09/29/2022

Utopian Rationalism in American Legal Thought

A Critique of the Hart & Sacks Legal Process Materials

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Abstract

This paper works out the scheme of "institutional competences" that underlies the famous Hart and Sacks Legal Process Materials first distributed in final mimeographed form in1958. The Materials were not published during the life times of their authors but were nonetheless a major influence on American legal thought from their first distribution as course materials at Harvard Law School until their abrupt fall from prominence in the early 1970s. The Materials offer the scheme as a solution to the apparent anomaly in a democracy of the law making power in both public and private law of unelected judges serving long terms. The paper critiques the Hart and Sacks solution, called law making through "reasoned elaboration," which they claimed was sharply distinct from legislative law making or administrative fiat. The paper argues that in both public and private law the materials the judge is to elaborate are characterized by contradictory internal logics. The judge has to choose between them without a meta-criterion. In cases with high stakes, extra-juristic normative orientations, whether moral theories or political ideologies, will come into play, regardless of the judge's commitment to excluding them. The second part of the paper places Hart and Sacks in a larger historical and comparative context of efforts to solve the problem of social order by way of legal rationality. These two parts were preceded in the original paper by a long discussion, now lost but never very satisfying to me, of the Hart and Sacks theory of "private ordering" in relation to state regulatory power. I wrote the paper for extra credit in the spring of 1970 as a third year student at the Yale Law School. I've corrected a few typos but haven't changed it in any other way. I never published it but it was circulated to a limited extent among Legal Process devotees. Eskridge and Frickey, editors of the Materials as published finally in 1994, credit it, along with another unpublished student paper by Roberto Unger, with hastening the demise of the Materials as a master text.[1] *The first part of this version of the paper was recently published in Droit et Philosophie, no. 13, p. 97-117 (2021).*

I.

[1] W. N. ESKRIDGE Jr. and P. P. FRICKEY, *An Historical and Critical Introduction to The Legal Process*, *in* The Legal Process: Basic Problems in the Making and Application of Law (H.M. HART Jr. and A. SACKS, Foundation Press, 1994), p. cxx-cxxi.

Electronic copy available at: https://ssrn.com/abstract=4233370

It would not be strictly accurate to say that we take up here for the first time the question of the role and functioning of specialized institutions within a legal system. Hart & Sacks quite properly treat private "orderers" as composing the most important of law making institutions; they treat issues raised by the relations of courts with private law makers as analytically identical with those raised by the relations of courts with administrative agencies and legislatures. It is thus possible to regard the preceding section of this paper as an essay on an institutional "system," one composed of an official and an unofficial element. The problem which Hart & Sacks discuss with regard to this system – what relationship of the elements will maximize human satisfactions? – is the same as that which confronts us when we attempt to break down the official element into its parts and treat it as a system in its own right.

Yet there is an important non-analytical difference between the detailed inquiry into the organization of officialdom and the attempt to define the proper border between public and private spheres. In short, it is that when Hart & Sacks discuss "government regulation," they can place themselves within a three hundred year old tradition of political and economic thought.

The issues as between "individualism" and "collectivism," capitalism and socialism, have been rendered familiar if not clear by public debate. The logical coherence of the utilitarian approach to the economic aspect of the problem has been fully demonstrated by economists,[2] and the close parallel between legal constraints and "prices" was first perceived and exploited by Bentham himself. The value and implications of "freedom of contract" was perhaps the central theme of nineteenth century jurisprudence.

Seen in this light, the indeterminacy (and therefore in Hart and Sacks' terms the unhelpfulness) of a utilitarian analysis of the relationship of private to public ordering is not surprising, nor, it must be said, is the attempt of any very great intrinsic interest. By contrast, the attempt at a theory of official legal institutions is both more ambitious and more promising, for here we are in the open field of the sociology of organizations, where the tradition is a short one and large systems are rare. It is also in this area that Hart & Sacks have been most influential. Although their theory is no more determinate, nor even more suggestive, in this area than in that of private ordering, it has become one of the principal bulwarks of judges and legal scholars who favor a "passive" role for the judiciary in its relations with the other branches of government. But before raising this "ideological" problem, I will try to lay out in some detail the logical structure of the Hart & Sacks theory.

A.

Let us imagine that our planner, Hart & Sacks, has somehow brought into being a complete body of substantive and remedial law designed to maximize the valid human satisfactions of their society. Further assume that this body of law is widely accepted by the population – that is, that in general people are willing to abide by its directives where it *is* directive, and to pay the "administered" prices of actions which the planner has decided would be incorrectly valued in a system of purely private ordering. Assume that in constructing the body of substantive and remedial law the planner has decided in favor of a regime friendly to private ordering; among the various presumptions about the optimality of free choices which he might have adopted, he has tended to reject those that would lead to large scale direct official action to create

[2] O. LANGE, On the Economic Theory of Socialism, University of Minnesota Press, 1938.

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welfare (*e.g.* nationalized industry) and to disfavor those which require detailed regulation of transactions. In short, with little problem of "law and order" and a benign view of the capacities and intentions of the citizenry, the planner has been able to avoid taking a large role. Nonetheless, a system of official institutions will be required in order to administer the legal order.

As compared with the apparatus which would be necessary in a more "collectivist" state, the planner's institutions can be organized to *respond* to legal problems rather than to initiate action. At the base of the official machine there will be a mechanism for the referral of private disputes. The official structure can also be relatively decentralized and unarticulated as a system, since it will rarely be necessary to mobilize all official resources for concerted, massive attack on any aspect of the society. Yet the importance of official institutions is not for that reason to be denigrated: unless the three functions of "creative order" are performed, the planner is quite clear that nothing like a maximum of satisfactions will be achieved.

The two most important functions are *elaboration* (adjudication) of the existing legal arrangements to cover particular circumstances and the *free adaptation* (legislation) of the legal system to changed circumstances. The third function is subsidiary to the first two; it is the development of factual information and technical knowledge in order to reduce the degree of objective uncertainty under which the other functions must be performed.

Both principal functions are directly related to the goal of maximization – that is, whoever performs them will take this ultimate rather than some intermediate goal as the criterion of the success or failure of his official activity. The functions are conceived as differing in that they are made necessary by two distinct kinds of private disputes requiring resolution in order for the legal order to operate optimally. Elaboration meets the need to resolve disputes between parties who accept the validity of the existing legal system but do not agree as to its proper application to their relationship.

Abstracting from the problem of determining the facts (as I will do throughout), the function of the elaborator is to resolve an uncertainty about what legal rule the goal of maximization requires in a particular situation. The result of elaboration is that "law is made" in some sense, but the law making is (in some sense) "interstitial." What this means is that the premises to be used in reaching a decision are fixed in advance: they are the elements of the *existing* body of substantive and remedial law. The correct decision is that which is in "harmony" with existing law in the sense that it will lead to welfare maximization through elaboration of the prescriptions for attaining that end which are implicit in existing law.

Free adaptation meets the need to resolve disputes as to whether existing legal arrangements actually serve to maximize human satisfactions. Again abstracting from the problem of determining the facts, the free adapter is like the elaborator in that his function is to resolve an uncertainty about which rule will maximize, and he too "makes law." But in adding to or changing existing law, he is not restricted to the premises embodied in that existing law: his decision must be the result of an open-ended consideration of all aspects of the situation which are arguably relevant to maximization. In short, he behaves much as did the planner himself in establishing a legal regime.

The "elaborator" and the "free adaptor" have been described as though they were two different people. There is nothing in the argument thus far that leads to the conclusion that this must be so. It might be argued that while institutional specialization by function is of course not required by the mere existence of two functions, it is, in the United States, compelled by the elemental commitment to "democracy." The sovereignty of the people may be taken to mean ultimate control of the content of substantive and remedial

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law by elected officials, and the rule of law to mean the existence of another, independent body of officials charged with administering that law. Hart & Sacks do not take this tack (in fact the argument from "democracy" as a simple value premise or article of faith is barely mentioned in the whole materials). Instead, they develop a three part rationale for specialization based solely on arguments about institutional "effectiveness" in achieving the goal of maximization. The result is a position that goes beyond what "democracy" alone will support: the argument sketched above does not preclude a system in which courts behave exactly as legislators, as long as the legislature had the last word about law making, and in which legislatures behave exactly as courts, so long as courts have the last word about adjudication. In the system sketched below, the rules properly require each institution to keep its own specialized function and actively to reject attempts to involve it in doing the work of other bodies.

The first argument for functional specialization (and the least compelling) is that while any dispute may combine an element of uncertainty about the application of existing law with an element of challenge to that law, cases tend in practice to cluster. A good many disputes are basically about elaboration, with little element of challenge; a good many are basically the opposite. Consequently, functional specialization is convenient, if nothing more.

The second argument for specialization is a very important one, and in one form or another it is implicit in most American post-realist legal thought: it is asserted that the skills that are required in order to resolve disputes over elaboration in such a way as to maximize welfare are fundamentally different from those necessary for optimal handling of disputes over the free adaptation of the law. Institutions which are organized ("organization" includes methods of recruiting personnel, obtaining information and enforcing decisions as well as the details of administration) to perform one function "competently" will be "incompetent" to perform the other function. The argument thus supports the strong form of specialization: not only should there be distinct institutions, but they should stick to the tasks which, as Hart & Sacks put it, "they are good for."

Disputes which are primarily over elaboration, according to the argument, are likely to be conceived by the participants as involving individual interests and past conduct. The area of dispute is likely to be limited, by which is meant that however momentous the principles and interests involved, there will exist a broad area of agreement about values and about law. By definition, elaboration is concerned with the meaning and implications of accepted existing legal arrangements. Yet while the area of dispute may be limited, the parties are likely to find the uncertainty particularly difficult to tolerate. Just because the great body of existing law is accepted as relevant, there is a feeling that there must be a "correct" solution to the question posed, and that a party is in some sense "entitled" to the benefit of application of that correct solution.

According to the theory, these expectations and emotions of the parties are quite justified. If we take the word "correct" to signify not some mechanical sort of precision but "amenability to reason," then it is true that there are "correct" decisions. The interstitial making of law involves "judgment" and "craft" (*i.e.* it is unlike natural science) yet there is a determinate method by which the elaborator can best go about attempting to maximize welfare, and the method provides sufficient criteria for evaluating, and controlling the results reached so that it is reasonable to demand "right" decisions and to criticize "wrong" ones.

