary quality of a judicial rule further tarnishes the image that is necessary to maintain judicial review in a democracy.  

One example, not discussed by Professor Israel in his article, exemplifies the most egregious application of the Tantalus ploy. In *Trupiano v. United States*, the Court held that unless the circum-

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Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles. *Brown v. Allen*, 344 U.S. 443, 535 (1953) (Jackson, J., concurring).

Contrast Mr. Justice Jackson's view with that of Professor Llewellyn who finds that "today no person feels The Law to wobble when a case that is obsolete is laid to rest, or when one which was a blob is corrected, nor does face require a court to pose as the Voice of Infallibility, nor yet does open overruling for sufficient cause either shock or dismay. ... One can almost urge that a frank overruling, when it does crop up brings with it something of relief: that point, at least, can for a while be counted on as clear. *Common Law Tradition* 256-57.

Mr. Justice Black apparently is quite proud of his frank overruling of *Betts* in *Gideon*. In *Garrison* he writes: "I would hold now and not wait to hold later, compare *Betts v. Brady* ... overruled in *Gideon v. Wainwright* ... that under our constitution there is absolutely no place in this country for the old, discredited Star Chamber law of seditious libel." *Garrison v. Louisiana*, 379 U.S. 64, 80 (1964) (Black, J., concurring).

288 Mr. Justice Black's opinion in *Gideon* naturally provides one of Israel's best examples, for the Court in *Gideon* could easily have relied upon at least two of those rationales that have traditionally been employed in overruling opinions. Not only were arguments based upon the "lessons of experience" and the requirements of later precedent relevant and persuasive, but they had been urged upon the Court both by the petitioner's brief and by the separate opinions of Justices Douglas and Black in two recent cases [McNeal v. Calver, 365 U.S. 169, 171-22 (1961) (Douglas, J., concurring); *Carnley v. Cochran*, 369 U.S. 506, 517-20 (1962) (Black, J., concurring)]. Israel, *supra* note 286, at 269.

stances were such as to "make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant,"290 a search without a warrant was invalid. *Trupiano* was overruled within a year in *United States v. Rabinowitz*,291 in which the Court held:

To the extent that *Trupiano v. United States*, . . . requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.292

The tantalizing judicial sleight of hand — now you see it, now you don't — begins in *Schmerber v. California*.293 Is it *Trupiano* or is it *Rabinowitz* which is "left as a derelict bound to occasion collisions on the waters of the law"?294 *Schmerber* raised the same issues, concerning blood tests made without the consent of a driver suspected of operating his vehicle while intoxicated, that had been resolved earlier in *Breithaupt v. Abram*.295 In *Schmerber*, the Court again upheld the validity of the blood test, even though in the interim period the peripheral rights approach that had been developed in a series of cases296 seemed to read into the Bill of Rights whatever ancillary rules were necessary to make the explicit guarantees fully meaningful.297 The following language of the *Schmerber* opinion is of special interest: "Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned."298

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290 Id. at 708. Earlier the Court had stated: "There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with." *Johnson v. United States*, 333 U.S. 10, 14-15 (1947).


292 Id. at 66.


296 See cases cited note 10 supra.

297 Justice Douglas, in dissent, remarks:

We are dealing with the right of privacy which, since the *Breithaupt* case, we have held to be within the penumbra of some specific guarantees of the Bill of Rights. . . . Thus, the Fifth Amendment marks "a zone of privacy" which the Government may not force a person to surrender. . . . Likewise the Fourth Amendment recognizes that right when it guarantees the right of the persons to be secure "in their persons." . . . No clearer invasion of this right of privacy can be imagined than forcible blood-letting of the kind involved here. *Schmerber v. California*, 384 U.S. 757, 778-79 (1966).

298 Id. at 770.
it startling to discover that this language was interpreted as indicating a return to the *Trupiano* doctrine and that "it may be that shortly the Court will require that search without warrant be done only when the delay incident to obtaining and serving a warrant will result in the disappearance of the material which is to be seized". Obviously, a communication and promulgation problem was involved, for within the year, the Court, in *Cooper v. California*, flatly stated that:

> It is no answer to say that the police could have obtained a search warrant, for "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States v. Rabinowitz*, 339 U.S. 56, 66.

Was the *Trupiano* doctrine finally put to rest in *Cooper*? Consider the following recent statements of the Court:

But even if we assume, although we do not decide, that the exigent circumstances in this case made lawful a search without a warrant only for the suspect or his weapons, it cannot be said on this record that the officer who found the clothes in the washing machine was not searching for weapons.

But if its rejection [the "mere evidence" rule of *Gouled v. United States*, 255 U.S. 298, 309 (1921)] does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of "a neutral and detached magistrate . . . . *Johnson v. United States*, 333 U.S. 10, 14." The case anticipated and enunciated the *Trupiano* doctrine. See note 290 supra.

One governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. . . . As the Court explained in *Johnson v. United States*, 333 U.S. 10, 14: "the right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and free-

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290 Especially since the Court continued by stating that the "requirement that a warrant be obtained is a requirement that the inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States*, 333 U.S. 10, 13-14 . . . ." 384 U.S. at 770. The *Johnson* case anticipated and enunciated the *Trupiano* doctrine. See note 290 supra.


301 See notes 443-540 infra & accompanying text.


303 Id. at 62.


305 Id. at 309-10 (emphasis added). On the significance of the use of *Johnson* as authority, see note 299 supra.
dom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.306

How is one to know the relevant rule so that he can act accordingly? Do laymen, police officers, lawyers, State or federal judges, or the Supreme Court Justices themselves, know whether it is Trupiano or Rabinowitz that is in vogue today? Justice Traynor's comments are apropos and hard to improve upon:

The sympathetic who hope that those on the front lines will get well from their bouts with the books and that the supreme word-spinners will get better, often overlook the third market for sympathy where huddle the middlemen who must establish a working pax in bello between the pacific skywriters and the bellowing front lines. It falls regularly to the state judges and recurringly to federal judges to expound with common as well as constitutional sense the skywriting that at times dots just enough t's to cross the eyes, but trails off on the if's, and's, and but's. The loftier the message and the more removed from the local scene, the more difficult it is for the judges on the ground to work out the ground rules. If they fail to transpose the message into earthy language, either because of their own ineptitude or because the message itself defies transposition, it continues to plane in the stratosphere with ill effect to itself as well as to those who are grounded. A rugged constitution, by definition the law of the land, suffers a loss of vitality when it must circle in thin air indefinitely.307

Charges of too frequent change in the law could be leveled at the Supreme Court in other periods of the Court's history,308 but

308 In United States v. South-Eastern Underwriter Association [322 U.S. 533 (1944)] the Stone Court negated a 75-year precedent when it held that insurance was commerce within the purview of congressional regulation. In Illinois ex rel. McCollum v. Board of Education, [333 U.S. 203 (1948)] the Vinson Court, then scorned as "eager crusaders" [Corwin, The Supreme Court as National School Board, 14 LAW & CONTEMP. PROB. 3, 14 (1949)] for the first time, 80 years after the adoption of the fourteenth amendment, held that the first amendment's "establishment clause" invalidated a state-sponsored program, in this case, released time for religious instruction, prompting Mr. Justice Jackson to charge that the Court had become "a super board of education for every school district in the nation." [333 U.S. at 237.] In Smith v. Allwright, [321 U.S. 649 (1944)] the Stone Court ruled that a primary election, held not by the state but by a political party, was subject to the prohibitions of the fifteenth amendment, overruling a decision
it is clear that since Mr. Chief Justice Warren\textsuperscript{300} was appointed to the Court in 1953, "the Justices have wrought more fundamental changes in the political and legal structure of the United States than during any similar span of time since the Marshall Court."\textsuperscript{310} These frequent and fundamental changes have occurred with an "extravagant disregard for [the Court's] own precedents, no matter how ancient, or recent they may be."\textsuperscript{311} \textit{UMW v. Gibbs,}\textsuperscript{312} is especially instructive in shedding light on the Court's regard for and manipulation of precedent. Paul Gibbs sought and recovered damages from the United Mine Workers of America in a federal district court in an action based upon a violation of section 303 of the Labor-Management Relations Act of 1947\textsuperscript{313} and the common law of Tennessee. Jurisdiction in a federal court over the Tennessee cause of action was based on exercise of "pendent jurisdiction," a doctrine the inception of which can be traced to Mr. Chief Justice Marshall's statement, in \textit{Osborn v. Bank of the United States},\textsuperscript{314} that "when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."\textsuperscript{315} Thus, a federal court exercising original jurisdiction over a case involving both federal and State issues may dispose of both, or only the State issue. In \textit{Siler v. Louisville & Nashville Railroad Co.},\textsuperscript{316} a State rate regulation was attacked as

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\textsuperscript{310} Kurland, \textit{supra} note 307, at 143.

\textsuperscript{311} Kurland, \textit{The Supreme Court Today}, \textit{TRIAL}, April-May, 1967, at 12, 13. Kurland believes that "the most serious contribution to confusion is the disdain with which the Court treats its own precedents." Kurland, \textit{supra} note 307, at 170. He also notes that there is an "increase in the rate of acceleration" regarding the Court's overruling its own precedent. \textit{Id.}


\textsuperscript{314} 22 U.S. (9 Wheat.) 738 (1824).

\textsuperscript{315} \textit{Id.} at 823.

\textsuperscript{316} 213 U.S. 175 (1909).
violating the Federal Constitution and as unauthorized by State law. The Court observed:

The Federal questions, as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, the court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only. 317

Disposition of Siler rested solely on the State grounds, avoiding both the constitutional issue as well as unnecessary friction between federal and State governments, 318 a policy that also supports the application of the abstention doctrine. 319 In both Osborn and Siler, the State issue was either an essential ingredient of the original cause of action or dispositive of the entire case. The doctrine was extended "to situations where decision of state issues must be justified solely on the ground of procedural convenience" 320 in Hurn v. Oursler. 321 In Hurn, the federal claim involved copyright infringement of a play, the State claims being based on unfair competition regarding both the copyrighted play and an uncopyrighted version of the play. Holding that the unfair competition claim regarding the copyrighted version of the play could be heard, but not the claim regarding the uncopyrighted version, the Court applied the Siler test, stating:

317 Id. at 191.
318 Mr. Justice Brandeis read Siler as standing for the proposition that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).
319 If State law is not clear, and its resolution may obviate the necessity of reaching the constitutional issue in a case brought in a federal court, and if the court is acting in equity, a situation is presented in which:

a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. . . . The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941).

In Pullman, the Court ordered abstention until the State courts had an opportunity to pass on the State issues. Jurisdiction was retained so that if the State issue was resolved in such a way as not to obviate the necessity of reaching the constitutional issue, no need for filing a new action in the federal district court would result. In certain types of abstention cases, dismissal is appropriate. See Burford v. Sun Oil Co., 319 U.S. 315 (1943). On abstention generally, see C. WRIGHT, FEDERAL COURTS § 52, at 169-77 (1963).
320 C. WRIGHT, supra note 319, § 19, at 56.
321 289 U.S. 238 (1933).
But the [Siler] rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground; in the latter it may not do so upon the non-federal cause of action.\textsuperscript{322}

In addition, the Court recognized that a cause of action means "one thing for one purpose and something different for another,"\textsuperscript{323} but that for "the purpose of determining the bounds between state and federal jurisdiction, the meaning should be kept within the limits indicated,"\textsuperscript{324} \textit{i.e.}, two different grounds in support of the same cause of action. Some lower federal courts have very narrowly construed the "limits," imposing a requirement of virtual identity between the federal and State claims.\textsuperscript{325} Since such "questions of jurisdiction . . . [are] questions of power as between the United States and the several states,"\textsuperscript{326} a narrow construction of pendent jurisdiction seems in order. Yet, in \textit{Gibbs} the Court extends the power of a federal court to hear a State claim for which no basis for jurisdiction exists other than the presence of "state and federal claims [which] . . . derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole."\textsuperscript{327} The modern trend "toward unlimited joinder of actions"\textsuperscript{328} may mean that a plaintiff will soon be expected to join all the claims he has against a defendant in

\begin{itemize}
  \item \textsuperscript{322}Id. at 245-46.
  \item \textsuperscript{323}Id. at 247.
  \item \textsuperscript{324}Id.
  \item \textsuperscript{325}See Zalkind v. Scheinman, 139 F.2d 895 (2d Cir. 1943), \textit{cert. denied}, 322 U.S. 738 (1944). For similar and contrary cases, see C. \textsc{Wright}, \textit{supra} note 319, \S\ 19, at 56 n.8.
  \item \textsuperscript{326}B. \textsc{Curtis}, Notice of the Death of Chief Justice Taney, Proceedings in the Circuit Court of the United States for the First Circuit, 1864, at 9, \textit{quoted in} C. \textsc{Wright}, \textit{supra} note 319, \S\ 1, at 1-2.
  \item \textsuperscript{327}\textsc{Umw} v. \textit{Gibbs}, 383 U.S. 715, 725 (1966).
  \item \textsuperscript{328}F. \textsc{James}, Jr., \textsc{Civil Procedure} \S\ 10.6, at 454 (1965); \textit{see, e.g.}, \textsc{Fed. R. Civ. P.} 18.
\end{itemize}
one judicial proceeding. Apparently, a plaintiff can confer subject
matter jurisdiction on a federal district court over a State cause of
action if a federal cause of action also arises from the same nucleus
of operative facts, even absent diversity of citizenship. If the fed-
eral court hears the case, the doctrine of *Erie Railroad Co. v. Tomp-
kins*<sup>329</sup> must be applied to the State claim. Perhaps, then, differ-
ent procedural rules, such as that regarding the standard for a di-
rected verdict, may be applicable to the federal and the State
claims.<sup>330</sup>

The preceding extension of federal jurisdiction was justified
by the Court's characterization that the "unnecessarily grudging"<sup>331</sup>
*Hurn* approach was articulated in 1933, prior to enactment of the
*Federal Rules of Civil Procedure*: "Under the Rules, the impulse
is toward entertaining the broadest possible scope of action consis-
tent with fairness to the parties; joinder of claims, parties and reme-
dies is strongly encouraged."<sup>332</sup> It takes considerable imagination
to see how the enactment of the *Federal Rules of Civil Procedure*
can justify an extension of federal jurisdiction, since the enabling
act for rulemaking power<sup>333</sup> contained the "implicit limitation . . .
that jurisdiction of the district courts or venue of actions therein
were not to be extended or restricted by the Rules,"<sup>334</sup> and *Federal
Rules of Civil Procedure* 82 expressly provides that "[T]hese rules
shall not be construed to extend or limit the jurisdiction of the
United States district courts . . . ." In *Gibbs*, the Court quoted
from *Baltimore Steamship Co. v. Phillips*:<sup>335</sup> "the whole tendency
of our decisions is to require a plaintiff to try his whole cause of
action and his whole case at one time,"<sup>336</sup> and added that the cita-
tion of *Phillips* in the *Hurn* opinion "shows that the Court found

<sup>329</sup> 304 U.S. 64 (1938).