The method itself – called "reasoned elaboration" by Hart & Sacks – follows from the nature of the dispute. First, the dispute is by definition one over the meaning of legal directives aimed at the maximization of welfare. If the law made interstitially by the elaborator is to further this large goal, it must be "consistent"

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with existing law, in the sense that it treats similar cases similarly. To take an example from the text, if a motorcycle is treated as a "motor vehicle" for purposes of a speed statute, but a motorcycle with a side-car is not, the conclusion is inescapable that a mistake in elaboration has been made. Second,

> Underlying every rule and standard . . . is at least a policy and in most cases a principle. This principle or policy is always available to guide judgement in resolving uncertainties about the arrangement's meaning. The uncertainties cannot be intelligently resolved – without reference to it . . . Not only does every particular legal arrangement have its own particular purpose, but that purpose is always a subordinate one in aid of the more general and thus more nearly ultimate purposes of the law. Doubts about the purposes of particular statutes or decisional doctrines, it would seem to follow, must be resolved, if possible, so as to harmonize them with more general principles and policies. The organizing and rationalizing power of the idea is inestimable.[3]

If the law is conceived in this way, neither apparent inconsistency nor uncertainty nor confusion at the level of specific legal rules should shake the faith of the parties and the elaborator in the existence of a correct solution. In ascending the hierarchy from the specific (*e.g.* an inheritance statute) to the more general (*e.g.* the principle that no man should profit from his own wrong) toward the ultimate end of law (maximization of valid human satisfactions), inconsistency, uncertainty and confusion will sooner or later disappear.

The technique of reasoned elaboration bears an interesting resemblance to systems analysis in a system in which goals are given and ranked (by existing legal doctrine). The method requires both technical proficiency of a highly specialized kind (logical distinction of aspects of the problem; ability to relate instances at one level to goals at another, and so forth) and creativity (sense of the coherence of the large system; ability to isolate semi-intuitively the essentially important aspects from large masses of apparently undifferentiated facts, and so forth). It follows readily that the institutional organization of the application of the method should ideally avoid both the "chain of command" model of bureaucracy and the "interest group" model of collegial decision. The number of people making a given decision should be small, conditions of work should favor intense devotion to the development of expertise, written justifications are appropriate, and internal control is best achieved by "review," that is the reapplication of the identical method by the supervisor.

The nature of the disputes dealt with also has its organizational consequences: since uncertainty over the application of accepted existing arrangements will inevitably be frequent and compose a large proportion of all the disputes the legal system must deal with, they must be dealt with quickly and as simply as possible: there must be "finality;" since these disputes involve individual interests and past acts, the procedures for obtaining information should be oriented toward probing the particular historical incident rather than the broad social trend.

In short, the elaborator should be a judge and the specialized institution a court.

[3] H.M. HART Jr. and A. SACKS, The Legal Process: Basic Problems in the Making and Application of Law, op. cit., p. 148.

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Before passing on to the function of free adaptation, it seems well to underline an aspect of this theory of courts which Hart & Sacks tend to blur. It was remarked earlier that parties to disputes about elaboration tend to limit the area of conflict but to feel very strongly about authoritative resolution of that conflict. Hart & Sacks themselves point out that parties are also likely to feel strongly that the requirement of consistency – that like case be treated alike – is a moral one: it is a demand they make of the system without regard to any notion about maximization of social welfare. Nonetheless, *neither* the technique of reasoned elaboration nor the peculiar organization of judicial institutions is justified in terms of popular demands or expectations. The first is referred to the function of law and the second to the function of official institutions in a system designed by the planner for the maximization of valid human satisfactions through private action.

The justification of specialized institutions of free adaptation is similar to that of courts: the demand for "democracy" plays no greater role than that for "justice," yet the social character of disputes about free adaptation is important. First, such disputes are likely to involve interests conceived as those of groups rather than of individuals, and they focus on future rather than past conduct. The area of conflict between disputants may be broad and deep: basic philosophical or ideological notions come into play and the elemental organization of the society may be questioned. Yet in contrast to disputes over elaboration, the tolerance of uncertainty or ambiguity in the resolution of questions is likely to be relatively great. The parties feel "entitled" not to a correct solution which vindicates their position but to a chance to influence the course of action, to the consideration of interests for which they claim immediacy rather than universality.

As with elaboration, these expectations are in accord with the intrinsic possibilities of the situation; it is a key tenet of the theory of institutions that questions of free adaptation are in general "not amenable to reason." By this it is meant that the methods available for solution of such problems in the interest of maximizing social welfare do not provide sufficiently precise criteria of evaluation so that it is meaningful, within broad limits, to criticize the results as either "right" or "wrong". An institution which laid claim to ability to do "justice" in such cases would be inherently unstable because unable to fulfill its promise. Still within broad limits, legitimacy in free adaptation must be based on procedures rather than on the conformity of the results to an ideal.

The fact that we lack a single determinate method for reaching correct decisions does not mean that we are without means to evaluate procedures. We refer first to the ultimate goal of welfare maximization. In an open-ended process designed to this end it is clearly of the utmost importance that the subjective consequences of legal action be communicated as forcefully as possible to the decision makers. The nature and the intensity of the feelings of all individuals and groups affected by proposed action should therefore be fed in. Since the result of decision is to be a change in what has heretofore been the accepted existing legal order, it is important not only that these opinions be known, but that they receive sufficient recognition in fact so that there is a probability that the change will be in turn accepted and complied with. Flexibility of this kind can be bought at some significant cost in "consistency," since by definition we are adding to the premises of legal argument rather than attempting to act "in harmony" with them.

In contrast with the practitioner of reasoned elaboration, the free adaptor is less the creative specialist than the master of compromise and the "art of the possible." He must have intuition about the subjectivities of social groups combined with the manipulative ability to fashion law which has a chance of acceptance by heterogeneous interests. It would seem to follow that the institutional organization of the application of

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these skills should be collegial. Since there will be many relevant interests, there should be many decision makers; conditions of work should favor the development of fine sensitivity to the trend of social feeling; the method of decision should be such as to favor compromise and coalition rather than the consistent imposition of a single point of view; a requirement of formal written justification for action would be unreasonable; internal control can be achieved only by the wide dispersal of power within the institution – hierarchy is impracticable.

Since it is assumed that there is a full, accepted legal system in operation, the function of free adaptation is practically by definition one of "backstopping", sporadic intervention designed to adapt the system to change and correct past mistakes. This is fortunate: it permits the full development of the procedures necessary to achieve the representation of interests, in spite of the inefficiency of such procedures as rapid dispute solvers. Large collegial bodies with dispersed power and unable to proliferate bureaucratic hierarchies of officials controlled by rules could not possibly perform the front-line work of dispute resolution which falls to the courts. They must operate under rules which strictly limit the number of disputes which can be resolved over a given time period.

In short, the free adaptor should be a politician and the specialized institution a legislature.

Courts and legislatures established according to the theory described above should, according to the theory, refrain from trying to perform functions not allocated to them for the simple reason that they are "competent" only in their own areas. Yet even an observer (or back-seat planner) who recognized that this argument has force and will often be determining might hesitate to accept it as conclusive in every case. Will there not be occasions when the results of an appeal to the legislature are highly predictable? Or when legislative procedures are quite evidently failing to function as they ought? The answer of the theory is the third argument for a strong form of institutional specialization: the necessity of "responsibility."

Thus far we have treated our specialized institutions as though they were to be autonomous – that is, not subject to any form of control by other institutions. Yet a basic problem for the planner is to ensure that his officials, however competent they may be, are committed in practice to achievement of the ultimate goal of welfare maximization. In order to satisfy himself that they will indeed be faithful to his purposes, the planner will certainly subject them to various kinds of pressure; he will attempt to induce in them a sense of responsibility, either in the form of commitment to internal standards, such as "rationality" or "craft," or in the form of direct checks, such as popular election, veto, or review. The theory asserts that for each specialized institution, a particular set of checks is desirable in the sense of maximizing control with a minimum sacrifice of efficiency in dispute resolution. Once these specialized control systems are installed, the planner can have some confidence that *when it is performing its allocated function* the institution will do as well as is humanly possible.

It will be obvious to the planner that such specialized controls should in fact be set up. From his point of view, a situation in which all institutions perform their functions as well as possible is ideal by definition. But it follows that he must institute a firm rule that specialization by function shall be complete. Since elaborators are controlled by a mechanism geared only to elaboration, it will be disastrous for them to engage in free adaptation, regardless of how competent they may be to do so. And vice versa. The argument from responsibility thus reenforces that from competence and allegedly renders the case for full specialization conclusive.

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A catalogue of control mechanisms is one of the more interesting contributions of the Legal Process materials. Hart & Sacks categorize the means to assure the responsibility of officials as "affirmative" and "negative;" the two groups might be more precisely labelled as *cultural and professional norms and institutional checks*.

In the broadest sense, a system of control through norms depends for its effectiveness on the existence of a high degree of consensus about the values to be furthered through the controlled activity, on a process by which the official "internalizes" the normative prescription and so controls himself (through conscience, a sense of "craft," or whatever), and on the existence of the social practice of criticism. Hart & Sacks speak often, but exceedingly vaguely, about instilling a general norm of fair dealing in all who participate in the legal process, and the book itself contains many exhortations to this purpose. The more concrete institution of professionalism plays, however, a much more important role in the theory than do more diffuse cultural patterns.

Systems of professional norms are characterized by an ideal of "service" to "clients," by the independent (non-employee or "tenured") status of the practitioner, by the existence of an organized body of colleagues consistently engaged in criticizing one another's work according to the criteria of the method. The planner is likely to consider it self-evident that a norm system of this type is an appropriate mechanism for the control of institutions designed to specialize in the reasoned elaboration of legal arrangements.

First, the nature of the disputes in question suits them to professional resolution: the area of conflict is limited by acceptance of the existing legal order; that order provides the defined body of premises for the application of a single, determinate technique – that of reasoned elaboration – which provides adequate criteria for criticism by a body of colleagues (and academics). Popular expectations that judges should be independent experts rendering "correct" results are in fact expectation of professionalism. Second, institutional organization designed to assure competence in elaboration will be highly compatible with control through professional norms: decision making by individuals or small groups and the requirement of written justification make criticism easy and favor internalization of the norm system; hierarchic structure and the practice of review guarantee full scrutiny of decisions according to the criteria of the method; the absence of means for the gathering of general knowledge about objective and subjective aspects of the society as a society may be an advantage, since it keeps the body of premises available limited, reduces the likelihood of extreme conflict of point of view among practitioners, and thereby preserves the determinate character of the method, its ability to specify "right" answers.

In the terms of the theory, the compatibility of professionalism with institutions of elaboration is so strong that one is tempted to say that professionalism will significantly increase competence as well as guaranteeing responsibility. In any case, it is a tenet of the theory that the effectiveness of control through norms is so great as to reduce to a minimum the necessity of controlling courts through institutional checks. And this, like so many other aspects of the theory, works out for the best, since checks – powers of other institutions to review, redetermine or veto decisions, or to replace decision makers – are *not* highly compatible with the function of elaboration.