<sup>330</sup> Such would occur if the difference between the pertinent federal and State
rules would be relevant to the choice of either a federal or a State forum. *See* *Hanna
v. Plumer*, 380 U.S. 460, 469 (1965). It is interesting to note that in *Hanna*, the
Court observed:

neither Congress nor the federal court can, under the guise of formulating
rules of decision for federal courts, fashion rules which are not supported
by a grant of federal authority contained in Article I or some other section
of the Constitution; in such areas state law must govern because there can
be no other law. *Id.* at 471-72.

<sup>331</sup> 383 U.S. at 725.

<sup>332</sup> *Id.* at 724.


<sup>334</sup> J. MOORE, A. VESTAL & P. KURLAND, FEDERAL PRACTICE AND PROCEDURE

<sup>335</sup> 274 U.S. 316 (1927).

<sup>336</sup> *Id.* at 320, *quoted in* 383 U.S. at 723.
that the weighty policies of judicial economy and fairness to parties reflected in res judicata doctrine were in themselves strong counsel for the adoption of a rule which would permit federal courts to dispose of the state as well as the federal claims.\textsuperscript{337} Actually, the \textit{Hum} opinion cited Phillips only to demonstrate that the two claims involved constituted two grounds for one cause of action, and for \textit{purposes of jurisdiction}, the meaning was to be limited to that narrow compass.\textsuperscript{338} The enactment of the \textit{Federal Rules of Civil Procedure} and the citation of Phillips in \textit{Hum} are the only authorities cited by Gibbs to justify overruling \textit{Hum}. If this is not an example of a disregard for precedent, what is?

The ready answer might be discovered in \textit{Linkletter v. Walker},\textsuperscript{339} in which the Court held that the exclusionary rule of \textit{Mapp v. Ohio}\textsuperscript{340} was applicable only to cases not yet final at the date of the \textit{Mapp} decision.\textsuperscript{341} Obviously, the Court did not adopt a rule of pure prospective overruling,\textsuperscript{342} although it apparently believed that it had the power to propound whatever form of prospective rule that policy dictates:

\textsuperscript{337} 383 U.S. at 724.
\textsuperscript{338} The reader may judge for himself the weight that ought to be accorded the citation of Phillips from the following excerpt in \textit{Hum}:

The primary relief sought is an injunction to put an end to an essentially simple wrong, however differently characterized, not to enjoin distinct wrongs constituting the basis for independent causes of action. The applicable rule is stated, and authorities cited, in \textit{Baltimore S.S. Co. v. Phillips}, 274 U.S. 316. "A cause of action does not consist of facts," this court there said (p. 321), "but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. . . . The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear." \textit{Hum v. Oursler}, 289 U.S. 238, 246 (1933).

\textsuperscript{339} 381 U.S. 618 (1965).
\textsuperscript{340} 367 U.S. 643 (1961).
\textsuperscript{341} "Final" for purposes of the \textit{Linkletter} and \textit{Tehan} [discussed notes 380-84 infra & accompanying text] prospective rules, means that "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in \textit{Mapp v. Ohio}."] Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965). The \textit{Tehan} case, which applied the same "finality" test to \textit{Griffin}, added to the above definition the phrase "or a petition for certiorari finally denied . . . ." \textit{Tehan v. United States ex rel. Short}, 382 U.S. 406, 409 n.3 (1966).

\textsuperscript{342} There are at least four forms of prospective overruling:
(1) denying the use of the new rule in the case changing the rule, the "pure" form; (2) using the new rule for the case that changed the rule, or giving the victor his fruits; (3) denying the use of the new rule in the overruling case and announcing that it will take effect on a future date, that is, acting like a legislature in the most obvious way possible; and (4) using the new rule in the overruling case and announcing that it will take effect at a
It has been suggested that this Court is prevented by Article III from adopting the technique of purely prospective overruling. Note, 71 Yale L.J. 907, 933 (1962). But see 1A Moore, Federal Practice 4082-4084 (2d ed. 1961); Currier, [Time and Change in Judge-Made Law: Prospective Overruling, 51 VA. L. REV. 201 (1965)], at 216-220. However, no doubt was expressed of our power under Article III in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). See also Griffin v. Illinois, 351 U.S. 12, 20 (1956) (concurring opinion of Frankfurter, J.).

Examination of the authorities cited in the above footnote in Linkletter proves most enlightening. First, the pagination of volume 1A of James Moore, Federal Practice (2d ed. 1961), does not now extend to page 4082. Second, in England v. Louisiana State Board of Medical Examiners, the Court applied a clarification of an aspect of the abstention doctrine in a purely prospective manner,


The Court, in the four prospective overruling cases decided thus far, Linkletter, Tehan, Johnson v. New Jersey, 384 U.S. 719 (1966), and Stovall v. Denno, 388 U.S. 293 (1967), has adopted some form of the second version.

343 381 U.S. at 622 n.3. Critics of pure prospective overruling point out that it is dictum; i.e., the judicial enunciation of a principle not dispositive of the case or controversy before the Court and thus without the power of binding precedent. On the other hand, some contend that this is "name-calling" whereby judicial language is nearly labeled as holding or dictum without responsible critical analysis. See Bartlett, supra note 342, at 1228-29; P. Mishkin & C. Morris, On Law in Courts 307-10 (1965). Some point out that even if it is dicta, the language constitutes useful warnings for the future, validly issued by the Court, since they reasonably could have been dispositive of the case or controversy before the Court. See Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 VA. L. REV. 201, 216-20 (1965); Keeton, Judicial Law Reform — A Perspective on the Performance of Appellate Courts, 44 TEXAS L. REV. 1254, 1265-66 (1966); Levy, Realistic Jurisprudence and Prospective Overruling, 109 U. PA. L. REV. 1, 21 (1960). Pure prospective overruling also appears to violate the rule of judicial self-restraint that "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). See note 318 supra. This rule is, however, discretionary and developed by the Court only "for its own governance." 297 U.S. at 345.

344 The England case held that in a Pullman-type abstention situation [see note 319 supra] a plaintiff whose case is returned to the State courts for determination of the State issues involved, may return to the federal court for resolution of the federal issues, even though he litigates the federal issues in the State courts, as long as the plaintiff informs the state courts that he is exposing his federal claims there only for the purpose of complying with [Government Employees v. Windsor, 353 U.S. 364 (1957), see note 345 infra], and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 421 (1964). Actually, "an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts." Id. at 421.
because the appellants relied on an earlier distinguishable Supreme Court decision,\(^\text{346}\) which had been misinterpreted by lower courts and legal writers generally.\(^\text{348}\) Therefore, the basis for England was the desire not to frustrate reasonable expectations generated by an earlier decision, a policy barring retroactive application which also dictated the result in James v. United States,\(^\text{347}\) discussed below. Third, the discussion of the constitutional validity of a purely prospective rule is dictum, unnecessary for disposition of the Linkletter case, and another violation of the rule of judicial self-restraint that the Court "will not anticipate a question of constitutional law in advance of the necessity of deciding it."\(^\text{348}\) Fourth, although law review articles may provide the basis for development of new law,\(^\text{344}\) and surely influence the judiciary,\(^\text{350}\) they do not constitute the strongest authority for extension of Article III jurisdiction.\(^\text{351}\)

\(^{340}\) Government Employees v. Windsor, 353 U.S. 364 (1957), held:

[A] bare adjudication by the Alabama Supreme Court that the union [appellant] is subject to this Act ["(Ala. Laws 1953, No. 720) which provides that any public employee who joins or participates in a 'labor union or labor organization' forfeits the 'rights, benefits, or privileges which he enjoys as a result of his public employment.'"] Id. does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court. Id. at 366.

\(^{346}\) See 375 U.S. at 419-23.


\(^{348}\) See note 343 supra.

\(^{344}\) The classic example is recognition of a cause of action for an invasion of the right of privacy. A cause of action was first accepted as based on an invasion of a right of privacy in Pavesich v. New England Life Ins., 122 Ga. 190, 50 S.E. 68 (1905). It had been considered and rejected in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), a case decided shortly after publication by Samuel D. Warren and his partner, Louis D. Brandeis, of the now-famous article, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

The student note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907 (1962), referred to at least five times in Linkletter, seems to have provided almost all of the material appearing in the opinion. Numerous similar examples could be provided. Compare, e.g., the opinion in Miranda v. Arizona, 384 U.S. 436 (1966), with Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L.J. 449 (1964), and Enker & Elsen, Counsel for the Suspect: Matiab v. United States and Escobedo v. Illinois, 49 Minn. L. Rev. 47 (1964).

\(^{360}\) See Newland, Legal Periodicals and the United States Supreme Court, 3 Midwest J. Pol. Sci. 58 (1959); note 349 supra.

\(^{351}\) The same can be said for the use of concurring and dissenting opinions as authority. For dissenting and concurring opinions suggesting prospective overruling, see Mishkin, Foreward: The High Court, The Great Writ, and the Due Process Clause of Time and Law, 79 Harv. L. Rev. 56, 57 n.5 (1965). Mr. Justice Frankfurter's concurring opinion in Griffin v. Illinois, 351 U.S. 12, 20 (1956), reflects general agreement with Mr. Justice Cardozo's view concerning prospective overruling, that "when the hardship [to those justifiably relying on the old rule] is felt to be too great or to be unnecessary retrospective operation is withheld." B. Cardozo, The Nature of the Judicial
The inappropriate and unnecessary discussion of pure prospective overruling in a single brief footnote in *Linkletter* is a prime example of sloppy and irresponsible opinion writing. The craftsmanship used in fashioning the holding is equally an exercise in "jejune logomachy." The serious, yet almost ludicrous, distinctions created by *Linkletter* were anticipated by Professor Thomas Currier when he described the following melodrama:

See in your mind's eye two men, cellmates. It is the late afternoon of yet another unamusing day in prison, and both men are suitably downcast. Each faces a possible seven years of servitude. Enter the first prisoner's lawyer. "Good news, Arnold, my boy! Your conviction has been reversed, because of illegally seized evidence the state used at your trial."

The other prisoner, who has become something of a law buff during the pendency of his appeals, breaks in: "You mean they decided to give *Mapp v. Ohio* retroactive effect?"

The lawyer says a little nervously, "No, Aaron, but Arnold's trial was held after yours, and his appeal had not become final by the time *Mapp* was decided. With that exception, the Supreme Court has just decided to make *Mapp* prospective only. It's terrible luck for you — I can't tell you how sorry I am."

Aaron, who has not been studying the law long enough for the intricacy and importance of balancing and line-drawing to have been borne in upon him fully, makes a series of rude remarks. Then: "We were alleged to have been in on the same robbery. We were together when the evidence was seized. We both protested the seizure, and that we were innocent. What's the deal?"

The lawyer explains that the deal is that Aaron's separate trial happened to be held before Arnold's, and his appeal was heard sooner. He had not petitioned for certiorari to the Supreme Court, so his conviction became final. Arnold is to go free, he explains, because as a matter of simple luck his conviction had not become

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382 The Court, in *Stovall v. Denno*, 388 U.S. 293 (1967), rejects the dictum of the *Linkletter* footnote without even a passing reference.

383 Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies (citing Note, supra note 349), and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against pure prospective overruling. 388 U.S. at 301. At least Mr. Chief Justice Marshall confessed to the relevance of his dicta in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to the issues in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

383 Kurland, supra note 311, at 13.
final as of the date of the *Mapp* decision. Arnold and his lawyer walk off, leaving Aaron rattling his cup against the bars and expressing his views about the majesty of a system of law that takes two people in literally identical circumstances, puts one of them in jail for seven years, and lets the other go free.\(^{354}\)

Ludicrous, pathetic, unreal, prophetic then, and now, true!\(^{355}\)

How does the Court justify the *Linkletter* rule? First, precedents are trotted out that allegedly adumbrate the decision. The Court cites a series of cases, including *Norton v. Shelby County*,\(^ {356}\) *Great Northern Railway Co. v. Sunburst Oil and Refining Co.*,\(^ {357}\) *England v. Louisiana State Board of Medical Examiners*,\(^ {358}\) *Chicot County Drainage District v. Baxter State Bank*,\(^ {359}\) and *James v. United States*,\(^ {360}\) none of which are on point. In each case, the new rule was applied prospectively so as not to create a hardship on individuals who had justifiably relied on the old rule.\(^ {361}\) Consider *James*, the case that expressly overruled *Commissioner v. Wilcox*\(^ {362}\) by holding that embezzled funds are included in the gross income of the embezzler for federal income tax purposes. At the same time, the Court in *James* reversed the petitioner’s conviction for wilfully attempting to evade federal income taxes by failing to report income obtained through embezzlement. No reference to prospective overruling, however, appears in the prevailing opinion by Mr. Chief Justice Warren. Three Justices voted to overrule *Wilcox*, but reversed *James’* conviction because “the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of the misappropriation so long as the statute contained the gloss placed

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\(^{354}\) Currier, *supra* note 343, at 201-02.

\(^{355}\) *Linkletter*, convicted in the state court by use of “unconstitutional evidence,” is today denied relief by the judgment of this Court because his conviction became “final” before *Mapp* was decided. *Linkletter* must stay in jail; Miss Mapp, whose offense was committed before *Linkletter*’s, is free. This different treatment of Miss Mapp and *Linkletter* points up at once the arbitrary and discriminatory nature of the judicial contrivance utilized here to break the promise of *Mapp* by keeping all people in jail who are unfortunate enough to have had their unconstitutional convictions affirmed before June 19, 1961. *Linkletter v. Walker*, 381 U.S. 618, 641 (1965) (Black, J., dissenting).