Since all institutions are specialized, the checking institution will inevitably make its decisions by some method other than that of reasoned elaboration; the result is likely to be the introduction of inconsistencies and anomalies into a system of elaboration which takes consistency and reference to the large purposes of law as the very definition of correctness. Moreover, a system of professional norms, if it is to be

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effective, must be supreme in the consciousness of the body of practitioners: they must regard the duty to serve and to act correctly in conformity with their method as the highest obligation. If they are subject to check by other institutions operating according to other methods, their responsibility will be endangered. A desire to please, or the necessity of pleasing the checking institution may subvert the independence of the checked.

Yet professionalism has its drawbacks and the direct check its virtues. First, the system of professional norms is a closed one: the practitioners themselves control the body of knowledge and are committed to their method. Since they are unlikely to be more than a small group within the society, and will tend to be isolated by their very devotion to calling, there is a danger that they will be insensitive to change and inexpert in sounding the intensities of the preferences their decisions affect. As objective knowledge becomes more complex, more like professional knowledge in its own right, practitioners of a given discipline are likely to become intellectually isolated. Second, the norm system is overwhelmingly effective only in so far as it is internalized; the process of collegial criticism taken by itself has obvious weaknesses as a control mechanism if the premises of criticism are not accepted. The professional system is therefore vulnerable to bad faith manipulation by those who acquire its skills without acquiring its ideals.

Institutional checks are likely to be strong exactly where professionalism is weak. The checking institution can be relied upon to feed into the decision process of the checked its concerns and its ways of seeing things. Where the coherence of the professional method and the static quality of "bodies of knowledge" tend to mask change and conflict, the checking institution can be expected to bring them to the surface and force them on the attention of the checked. And of course, powers of redetermination, veto or election of officials may be effective against the bad faith manipulator, the usurper, where criticism cannot be. Checks provide a kind of safety where norms are weak.

These considerations are likely to lead the planner to the conclusion that even his specialized institution for the professional resolution disputes through reasoned elaboration should be subject to some direct institutional checks. The problem is easily solved: the legislature has in any case the function of free adaptation of the law. It can check the judges by changing the interstitial law they make (a power of redetermination). The organization of the legislature – the inherent limits on the amount of business it can transact and the difficulty it must have in dealing with individual cases – make it highly unlikely that this check can ever be so extensive as to seriously interfere with the professionalism of the courts. (The power of executive appointment of judges is a further institutional check.)

The problems presented by the necessity of ensuring legislative responsibility are the inverse of those presented by the courts. It should be apparent that professionalism is unlikely to be effective in controlling an institution dealing with the broadest sorts of problems, in areas where cleavages over values and norms are profound and there is no determinate technique which offers an assurance that answers are "correct." Further, a legislature organized to be competent at free adaptation cannot hope to be professional: decisions are the product of compromise in a numerous body; the allocation of individual responsibility is enormously difficult; information gathering techniques which allow sensitive response to a vast number of interests and to all aspects of a situation relevant to welfare maximization will be ill-adapted to the creation of finite bodies of knowledge methodically organized.

Conversely, direct institutional checks in the form of popular election of legislators seem appropriate. Sensitivity to the distribution and intensity of the interests of the citizenry is of the essence of the legislator's

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art. And the safety provided by checks is particularly important where the decision maker has a mandate to change the law but cannot be effectively restrained by norms.

The planner's institutional system can now be described in summary form. In order that the functions of official institutions may be performed as competently as possible, they must be specialized: organized so as to perform one function only. In order that officials may be effectively induced to commit themselves wholeheartedly to the proper performance of their duties, each specialized institution must have a control mechanism adapted to eliciting its peculiar excellence. The results are courts specialized in elaboration and controlled by professional norms, and a legislature specialized in free adaptation and controlled by the direct check of popular election. In theory, so long as each institution sticks to its appointed tasks, each function will be performed as well as is humanly possible in the circumstances; the planner will have constructed the most accurate of possible watches.

But how well is "as well as humanly possible in the circumstances?" It has already been pointed out that The Legal Process is an ambiguous mixture of utopian social theory and description of social reality. Hart & Sacks not surprisingly have something to say about what is "humanly possible" in the United States:

> The Constitution of the United States and the various state constitutions commit American society, as a formal matter, to the goal of the general welfare, judged on the basis that every human being counts one – which seems only another way of expressing the objective of maximizing the total satisfactions of valid human wants, and its corollary of a presently fair division. But these constitutions do more than this. They distribute power in such a way as to insure a steady pressure for the continued acceptance and the active pursuit of these objectives. Institutional systems are relatively inflexible. Steps of this kind, once taken, are hard to retreat from. Thus, in American society all the forces both of vested interest and institutional inertia which are on the side of maintenance of existing institutions are on the side of steadily more effective use of the institutions toward the achievement of their settled objectives.[4]

A planner capable of crediting this quotation as an accurate description of the social situation he confronted (and one may ask whether anyone but a fool could so credit it, or could have credited it in 1957, 1937, 1917 or 1897) would have little difficulty in resolving the final question raised in this section. He would institute forthwith a rule of jurisdiction forbidding courts to perform legislative (or administrative or private ordering) functions, and secure, perhaps by constitutional provision, the elaborative (adjudicative) function from legislative interference. The strong form of specialization would be clearly optimal, and nothing short of it acceptable.

B.

In its own terms, the theory set forth above is an attempted resolution through the technique of reasoned elaboration of a set of particularly disturbing legal uncertainties: those which confront officials, and especially judges, when asked to resolve disputes which arguably fall on the borderline of their appropriate

[4] H.M. HART Jr. and A. SACKS, The Legal Process: Basic Problems in the Making and Application of Law, op. cit., p. 105-106.

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institutional sphere. In the case of the judge, such cases involve arguments about "jurisdiction." A party asks the court simply to refuse to decide an uncertainty on the ground that it is better left to the legislature, an administrative agency, or private law making institutions. Where another institution has already taken legal action arguably determinative of the uncertainty, the problem of reasoned elaboration may be put in terms of "interpretation" (of a statute, administrative rule or private contract), but this is not necessarily the case. Since courts are "front-line" dispute resolvers ("general jurisdiction") they will be presented with uncertainties not colorably resolvable by reference to the will of other law makers, but nonetheless presenting the question of what is "in harmony" with the accepted body of existing legal doctrine (e.g. is there a common law right of privacy?).

The theory itself is proposed as "law;" that is, as a body of rules designed to resolve particular kinds of disputes in such a way as to maximize valid human satisfactions. As such, it seems to me that it can be criticized on two levels. One may ask whether the theory is "right" in the sense of offering a set of consistent propositions adapted to achieving the specified goal. And one may ask whether it is adequate specifically as "law," that is whether it offers a method of decision sufficiently determinate to meet the theory's own demand that courts behave professionally. The two questions are related. If judges are not convinced that the theory is "right," then to ask them to apply it would be inconsistent with the professional ethic. If, on the other hand, the theory is not sufficiently determinate to provide a useful basis for control through internalized norms and collegial criticism, then its employment by courts controlled in this way would be inconsistent in the theory's own terms.

Both suggested questions are posed on the assumption that it is meaningful to speak of a legal system as a purposive enterprise designed to maximize welfare and therefore useful to formulate rules for official conduct to that end.

If it turns out that the theory is inadequate in these terms (*e.g.* is logically inconsistent or assumes so much contrary to fact as to be useless), then our hypothetical planner has failed: he must begin again to construct a better theory. Yet it should be kept in mind that there are other possible approaches. A social theorist less committed to the working out of "reasoned" solutions to social problems might consider a finding that the theory is inconsistent to be of little interest: a far more important question to him might be "Would the use of an internally inconsistent theory of this type cause the legal system to have a different impact on welfare that it would have if a different theory were in use?" A theorist claiming no interest whatever in concepts like "welfare" might ask: "Is the use of an internally inconsistent theory of this particular type likely to be associated with other social traits? Norms? Technologies?"

After attempting to show that in fact the theory is neither "right" in terms of the maximization objective nor adequate as law appropriate for administration by courts, I will suggest an answer to one extra-systemic question of this sort. How, given its inconsistency, can the theory be brought to bear so as to *appear* to resolve uncertainties about the jurisdictions of institutions?

The message of the theory to the judge can be summed up in three propositions:

(a) "Each individual deciding officer [is] to reach what *he* thinks is *the* right answer." (italics in original). *The* right answer is defined as that most conducive to the maximization of valid human satisfactions.

(b) In this frame of mind, the judge is to distinguish those questions which are appropriate to resolution through the technique of reasoned elaboration from those which are not.

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(c) The judge is to decide those questions appropriate to reasoned elaboration, and to refer the others to other institutions.

Assume for the moment that the judge is in fact capable of performing the operation described in step (b), that is, that he can make the required distinction in a way which is satisfactory to his sense of obligation to decide correctly, and that there are available criteria of criticism sufficiently precise so that the judge can be effectively controlled by his colleagues (and academics). The question is then: Are proposition (a) and proposition (c) consistent with one another?

The following case can be used to test the matter. Suppose a judge confronted with what is to him clearly a "legislative question," but a judge who is certain, on reflection, that if he refuses to decide, the legislature will reach a result opposite to that which he would reach were he to set himself the task of maximizing human satisfactions in the particular dispute. Suppose that he then goes on to consider the following: (a) the evil to the present and to future parties of the legislative rule; (b) the evil likely to result through other judges than himself misapplying a decision by him to usurp the legislative function in the case at hand; (c) the evil of a diminution of the prestige and effectiveness of the judiciary resulting from such a usurpation; (d) the likelihood of legislative overruling of the usurpation; (e) the likely ill effects and good effects on legislative process in general resulting from usurpation in the particular case, including the indirect effects on the legislature of actions of other judges and private parties influenced by the decision. Finally, let us suppose that with a full and solemn sense of his obligation to render *the* correct decision, defined as that which maximizes human satisfactions, the judge concludes that the institutional ill effects will be minimal, while the strictly law-making effects will be large and positive: the balance lies quite clearly in his own mind with usurpation, and the rule of functional specialization is in conflict with the norm of welfare maximization.

One possible way of disposing of this case should be dealt with at the outset: a critic might be convinced that as a matter of fact each body of officials inevitably performed its function *in every case* as well as it was humanly possible to perform that function. For such a critic, the conclusion would be inescapable that any judge who found himself in the dilemma described above was mistaken in his calculations: it would be logically impossible for his resolution of the dispute to be preferable as law to that of the legislature, no matter how special the particular circumstances might appear to him to be. While it might be difficult to persuade the judge that his perplexity was the product of mere error, the body of critics should have no hesitation in condemning the practice of usurpation whenever and wherever it occurred.