\(^{356}\) 118 U.S. 425 (1886). For a discussion, see note 50 *supra*.

\(^{357}\) 287 U.S. 358 (1932). For a discussion, see note 351 *supra*.

\(^{358}\) 375 U.S. 411 (1964). For a discussion, see notes 344-47 *supra*.

\(^{359}\) 308 U.S. 371 (1940). For a discussion, see note 50 *supra*.


\(^{361}\) This is only a paraphrase of Mr. Justice Cardozo’s language. *See* note 351 *supra*.

\(^{362}\) 327 U.S. 404 (1946).
upon it by Wilcox at the time the alleged crime was committed.”

Thus, the prevailing opinion in James was concerned with avoiding the frustration of reasonable expectations of those persons who had justifiably relied on the overruled Wilcox case—especially since such reliance nullified the wilful intent constituting a basic element of the offense charged, although it was debatable whether James’ reason for nondisclosure was his reliance upon Wilcox. Two Justices would have remanded the case for a jury decision on this issue.

The sole relevance of James, or any of the other cited cases, is that an individual’s justifiable reliance on prior, ostensibly valid, law may require prospective rather than retroactive application of new law.

A prospective ruling in James kept the accused out

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364 A great deal of controversy has arisen concerning the extent to which the prevailing opinion in James actually represents the opinion of the Court. This is generally true where the Justices cannot agree on an opinion for the Court and propound multiple concurring opinions—a too frequent occurrence in recent years. In James, Justices Black, Whittaker, and Douglas concurred on the ground that Wilcox was correct. Mr. Justice Black, joined by Mr. Justice Douglas, expressed disapproval of the prevailing opinion, stating that the Court’s “judgements [can] not be limited to prospective application [since] . . . prospective lawmaking is the function of Congress rather than the Courts.” 366 U.S. at 225. Thus, in James six Justices favored reversal of James’ conviction, a different group of six favored overruling Wilcox, and only three of them favored prospective application of the overruling. This is not quite as egregious as the situation in National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), wherein “conflicting minorities in combination [brought] to pass a result—paradoxical as it may appear— which differing majorities of the Court [found] insupportable.” Id. at 655 (Frankfurter, J., dissenting).

365 The determination of when reliance is justifiable raises the perplexing problem of when one ought to resist the law rather than rely on it. Recently, a Nazi judge was convicted and sentenced to 5 years at hard labor for sending a Roman Catholic priest to the gallows for relating a political joke during the Nazi regime. The judge’s defense was that he was merely executing the law. See N.Y. Times, July 4, 1967, at 6, col. 1.

On theories of resistance, see L. FULLER, THE MORALITY OF LAW (1964); J. STONE, HUMAN LAW AND HUMAN JUSTICE § 11, at 251-58 (1965); and the articles involved in the Hart-Fuller-Nagel debate cited note 154 supra. Aquinas’ classic theory of resistance postulated that if the law is contrary to the common good, it must be resisted, unless the disorder occasioned by disobedience is more onerous than the evil created by obedience to an unjust law. When the positive law is contrary to the divine, then, according to Aquinas, regardless of resulting disorder, one must resist the unjust law. See T. ACCQUINAS, SELECTED POLITICAL WRITINGS 74 (d’Entreves ed. 1948). Fuller’s theory of resistance is based in large part on the existence of the minimal standards necessary to maintain a legal system. See text accompanying notes 152-56 supra. “A total failure [in the existence of these standards] . . . does not simply result in a bad system of law; it results in something that is not properly called a legal system at all . . . .” L. FULLER, supra at 39. The resulting absence of a legal system, as perhaps was true in Nazi Germany, would mean that a Nazi judge, such as the one mentioned above, could not justifiably rely on the law in Nazi Germany, since later it would be determined that there was no legal system in Germany. This requires the type of superhuman prescience inherent in Churchman’s definition that X ought to do A on ethical grounds as “A is what
of jail; in *Linkletter* it keeps him in jail. Nor was the Bill of Rights involved in any of the cases cited in *Linkletter*. Indeed, the Court admits that "heretofore . . . we have applied new constitutional rules to cases finalized before the promulgation of the rule."\(^6\)

Shortly before, in *Fay v. Noia*,\(^3\) the Court spoke of this issue:

> Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison. Noia, no less than his codefendants Caminito and Bonino, is conceded to have been the victim of unconstitutional state action. Noia's case stands on its own; but surely no just and humane legal system can tolerate a result whereby a Caminito and a Bonino are at liberty because their confessions were found to have been coerced yet a Noia, whose confession was also coerced, remains in jail for life. For such anomalies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy.\(^3\)

Because *Linkletter* probably will have a significant impact on the Court's image, it is profitable to trace briefly the general reasoning, aside from the citation of general precedent, that was used to justify this sharp departure from the usual practice — a departure that makes the Court's legislating rather than adjudicating function all too visible.\(^6\) The Court adduces three reasons for the prospective rule: (1) the *Mapp* rule is designed to deter offensive police practices, and has no relevance to the reliability of the


\(^3\) 372 U.S. 391 (1963).

\(^3\) Id. at 441.

\(^6\) "[The pronouncement of a general power of prospective limitation] . . . will tend to generate more frequent arguments for the exercise of such power and the necessity to respond thereto, with concomitant spotlighting of the fact of change and strong overtones of legislative rather than judicial process." Mishkin, *supra* note 351, at 69.

"The public image which sustains the unique powers of a federal court is thus not strikingly different from the image which possessed Blackstone; both images bespeak an uneasiness about a court making law." Note, *supra* note 349, at 931. The loss of the inhibitory impact of the retroactive operation of constitutional adjudications has frequently been noted. Mr. Justice Black, in *James*, observed: "In our judgment one of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmakers has been the fact that its judgments could not be limited to prospective application." 366 U.S. at 225. See H. HART & A. SACKS, *The Legal Process: Basic Problems in the Making and Application of Law* 627 (tent. ed. 1958); Bartlett, *supra* note 342, at 1231; Currier, *supra* note 343, at 226; Mishkin, *supra* note 351, at 70-72. On the other hand, "In situations of this kind, then, if courts had no alternative but to operate with retroactive effect, judicial change of some existing rules of law — no matter how bad they might now appear to be — would be totally unavailable." P. MISHKIN & C. MORRIS, *supra* note 343, at 506.
guilt-determining process,\textsuperscript{370} (2) the States had justifiably relied on the doctrine of \textit{Wolf v. Colorado},\textsuperscript{371} and (3) "to make the rule of \textit{Mapp} retrospective would tax the administration of justice to the utmost."\textsuperscript{372} It is clear that (2) and (3) are simply makeweights, since in all prior cases reversing earlier more restrictive cases, the same arguments could be made.\textsuperscript{373} Indeed, the Court recognizes that (1) is \textit{the} reason for \textit{Linkletter} in that it emphasizes that the consideration of both (2) and (3) is in the context of dealing with an "extraordinary procedural weapon that has no bearing on guilt."\textsuperscript{374}

Thus, \textit{Linkletter} establishes that the \textit{Mapp} doctrine is designed to deter offensive police practices that do not affect reliability in the guilt-determining process. This is patently inconsistent with the penumbral right theory,\textsuperscript{375} which is bottomed on the rights of the accused, not the duties of police officers.\textsuperscript{376} In fact, \textit{Linkletter}

\textsuperscript{370} "Here, . . . the fairness of the trial is not under attack. All that petitioner attacks is the admissibility of evidence, the reliability and relevance of which is not questioned, and which may well have had no effect on the outcome." 381 U.S. at 639.

\textsuperscript{372} 338 U.S. 25 (1949).

Again and again this Court refused to reconsider \textit{Wolf} and gave its implicit approval to hundreds of cases in their application of its rule. In rejecting the \textit{Wolf} doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. That purpose will not at this late date be served by the wholesale release of the guilty victims. 381 U.S. at 637.

How justifiable was the States' reliance on \textit{Wolf}?

It was for the Warren Court to assure the rights of citizens to be free from unreasonable searches and seizures in \textit{Mapp v. Ohio}, for it was plain that the political process was inadequate; twelve years had passed since the states had been told that such action violated the Constitution, yet more than half of them continued to admit into evidence the fruit of the violation. Choper, \textit{On the Warren Court and Judicial Review}, 17 CATHOLIC U.L. REV. 41 (1967); see Traynor, \textit{The Devils of Due Process in Criminal Detection, Detention, and Trial}, 21 RECORD OF N.Y.C.B.A. 357, 362 (1966).

\textsuperscript{372} 381 U.S. at 637. "Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. . . . To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice." \textit{Id.} at 637-38.

\textsuperscript{373} Consider, \textit{e.g.}, \textit{Gideon v. Wainwright}, 372 U.S. 335 (1963), \textit{overruling} \textit{Betts v. Brady}, 316 U.S. 455 (1942).

\textsuperscript{374} 381 U.S. at 638; \textit{see} notes 371, 372 \textit{supra}. The Court states: "[I]n each of the three areas in which we have applied our rule retrospectively the principle that we applied went to the fairness of the trial — the very integrity of the fact-finding process." \textit{Id.} at 639.

\textsuperscript{375} \textit{See} note 10 \textit{supra} \& accompanying text.

\textsuperscript{376} If the exclusionary rule has the high place in our constitutional plan of "ordered liberty," which this Court in \textit{Mapp} and other cases has so frequently said that it does have, what possible valid reason can justify keeping people in jail under convictions obtained by wanton disregard of a constitutional protection which the Court itself in \textit{Mapp} treated as being one of the "constitutional rights of the accused?" 381 U.S. at 650 (Black, J., dissenting).
very much lends to Mapp the appearance of an exercise of supervisory powers by the Court, although the Court has repeatedly denied that its supervisory powers extend to State officials.

For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice," the scope of our reviewing power over federal courts is not confined to the ascertainment of Constitutional validity. Judicial supervision in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

Subsequent cases, however, indicate that factors (2) and (3) really are, for the Court, the most important for ascertaining whether a rule is given prospective operation. This phenomenon is incredible only if one forgets the fast and loose use of precedent by the Court. The no-comment rule of Griffin v. California was held prospective in Tebin v. United States ex rel. Shott, ostensibly for the same reasons given in Linkletter. But, the statement that "the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent," does not jibe with the observation in Griffin:

\[
\text{[T]he inference of guilt is not always so natural ... [as] brought out in the Modesto opinion itself: "Defendant contends that the reason a defendant refuses to testify is that his prior convictions}
\]

\[\text{577 In Chapman, [see discussion notes 256-60 supra & accompanying text] Mr. Justice Harlan, in dissent, contended that the Court was exercising its supervisory power:}

The harmless-error rule ... flows from what is seemingly regarded as a power inherent in the Court's constitutional responsibilities rather than from the Constitution itself. ... I regard the Court's assumption of what amounts to a general supervisory power over the trial of federal constitutional issues in state courts as a startling constitutional development that is wholly out of keeping with our federal system and completely unsupported by the Fourteenth Amendment where the source of such a power may be found. 386 U.S. at 46-47.


\[\text{578 Compare, e.g., Benanti v. United States, 355 U.S. 96 (1957), with Schwartz v. Texas, 344 U.S. 199 (1952), and Nardone v. United States, 302 U.S. 379 (1937); see Ker v. California, 374 U.S. 23, 31 (1963).}

\[\text{579 McNabb v. United States, 318 U.S. 332, 340 (1943). The Court recently made very clear that it was operating under its supervisory power in requiring trial by jury for all federal contempt cases if a sentence of 6 months or longer may be imposed. Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966). Mr. Justice Black objects strenuously to the limitation of Mapp to doing "nothing in the world except to deter officers of the law," 381 U.S. at 649, since that makes Mapp "more like law-making than construing the Constitution." Id.}

\[\text{580} 380 U.S. 609 (1965). \text{ See discussion notes 259-68 supra & accompanying text.}


\[\text{582 Id. at 415.}\]
will be introduced in evidence to impeach him... and not that he is unable to deny the accusations. It is true that the defendant might fear that his prior convictions will prejudice the jury, and therefore another possible inference can be drawn from his refusal to take the stand.\textsuperscript{383}

Why the reinforcement of an invalid inference of guilt based on failure to take the stand is not related to reliability in determining the innocence or guilt of the accused is not explained in \textit{Griffin}.\textsuperscript{384}

In \textit{Johnson v. New Jersey},\textsuperscript{385} the Court held that the doctrines of \textit{Escobedo v. Illinois}\textsuperscript{386} and \textit{Miranda v. Arizona}\textsuperscript{387} were also prospective in operation, each applicable only to trials commenced subsequent to the date of the relevant decision. This prospective rule, less liberal than the final judgment test of \textit{Linkletter} and \textit{Tehan},\textsuperscript{388} was imposed since the Court believed that questions relating to the reliability of the guilt-determining process in \textit{Miranda}- and \textit{Escobedo}-type cases could be tested by habeus corpus proceedings. "Thus while \textit{Escobedo} and \textit{Miranda} provide important new safeguards against the use of unreliable statements at trial, the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim."\textsuperscript{389} The suggestion that the involun-

\textsuperscript{383} 380 U.S. at 614-15 (footnote omitted).

\textsuperscript{384} The relation of \textit{Griffin} to reliability in the guilt-determining process is even more apparent when one considers that the defendant has the right to a "Bruno charge," see note 266 supra, and Mr. Justice Douglas' quotation from \textit{Wilson v. United States}, 149 U.S. 60, 66 (1893), in \textit{Griffin}:

"It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him... The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him." 380 U.S. at 613.

All this led Professor Mishkin to conclude that \textit{Griffin} is related to reliability in the guilt-determining process and should be retroactive. See Mishkin, supra note 351, at 92-93. The Court did not agree in \textit{Tehan}, although later, in \textit{Johnson v. New Jersey}, 384 U.S. 719 (1966), the Court stated that "we denied retroactive application of \textit{Griffin v. California}... despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand." \textit{Id.} at 729.

\textsuperscript{385} 384 U.S. 719 (1966).

\textsuperscript{386} 378 U.S. 478 (1964).

\textsuperscript{387} 384 U.S. 436 (1966).

\textsuperscript{388} See note 341 supra.