This reasoning seems accurate enough, but it is trivial. Neither Hart & Sacks nor any other commentator I know of would argue that the result of strong specialization will be better *in every case* than would be the result of specialization seasoned with usurpation. The argument is rather that *over the long* run fully specialized institutions will perform better than specialized institutions regarding themselves as free to make ad hoc exceptions to the rule.

The problem posed by this sort of interpretation of the rule of specialization is perhaps best understood in the context of the philosophical debate over "extreme" versus "restricted" utilitarianism. The extreme utilitarian position is that if a decision is to be justified as "right" in terms of the goal of maximizing welfare, the decision maker must proceed exactly as the judge in our hypothetical: he must examine in detail the utility consequences of alternative dispositions of the specific case at hand. An appeal to a rule, without more, is never an adequate justification. As put by Professor Wasserstrom, the answer of the restricted utilitarian is that:

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> there are *utilitarian* arguments which support the thesis that one ought not attempt to justify particular moral decisions by appealing directly to the utilitarian factors of those decisions. In other words, there may be a *utilitarian* justification for a moral decision procedure which does not itself consist in direct appeals to the principle of utility as a justification for particular decisions. When the merits of extreme and restricted utilitarianism are contrasted, so the argument runs, it is discovered that if a restricted utilitarianism is consistently employed, it will produce a greater quantum of particular decisions, themselves justifiable on utilitarian grounds, than will any other possible justificatory procedure. The point of the argument is this: If one is consistently a restricted utilitarian, then a greater number of particular results which are themselves justifiable on utilitarian grounds will be achieved than would be achieved were any other procedure of justification to be consistently employed.[5]

It may appear that restricted utilitarianism offers an exit from the impasse in which we placed our hypothetical judge: he is to sacrifice the maximizing result in the particular case to the rule which maximizes over the long run. The problem, as Wasserstrom points out, is that such a procedure implies an inquiry into the utilitarian virtues of the general rule itself. More specifically, if that rule could be changed so as to exclude the class of cases of which our particularly difficult case is a member (for example by the addition to the rule of a more or less narrow exception), then in order to reach *the* correct, maximizing result, the judge must make the change and decide the particular case contrary to the old rule. Given the great flexibility of rules, it is practically impossible to imagine a case in which the judge would be required to sacrifice the particular result because unable to reformulate.[6] It now appears that far from requiring the sacrifice of *the* correct maximizing result to *the* maximizing rule, the restricted utilitarian position does just the opposite: there is not much left of a rule of specialization which the judge is free to refashion in order to satisfy his notion of the best result on all the circumstances of the particular case.

If the analysis thus far is accepted, it should be clear that there *is* a serious inconsistency in the Hart & Sacks theory of institutional specialization. The requirement that the official behave as a maximizing utilitarian is simply not compatible with the setting up of any "absolute" rule of specialization. The existence of an inconsistency of this kind affords the judge or critic attempting to apply the theory a choice; he can emphasize the obligation of the official to behave as an extreme utilitarian – with all that implies about the legitimacy of "activism" – or he can bear down hard on the virtues of the rule of specialization as an instance where restricted utilitarianism is appropriate – with all that implies about the judicial role. The uses of this "fertile ambiguity" will be discussed in the last part of this section.

At the risk of making the argument over-elaborate, it seems well to consider a final defense for the theory. It might be argued that the inconsistency discussed above would disappear *as far as it affects courts* if the planner simply defined any change in the rule of complete specialization as "free adaptation" and required such changes to be made by the legislature. The judge confronted with a situation in which a change (say by addition of a narrow exception) in the specialization rule appeared desirable on extreme utilitarian grounds would be obliged to leave the question of whether such a change should be made to the legislature.

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[5] R.A. WASSERSTROM, The Judicial Decision. Toward A Theory Of Legal Justification, Stanford, Stanford University Press, 1961, p. 132 (emphasis in original).

[6] Ibid., 132-37.

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It should be apparent that this argument involves a *petitio principii*. Before the judge can accept the rule of legislative decision about the rule of specialization, he must justify that rule, and this involves him again in all the problems discussed above.

The argument thus far can be stated in another way, and thereby summarized. Suppose a system in which a particular value will be maximized if each element in the system behave in a specified way. If all elements in the system but one are behaving as specified, it is obviously desirable in aid of maximization that the final element be required to behave as specified as well. If, on the other hand, *two* elements deviate from the norm, but only one can be controlled by the maximizer, it does *not* necessarily make sense to force that one to conform. Given that the system cannot be made to reach a maximum (there is one element which cannot be controlled), the maximizer must make a detailed ad hoc inquiry as to what behavior by the next to last element will be optimal in the circumstances. This is, once again, what economists call the "problem of the second best." A judge required to define his own jurisdiction in a situation in which other institutions cannot be relied upon (or compelled) to act in conformity with what he considers ideal institutional arrangements faces the second best problem in a particularly acute form. Hart & Sacks are no help to him. Like the neo-classical economists who elaborated the concept of "perfect competition," Hart & Sacks base their system on a utopia. Their prescription of full specialization is in the end no more convincing than the economists' argument for unmitigated laissez-faire.

Thus far our analysis has been based on the assumption that the judge faced with a difficult question of jurisdiction (using the term in its widest sense) is able to distinguish in the terms of the theory between "legislative" and "judicial" questions, so that he need only deal with the problem of whether or not to "usurp." We will now reverse perspective and ask what guidance the theory offers to the judge who is quite convinced that usurpation is undesirable (he accepts a restricted utilitarian approach to the rule of institutional specialization). The question is whether the theoretical distinction between legislative and judicial questions can be applied in practice with sufficient precision so that the judge is subject to some kind of meaningful control, either by his own desire to reach the "right" result or by consensus among professional critics as to what is required in particular cases.

The first difficulty is semantic: a great deal of mischief has been done by calling the classes to be defined legislative and judicial "questions." The distinction between usurpation and proper exercise of the judicial role lies, according to the theory, not in the nature of the question asked of the court, but in the answer given. When that answer cannot in good faith be reached by application of the method of reasoned elaboration, then there has been usurpation. The judge must have used some other method, in the application of which he is neither peculiarly competent nor made responsible by effective control mechanisms, and this is the evil at which the theory is directed. The question posed in the first paragraph can therefore be made more precise: does the technique of reasoned elaboration provide sufficiently precise answers to uncertainties about legal arrangements so that it will be clear to the judge and to his critics that he has or has not applied the method in good faith in reaching his result?

If the answer to this question is, No, then the distinction between legislative and judicial functions collapses in practice, and the theory will be useless as a means of maintaining institutional specialization, even assuming that all officials believe specialization to be desirable and usurpation to be a vice.

When the problem is formulated in these terms, it becomes apparent that a number of common interpretations of the distinction between legislative and judicial questions are inconsistent with the theory.

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I will attempt to dispose summarily with three such interpretations before meeting the theory on its own ground. First, it cannot be that a dispute is "judicial" *because* it is pressed by individual parties, concerns past acts, is argued in terms of existing legal order and evokes a demand for "justice." Nor do contrary characteristics in the dispute indicate that it is "legislative." Judges, according to the theory, "make law," if only interstitially, and their decisions may therefore always affect future interests of groups. A doctrine of jurisdiction which rested on the ability of these groups to mobilize themselves and their willingness to "politicize" the issue would be no doctrine at all: the same case might be "judicial" one day and "legislative" the next. No judge could be expected to do the research necessary to make up his mind about the sociological and psychological questions implied in every jurisdictional question – even supposing that social science offers adequate frameworks for such research in the first place.

Second, it is quite obviously not the individual judge's frame of mind in hearing the dispute – his effort to find *the* right result or even his belief that he is applying the method – which defines a judicial question. The theory requires him to adopt this attitude in all cases he hears. His problem is to decide when a proposed line of argument would involve him in a departure from the method (reasoned elaboration) which *defines* the "right" result. If he makes a mistake, and accepts jurisdiction in a case not amenable to resolution through the method, or reaches a result the method does not justify, then he should be criticized, no matter what the frame of mind in which he erred.

Third, it cannot be that *because* a dispute is argued in whole or in part in terms of "social policy" it is therefore "legislative." Nor can it be that because in order to reach a particular result the judge must make arguments from social policy, that result represents usurpation. The technique of reasoned elaboration – the only technique appropriate for judicial use – is itself nothing more than the technique of arguing from the "principles and policies" underlying the particular elements of the legal order. A judge who refused to work his way upward, from the rule to its reason, from that reason on toward the ultimate purpose of law, would be incapable of properly fulfilling his specifically judicial function. For Hart & Sacks, every legal question is a question of social policy.

We are left, then, with compatibility with the method of reasoned elaboration as the sole criterion of a "judicial" resolution of an uncertainty. When in a given case there is no resolution possible which is consistent with the method, then the subject matter is "non-justiciable;" when there is a single result consistent with the method, to reach a different result is, to use one of Hart & Sacks' favorite phrases, "pure *fiat*" – a bald assertion of an usurped legislative power. Our problem is to evaluate the method in terms of certainty.

It seems best to exclude at the outset two meanings of certainty clearly not intended by Hart & Sacks. They do not mean to suggest that reasoned elaboration provides "answers" to uncertainties in the same manner that logico-deductive method provides answers in mathematics or symbolic logic. The complexity of the social reality with which the planner must deal, and the consequent imprecision in the process of formation of concepts and premises for argument, are fully apparent to them: they are enthusiastic participants in the "revolt against formalism" and "mechanical jurisprudence." On the other hand, they are equally opposed to the notion that certainty can be reduced to a "high probability that courts will decide a particular question in a particular way." Their method is to be applied self-consciously by judges and critics striving to find *the* right answer in the particular case. Its utility depends not on statistical regularity in results, but on the conviction of the planner and the participants that one can reach right answers sufficiently often

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to make it legitimate to use the method to police the borders of institutional domains. Hart & Sacks are above all leaders in a "revolt against Realism."

They appeal, then, to our sense of the social possibilities of the use of Reason in human affairs: they suggest the delimitation of the sphere of judicial action in terms of our notions of how far we can get in the resolution of disputes through the working out of widely shared purposes based on the ultimate shared purposes of maximizing valid human satisfactions through law. Without challenging, for the moment, the larger view of American society implicit in this approach, one can criticize Hart & Sacks' view of reasoned elaboration as over-sanguine in two respects.

First, let us suppose most favorably to the theory, that most disputes involve the reconciliation of conflicting purposes far more specific than "maximization of human satisfactions." Take the instance of an inheritance statute which directs the disposition of property in accordance with the desires of the deceased as expressed in a written will, but says nothing about the case of a murderer inheriting by will from his victim. Hart & Sacks argue that an asserted uncertainty in the meaning of the statute as to murderers can be resolved by appeal to the legal principle that "no man shall profit by his own wrong." This principle outweighs in this case the countervailing utilitarian principle that "every alienation imports advantage" because we cannot presume that the testator was aware of the murderer's intentions at the time he wrote the will. Resort to the purposes of the law as embodied in its unifying principles thus assertedly resolves the uncertainty at a level of abstraction far short of the ultimate purpose of maximization.