\textsuperscript{389} 384 U.S. at 730.
tary confession route was adequate\textsuperscript{390} and that \textit{Miranda} and \textit{Escobedo} did not relate to reliability in guilt-determining is absurd.\textsuperscript{391} The purpose of \textit{Miranda} is to provide safeguards "to dispel the compulsion inherent in custodial surroundings,"\textsuperscript{392} sometimes including the presence of counsel when statements are taken, a presence which "enhances the integrity of the fact-finding processes in court."\textsuperscript{393} Clearly, the "availability [of counsel] as a witness to the events of the period [of interrogation] might serve to improve the determination of the facts on which a decision as to 'coercion' must be made."\textsuperscript{394} If one of the difficulties confronting the accused is demonstrating the circumstances at the time of the interrogation, before he can argue that those circumstances resulted in an involuntary and unreliable confession, how can one say that the \textit{Miranda} rule relating directly to that demonstration is not related to guilt-determination?\textsuperscript{395} In \textit{Johnson}, the Court finally was compelled to admit that \textit{Miranda} and \textit{Escobedo} might relate to the guilt-determining process, the prospective ruling being justified by noting that collateral attack was available to protect the innocent.\textsuperscript{396} The interesting bootstrap manipulation of precedent is presented by the Court's interpretation of \textit{Griffin} in \textit{Johnson}: "[W]e denied retroactive application to \textit{Griffin v. California} . . . despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand."\textsuperscript{397}

\textsuperscript{390} Mr. Justice Clark felt that the weight given to the same safeguards in an involuntary confession case decided the same day as \textit{Johnson} virtually rendered \textit{Miranda} retrospective. \textit{See} Davis \textit{v. North Carolina}, 384 U.S. 737, 753-54 (1966) (Clark, J., dissenting).

\textsuperscript{391} "If, as seems plain, \textit{Escobedo} and \textit{Miranda} indicate dissatisfaction with — and lack of confidence in — the actual operation of the old 'voluntariness' and 'totality of circumstances' tests . . . how can it be sufficient that 'our law on coerced confessions is available for persons whose trials have already been completed'? 384 U.S. at 730." Kamisar, \textit{A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test}, 65 \textit{Mich. L. Rev.} 59, 100 n.163 (1966).

\textsuperscript{392} 384 U.S. at 458.

\textsuperscript{393} Id. at 466.

\textsuperscript{394} Mishkin, \textit{supra} note 351, at 96.

\textsuperscript{395} See the discussion of \textit{Davis} in Kamisar, \textit{supra} note 391, at 99-104.

\textsuperscript{396} Thus while \textit{Escobedo} and \textit{Miranda} guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion. At the same time, our case law on coerced confessions is available for persons whose trials have already been completed. \textit{Johnson v. New Jersey}, 384 U.S. 719, 730 (1966). \textit{See} discussion notes 385-97 \textit{supra} & accompanying text.

\textsuperscript{397} 384 U.S. at 729.
The bizarre denouement of the entire episode was delivered in *Stovall v. Denno*, in which the Court was confronted with the issue of whether the rules of *United States v. Wade* and *Gilbert v. California* that identification evidence is tainted and must be excluded if the accused was exhibited to the identifying witness before trial in the absence of counsel, were to be prospective or retrospective in operation. In holding these rules prospective only, the Court comes full circle, with factors (2) and (3), the "make-weights" of *Linkletter*, becoming the most important, while (1), the only remotely valid reason, is reduced to mere baggage:

Although the *Wade* and *Gilbert* rules ... are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence, "the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree." *Johnson v. New Jersey*. ... The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a "question of probabilities." Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice.

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388 U.S. 293 (1967).
399 U.S. 218 (1967).
400 U.S. 265 (1967).
401 The Court did note in *Wade*: "Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.'" 388 U.S. at 239.
402 U.S. at 298. In *Stovall*, factors (2) and (3) preponderated even though [a] conviction which rests on a mistaken identification is a gross miscarriage of justice. The *Wade* and *Gilbert* rules are aimed at minimizing that possibility by preventing the unfairness at the pretrial confrontation that experience has proved can occur and assuring meaningful examination of the identification witness' testimony at trial. Id. at 297.

Justice Black, dissenting, stated: "I do not believe . . . [the Court] has the power, by weighing 'countervailing interests,' to legislate a timetable by which the Constitution's provisions shall become effective." Id. at 304.

D. The Janus Ploy

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you can make words mean different things."
"The question is," said Humpty Dumpty, "which is to be master — that's all."

LEWIS CARROLL

THROUGH THE LOOKING-GLASS

The Court, itself, has recognized that statutes proliferating "conflicting commands" do not provide "fair warning" and are thereby void for vagueness.403 Thus, in James,404 even an embezzler is protected from compulsion to obey conflicting commands — an obedience that would require something of the impossible.405 The Trupiano-Rabinovitz-Schmerber-Cooper-Warden-Camara sequence embodies within it a cycle of contradictions as well as a promulgation problem. If it is unclear whether a precedent is overruled, then contradictory commands are often present.406

403 E.g., United States v. Cardiff, 344 U.S. 174 (1952), wherein the Court stated: The alternative construction pressed on us is equally treacherous because it gives conflicting commands. It makes inspection dependent on consent and makes refusal to allow inspection a crime. However we read § 301(f) we think it is not fair warning . . . to the factory manager that if he fails to give consent, he is a criminal. Id. at 176.

The Court recently incorrectly cited Cardiff as "[holding] that the Federal Food, Drug and Cosmetic Act did not compel that consent be given to warrantless inspections of establishments covered by the Act." See v. City of Seattle, 387 U.S. 541, 544 n.4 (1967). (See involved issues similar to those in Camara and was handed down the same day. See text accompanying note 306 supra.) Cardiff reached no holding on the issue of whether the Act compelled inspection; rather the vagueness relating to that issue was the reason for vitiating the relevant provision.

404 See discussion in notes 360-66 supra & accompanying text.

405 See discussion in note 363 supra & accompanying text.

406 Unanimous verdicts in Employer Liability Act cases brought in State courts are not required. Minneapolis & St. L.R.R. v. Bombolis, 241 U.S. 211 (1916). "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.'" Bailey v. Central Vermont Ry., 319 U.S. 350, 354 (1943), and must be afforded to the litigants in such a case brought in a State court. Dice v. Akron, C. & Y.R.R., 342 U.S. 359 (1952). Since the federal trial by jury is based on the seventh amendment that demands a jury of 12 returning a verdict by unanimous decision, Capital Traction Co. v. Hof, 174 U.S. 1 (1899), is Bombolis still valid? Would it not have been preferable for the Court to overrule Bombolis "explicitly instead of [leaving it] . . . as a derelict bound to occasion collisions on the waters of the law." 342 U.S. at 368-69 (Frankfurter, J., concurring). Since Congress cannot act "abroad . . . free of the Bill of Rights," Reid v. Covert, 354 U.S. 1, 5 (1957), a fortiori, it would follow that Congress cannot avoid the limitations of the Bill of Rights by placing federal actions in State courts; thus Bombolis is indeed overruled, if the Court is to be consistent. The Reid case is of special interest since the opinion arrives at a conclusion antipodal to that of an opinion published the term before in Kinsella v. Krueger, 351 U.S. 470 (1956).

Professor Paul Kauper explains how this anomalous situation came about:

The majority opinion [in 351 U.S. 470], written by Mr. Justice Clark, justified the use of military courts in this situation on the ground that the underlying legislation was a valid exercise of the Congressional power under Article I of the Constitution to establish legislative courts outside the territorial limits of the United States . . . . Mr. Justice Frankfurter reserved opinion in the
Logical consistency of legal doctrine is, at the least, a necessary condition for effective implementation of the law-in-books. The role of logic and consistency in the law requires little elaboration.\footnote{407}

Law without concepts or rational ideas, law that is not logical, is like pre-scientific medicine — a hodge-podge of sense and superstition . . . .

To urge that judges . . . should rely on their experience or intuition in disregard of logically formulated principles is to urge sentimental anarchy. Men will generalize in spite of themselves. If they do it consciously in accordance with logical principles, they will do it more carefully and will be liberally tolerant to other possible generalizations.\footnote{408}

case since he felt that there had not been sufficient time for adequate reflection upon the issues presented by the case. . . . Mr. Chief Justice Warren and Justices Black and Douglas dissented, but reserved the writing of their dissenting opinions until the next Term of Court. Then on November 5, 1956, after the opening of the new Term of Court, the Court granted a motion for a rehearing of these two cases [Reid and Kinsella] . . . . Justices Reed, Burton and Clark dissented from the order granting a rehearing. Mr. Justice Brennan, who had replaced Mr. Justice Minton on the bench, took no part in the consideration or decision of the order granting a rehearing.

Following the rehearing the Court handed down . . . [the decision reported in 354 U.S. 1]. P. KAUPER, CONSTITUTIONAL LAW: CASES AND MATERIALS 505 (3d ed. 1966).

\footnote{407} The logical form of a decision serves the function of justification:

[B]efore any particular decision is deemed to have been truly justified it must be shown to be formally deducible from some legal rule . . . . To require that judicial decisions be deducible from legal rules is to do more than insist that an argument not be formally fallacious. For it is to ensure as well that further criticism and evaluation of the premises of that argument will be possible; it is to require that their content will be understandable and their correctness verifiable. R. WASSERSTROM, THE JUDICIAL DECISION 172-73 (1961).

Logic also serves to clarify legal principles while aiding rational decisionmaking.

The lawyer and the judge can, and ordinarily do, reason in a way consistent with the rules of formal logic, without knowing those rules. They can, indeed, reach reasonable decisions (sometimes) without reasoning at all. Yet in the long run and for decisions which justify the expenditure of time and effort, they will get better results if they utilize the resources of logic, both formal and instrumental. Patterson, Logic in the Law, 90 U. PA. L. REV. 875, 909 (1942).

For a bibliography on law and logic, see Cowan, Decision Theory in Law, Science and Technology, 17 RUTGERS L. REV. 499, 522 (1963).

\footnote{408} Cohen, Law and Scientific Method, in JURISPRUDENCE IN ACTION 115, 127 (1953). Cohen observes that a "deductive system that enables us to derive many legal rules from a few principles makes the law more certain, so that people can better know their rights." Id. at 125. Cohen was critical of the realists for discounting legal rules. In answer, Jerome Frank wrote: "The skeptics [realists] insist that legal rules . . . must be studied. But they say that knowledge of the rules is but a small part of what lawyers and judges use in their work . . . . Frank, Are Judges Human?, 80 U. PA. L. REV. 17, 44-45 (1931).

"[T]he value of logic to philosophy is not that it supports a particular system, but that the process of logical organization of any system . . . serves to test its internal consistency, to verify its logical adequacy to its declared purpose, and to isolate and clarify
To require logical consistency is not, however, to dictate that judges reason "according to strict rules of logic." Rather, judges should act in accordance with what Ernest Nagel terms the assumptions on which it rests." A. CHURCH, INTRODUCTION TO MATHEMATICAL LOGIC 55 (1956). Modern logic, it is contended, is a more versatile and powerful organon. Layman Allen has proselytized vigorously for lawyers to adopt his brand of symbolic logic, which he describes as a "razoredged" tool for analysis of legal doctrine. Allen, Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents, 66 YALE L.J. 833 (1957). The function of the razoredged tool is to ferret out various possible interpretations from syntactically ambiguous legal language." Allen & Caldwell, Modern Logic and Judicial Decision Making: A Sketch of One View, 28 LAW & CONTEMP. PROB. 213, 229 (1963). This is not especially startling since modern logic or Boolean algebra was developed primarily to assist the design of logic circuits for computers and switching circuits for control systems and telephonic networks. See R. Hohn, APPLIED BOOLEAN ALGEBRA, INTRODUCTION (1960). In switching networks the material carried is not important, rather it is the route which is important. See J. Kemeny, J. Snell & G. Thompson, INTRODUCTION TO FINITE MATHEMATICS 49 (1957); Hohn, Some Mathematical Aspects of Switching, 62 AM. MATHEMATICAL MONTHLY 75 (1955). Modern logic, as now constituted, cannot ferret out the referent if conceptual ambiguity is involved, although other means of eliminating conceptual ambiguities exist, such as precisely delineating the extensional or denotative meaning of a word. See Allen, Symbolic Logic and Law: A Reply, 15 J. LEGAL ED. 47, 50 (1962). Anderson, by the use of deontic logic, has illustrated logical weaknesses and inconsistencies in Hohfeld's approach. See Anderson, Logic, Norms and Rules, in MATHEMATICAL METHODS IN SMALL GROUP PROCESSES 11, 14-21 (J. Criswell, H. Solomon & P. Suppes eds. 1962). See also Anderson & Moore, The Formal Analysis of Normative Concepts, 22 AM. SOCIOLOGICAL REV. 9, 13 (1957). Other studies have also focused on the problem of ambiguities in the law. E.g., Curtis, A Better Theory of Legal Interpretation, 4 RECORD OF N.Y.C.B.A. 321 (1949); Williams, Language and the Law, 61 L.Q. REV. 71, 179, 293, 384 (1945). See also D. Mellinkoff, The Language of the Law (1963); Chafee, The Disorderly Conduct of Words, 41 COLUM. L. REV. 381 (1941); Hager, Let's Simplify Legal Language, 32 ROCKY MNT. L. REV. 74 (1960); Lavery, The Language of the Law, 8 A.B.A.J. 269 (1922); Lavery, The Language of the Law, 7 A.B.A.J. 277 (1921); Mehler, Language Mastery and Legal Training, 6 VILL. L. REV. 201 (1961); The Language of Law — A Symposium, 9 W. RES. L. REV. 115 (1958). Since conceptual ambiguity is generally the type of interpretation problem confronting lawyers, modern logic is not too helpful for them. This was one of the primary criticisms of Allen's razoredged tool in Summers, A Note on Symbolic Logic and the Law, 13 J. LEGAL ED. 486 (1961). Allen's reply to Professor Summers appears in Allen, Symbolic Logic and Law: A Reply, 15 J. LEGAL ED. 47 (1962). Professor Tammelo comments on the Summers-Allen articles in Tammelo, Syntactic Ambiguity, Conceptual Vagueness, and the Lawyer's Hard Thinking, 15 J. LEGAL ED. 56 (1962). Professor Summers has the last word in Summers, Symbolic Logic and Law: A Reply to Professors Allen and Tammelo, 15 J. LEGAL ED. 60 (1962). At this stage, modern logic probably will not produce more rational methods for analysis and evaluation of legal problems.