There is something fishy here. The utilitarian purpose lying behind the principle that "no man shall profit by his own wrong" is that "the law should not increase the frequency of socially undesirable actions by rewarding them." Yet we have no more than the most imprecise and intuitive evidence that failure to amend the inheritance statute by judicial decision would have an effect of any kind on the number of murders of testators by heirs. A sketchy knowledge of modern criminology suggests the opposite: the motive of gain seems virtually never present in theories of intra-family crime. In this light, we may wish to reassess the force of the principle that "every alienation imports advantage" as applied in this case. After all, the *only* hard evidence we have as to the testator's intent is the will. Do we endanger the general policy of testamentary freedom by importing an exception on so little evidence?

The answer to the problem posed by this case is probably that testamentary freedom is sacrificed not to higher shared purposes but to a higher shared morality. Deterrence aside, it shocks the conscience to reward the murderer. The trouble is that this has little or nothing to do with the method of reasoned elaboration. First, to assimilate "moral action" to "action designed to maximize satisfactions" will appear to all but proponents of utilitarian ethics a gross distortion of one or both concepts. Second, even if we accept the assimilation, the question of how much "morality" can legitimately be imported into "law" is an extremely difficult one, probably resolvable only at the level of ideologies. If we invite the judge to reach a position on the issue as a step in resolving the uncertainty over the inheritance statute, we will hardly be able to claim a great deal of certainty for the method of reasoned elaboration. If, the other hand, we instruct the judge that the question of the proper role of morality in particular statutory arrangements raises questions "not amenable to reason," he will be unable to resolve purposively a case which Hart & Sacks consider quintessentially "judicial."

The point of this first objection to the method can be summarized as follows: a large proportion of the principles and policies to which the method attributes purpose cannot, because of objective and subjective

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uncertainty about the consequences of decision in particular cases, be applied with any confidence if they are to be justified on utilitarian grounds. If these principles and policies are to be applied without strong evidence as to effects in particular cases, then the judge's reconciliation of conflicts among them can be justified only in terms of more abstract uncertainties. As to these, we must recognize that the method is either largely indeterminate or not appropriate at all.

The existence of uncertainty of this kind affords the critic or judge applying the theory a useful choice: in the case of virtually every legal uncertainty he will be able to argue that the application of a particular principle or policy is unjustified because "data" is inadequate; alternatively he can argue from the fact that the principle or policy is "deeply rooted" in the law that it is entitled to substantial respect as representing the wisdom of a great tradition of thinkers about the maximization of welfare.

The second, and more basic objection to the method is implicit in the description of the first. It should be apparent that the resolution of uncertainties by the interstitial harmonization of the particular area with larger principles and policies of the law can be successful (or meaningful) only to the extent that the larger principles and policies are consistent among themselves. For example, in the case of the inheritance statute it is possible to interpret the principle "a man should have the power to dispose of his property as he sees fit" as derived from the principle "every alienation imports advantage." This principle is consistent with the principle "the law should not increase the frequency of socially undesirable actions by rewarding them," because both are derived from a common (utilitarian and individualistic) view of man's psychological and social nature. When they conflict, we can "weigh" them against each other in the terms of their common utilitarian framework.

The case is far different when we deal with principles derived from different systems (ideologies, cognitive structures, philosophies, or whatever word is in fashion). "A man should pay damages when he has been at fault," cannot be "weighed" against "Damages should be allocated among actors so as to maximize deterrence" unless we are willing to ascend simultaneously two distinct hierarchies of purpose to the ultimate conflict over the social function of law. The same is true of "*pacta sunt servanda*" matched against Holmes' "the payment of damages is a tariff legitimating a breach of contract." As for the criminal law, it is notorious that it is grounded in conceptions of man's nature so radically incompatible that it is impossible for their expositors to hold meaningful conversation. Any comment as to "equal protection of the laws," or the taking of life, liberty or property without "due process of law" would be superfluous. Two more examples will perhaps be enough to make the point. In antitrust law, there coexist two equally long and equally distinguished lines of cases, one based on the notion that the goal of maximization implies that the economy must be made to correspond as closely as possible to the model of perfect competition, the other on the notion that in an imperfectly competitive, regulated economy the law can achieve no more than atomization of economic power. In business law, the corporation can be conceived either as an association of private individuals or as an arm of the state. (An elaborate and far-reaching case of this kind can be developed from Pound's brilliant 1917 article on the development of the antithetical concepts of contract and status during the nineteenth century.)

It may be that it is hopeless to argue over the extent of conflicts of this kind among the premises available for the method of reasoned elaboration. I should say that I think such conflicts pervasive, and that in areas where the law appears highly consistent the constant trend is to the development of new models – such as Professor Griffiths' "family model" of criminal procedure – while there is no over-all trend to

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"rationalize" the areas where incompatible models coexist. It is clear, however, that *some* such areas of conflict do exist, and that they tend at present to be centrally important so far as the place of the judiciary in the public consciousness is concerned. The implications for the method of reasoned elaboration are thus interesting even if one denies that alternative "ideologies" are *always* available to support alternative resolutions of particular legal uncertainties.

First, it should be clear that the judge making a good faith effort to reach *the* correct decision through reasoned elaboration can perfectly consistently mount the two hierarchies of values implied in two different results until he reaches the choice between ideologies, and that he can then make the choice according to which system will, in his earnest opinion, serve to maximize valid human satisfactions. This choice once made, one or the other of the resolutions of the specific problem will in all probability appear quite distinctly "correct." Yet if it is open to the judge to make such choices, it is difficult indeed to see how his specialized method of decision differs from that of the legislator: if the category of "choices amenable to resolution through Reason" has any meaning at all, it must exclude the choice of ideologies (cognitive structures, philosophies, world-views, systems). If, on the other hand, we deny the judge the right to choose at this level, require him to halt at some point in the hierarchies of purposes, the method of reasoned elaboration becomes meaningless: everything will depend on the choice of a set of premises within which to "harmonize" the law, but the judge is forbidden to justify that choice.

As with the other aspects of the theory, the indeterminacy of the method when applied to a legal system riddled with inconsistency has its advantages for the critic employing it as a tool in argument. He can assert with equal plausibility about almost any legal dispute, first, that a given result can be reached only by making an essentially "legislative" choice of ideology, and, second, that the result he favors is compelled, since it is the only one the judge can reach if he acts consistently, mounting the hierarchy of purposes within the critic's system.

It remains to draw the consequences for the theory of institutional specialization. We have not tried to state with any precision the degree of uncertainty of the method as applied to even slightly difficult cases. The reader can form his own estimate on the basis of the degree of inconsistency and reliance on incompatible models he sees in the body of premises for legal reasoning. For the judge or critic who feels the degree of indeterminacy to be great (as I do), the consequences for the theory of specialization are also great: if he cannot, consistently with a strong conviction that he is reaching the correct result, distinguish those questions which are non-justiciable and those results which represent "pure *fiat*," the injunction against usurpation becomes meaningless, even supposing that he is convinced by the (specious) argument that usurpation is in all cases undesirable.

As for the appropriateness of a distinction between legislative and judicial questions as a basis for a professional norm of specialization, one would expect the indeterminacy of the method to produce conflict among the body of critics, as indeed it has. In so much as there is consensus, it must be traced to something else than the "correctness" of the theory, *e.g.* a pre-existing ideological consensus among legal scholars or a structure of professional rewards (from law school through the granting of tenure) which functions, however inadvertently, to deaden independent thinking.

It can be convincingly argued that the theoretical schemas of Hart & Sacks have in fact added an invaluable aura of intellectual respectability to what is essentially a set of ideological biases: the position of the influential group of legal thinkers denominated "the modest" by Professor Shapiro seems to rest, however

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unstably, on the conceptual framework laid out in *The Legal Process*. Yet it is important to recognize that Hart & Sacks themselves do not fall within a school. The materials are full of self-righteousness but in no sense predictable, full of elaborately structured arguments but also slippery. The ambiguities and inconsistencies of their theory of institutions are "fertile," permitting the development of two internally consistent but mutually incompatible sub theories of the judicial role. Much of the force and apparent coherence of the positions taken in the materials derives from the use of one or the other but never both of these sub theories in each particular case.

The Passive Model

When Hart & Sacks are against a proposed judge made change in the law, they tend to make arguments based explicitly or implicitly on the following view of the legal system.

(a) While many areas of legal action are consistently structured in terms of common views about how men should go about maximizing valid human satisfactions, the result urged in this case cannot be reached without an excursion into areas where there are no commonly accepted, consistent legal premises for reasoned elaboration. The existence of areas of consistency is simply asserted; the inconsistency in the area in question is demonstrated more or less as was done above.

(b) The available factual information is inadequate in the particular case to permit the intelligent weighing of conflicting policies. This inadequacy is related on the one hand to the inherently "legislative" nature of the question, and on the other to the institutional incompetence of courts as information gatherers.

(c) There are alternative institutions designed specifically to be both competent and responsible in making decisions of the kind proposed, and it is asserted that if judges considered themselves free in every case to question the actual performance of those institutions in the particular disputed area, the result would be chaos and anarchy.

(d) There is an alternative (which may be a holding of non-justiciability) to the proposed "legislative" resolution of the dispute, an alternative consistent with the method of reasoned elaboration. The parties have a legitimate expectation that the alternative result will be reached; this demand for "justice" is in conflict with the judge's impulse to treat the case legislatively.

(e) The conclusion is clear that the proposed change would be "pure *fiat*."

The Activist Model

When Hart & Sacks are in favor of a proposed judge-made change in the law, they tend to make arguments based explicitly or implicitly on the following view of the legal system.

(a) While there are some areas of legal action so riddled with inconsistency and so devoid of consensus that they are inappropriate for action by courts, the result urged in this case can be reached along a path no more difficult than that normal in the law. True, there are inconsistencies, alternative models and passionate disputes, but many of these are the product of error or misunderstanding and can be illuminated by the application of Reason. For the rest, no claim has been made that the technique of reasoned elaboration can be applied like a mathematical formula to results indisputable by all but fools. The judge's elemental responsibility is *to judge*.

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(b) The factual data on the impact of a given policy in this particular case may be weak, yet the principles and policies urged upon the court represent the accumulated wisdom of centuries during which the common law has been working itself pure. This wisdom is more enduring and more useful than any number of research projects based on a still nascent scientific theory of society.

(c) Alternative institutions may be of some help should the judge refuse to resolve this uncertainty, yet it must be kept in mind that courts are the front-line dispute resolvers in any society. Legislatures are not and could not be designed to do justice in particular cases, and here it is evident that they are likely either not to act at all or to perform their function with peculiar incompetence and/or irresponsibility.

(d) Both parties to a lawsuit expect to win or there would be no lawsuit. To speak of a "justice between the parties" which is not related to the larger "social justice" which consists in maximizing valid human satisfactions is meaningless. Where a party relies on a doctrine which sacrifices the common good to his particular good, his reliance is "unjustified." This is especially true since a more spacious view of the role of law would place greatest emphasis not on the division of a static pie among irreconcilably hostile parties but on devising flexible rules which favor a dynamically expanding pie.

(e) The conclusion is clear that to decide against the proposed change would be "denial of justice".

These two styles of argument are, at this point in history, only too familiar on the American legal scene. The point is not that one is "better" than the other, or even that Hart & Sacks misapply them (although I often disagree with their particular results). It is that they are equally consistent with the method of reasoned elaboration and the theory of institutional specialization. It all depends on whether you admire the "fine spun texture" of the law or rather enjoy its "fertile disorder," on whether the functioning of legislatures, administrative agencies and private orderers (especially large corporations) gives you a feeling of security or fills you with fear and outrage. Most people seem to feel consistently one way or another about these things: they become activists or pacifists, and the work of Hart & Sacks should buoy them equally. But what of Hart & Sacks themselves? If it is not their "system" which turns them first one way and then another, what is it? Two answers are possible, one hopeful, the other not.

It is possible that they are simply "pragmatists," ambivalent about the workings of the society and the coherence of the law, responding idiosyncratically according to the emotions evoked by the particular case, but altogether unwilling to accept the cosmic *angst* an admission of freedom would entail. And then it is possible that the logical inconsistency, the naivete, the incoherence of their theory of the legal process is irrelevant: what matters is the *cases*, for if we analyze them with sufficient skill we will discover the cognitive keying system which turns these consummate judges first to the activist, ten to the pacifist model. In short, behind all the indeterminate talk of Reason we will find the "real" theory which is the legal mentality.

II

A theory which fails to solve the problems it sets itself may nonetheless be interesting and important for the insight it provides into its time or society. In this section, I will attempt to place Hart & Sacks--with their method of reasoned elaboration, institutional specialization and activist and passivist arguments--first in the context of contemporary American legal thought and then in that of an historical tradition. My purpose

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is to elucidate the structure of a mode of legal thinking which I will call Rationalist, following the distinction drawn perhaps most perceptively by the German sociologist Ralf Dahrendorf. According to him

> Throughout the history of Western political thought, two views of society have stood in conflict. Both these views are intended to explain what has been, and will probably continue to be, the most puzzling problem of social philosophy: how is it that human societies cohere? There is one large and distinguished school of thought according to which social order results from a general agreement of values, a consensus omnium or volonte generale which outweighs all possible or actual differences of opinion and interest. There is another equally distinguished school of thought which holds that coherence and order in society are founded on force and constraint, on the domination of some and the subjection of others. To be sure, these views are not at all points mutually exclusive....

Some implications of this distinction for the study of law will be developed at some length in the following sections. There I will examine a number of modern attempts to recast and thereby solve the problems which are perennial in the rationalist approach to law. I will argue that these attempts, however unsuccessful, indicate that a non-rationalist approach to the dilemma posed by Hart & Sacks is feasible--and indeed that at this point in time such an approach is likely to be more fruitful than continuation in a rationalist tradition which appears at least temporarily exhausted.

I cannot prove that what I will describe in this section is the dominant mode of contemporary American legal thought (it is clear that many of those I try to group together do not think of themselves as linked with Hart & Sacks). This strikes me as only mildly worrisome: the main interest of the exercise lies in the development of categories for use in arguing about these matters, and the reader who is unconvinced by my description is invited to play the game with his own counters. I should emphasize that I make no claim to "discovering" either this mode or the one discussed later. I am merely working over ground explored by legal philosophers in all ages.

A.

In the dominant mode of legal thought, laws are conceived as primarily rules governing the application of sanctions. The function of the system of rules should be, and is to some extent, to assure to each member of society the maximum of freedom and welfare which is consistent with freedom and welfare for others. Sanctions are necessary because of the imperfection of man's nature: unless restrained by superior force, he will tend to restrict and oppress his neighbor in his own interest. Homo hominis lupus. The rules by which men's lupine nature is restrained must be rules in a strong sense--meaning that they attach consequences precisely known to actions sufficiently clearly defined so that disregard of the rule is easily identifiable--for two reasons. First, the more precise the rule the greater its deterrent effect. Second, and more important, the power to administer sanctions must be exercised by men who are no less lupine than the

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private orderers they restrain. Where they have discretion, there is constant danger that power was designed to assure.

The rule of law in its broadest sense means that since all power in a society is subject to abuse, all power must be controlled through rules. Since Hobbes, this means for the dominant view that private orderers must be subject to civil and criminal law backed by official sanctions for violation; since the eighteenth century, it means that legislatures must be governed by constitutions and subject to the sanction of popular election; since the English Revolution, it means that executive action must be governed by laws passed by the legislature with departures sanctioned by the courts. The central problem for the dominant mode of thought is to fit the judiciary into this scheme of things: on the one hand, judges are men like other men and therefore lupine; on the other, it is a requirement of the rule of law that they, and they alone, are independent in the sense of not sanctionable in the performance of their duties.

The seriousness of this problem will be seen to vary with three interrelated factors: the extent of jurisdiction, i.e. the range of questions over which judges act; the extent to which judicial decisions are subject to effective control through prospective overruling by the legislature; and the precision of the rules which courts apply. Given that the primary factor in assuring the responsibility (in the sense of non-abuse of power for personal or partisan ends) of an independent judiciary must be professional norms of the kind already described, then such norms can be expected to operate more effectively as the importance and political sensitivity of questions presented is less, as the probability of legislative resolution of difficult points of law is greater, and as uncertainty about the correct result in any given situation is reduced.

Perhaps the best example of an attempt to eliminate the difficulty altogether by a simultaneous manipulation of all three factors is the case of France. The role of courts is minimized; that they should be allowed to decide the sorts of cases considered natural for the judiciary here is regarded as aberrant. Not only is there no final judicial review of legislative action in our sense, but the dominant view of courts is that they are utterly subservient to legislative power: it is denied that they ever make law. Finally, a detailed code specifies what law applies in any given situation; while it is recognized that judges must occasionally "interpret" because of uncertainty on the face of the Code, the process is regarded as essentially one of deduction. In general, judges are conceived as having so little discretion that it is permissible for them to report their decisions in the most complex cases in the form of a one sentence list of references to Code provisions.

American lawyers tend to find something almost comic in the French assurance that they have solved the problem. Dawson, for example, sees the French high courts as working creatively behind a logico-deductive smokescreen to uphold their own libertarian ideals against the encroachments of the bureaucratic state. Nonetheless, there is obvious truth to the French view that for them as compared with the United States democratic control of the judiciary is a non-issue. It is equally clear that what sharply distinguishes our situation is the institution of final judicial review of legislative action, and the vast jurisdiction which that institution has been found to imply.

Yet it is far too easy to attribute our greater concern with the problem of control to Constitutional Law alone. It is true that the spectacle of a court asserting its authority to resolve finally the most important political issues of the day--whether the status of fugitive slaves or the organization of the schools--provokes with particular intensity the question, To whom are the judges responsible? But Hart & Sacks are at the precise mainstream of American legal thought when they pose the same question with regard to cases of

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contract, tort or statutory interpretation. This tendency can be seen as in part the consequence of the dominance of constitutional specialists among academic lawyers, but it is a current fed by many springs. In the mid-nineteenth century, a period when constitutional decisions of the Supreme Court were a negligible factor in national politics, there was a widespread movement for complete codification of the civil law and an end to "judicial tyranny." The issue of the judge's freedom has been for us the most fundamental of all legal issues.

In the inevitable questioning that results, the simplicities of the French "solution" disintegrate. First, there is our tendency, remarked long ago by DeTocqueville, to leave a vast range of questions, regarded elsewhere as legislative or administrative, to the courts. Again, we tend today to think of this as a consequence of judicial review, and to miss the fact that under the Sherman Act, or the NLRA, we have astonishing bodies of judge-made law. And one wonders whether the vast expansion or jurisdiction under the Due Process and Equal Protection clauses is not better viewed as a response to an ineradicable societal "demand for law" (cf. Dawson) than as a self-generating phenomenon rooted in the Sacred Texts. Perhaps we should seek an explanation in the heterogeneity of our society, in the absence of the sense of unifying norms which makes private or executive solutions to social problems seem acceptable, in the need of a dynamic but insecure society to feel that there is a somehow transcendent structure to which all can cling in times of crisis. In any case, Hart & Sacks are speaking of a condition accepted as given when they say that

> In the development of Anglo-American legal systems, courts have functioned characteristically as the place of initial resort for the settlement of problems which have failed of private solution. All these systems include the immensely significant institution of courts of general jurisdiction….
> So it has happened and continues to happen that emerging problems of social maladjustment tend always to be submitted first to the courts. The body of decisional law announced by the courts in the disposition of these problems tends always to be the initial and continues to be the underlying body of law governing the society. (185-186 emphasis in original)

Second, the notion that <u>all</u> law making functions can or should be entrusted to the legislature is unacceptable to us. There is, of course, the striking and disquieting fact of judicial review. But beyond that, at least since the mid-nineteenth century, American academic lawyers have cherished the common law exactly for its "flexibility," its "capacity for growth" and ultimately for <u>purposive</u> change. Since the Realists, it has come to seem elementary that even in the interpretation of statutes judges constantly make law, and must do so, even when they most vigorously deny it. Further, there is the fact, perhaps exaggerated by Hart & Sacks but nonetheless important, that there are limits of time and resources on the legislature's capacity to deal with the vast range of problems passing through the courts. Allowing a judicial resolution of even an extremely controversial problem to stand is a highly acceptable resolution for politicians in a great many cases. It has therefore come to seem a poor justification for an act of judicial power that "the legislature can always reverse us if they see fit."

The point of all this is that the third element making tolerable the necessary independence of the judiciary under a regime of democracy and the rule of law, namely the certainty of the rules according to

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which judges resolve the cases before them and administer sanctions, must bear an enormous burden. The French solution is unavailable. No code would help with the equal protection clause, but within the dominant view the problem goes deeper. Case law is seen as the essence of law exactly because of its close association with wide jurisdiction and judicial creativity. Codes are likely to be the product of the very interests which the law is supposed to transcend. And even the meaningfulness of any statement of law not "embedded in the facts" may be challenged. (cf. Hart & Sacks on the A.L.I. Restatements; Hart & Sacks and Dawson reporting with glee the disintegration of the German Code through judicial exploitation of the residual sections). Yet if judges must be regarded as exercising discretion in the making of law, if it is impossible to argue about the legally correct result in terms other than political, then the notion that judges may be adequately controlled by no more than professional norms and professional criticism becomes untenable.