[1] It is doubtful whether they [modern logic formulae] even simplify the formulation of the problem. Perhaps we have here yet another intellectual fad, the desire of the jurist to be in the august company of the mathematical physicist, to speak with the mathematician's language in the field of legal science. Friedmann, Legal Philosophy and Judicial Lawmaking, 61 COLUM. L. REV. 821, 825 (1961).

Professor Alonzo Church, a noted authority on modern logic, after listening to a presentation by Layman Allen on his logical method, stated that the logic applicable to the statutory problems presented by Allen would be implicitly, not explicitly, used, and that he, himself, had considered the statutory problems on a case-by-case approach rather than formulating and analyzing the problems by use of modern logic. See Chasalow, The
more inclusive sense of logic . . . [that] studies the methods employed by men aiming at stable knowledge, assays their efficacy in achieving this aim, examines the role of critical thought in every department of human activity, and institutes a rigorous inquiry into the conditions upon which the significance and effective operation of discourse rest. It is a genuine organon for achieving a rational life and society. It will discover the limitations of procedures sometimes adopted on impulse, and by acting as the searching critic of man's aspirations and customary beliefs may free him from the shackles of blind routine and force.\footnote{E. NAGEL, supra note 409, at 52-53.}

The examples selected to illustrate the Janus ploy suggest that if the Court is using logic to arrive at such incompatible positions, then perhaps its logic is correctly defined as "arriving at the wrong result with confidence."


In \textit{Miranda}, the Court held:

When an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any question-
ing that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. 414

Later, in Hoffa, the Court held that "[T]here is no constitutional right to be arrested," 415 even though the Government has sufficient evidence to take the accused into custody and charge him with the alleged crime. 416 This is akin to throwing a drowning man both ends of the rope! It is not only inconsistent with the promise of Escobedo v. Illinois, 417 that where "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect," 418 and that "when the process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession — our adversary system begins to operate, and, under the circumstances . . . the accused must be permitted to consult with his lawyer," 419 but it is also inconsistent with the "fully meaningful" approach supposedly in favor with the current Court. 420 As long as police move within certain prescribed limits, they may gather enough evidence to literally hang a person (a critical stage of the process?) without arresting him, i.e., subjecting him to custodial interrogation, 421 thereby not affording him the "protection" of the Miranda doctrine. 422 Such is

414 384 U.S. at 478-79.
415 385 U.S. at 310.
416 See id. at 309.
418 Id. at 490.
419 Id. at 492.
420 See note 10 supra.
421 "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. The Court hides in a footnote the amazing revelation, "this is what we meant in Escobedo when we spoke of an investigation which had focused on an accused." Id. at 444 n.4. That tops Lewis Carroll's cat that vanished before his grin.
422 This situation occurred in Hoffa. See also, e.g., Osborn v. United States, 385 U.S. 323 (1966). It is doubtful whether Miranda will ever provide meaningful protection if State police superintendents continue ordering their men to "forget Miranda
the manner in which the Court renders constitutional guarantees meaningful.

Another mismatched pair is *Jackson v. Denno* and *New York Times v. Sullivan*. In *Jackson*, the Court adopted what is known as the Massachusetts doctrine regarding the instructions given to a jury concerning alleged involuntary confessions, holding that the approach adopted in *Stein v. New York* was invalid "by going behind the historic assumptions of the law of evidence and considering the psychological reality of the jury's functioning in [*Jackson*]... as it related to its consideration of the voluntariness of confessions." The Court in *Jackson* apparently recognized that "cautionary instructions [even if] copiously provided by the trial judge... do not give the accused adequate protection." Therefore, the

danger that matters pertaining to the defendant's guilt will infect the jury's findings of fact bearing upon voluntariness, as well as its conclusion upon that issue itself, is sufficiently serious to preclude their unqualified acceptance upon review in this Court, regardless of whether there is or is not sufficient other evidence to sustain a finding of guilt.

Conversely, in *Sullivan* the Court ignored the psychological realities of jury functioning, holding that a public official can—and Escobedo and become policemen again.” N.Y. Times, June 23, 1967, at 24, col. 5; see Kamisar, *infra* note 391, at 67 n.47.


424 376 U.S. 254 (1964). Although prior to *Jackson*, the *Sullivan* doctrine is accepted and applied in numerous cases after the date of the *Jackson* decision. See note 16(5) *infra*.

425 See 378 U.S. at 377-79. Although the Court did not explicitly adopt the Massachusetts doctrine, it must have done so implicitly in light of the remand to the trial court for a hearing by the judge on the issue of whether the confession was voluntary, and only if the judge found it involuntary was a new trial required. See *id.* at 394-95; Sims v. Georgia, 385 U.S. 538 (1967).

426 346 U.S. 156 (1953).


428 *Id.* at 645-46. Mr. Justice Jackson had earlier observed that "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury... all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. United States, 336 U.S. 440, 453 (1949) (concurring opinion).

429 378 U.S. at 383.

430 Realistically, evidence proves that juries do ignore judges' instructions and apply their own notions of the law. In one early study the case given to the jury involved a defense of criminal irresponsibility. Alternate charges were given, one based on the *M'Naghten* rule, see text accompanying note 243 *infra*, the other on the *Durham* rule. Logically, the jury should have arrived at different verdicts, depending on which charge was given, but instead, they entirely disregarded the instructions. See R. JAMES, JURORS' REACTIONS TO ALTERNATIVE DEFINITIONS OF LEGAL INSANITY (Univ. of Chicago Microfilm 1957). On the jury, see H. KALVEN & H. ZEISEL, THE AMERICAN
not recover “damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” Freedom of expression will only gain limited protection by this rule if jury functioning is viewed realistically, since

[[]If malice is all that is needed, inferences from facts as found by the jury will easily oblige. How can we sit in review on a cold record and find no evidence of malice . . . when it is the common-

place of life that heat and passion subtly turn to malice in actual fact.432

"The requirement of proving actual malice or reckless disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the Court recognizes not to be an adequate safeguard."433

Resolution of the real meaning of Jackson finally became unavoidable in Spencer v. Texas,434 in which the jury was given evidence of prior convictions of the accused for sentencing purposes, but was charged not to take this evidence into account in determining the guilt or innocence of the accused under the current indictment. The Court avoided any contradiction by emasculating Jackson, restricting it to its facts.435

It would be extravagant in the extreme to take Jackson as evincing a general distrust on the part of this Court of the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case, or as standing for the proposition that limiting instructions can never purge the erroneous introduction of evidence or limit evidence to its rightful purpose.436

The Court admitted, however, that "the Court in Jackson supported its holding by reasoning that a general jury verdict was not a 'reliable' vehicle for determining the issue of voluntariness because jurors might have difficulty in separating the issues of voluntariness from that of guilt or innocence."437

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433 376 U.S. at 298 n.2.
435 Confining a precedent to its facts is described by Llewellyn as "Killing the Precedent." COMMON LAW TRADITION 87. He characterizes as "Avoidance Without Acceptance of Responsibility: Illegitimate Techniques:" (1) a distinction being drawn without a difference, (2) an earlier similar case "being brushed off because of the 'facts' . . . there, while a completely different manner of interpretation and classification is used on the raw facts of the case in hand," and (3) the "older case being knowingly disregarded without mention." Id. at 85. In regard to (3), the question arises as to why none of the opinions in Adderley v. Florida, 385 U.S. 39 (1966), even mentions Brown v. Louisiana, 383 U.S. 131 (1966).
437 385 U.S. at 565. Although Robinson v. California, 370 U.S. 660 (1962), is never mentioned in Spencer, it is clear that the Court did hold that recidivist or habitual criminal statutes are not proscribed by the eighth amendment's prohibition of cruel and unusual punishments. See 385 U.S. at 560. This is a highly relevant inquiry. See discussion notes 536-40 infra & accompanying text.
Finally, it is interesting to scrutinize *Mapp v. Ohio* and *McCray v. Illinois*. In *McCray*, the Court held that a valid search warrant may issue pursuant to a State officer's affidavit which may be based on the hearsay testimony of an informer. Further, the informer's identity need not be disclosed, since "[n]othing in the Due Process Clause requires a state court judge . . . to assume the arresting officers are committing perjury." Is this consistent with the *Mapp* policy of making the search and seizure provision of the fourth amendment fully meaningful? Professor Younger draws attention to the ironical demise of a doctrine based on a recognition of the realities of law enforcement, due to the Court's failure to remain perceptive and sensitive to those realities:

> [A]s every lawyer knows who practices in the criminal courts, police perjury is commonplace. To be sure, judicial recognition of the fact is extremely rare, but can be found. (See, e.g., *Veney v. United States*, [344 F. 2d 542 (D.D.C. 1965)].) Should the Supreme Court be blind to what all else see? Far from adopting a presumption of perjury, *McCray* almost insures wholesale police perjury.

When his conduct is challenged as an unreasonable search and seizure, all the policeman now need say is that an unnamed "reliable informant" told him that the defendant was committing a crime. That will establish probable cause, thus making reasonable the search and seizure and admissible the evidence thereby obtained.

Henceforth, we can be certain, most policemen will have a genie-like "reliable informant" whose job it will be to legalize his master's arrests.

This affronts the integrity of the administration of justice. From the viewpoint of realistic jurisprudence, it also marks the end of the short life of *Mapp v. Ohio*.

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439 386 U.S. 300 (1967).

440 *Id.* at 313.

441 Unfortunately, the *Mapp* doctrine is losing its vitality in other ways beyond the control of the Court. In New York:

>The police made the great discovery that if the defendant drops the narcotics on the ground, after which the policeman arrests him, the search is reasonable and the evidence admissible.

Spend a few hours in the New York City Criminal Court these days, and you will hear case after case in which a policeman testifies that the defendant dropped the narcotics on the ground, whereupon the policeman arrested him. *Younger, Constitutional Protection on Search and Seizure Dead?*, TRIAL, Aug.-Sept., 1967, at 41. *See also note 422 supra.*

442 *Younger, supra* note 441, at 41. Unhappily, there are all too many other examples of inconsistencies propounded by the Court. For instance, the reader might see if
E. The Zuckerkandl Syndrome

'Twas brillig, and the slithy toves
Did gyre and gimble in the wabe;
All mimsy were the borogoves,
And the more raths outgrabe.

LEWIS CARROLL
THROUGH THE LOOKING-GLASS

Having come this far in the discussion concerning the Court's craftsmanship, the reader may have already diagnosed that the Court is afflicted with the dread disease, Zuckerkandlism. The pathognomonic symptom — the absence of communication — is clearly present where contradictions abound.\(^4\)\(^4\)\(^3\) Several judicial Zuckerkandlites, not yet discussed, readily come to mind, the most visible projecting us into the fascinating topic of obscenity.\(^4\)\(^4\)

As an initial premise, clearly obscenity is not easily defined. It ordinarily has at least three distinct, but equally vague, meanings: (1) something that offends accepted standards of propriety; (2) something that tends to corrupt; or (3) something that provokes erotic thoughts or desires.\(^4\)\(^4\)\(^3\) The etymology of the term does not provide much of a clue, the Latin term being perhaps an amalgam of "ob" (on account of) and "caenum" (filth).\(^4\)\(^4\)\(^6\) Perhaps St. John Stevas is correct when he counsels that "the attempt


\(^4\)\(^4\) An interesting hypothesis is that in communication "[a]ll that is not information, not redundancy, not form and not restraints — is noise, the only possible source of new patterns." Bateson, *Cybernetic Explanation*, AM. BEHAVIORAL SCIENTIST, April 1967, at 29, 32. The Court surely is not short on noise, which perhaps explains its willingness to adopt new patterns.


\(^4\)\(^4\) Havelock Ellis suggested that the word is a modification of 'scena,' and means literally what is 'off the scene,' and not normally presented on the stage of life." S.J. Stevas, *supra* note 444, at 1.
to understand 'obscenity' in terms of a simple definition is fruitless and best abandoned. Attempted definitions of obscenity by experts in other disciplines are of little help, and only serve to exemplify the amorphous, almost evanescent meaning ascribed to the term, a meaning that varies widely from one period of history to the next.

The Court, since it first got into the business of defining obscenity, has succeeded only in generating more and more confusion. In Roth v. United States, after deciding that obscenity is not protected by the first amendment, Mr. Justice Brennan, for the Court, defined obscene material as "material which deals with sex in a manner appealing to prurient interest." At first glance, Mr. Justice Brennan's definition coincides with that of the American Law Institute, but he adds in a footnote, "[i.e., material

447 Id. at 2. He continues, however, to note that obscenity has always been confined to matters relating to sex or the excremental functions. Although there is an ideological element in the word and it is sometimes used to describe unconventional moral attitudes, the word is normally related to the manner of presenting a theme or idea rather than to the theme itself. Id.

448 From an anthropological facet, obscenity is a relative term, with nothing being absolutely obscene, i.e., vis-a-vis various societies. La Barre, Obscenity: An Anthropological Appraisal, 20 LAW & CONTEMP. PROB. 533, 543 (1955).

From an aesthetic-philosophical view, obscenity, especially pornography, "is not itself the object of an experience, esthetic or any other, but rather a stimulus to an experience not focused on it. It serves to elicit not the imaginative contemplation of an expressive substance, but rather the release in fantasy of a compelling impulse." Kaplan, Obscenity as an Esthetic Category, 20 LAW & CONTEMP. PROB. 544, 548 (1955).

Both art and obscenity have a single genetic root: the infantile capacity to endow a mere sign with the affect that belongs properly to what it signifies. Obscenity is a matter, not of what the work refers to, but rather of the expressive substance of the work. A sexual subject (or similar reference) is a necessary condition for obscenity but not a sufficient one. Id. at 550-51.

And from a psychiatric point of view, the dynamics of obscenity are described: "[obscenity] seems to coincide with the expression, verbally or non-verbally, of sadistic-sexual strivings associated with notions of dirt derived from preoccupation with excretory processes and emotionally toned with defiance of established authority." Abse, Psychodynamic Aspects of the Problem of Definition of Obscenity, 20 LAW & CONTEMP. PROB. 572, 580-81 (1955).