The answer within the dominant view is that the results of judicial law making (whether minor or major) are adequately if admittedly not perfectly certain, and it is meaningful to argue about the right result, because the method of rational argument from the purposes and policies embedded in the law is an adequately determinate one. As the double use of the word "adequately" should suggest, this formulation is designed to take in a vast range of differently shaded individual perspectives, perspectives often regarded as fundamentally in conflict with one another. What is significant about Hart & Sacks, and what makes them exemplary of the American legal mentality rather than idiosyncratic, is that they accept this statement in all its implications, and focus their efforts on demonstrating its truth.

The approach of Hart & Sacks is comprehensive where that of most American academic lawyers is fragmented. The two basic difficulties which make it hard for us to accept The Method as an adequate justification for judicial independence are rooted deeply in the structure of the dominant view: the imperfection of man's animal nature makes clear rules necessary; the imperfection of man's rational capacity makes rule-making arbitrary. Hart & Sacks attack on both fronts. First, as we have seen, they offer an account of reasoned elaboration which asserts the general feasibility of reaching correct results by deduction from universally accepted premises. For their colleagues, it is usually enough to push a single principle to its logical result in a particular case, reserving always the right to disregard it in the next particular case. Second, recognizing the residual imperfections of even the most perfectly worked out rational process, they insist that we must hedge our bets by reenforcing wherever possible the norms of cooperation, fairness and toleration which are all that is left when Reason fails. If man can be made less a wolf to man, the dangers inherent in the use of rules and sanctions by an independent judiciary and by relatively independent private-orderers are correspondingly reduced. Where Hart & Sacks fall into preaching, it is from an excess of consistency.

There is a certain nobility in the enterprise, in a time when Reason seems a peculiarly fragile bulwark and man in a peculiarly lupine phase. But the use of a very general framework also has its advantages, for the advocate of particular results in a society which craves an assurance that "the law is the law," and in a profession obsessed with rationality. The important point is that Hart & Sacks are only academic law writ large and bold: it is precisely the forced conjunction of extreme positivist assumptions about the social function of law with the natural lawyer's extreme preoccupation with the reasoned justification of rules that most accurately characterizes what I have been calling the dominant view. The philosophies of Justices Frankfurter and Black, the neutral principles of Professor Wechsler, the functional analysis of Professor Emerson, the free contract of Professor Wellington, the marginalist micro-economic theory of Professors

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Bork and Calabrezzi, the per se rules of Professor Bok, the Rawlsian social contract of Professor Michelman, the new property of Professor Reich, and the reasoned adjudication opposed by Professor Bickel to the passive virtues--are warp and woof of the same fabric of Natural Law for the Positivist.

Within the structure of the dominant view, lawyers engage in two kinds of arguments. The first kind of argument is essentially concerned with deciding whether, given man's lupine nature and the fallibility of reason, a proposed doctrinal justification for specific acts of judicial rule-making is adequate. The criteria of adequacy are quite simple: (a) Does the doctrine, in all its conceivable applications, further shared social values? (b) Is the doctrine sufficiently precise and sufficiently logically consistent, so that the judge who applies it will have only very limited discretion? The form of the argument is also simple. Proponent: "I followed where Reason led, and have gone out a step further." Professor Bork and Professor Emerson are in this identical. Opponent: "You are convoying the judiciary onto uncharted seas with prejudice at the helm." Professor Bickel and Professor Frantz are in this identical.

The problem with this sort of argument is that the opponents always win: in the legal world, not only the palace of Reason, but the trianons, stables and outhouses all seem to be built on sand. It may be answered that this is no more than the academic condition. The same (or worse) might be said of sociology or political science. The social sciences are young and cannot be expected to attain the precision of the natural sciences. In a More Spacious and therefore Tragic View, we recognize the Ultimate Futility of all Human Endeavor but still Keep Plugging. The problem is that law differs from sociology in the important respect that, as Hart & Sacks say over and over again, it is applied social science. For academic lawyers within the dominant view, the law performs an absolutely vital social function in the most immediate present, and the problem of controlling private and judicial behavior cannot be left in abeyance while the edifice of Reason is perfected.

The result is the argument between activists and passivists. In this argument, both sides tend to assume that the enterprise of devising rules which will adequately control the judge's exercise of his power to intervene in the affairs of private-orderers and legislatures has been, to a large extent, a failure. In the sophisticated form of the argument, both sides also assume that the rules already devised for the control of private orderers and legislatures--the substantive law which the judge is to change or leave alone--is also inadequate in the sense of leaving more play to man's lupine nature than would be desirable in ideal circumstances. The question is: Which set of rules--those governing social behavior or those governing judicial law making--is worse, that is, allows more scope for the abuse of power? It should be clear that both sides argue from despair. The mere fact that the debate is occurring indicates that the enterprise of natural law for the positivist is in difficulty.

Activism and passivism are thus useful as alternative resolutions of the basic tension within the dominant view, but useful only to a point, since they require abandonment—at least temporarily--of some part of the overarching ideal of the rule of law. In effect, a new tension is created: for the activist, it is the tension between toleration of relative freedom for the judge and the demand that private orderers and legislatures treat the law as removing their power of choice; for the passivist, it is the tension between the demand that judges act only when they can be controlled by reason and toleration of unrestrained anti-social behavior by private orderers and legislatures.

This unsatisfactory situation represents the latest in a series of impasses constructed by rationalist legal theorists confronted with the problem of explaining the role of law in social order. I will now try to fit

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what I have been calling the dominant view, and particularly the paradigmatic version of Hart & Sacks, into this larger tradition of American rationalist legal thought.

B.

Law has always been important in rationalist social thought, and rationalism has always been important in legal thought. If we begin with Dahrendorf's summary "premises" of rationalism, this appears natural:

(1) Every society is at every point subject to processes of change; social change is ubiquitous.
(2) Every society displays at every point dissensus and conflict; social conflict is ubiquitous.
(3) Every element in a society renders a contribution to its disintegration and change.
(4) Every society is based on the coercion of some of its members by others.

We have already mentioned the homo hominis lupus theory of human nature which underlies the dominant view, and the conception of law which follows from it:

(1) The law changes constantly.
(2) Legal events are a manifestation of conflict.
(3) All legal events hold the possibility of disintegration and change.
(4) The essence of law is the coercion of litigants by the administrator of sanctions.

For rationalist legal thinkers, the fundamental problem of legal philosophy is: Can the legal process be set up so that the inescapable use of coercion will achieve "order" in spite of ubiquitous social conflict, and "progress" rather than disintegration through ubiquitous social change?

It is extremely important to understand that the rationalist legal thinker who believes that he has solved this problem is just as much a "utopian" as the consensus theorists who are given that name by Dahrendorf. The rationalist utopian believes that in spite of the fact that the essential reality of social life is conflict, disintegration, coercion and change, it is possible to impose a rationally worked out scheme which will lead to the maximization of pre-selected values. Thus while the rationalist utopian does not conceive of social life in terms of stability, integration or consensus--and indeed tends to mock those who do--he does conceive of an ideal social situation, either as a valid although unattainable goal or as a possible social reality. The ideal is that of an organization of social life through the legal system such that the conflicting and often anti-social impulses of individual men are channelled and combined to produce social good. The resulting equilibrium--which may be either stable or dynamic--rests on coercion rather than on consensus, but it is none the less an equilibrium and a utopia.

In non-Marxist rationalist legal thought, "progress" (that is, the values to be maximized) tends to be closely associated with "freedom," both because freedom is taken to be a very important value in itself and because some substantial measure of it is thought essential for the efficient production of material welfare. Freedom in turn is identified with "arbitrariness," that is with action which is not compelled or

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closely constrained by forces external to the actor. Law--the means to "progress"--is identified with coercion, which is the antithesis of freedom (arbitrariness). The basic problem of rationalist jurisprudence is to make the best of (not to "resolve") this fundamental contradiction between means and ends. This means the use of the smallest possible amount of legal coercion to suppress that quantum of individual freedom (arbitrariness) which is incompatible with the achievement of the desired equilibrium.

In the classic rationalist solutions to the problem, the first step is the definition of a law as a preestablished general rule; action according to law means action conditioned by the application of known sanction to particular conduct sufficiently clearly defined so that violation and compliance are easily determinable. Using general rules as elements, the rationalist utopian puts together a system which does two things: (a) it constitutes a body of substantive law for private orderers and executive officials which imposes only that minimum of coercion necessary to permit the attainment of (static and dynamic) equilibrium through free (arbitrary) action; and (b) it eliminates altogether the freedom (arbitrariness) of the law applying official so that he cannot use the coercive power which has been put at his disposal for his own purposes.

It should be obvious that the key to the success of the rationalist utopian enterprise is the method by which the body of rules of law is to be generated. In the rationalist legal thought of the nineteenth century (the German pandecten and the Anglo-American analytical jurists), the method par excellence was that of logical deduction from the premises of an extreme individualist utilitarian philosophy and the classical economists' theory of markets. Using the method, rationalist utopians were able to derive three intermediate premises of whose validity they were certain--laissez-faire, the inviolability of property, and freedom of contract--and thence a complete system of substantive rules of law.

There are two alternative ways to organize the application of the method to social reality. On the Continent, it was felt that the results reached were valid and determinate to such an extent that they could be very fully codified: the function of the judge would be simply to apply statute law, and his freedom (arbitrariness) would therefore be reduced to an absolute minimum. Under the Anglo-American approach, it was felt that the method was best applied case by case (and perhaps that the legislatures were unreliable), and that codification was therefore undesirable. In this system, the judge's function was both to discover the law through the method, and then to apply it. He was to be no more free (arbitrary) in America than in Germany: the premises and rules of the method were known and highly determinate in application, and compliance or deviation could be recognized with sufficient ease so that norms and professional criticism were adequate to control the judge. Moreover, a very strict rule of stare decisis--in effect codifying past applications of the method--could reduce to a minimum the occasions for judicial bungling.

In both systems, the role of the legislature was basically passive. On the Continent, it had the important function of enacting the Code, but in this it acted as ventriloquist's dummy for the legal scientists who practiced the method. In America, the legislature was to correct judicial mistakes in the application of the method, but otherwise was to be restricted to meeting emergencies. Once property rights and free contract had been established, progress was assured through laissez-faire. Logically enough, searching judicial review and strict construction of statutes became the rule in America—where the judges practiced the method—and were completely eliminated in Germany--where legal scientists controlled the content of the Code. In both cases, the greatest glory of the method was that it was a closed logical system: all the value choices were embedded in the premises (which were thought to be universally valid), and the judge or scientist was restricted to "reasoning" from case or statute. His views on "social policy" could be rigidly excluded.