449 Plato advocated expurgation of certain "obscene" passages in the Odyssey, such as those describing the lust of Zeus for Hera, since they were "not conducive to self-restraint." See S.J. STIBVAS, supra note 444, at 2.


451 At the time of the Roth decision, "[s]ubstantially all of the states had statutes which declared the distribution of obscene material to be criminal conduct and punishable as such." MODEL PENAL CODE § 207.10, Comment (Tent. Draft No. 6, 1957).

452 354 U.S. at 487.

453 A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or
having a tendency to excite lustful thoughts," a standard rejected by the Institute. The holding of Roth necessarily includes the footnote extension, since the standards applied in the cases before the Court, were: (1) obscene, lewd, and lascivious describe that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts; and (2) material is obscene if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire.

After a careful exegesis of Roth, Lockhart and McClure conclude: "[T]he Court laid down two — and only two — constitutional requirements for determining what is obscene. The two requirements are . . . that material must be judged as a whole, not by its parts, and that it must be judged by its impact on average persons, not the weak and susceptible." The holding clearly does encompass at least these two elements: "[The test is] whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

A series of per curiam opinions handed down shortly after

representation of such matters . . . . Obscenity shall be judged with reference to adulty adults. MODEL PENAL CODE § 207.10 (Tent. Draft No. 6, 1957).


Obscenity is defined in terms of material which appeals predominantly to prurient interest in sexual matters and which goes beyond customary freedom of expression in these matters. We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties. We likewise reject the common definition of obscene as that which "tends to corrupt or debase." If this means anything different from tendency to arouse lustful thought and desire, it suggests that change of character or actual misbehavior follows from contact with obscenity. Evidence of such consequences is lacking; if actual proof of tendency to corrupt were required, prosecutors would have a difficult task. On the other hand, "appeal to prurient interest" refers to qualities of material itself: the capacity to attract individuals eager for a forbidden look behind the curtain of privacy which our customs draw about sexual matters. Psychiatrists and anthropologists see the ordinary person in our society as caught between normal sex drives and curiosity, on the one hand, and powerful social and legal prohibitions against overt sexual behavior. The principal objective of Section 207.10 is to prevent commercial exploitation of this psychosexual tension. MODEL PENAL CODE § 207.10, Comment, at 10 (Tent. Draft No. 6, 1957).


354 U.S. at 489.

On the use of per curiam opinions, see notes 497-521 infra & accompanying text.
Roth, indicated the Court was moving toward an acceptance of the more liberal standard of the Model Penal Code.\footnote{460}{See Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958); One, Inc. v. Olesen, 355 U.S. 371 (1958); Mounce v. United States, 355 U.S. 180 (1957); Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957); Lockhart & McClure, supra note 456, at 49-60.}{460}

In the following decade numerous cases dealing with obscenity have come before the Court. For purposes of this discussion it is sufficient to set forth the Court's own description of the current standard as rendered in Redrup v. New York:\footnote{460}{See 386 U.S. 767 (1967). For the impact of Redrup on Ginzburg and Mishkin, see note 211 supra.}{460}

Two members of the Court have consistently adhered to the view that a State is utterly without power to suppress, control, or punish the distribution of any writings or pictures upon the ground of their "obscenity." A third has held to the opinion that a State's power in this area is narrowly limited to a distinct and clearly identifiable class of material \(\text{i.e.},\) hard-core pornography. Others have subscribed to a not dissimilar standard, holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless \(\text{a)}\) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; \(\text{b)}\) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and \(\text{c)}\) the material is utterly without redeeming social value," emphasizing that the "three elements must coalesce," and that no such material can "be proscribed unless it is found to be utterly without redeeming social value." Memoirs v. Massachusetts, 383 U.S. 413, 418-419. Another Justice has not viewed the "social value" element as an independent factor in the judgment of obscenity. \textit{Id.}, at 460-462 (dissenting opinion).\footnote{461}{386 U.S. at 770-71.}{461}

The ambiguities and vagueness inherent in these standards is so great\footnote{462}{For an excellent treatment of the ambiguities, see Wilson, \textit{California's New Obscenity Statute: The Meaning of "Obscene" and the Problem of Scienter}, 36 S. CAL. L. REV. 513 (1963). \textit{See also Ginzburg v. United States, 383 U.S. 463, 476-82 (1966) (Black, J., dissenting); Comment, \textit{More Ado About Dirty Books}, 75 YALE L.J. 1364 (1966).}{462} that if a legislature promulgated a statute with a similar standard the Court would probably find it "void for vagueness" — a denial of due process.\footnote{463}{See, e.g., Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Ashton v. Kentucky, 384 U.S. 195 (1966); Giaccio v. Pennsylvania, 382 U.S. 399 (1966); United States v. Cardell, 344 U.S. 174 (1952).}{463} In \textit{Baggett v. Bullitt},\footnote{464}{377 U.S. 360 (1964).}{464} the Court held that the phrase "aiding or abetting" was too vague since it might include lawful exercise of constitutional rights.\footnote{465}{The Court pointed out that it was not clear whether a lawyer defending an in-
one not make the same charge regarding the Court's obscenity standard which is incorporated into existing State criminal statutes?

Three cases were disposed of in Redrup v. New York466 on the ground that the material published by the defendants in each case was not constitutionally obscene. In one of the three consolidated cases, Gent v. Arkansas, the Court originally granted certiorari "to consider the validity of a comprehensive Arkansas anti-obscenity statute in light of the doctrines of 'vagueness' and 'prior restraint.'"467 It is possible that the Court avoided resolution of this problem because of a realization that the obscenity standard it propounded could not meet the Court's standard of clarity required for legislative language. This probability is increased when one considers that the issue of whether the material was obscene was not discussed anywhere in the briefs or at oral argument, attention being directed instead at the issues of scienter, vagueness, and prior restraint.468 Mr. Justice Harlan's comment appears justified:

In my opinion these dispositions do not reflect well on the processes of the Court, and I think the issues for which the cases were taken should be decided. Failing that, I prefer to cast my vote to dismiss the writs in Redrup and Austin as improvidently granted and, in the circumstances to dismiss the appeal in Gent for lack of substantial federal question. I deem it more appropriate to defer an expression of my own views on the questions brought here until an occasion when the Court is prepared to come to grips with such issues.469

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466 386 U.S. 767 (1967).
467 Id. at 771 (Harlan, J., dissenting). Redrup and Austin v. Kentucky, the other two consolidated cases, were taken to clarify the scienter requirement of Smith v. California, 361 U.S. 147 (1961). The Smith test was scarcely the epitome of clarity: "The circumstances may warrant the inference that [the bookseller] ... was aware of what a book contained, despite his denial." Id. at 154.
468 See 386 U.S. at 771-72 (Harlan, J., dissenting). A similar situation existed in Mapp v. Ohio, see note 10 supra, in which practically no mention was made of the application of the exclusionary rule to the States in either the briefs or at oral argument.
469 386 U.S. at 772 (Harlan, J., dissenting). Making a similar point, Mr. Justice Fortas dissented in Rosenblatt v. Baer, 383 U.S. 75 (1966), stating:

I would vacate the writ in this case as improvidently granted. The trial below occurred before this Court's decision in New York Times Co. v. Sullivan, 376 U.S. 254. As a result, the factual record in this case was not shaped in light of the principles announced in New York Times. Particularly in this type of case it is important to observe the practice of relating our decisions to factual records. They serve to guide our judgement and to help us measure theory against the sharp outlines of reality. Especially where our decision furnishes a necessarily Procrustean bed for state law, I think, with all respect, that we should insist upon a relevant factual record. A subsequent trial may conceiv-
Another instance of the confusion generated by unclear opinions is graphically illustrated by the state of the law subsequent to Escobedo v. Illinois, in which the opinion stated the holding as follows:

We hold . . . that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect [this language is treated as nonexistent in Miranda. See note 421 supra], the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," Gideon v. Wainwright . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

This stream of consciousness nowhere indicates whether all, some, or one of these circumstances is sufficient to render a confession inadmissible. In Miranda, the Court confessed that Escobedo had been "the subject of judicial interpretation and spirited
and that "state and federal courts, in assessing its implications have arrived at varying conclusions."\(^{476}\) This comment constitutes an amazing judicial hyperbole of understatement! Some cases held *Escobedo* prospective in operation,\(^{478}\) some retrospective.\(^{477}\) Certain cases read *Escobedo* narrowly, virtually restricting it to its facts,\(^{478}\) others took an expansive view toward making constitutional rights meaningful.\(^{479}\) This led to a dramatic confrontation of the divergent interpretations of *Escobedo* by the United States Court of Appeals for the Third Circuit and the New Jersey Supreme Court. Justice Weintraub, Chief Justice of the New Jersey

\(^{474}\) 384 U.S. at 440.

\(^{475}\) Id. The Court footnoted this conclusion with:


\(^{477}\) E.g., United States ex rel. Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965), cert. denied, 384 U.S. 1012 (1966). Mr. Justice Douglas was "of the opinion that . . . the judgment below . . . [should be] vacated. He would remand the case for reconsideration in light of *Miranda v. Arizona* . . . ." 384 U.S. at 1012.

\(^{478}\) We have held that the Supreme Court limited the effect of *Escobedo* to the facts before it in that case and that one of those decisive facts was that the accused there had repeatedly and in terms asked to see a previously retained lawyer and had been refused. Here no request for a lawyer whatever was made and *Escobedo*, in our view, does not control. Swartz v. State, 237 Md. 263, 265, 205 A.2d 803, 804 (1965).


Supreme Court, reacted to the Third Circuit’s liberal interpretation of Escobedo in United States ex rel. Russo v. New Jersey480 (an interpretation much broader than that of the New Jersey Supreme Court)481 by issuing a directive to all New Jersey State judges and county prosecutors ordering them to ignore Russo if there was no other way around the use of a questionable confession at the trial.482

Suppose an individual was released by the federal court, then retried by the State, which again admitted into evidence the confession pursuant to the State’s interpretation of Escobedo. Probably, the accused would merely petition the federal court for release under a writ of habeas corpus, and "the round-robin could go on and on,"483 culminating in an impasse due primarily to the ambiguous nature of the Court’s holding in Escobedo.484

Rather than set forth other judicial Zuckerkandlites, it suffices here merely to note that the Court’s standards for due process,485

483 N.Y. Times, supra note 482, at 32, col. 5.
484 There are times where the law is necessarily vague, but the Escobedo doctrine scarcely qualifies as such a situation. See generally Clark & Trubek, The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition, 71 YALE L.J. 255 (1961); Pannam, Professor Hart and Analytical Jurisprudence, 16 J. LEGAL ED. 379, 386-92 (1964).
485 Consider the vagueness inherent in the very concept of “due process,” then mix in the various incorporation theories, the “shocking to conscience” and “fundamental fairness” tests, penumbral rights (see discussion notes 8-11 supra & accompanying text), the dialectic between the equal protection clause and due process (see, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954)), the prospective operation of some due process requirements (see discussion notes 339-402 supra & accompanying text) and — voila — Zuckerkandlites! For a discussion of some of the perplexing difficulties in determining the dimensions of due process and what limitations it imposes on the government, see Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74 (1963); Kadish, Methodology and Criteria in Due Process Adjudication — A Survey and Criticism, 66 YALE L.J. 319 (1957). For a discussion of the difference between the standards for economic regulation of substantive due process and other forms of substantive and procedural due process, see Hetherington, State Economic Regulation and Substantive Due Process of Law (pts. 1-2), 55 NW. U.L. REV. 13, 226 (1958); Professors Lockhart, Kamisar, and Choper comment on the historical basis for incorporation theories: “Historical research has produced ample support — and ample skepticism — for the ‘incorporation’ theory.” After citing numerous authorities with conflicting views, they continue, “[I]f further historical search likely to do more than ‘further obscure the judicial value-choosing inherent in due process adjudication which can proceed with greater expectation of success if pursued openly and deliberately rather than under disguise?'” W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW: CASES — COMMENTS — QUESTIONS 556 (2d ed. 1967).
reapportionment, equal protection, and State action are likely candidates. The use of imponderable, amorphous standards detracts from the myth of objectivity and the notion of a "rule of law," since incomprehensible rules provide no more of a guiding constraint for the Justices than for the public. "A prudent court will seek always to minimize doctrinal developments that cut so close to the very fulcrum of judicial power."

F. The Caligula Ploy

"Then you should say what you mean," the March Hare went on.

"I do," Alice hastily replied; "at least — at least I mean what I say — that's the same thing, you know."

"Not the same thing a bit!" said the Hatter. "Why, you might just as well say 'I see what I eat' is the same as 'I eat what I see'!"

LEWIS CARROLL
ALICE'S ADVENTURES IN WONDERLAND

That law must be promulgated to be effective, can be con-

486 On the standards for apportionment, see articles cited in P. KAUPER, CONSTITU-TIONAL LAW: CASES AND MATERIALS 44 n.2, 1284 n.h (1966). Professor Choper believes:

As to the constitutional standard adopted, it must be perceived that in the Re-apportionment Cases the Court "recognized as constitutional rights . . . 'the democratic ideals of equality and majority rule.'" [Auerbach, The Reapportionment Cases: One Value, 1964 SUP. CT. REV. 1, 66.] The Court, cogently fulfilling its role in a democratic society, ruled for the majority of citizens and voters in the nation, mostly living in urban areas, whose political influence was being seriously diluted by state legislatures dominated by minority rural interest. On the question of the standard adopted, I believe it is adequate here to point out, as Professor Carl A. Auerbach has thoroughly and admirably demonstrated, that "no reason consistent with the democratic ideals . . . has been advanced for not effectuating" [id. at 67] the Court's "one man-one vote" principle . . . . Choper, On the Warren Court and Judicial Review, 17 CATHOLIC U.L. REV. 20, 30 (1967).


489 "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula." United States v. Cardiff, 344 U.S. 174, 176 (1952).

sidered a truism. "Law as a guide to conduct is reduced to the
level of mere futility if it is unknown and unknowable." Yet,
the torrent of published material, legal and nonlegal, reduces,
in large measure, much law to the unknowable. Counsel fre-
frequently omit relevant cases and material because the output of
legal material is too enormous to yield to traditional indexing
systems, which never have been entirely adequate. Judges

491 B. CARDOZO, THE GROWTH OF THE LAW 3 (1924). This appears especially
true where the Court is attempting to make constitutional guarantees fully meaningful.
Ehrlich was undoubtedly correct about the general body of law when he observed that
"the effect of norms for decision is usually very much over-estimated. The whole matter
hinges upon action by the parties, who very often fail to act altogether. Often the statute
remains unknown to a considerable part of the population . . . ." E. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 368 (W. Moll transl. 1936). The
Court seems to agree. See note 489 supra.

492 On the amazing increment in publication of legal material with which courts
and lawyers must cope, see L. ALLEN, R. BOOKS, & P. JAMES, AUTOMATIC RETRIEVAL
OF LEGAL LITERATURE: WHY AND HOW 1-22 (1962). On the possibility and potential

493 "Inadequate trial preparation is often inevitable due to the prohibitive time and
effort required to prepare a case with the primitive legal tools of today . . . ." Lewis,

494 From the outside the West system looks impressive . . . . People who re-
search law . . . tend to be less impressed. "If you're doing a products liability
book," says Bender's Frumer rather mildly, "you'll find a lot of cases you'd
never locate in the West Digest." Jack Antiques, the young lawyer in charge
of the American Law Institute's Books for Continuing Legal Education says
that "some of the headnotes read like they were written by first-year law stu-
dents." Craig Spangenberg of Cleveland told a meeting recently, "I spend
a lot of time in upper courts on fine points of law and I tell you most of them
are points that we can never find indexed anywhere . . . . We read maybe
fifty cases hoping to find some paragraph in one opinion where some judge
has decided the point, but it isn't in the headnote and it isn't in the index . . . ."
California's Felix Stumpf says, "You know the Palsgraf case? . . . . Well,
West didn't put it under 'proximate cause.' The avalanche of head notes
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The West system is, however, quite sophisticated compared with existing indexing
schemes in the sciences. The very inaccessibility of scientific studies and reports leads
to innumerable instances of needless duplication of research efforts. See Kent, A Ma-
chine that Does Research, HARPER'S MAGAZINE, April 1959, at 1. Some contend that
the Russians advanced rapidly in space technology because they made effective use of
existing knowledge reported in foreign literature. The fantastic amount of time and
effort expended by the Russians on documentation, abstracting, and retrieval, is reported
in Kent & Iberall, Soviet Documentation, 10 AM. DOCUMENTATION 1 (1959). See
also Kerimov, Cybernetics and Soviet Jurisprudence, 28 LAW & CONTEMP. PROB. 71
(1963); Kerimov, Future Applicability of Cybernetics to Jurisprudence in the U.S.S.R.,
63 MODERN USES OF LOGIC IN LAW 153 (1963).
are publishing more, and apparently reading less, thereby adding to the rapidly growing and intractable mass of precedents, statutes, and regulations, that must be examined to discover the relevant, if any, legal doctrines for a particular case.

The Court only exacerbates this condition when it "promulgates" the law in such a way that nobody, not even the Court, knows what it is that has been said. In *Rosenblatt v. American Cyanamid Co.*, the Court's per curiam opinion merely stated: "The appeal is dismissed for want of a substantial federal question." Unlike a denial of certiorari, a dismissal for want of a substantial federal question may constitute a decision on the merits, even though most of the dismissals are entered without hearing arguments. Therefore, it appears that in *Rosenblatt* the Court has

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495 For a good summary of efforts to reduce publication of opinions that add nothing but volume to the law, see Prince, *Law Books Unlimited*, 48 A.B.A.J. 134 (1962).

496 Unless a judge knows the judicial treatment accorded similar cases how can he render justice? "Rendering contrary decisions in like or similar cases would not be law and right, but arbitrariness or caprice." E. EHRlich, *supra* note 491, at 132. Of course, a compulsive adherence to this principle would result in a static rather than a "living" law, since social changes require that factually similar cases be treated differently at different times. See Spengler, *Machine-Made Justice: Some Implications*, 28 LAW & CONTEMP. PROB. 36 (1963).

497 See, e.g., the discussion of the *Trupiano* doctrine in text accompanying note 290 *supra*. Professor Kurland has remarked that:

Certainly there is something to be said, under the circumstances of the Court's behavior, for Lord Mansfield's advice: "[C]onsider what you think justice requires, and decide accordingly. But never give your reasons; — for your judgment will probably be right, but your reasons will certainly be wrong." [4 J. Campbell, *Lives of the Chief Justices of England* 26 (3d ed. 1874).] To this view of the judicial process might be added the observation that in the absence of reasons it may not be possible to discover whether the judgment was right or wrong, especially if, in addition to refusing reasons, the Court does not reveal the facts of the case. The Court's memorandum decisions demonstrate the absence of novelty in this suggestion. Kurland, *Foreward: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 175 (1964).


499 Id.

500 Wright categorically states that "Summary disposition of an appeal . . . either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits." C. Wright, *Federal Courts* § 11, at 431 (1963). Wolson and Kurland are more cautious, observing that "dismissals by the Supreme Court for want of a substantial federal question often constitute undisclosed determinations on the merits." R. Robertson & P. Kirkham, *Jurisdiction of the Supreme Court of the United States* § 58, at 104 (R. Wolson & P. Kurland eds., 1951). They also note that the "distinction between federal questions sufficiently substantial not to be dismissed but not so substantial as to resist summary affirmance is not clear." Id. § 58, at 104 n.11. See also Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

upheld the New York "long arm" statute\textsuperscript{502} without hearing arguments and without discussion, although this significant issue is not resolved in any preceding opinion of the Court.\textsuperscript{503} How many attorneys and judges are aware of the \textit{Rosenblatt} holding?

Unfortunately, the above is not an isolated instance. Other important issues have been disposed of by the Court in one or two sentence memorandum per curiam opinions:\textsuperscript{504}

(1) The \textit{Wong Sun v. United States} rule\textsuperscript{505} was applied to the States in \textit{Traub v. Connecticut},\textsuperscript{506} a memorandum opinion.

(2) The Court has indicated that the abstention doctrine\textsuperscript{507} is not to be employed if it would "force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings [and thereby] . . . itself effect the impermissible chilling of the very constitutional right he seeks to protect."\textsuperscript{508} In \textit{Fenster v. Leary},\textsuperscript{509} the Court may have held for the first time that this limitation is not available to a plaintiff unless a "delay in adjudication on the merits could be 'costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms.'"\textsuperscript{510}

\textsuperscript{502}N.Y. CIV. PRAC. LAW § 302(a).2 (McKinney 1963). This section provides that "A Court may exercise jurisdiction over any non-domiciliary . . . as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he: . . . 2. commits a tortious act within the state . . . ."


\textsuperscript{504}The Court must itself view these per curiam opinions as authoritative since they justify decisions by merely citing them. \textit{See, e.g.}, \textit{Rosenbloom v. Virginia}, 388 U.S. 450 (1967), \textit{citing as dispositive} \textit{Sunshine Book Co. v. Summerfield}, 355 U.S. 372 (1958), one of the per curiam opinions following \textit{Roth} indicating that the Court had adopted the \textit{Model Penal Code} standard.

\textsuperscript{505}371 U.S. 471 (1963), which held that the exclusionary rule is applicable to verbal evidence obtained during an unconstitutional search and seizure. The holding of \textit{Mapp} dealt only with "papers and effects," \textit{i.e.}, physical evidence.


\textsuperscript{507}\textit{See note 319 supra.}

\textsuperscript{508}Zwickler v. Koota, 389 U.S. 241 (1967).


\textsuperscript{510}264 F. Supp. at 156 (emphasis added). Or is the holding that the instant case is clearly distinguishable from \textit{Dombrowski} \textit{(Dombrowski v. Pfister}, 380 U.S. 479 (1965)) and \textit{Baggett} \textit{(Baggett v. Bullitt}, 377 U.S. 360 (1964)). Plaintiff does not claim that the statute is vague or that prolonged litigation in the State courts would be required to determine its constitutionality. Neither does he claim that first amendment rights are involved. 264 F. Supp. at 156.
(3) The rule of *Wickard v. Filburn* \(^{511}\) was extended to situations in which the activities involved would have no substantial effect on interstate commerce in the memorandum decision *United States v. Ohio.* \(^{512}\)

(4) It appears the standard for obscenity \(^{513}\) continues to become more liberal (or libertine, depending on how you view it) with the Court's memorandum per curiam reversals of a series of cases. \(^{614}\)

One variation in the use of memorandum per curiam opinions, designated as the Sisyphus ploy for reasons that will become apparent, is illustrated by the strange case of *McLeod v. Ohio.* \(^{515}\) Mr. Joseph T. McLeod, while voluntarily attempting to help the police secure evidence relating to a murder, made incriminating statements. At that time he was under indictment for the crime, but he had not yet been arraigned and had not requested nor retained counsel. Further, the incriminating statements were not made as the result of any stratagems or artifice of the police. Therefore, these factors seem to differentiate McLeod's case from *Massiah v. United States,* \(^{616}\) in which incriminating statements were elicited

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\(^{511}\) 317 U.S. 111 (1942).

\(^{512}\) 385 U.S. 9 (1966) (mem.), *rev'd* 354 F.2d 549 (6th Cir. 1965). The lower court did an excellent job of distinguishing *Filburn.* *See* 354 F.2d at 555-556.

\(^{513}\) *See* notes 460-61 *supra* & accompanying text.

\(^{514}\) *See,* e.g., *Keney v. New York,* 388 U.S. 440 (1967); *Friedman v. New York,* 388 U.S. 441 (1967); *Ratner v. California,* 388 U.S. 442 (1967); *Cobert v. New York,* 388 U.S. 443 (1967); *Sheperd v. New York,* 388 U.S. 444 (1967); *Avansino v. New York,* 388 U.S. 446 (1967); *Aday v. United States,* 388 U.S. 447 (1967); *Corinth Publications, Inc. v. Wesberry,* 388 U.S. 448 (1967); *Books, Inc. v. United States,* 388 U.S. 449 (1967); *Rosenbloom v. Virginia,* 388 U.S. 450 (1967); *A Quantity of Copies of Books v. Kansas,* 388 U.S. 452 (1967); *Mazes v. Ohio,* 388 U.S. 453 (1967); *Schakman v. California,* 388 U.S. 454 (1967). In *United States v. 392 Copies of Magazine Entitled "Exclusive,"* 373 F.2d 633 (4th Cir. 1967), the Court of Appeals held that the magazine *Exclusive* was obscene. The magazine was a collection of photographs of young women. In most of them, long stockings and garter belts are employed to frame the pubic area and to focus attention upon it. A suggestion of masochism is sought by the use in many of the pictures of chains binding the model's wrists and ankles. Some of the seated models, squarely facing the camera, have their knees and legs widespread in order to reveal the genital area in its entirety. In one of the pictures, all of these things are combined: The model, clad only in a framing black garter belt and black stockings is chained to a chair upon which she is seated, facing the camera, with one knee elevated and both spread wide.


It was earlier noted that the *Roth* decision was clarified by a subsequent series of memorandum per curiam opinions. *See* note 459 *supra.*

\(^{515}\) 381 U.S. 356 (1965), *rev'd per curiam* 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964).

\(^{618}\) 377 U.S. 201 (1964).
from the accused by stratagem, after indictment and arraignment for the crime, and after he had retained counsel. In Massiah, the Court stated that "[a]ll . . . we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his [federal] trial."517

In McLeod, the defendant was convicted after incriminatory statements made by him were introduced into evidence. The Supreme Court reversed and remanded to the Ohio courts "for consideration in light of Massiah v. United States . . . ."518 The Ohio Supreme Court affirmed McLeod's conviction, finding that the "defendant had not yet been arraigned and . . . the 'circumstances' under which his incriminating statements were given were wholly different from those in Massiah."519 On appeal, the Supreme Court again reversed, this time with the informative statement: "The judgement is reversed. Massiah v. United States . . . ."520

The wisdom of such cryptic reversals and remands is doubtful, especially if several appeals to the Court are required when one would suffice. Thus, adequate guidance should be provided in the first opinion. Unfortunately, sequences parallel to the McLeod round-robin are not difficult to locate.521

The ordinary full-dress opinions provide us with plentiful ex-

517 Id. at 207. The statements could have been used, however, to convict him of a crime for which he was not yet indicted. See the discussion of Miranda and Hoffa in notes 412-22 supra & accompanying text.

518 378 U.S. 582 (1964), vacating and remanding per curiam 173 Ohio St. 520, 184 N.E.2d 101 (1962).

519 State v. McLeod, 1 Ohio St. 2d 60, 62-63, 203 N.E.2d 349, 351 (1964) (per curiam), rev'd per curiam, 381 U.S. 356 (1965).


amples of promulgation problems, some of which already have been mentioned. Occasion- 
ally it is merely a matter of care- 
lessness, although one never knows for sure. In Parker v. Glad-
den," discussed earlier, the Court wrote:

We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Four- 
teenth Amendment. It guarantees that the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [and] be confronted with the witnesses against him.

This language suggests that the sixth amendment's right to an impartial jury trial is now applicable to the States. Yet, in Maxwell v. Dow," and other cases, the Court has "steadily . . . ruled that the commandments of the Sixth and Seventh amendments, which require jury trial in criminal and certain civil cases, are not picked up by the due process clause of the Fourteenth so as to become limitations on the states." Probably, the Court intended in Parker only to hold that the fair and impartial trial required by the due process clause of the 14th amendment had not been afforded the defendant in Parker. But, given the incorporation theory now in ascendancy, and the above quoted language in Parker, it appears that both the confrontation clause, and the right to an impartial jury clause, of the sixth amendment are now "to be enforced against the States under the Fourteenth Amend-

522 See notes 289-307 supra & accompanying text.
524 See note 265 supra.
525 385 U.S. at 364.
526 176 U.S. 581 (1900).
528 This explains why the Court declares: "In any event, petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors. See State v. Murray, 164 La. 883, 888, 114 So. 721, 723 [1927]." 385 U.S. at 366. Actually, that was not necessarily the holding of Murray. The Louisiana court stated: "[the defendant] was entitled to be tried by twelve — not nine or ten or eleven, but twelve — impartial and unprejudiced jurors. Besides, we are not sure that the 'pernicious activities' of the deputies sheriff in this case had no effect upon the deliberations of the jury." 164 La. at 888, 114 So. at 723.
529 The confrontation clause was applied to the States in Pointer v. Texas, 380 U.S. 400 (1965). The Court has also held the following sixth amendment guarantees applicable to the States: the right to compulsory process to obtain the presence of witnesses, Washington v. Texas, 388 U.S. 14 (1967); the right to speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967); the right to public trial, Estes v. Texas, 381 U.S. 532 (1965); the right to be informed of the nature and cause of the accusation, Smith v. O'Grady, 312 U.S. 239 (1941); and the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963). Thus, the only guarantee in the sixth amendment not now applicable to the States is the right to trial by jury.
ment according to the same standards that protect those personal rights against federal encroachment."\textsuperscript{530} Either a problem of promulgation and a failure to deal with relevant precedent arises or another instance of sloppy and irresponsible craftsmanship in constructing an opinion is presented.

The frequent use of unnecessarily broad principles or dictum by the Court has already been noted.\textsuperscript{531} It is appropriate, however, to add that Justices in concurring opinions frequently make statements that give us pause as to what really is the law. Mr. Justice Douglas' observation in his concurring opinion in Engel v. Vitale,\textsuperscript{532} that "[t]he Everson case seems in retrospect to be out of line with the First Amendment,"\textsuperscript{533} may indicate that the holding of Everson v. Board of Education\textsuperscript{534} is no longer valid.\textsuperscript{535} Consider the import of the following assertions by Mr. Justice Black in his dissenting opinion in Mishkin v. New York:\textsuperscript{536}

\begin{quote}
I would reverse these convictions. The three-year sentence imposed on Mishkin and the five-year sentence imposed on Ginzburg for expressing views about sex are minor in comparison with those more lengthy sentences that are inexorably bound to follow in state and federal courts as pressures and prejudices increase and grow more powerful, which of course they will. Nor is it a sufficient answer to these assuredly ever-increasing punishments to rely on this Court's power to strike down "cruel and unusual punishments" under the Eighth Amendment.\textsuperscript{537}
\end{quote}

Does this mean that the Court is now ready to extend the eighth amendment proscription of cruel and unusual punishments to cover "all punishments which by their excessive length or severity are greatly disproportioned to the offences charged"?\textsuperscript{538} While dicta

\begin{footnotes}
\textsuperscript{530} Malloy v. Hogan, 378 U.S. 1, 10 (1964).
\textsuperscript{531} See discussion notes 231-40 supra & accompanying text.
\textsuperscript{532} 370 U.S. 421, 437 (1962).
\textsuperscript{533} Id. at 433.
\textsuperscript{534} 330 U.S. 1 (1947).
\textsuperscript{535} Everson was a five to four decision, with Mr. Justice Douglas joining the majority.
\textsuperscript{536} 383 U.S. 502, 515 (1966).
\textsuperscript{537} Id. at 517.
\textsuperscript{538} O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting). In O'Neil, the majority refused to apply the eighth amendment to the States, therefore refusing to discuss its scope. Irving Brant comments: No more biting dissent ever came from Justice Field than the one he delivered in ... [O'Neil], with the support of Justices Harlan and Brewer in a separate dissent. ... The term "cruel and unusual" punishment was usually applied to the infliction of torture ... but the inhibition embodied in the ... Eighth Amendment was directed also against all punishments greatly disproportioned to the offense charged. I. BRANT, THE BILL OF RIGHTS 352 (1965).
\end{footnotes}
to this effect appears in some Court opinions, no Court language can, as yet, be considered as holding for the proposition.

The cruel and unusual punishment prohibition was applied to the States in Robinson v. California, 370 U.S. 660 (1962). See discussion note 249 supra. In his concurring opinion in Robinson, Mr. Justice Douglas stated that "[a] punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.'" 370 U.S. at 676.

539 In Weems v. United States, 217 U.S. 349 (1910), the Court stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense." Id. at 367, quoting in support of this proposition Mr. Justice Field's statement in O'Neil, as appears in text accompanying note 538 supra. The defendant in Weems was a disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, who falsified a public document by entering as paid out certain wages which had not been paid out. He was convicted and the following sentence was imposed:

To the penalty of fifteen years of Cadena, together with the accessories of section 56 of the Penal Code, and to pay a fine of four thousand pesos, but not to serve imprisonment as a subsidiary punishment in case of his insolvency, on account of the nature of the main penalty, and to pay the costs of this cause. Id. at 358.

The questions assigned by the defendant as error on appeal to the Supreme Court included: "4. The punishment of fifteen years' imprisonment was a cruel and unusual punishment, and, to the extent of the sentence, the judgment below should be reversed on this ground." Id. at 359. In reversing the conviction on this ground, Mr. Justice McReynolds, writing for the majority, stated emphatically:

In other words, the highest punishment possible for a crime which may cause the loss of many thousand of dollars, and to prevent which the duty of the State should be as eager as to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account. And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. Id. at 381 (emphasis added).

But, the case involved the "cruel and unusual punishment" prohibition of the Philippine Bill of Rights. The imposition of the punishment of "fifteen years of Cadena" raises the issue of the type of punishment, rather than its duration. The Cadena exacts that the prisoner "always carry a chain at the ankle, hanging from the wrists . . . [and] shall be employed at hard and painful labor . . ." Id. at 364. Trop v. Dulles, 356 U.S. 86 (1958), involved imposition of the penalty of denationalization for wartime desertion and, thus, also dealt with the type and not the duration of punishment. See also Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari); Lambert v. California, 355 U.S. 225, 330-31 (1957) (Frankfurter, J., dissenting); Hedrick v. United States, 357 F.2d 121, 124 (10th Cir. 1966); Carey v. Settle, 351 F.2d 483, 485 (8th Cir. 1965).

540 State decisions are quite different:

III. CONCLUSION

The preceding portrait of the Court has been painted with a broad brush to accentuate those features most critical and pertinent to its power and prestige. With finer and more sophisticated brushwork we might have created a "prettier" picture of craftsmanship and artistry, but only a casuistical masterpiece could conceal the instances in which the Court ignored or inartistically manipulated precedent, imposed the impossible, propounded contradictory and incomprehensible rules, and sometimes simply failed to promulgate any relevant rule for decision.

Intended as a realistic appraisal of the work of the Supreme Court, the completed composition, in retrospect, certainly does not evince even a hint of the naive optimism of a Pangloss. Indeed, it occasionally may manifest a tone approaching the direful pessimism of a Jeremiah. But is that inappropriate, considering the input and output demands made on the Court, and considering its extremely limited resources? The Court's output is not as ludicrous as some statutes enacted by American legislatures, but it is egregiously deficient in clarity and internal consistency. Perhaps the Court needs not only a Council of Constitutional Advisers, but an opinion drafting service as well.

The critical and pessimistic evaluation of the craftsmanship of some of the Justices has been based on a prescriptive criterion: if the Court is to attain its goal of transmuting constitutional language into living law and making constitutional rights fully meaningful, then good craftsmanship would not abrade the fons et origo of its authority and power.

The analysis of legal, traditional, and charismatic power sources revealed that "[t]he Court's authority . . . ultimately rests on sustained public confidence in its moral sanction." This public confidence is based largely on the assumption that the Justices resolve cases and controversies by a process of reasoned elaboration quite different from that of elected politicians. As McCloskey has pointed out, "[i]f the public should ever become convinced that the Court is merely another legislature, that judicial review is only a euphemism for an additional layer in the legislative process, the

541 For example, the Ohio Legislature provided, in 1913, that the State coat of arms was to be engraved on each State official. The Kansas Legislature passed a law requiring that when two trains met on a single track "each train should take to a siding, and remain there until the other should have passed." W. GRAVES, AMERICAN STATE GOVERNMENT 263 (1955).

Court's future as a constitutional tribunal would be cast in grave doubt.\textsuperscript{543}

How different is the judicial from the legislative approach? It is apparent that the Court today legislates, not just interstitially or in the gaps, but fully and comprehensively in its attempt to make constitutional rights and the democratic process meaningful. For instance, the \textit{Miranda} opinion reads almost like a portion of a code of criminal procedure, with relatively little attention given to the facts and disposition of the particular cases involved. The activism of the Court, the device of prospective overruling, the appearance of propounding the desirable as well as the constitutional, the use of sweeping generalizations, the disregard for precedent, the resolution of polycentric problems in an ad hoc fashion — all these elements combine to convey the impression that the Court is only "an additional layer in the legislative process."

Yet, notable contrasts between the legislative and judicial approaches remain. For example, the legislative branch has many more resources than does the Court for gathering data and investigating social antecedents, consequences, and values. Further, the legislative branch is furnished with better facilities for implementing comprehensive legislative schemes. Courts are traditionally limited to deciding the justiciable case or controversy before them in light of the evidence developed at trial — the adjudicatory facts — aided sometimes by the doctrine of judicial notice, amicus curiae briefs, and appointment of masters in appropriate cases. Thus, access to the facts necessary for legislating rationally is extremely limited. In addition, the legislature is generally responsive to the will of the majority. The Court, invested with the security of tenure and salary, is often characterized as an antimajoritarian institution and an anomaly in a democracy. But, as noted, there is abundant evidence of antimajoritarian sentiment expressed in the Constitution. The constituency of the Court includes the Ishmaels and Paraiyans of our society, as well as the majority. Minority groups with no effective legislative representation look to the Court for protection and elaboration of their rights. That minority groups, relying on the activism of the Court, increasingly look to the Court for vindication, exacerbates the Court's dilemma since a refusal to act will frustrate the justifiable, albeit esurient, appetite of these groups for favorable judicial decrees. A salient distinction

between Court and congressional recognition of these rights is that Court decrees are subject to reversal only by the cumbersome process of constitutional amendment, whereas statutes are abrogated or amended at the pleasure of the legislature.

The fact is, of course, that the Court is responsive and sensitive to public and community demands. It may temporarily substitute "cool and sedate" reflection for legislative readiness to effectuate popular demands, but in the long run the Court does not resist most dominant and persistent societal values and programs. After all, the Court has neither the power of the sword nor the purse, is comprised of individuals appointed by the President with the advice and consent of the Senate, is bombarded continually by critiques in the law reviews, popular magazines, and the press, and is dissected daily by political scientists and behavioralists. Still, the Court will oppose the will of the majority if it believes constitutional policy so dictates; such unpopular decrees are effective because the public venerates the Constitution and its guardian, the Court. In some cases, the opinion-creating force of the Court will so affect the public sentiment that the decrees will ultimately reflect public opinion generally.

As previously mentioned, the public confidence in the Court has rested not only on notions of judicial detachment and objectivity, but also on the "declaratory myth." The cynical acid of the realists and behavioralists, with the Court acting as a catalyst, has almost completely dissolved the latter, and considerably corroded the former. Of course, the apparent absence of rules in significant areas of constitutional adjudication does little to enhance public or professional confidence in the competence and appropriateness of the Court continuing in the role of final arbiter of constitutional meaning. Reasoned elaboration of the Great Charter requires at the least conscientious and unbiased application of discernible, consistent rules and principles in resolving the conflicts of interest presented by justiciable cases or controversies, *insofar as is judicially possible*. Without rules, it is said, judges function like qadis, drawing on their personal notions of how to decide a particular case. Professor Fuller, as noted, contends that the existence of general rules of obligation constitute the primary desideratum for establishment and maintenance of a legal system. But rules of law alone cannot provide sufficient guidance for deciding the type of poly-

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Fuller restates this as a "requirement of generality." L. FULLER, THE MORALITY OF LAW 46 (1964).
centric problems with which the Court today wrestles. It is quite easy to assert that "[t]o practice the requisite detachment and to achieve sufficient objectivity . . . demands of judges the habit of self-discipline and self-criticism . . . ." and that with self-discipline the Justices can approach a case "without any conclusion, . . . analyze issues, dissect and assemble facts, explore hypotheses, consider competing arguments, and finally come to a [sound] resolution in terms of the law as it has been received and understood, and with as little personal admixture as possible . . . ." But it is not so easy to determine how little admixture is possible or desirable, or the degree to which the Justices ideally ought to feel constrained by precedent, or ought to make a studied effort to give the appearance in their opinions that they are so constrained. In the contemporary jurisprudential climate a sound resolution of the perplexing controversies brought before the Court requires consideration of the pertinent demands of justice, public policy, community values, social antecedents and consequences, the opinion-making and legitimating force of the Court's decrees, and a host of other parameters in addition to the text of the Constitution, statutes, precedent, and history. The virtual impossibility of ascertaining the content, strength, and interrelation of these variables and their application to a case and the subsequent justification of that application in a written opinion compelled us to eschew any extended effort to describe the dimensions of an ideal opinion. But, it can justifiably be concluded that the Danaides, Tantalus, Janus, and Caligula ploys and the Zucker-kandlites do violate our prescriptive criterion since they clearly erode the foundations of the Court's authority and power by creating the impression, in the instances cited, that there really was no guiding rule or "neutral principle" established. Although it is admittedly impossible for rules of law alone to provide an adequate basis for resolution of the perplexing and difficult cases that are heard by a court of last resort, it does not follow that the opinions that justify difficult decisions cannot display a rational, comprehensible, and consistent rule which will provide some degree of "regularity, reck- onability, and justice."

The difficulty involved in formulating such a rule, in conjunction with the limited resources of the Court and the relatively irre-

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546 Griswold, Foreward: Of Time and Attitudes — Professor Hart and Judge Arnold, 74 HARV. L. REV. 81, 91 (1960). Griswold stresses "the importance of constant effort to see that decisions are really reached, as far as humanly possible, on intellectually valid and disinterested grounds." Id. at 91.
versible nature of judicial constitutional decrees suggests the value of a prudent exercise of the certiorari power and other rules of judicial self-restraint that avoid constitutional determinations until the right time. To know when the time is ripe and how to formulate the rule in a manner that will effectuate the policy goals of the Justices without detracting from the public confidence in the judiciary requires competence, skill, creativity, devotion — in a word, craftsmanship. Judicial opinions are more than a report of the psychological processes that culminated in a decision favoring one of the litigants before the Court; they are a form of art. It is thus fitting to conclude with the advice of Joseph Conrad — "A work that aspires, however humbly, to the condition of art, should carry its justification in every line."\textsuperscript{547}

\textsuperscript{547} Conrad, Preface to J. Conrad, The Nigger of the Narcissus at xi (1914).