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In America, this rationalist utopian thesis came to be associated with those who favored the nineteenth century status quo against social legislation, labor unions and federal power. The result was an equally rationalist antithesis which attacked the utopian position at all points. Drawing on Bentham and the early English positivists who had favored drastic reform of English legal institutions, and on Holmes, the American legal realists argued: (a) That the logico-deductive method working from universally valid premises was in fact hopelessly indeterminate: not only were the philosophical premises distorted and unhelpful, but the rules of law do not decide cases. (b) The judges not only make law as opposed to discovering it, but in doing so they are close to totally free (arbitrary) and so naturally enact their particular, class bound preferences as to social policy. (c) That the body of substantive law resulting from this situation amounted to congealed injustice, failing utterly to achieve progress while leaving certain private orderers (principally large corporations) free to coerce others for anti-social ends.

This attack on the rationalist utopian position was bad enough, but it led logically to something perhaps even more disconcerting: an attack on the organization of the legal process which threatened everything the Harvard Law School stood for. (a) The independence of the judiciary was threatened by the Court Packing Scheme and the politicization of the appointments process. (b) It was proposed to eliminate the judiciary as much as possible from the administration of a vast mass of new regulatory legislation. (c) An active legislature and administrative agencies would replace the courts as the principal institutions in charge of the content of the common law. These institutions were to respond to the will of the people as expressed through the processes of democratic politics rather than to any legalistic method.

The polarization within the rationalist approach culminated finally in the crisis of the 1930's, in which those who believed in the old method appeared to be using the ideal of the rule of law as a tool for reactionary ends, and those who did not believe in the method appeared to be willing to toss out the ideal of the rule of law altogether. When the dust began to clear, it became apparent that although there was no developed middle position between the extremes, there were men in the highest judicial positions--chief among them Justice Frankfurter—who were in favor of the New Deal but not Realists and passionately devoted to the rule of law but not reactionaries. What was needed was a new theory which would be adequate to resolve the following dilemma: (a) The logico-deductive method appeared to be irremediably linked to the conclusions about substantive law which had been advocated by classical European liberalism. Laissez-faire, property rights and freedom of contract appeared to be the correct results whenever it was used. (b) As a method, it had been thoroughly discredited, so that even if one thought that it might be turned around to produce more acceptable results in the post-New Deal world, it lacked intellectual respectability. (c) It was nonetheless clear that the courts had an extremely important function to perform in the effective carrying out of the new social and economic programs and in maintaining some basic liberties in a chaotic federal system. (d) In order to perform this function, the courts needed a method which would not brand as unconstitutional the political reality of the New Deal.

In short, the problem was to reestablish the ideal of the rule of law as something both intellectually tenable and socially constructive, to save it from the Court-packers who wanted to destroy it and from the reactionaries who provoked them. The solution of the 1940's and 50's--what I have been calling the dominant view--is the Legal Process materials of Hart & Sacks. In effect, they attempted a synthesis of the two poles within the rationalist tradition. They agreed with the formalists that there was a correct method both for the generation of substantive law and for the control of the judiciary. They could therefore argue

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that judges are not free, and justify extreme judicial independence. They disagreed about what the method was, proposing "reasoned elaboration" in place of "logic." They agreed with the positivists and realists that judges make, rather than discovering, law, that no closed system of legal premises was possible, and that the maximization of freedom and welfare required active, innovative intervention by the legislature rather than passive acquiescence in the working of the market system. They disagreed with the realists/positivists conclusions that the legislature should use a mass of new statute law to control the courts as tightly as possible, that the courts should be kept out of the administration of the new social and economic programs, that the appointments process should be politicized, and that judicial review of legislative and administrative action should be reduced to an absolute minimum.

The trick turns on the technique of analysis of substantive law discussed at length in Part II of this paper. This technique differs in one all-important respect from the technique of the nineteenth century economists and legal philosophers from which it derives: it fully recognizes the disastrous income-distribution and other social effects which may result from the free play of private ordering under laissez-faire, freedom of contract and inviolable property rights. It is, of course, just this technique which was employed to work out and justify the legislative program of the Second New Deal, and looked at in terms of the propositions of the theory, the body of New Deal legislation—the creation of administrative agencies and other regulatory measures—can be conceived as a coherent, rational structure designed to impose that minimum of coercion necessary to permit the attainment of equilibrated "progress" through the free (arbitrary) action of private orderers. Of course the structure is not perfect; nor was the actual substantive law in force in Germany or the United States in the nineteenth century ever perfect from the point of view of the "legal scientist" or analytical jurist. But a rationalist utopian of the 1950's could conceive of it as at least "perfectible."

Once the basic ground rules of the new system are justified as a rational structure purposively designed to maximize progress with minimum coercion, the Method which is the lynch-pin of the utopian rationalist theory of the judiciary is not hard to come by. Reasoned elaboration as proposed by Hart & Sacks consists simply of the reapplication to particular uncertain situations of the technique of analysis which justifies the ground rules. The function of the judge using the technique is to fill in gaps and generally to make the system more consistent and rational: in short, to make it as perfect as possible in its own terms. The solution of Hart & Sacks is thus directly analogous to that of the analytical jurists. The nineteenth century judge was to apply logic using substantive rules based on the goal of progress conceived in terms of extreme individualist utilitarian philosophy and the economist's theory of perfect competition. The twentieth century judge is to deal "rationally" with substantive rules based on a more collectivist but still utilitarian philosophy and the economist's theory of imperfect competition. The analytical jurist gave a purely formal and legalistic definition to "freedom," secure in the belief that self-regulating markets would produce "progress." Hart and Sacks give a somewhat more substantive definition to "valid human satisfactions," and thereby justify new ground rules, but are equally secure in the belief that officially regulated markets will produce a "constantly expanding pie."

The new method is more complicated than the old. It is not a closed system and requires the injection of massive amounts of detailed information about the context and consequences of decision. One result is a decrease in determinacy--which Hart & Sacks admit. The great countervailing boon is that it proves possible to square particular instances of abrogation of contract or property rights with Reason and the rule of law.

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Faithfulness to correct method no longer requires the judge to oppose or ignore the social history of his time. Better yet, the method appears to define limits as well as create lee-ways. In the hands of Hart & Sacks, reasoned elaboration produces ringing denunciations of judicial fiat as easily as praise of judicial foresight and creativity. In short, we have a new control mechanism.

Armed with a new method, Hart & Sacks proceed to sketch in a role for the judiciary which compromises between the polar positions in the rationalist dispute. The problem to be solved is that under the old system, a highly determinate method and a static concept of law had led first to a theory of legislative passivity and second to a tendency on the part of judges to act as though the defining of the proper boundaries of institutional competence were no concern of theirs. In the reaction, legislatures appeared willing to treat courts as "mere power organs" and apply all their resources to subordinate them. Of course this might be viewed as an eminently "Madisonian" approach—the legislatures might be said to behave perfectly legitimately in "checking" a coordinate branch of government. The trouble with this is that if the judiciary is convincingly portrayed as a "mere power organ"--and is in bad odor with the people--the process of "checking" is likely to result not in the restoration of equilibrium, but in the transformation of the system into one of legislative supremacy. This was precisely what the "Court-packers" had implicitly proposed, and what the new rationalist school was trying to avoid.

Hart & Sacks propose a two stage solution. First, the lesser determinacy of the new method, and the admission that judges "make" law through a dynamic process, justify concessions to the Realist position. If courts make law dynamically, it is only reasonable that legislatures should do so also, and passivity is no longer demanded of them. Since both institutions make law through relatively uncertain and admittedly contingent value analysis, the old style of dogmatic judicial review and strict (emasculating) reading of statutes becomes inappropriate. Courts are reconceived as collaborating with legislatures in an ongoing process of experimentation and change. A compensating advantage is that they retain--against the Realist assault--their position as the front line agency using coercion to control conflict in the interest of order and progress.

Having made these concessions, however, the theory is in danger of obliterating any distinction between courts and legislatures. The short run benefit of an increase in political acceptability for the judiciary would then be purchased at the cost of an increase in vulnerability over the long run. To meet this problem, Hart & Sacks propose the institutional theory discussed in Part I above, hoping to steer between the Scylla of Madisonianism and the Charybdis of formalism. The new method, which makes it possible to assert once again that the judge is not "free," is identified as the distinctive characteristic of judicial institutions, and used to justify a theory of complete functional specialization of institutions. Since the method itself defines and forbids "usurpation," it can be argued that oppressive political control of the courts is superfluous as well as undesirable. Since usurpation is defined in explicitly institutional terms, the judge is obliged to pay attention to the conflicting claims of political organs which the analytical jurist had been able to at least ostensibly ignore. In short, we have a justification for judicial independence and a defense against its abuse.

The success or failure of this elaborate attempt to refurbish the ideal of the rule of law rests, in its own terms, on the usefulness of the New Method of reasoned elaboration. As we have seen, the method is open to criticism in terms both of logical consistency and of determinacy. What is important for present purposes, however, is that the new system represents a structural transformation of the nineteenth century

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solution, preserving the most important distinguishing characteristics of utopian rationalist thought (see Figure l, next page). These are:

(a) The development through Reason and factual analysis of a method of analysis of social life which will
    (i) generate a complete body of substantive rules of law for private orderers and officials, and
    (ii) control the judge in his law-making function (thus justifying his independence) so that
(b) conflict and change are controlled through coercion, and
(c) a (stable or dynamic) equilibrium is created in which free (arbitrary) private action maximizes "progress."

Within this framework, there are striking parallels between successive utopian rationalist "solutions," both in their treatment of the problem of substantive law and in their approach to controlling the judiciary. These are suggestive when extended into a discussion of the present state of American law-making.

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Figure 1

The Rationalist Tradition in American Legal Thought

Common premises: (1) Law = coercion and is the opposite of freedom (arbitrariness). (2) Law's function is to control change and contain conflict in order to maximize progress. (3) This means leaving the greatest possible freedom to private orderers and depriving officials of all freedom (arbitrariness).

	Formalism	Hart/Sacks	Realism
The Rule of Law			
There is a True Method	Yes	Yes	No
So the Judge is not free	Yes	Yes	No
And should be independent	Yes	Yes	No
And play an important role	Yes	Yes	No
Inferences from Rule of Law			
Judge does not make law	Yes	No	No
Operates in a closed logical system (no "social policy")	Yes	No	No
Classical liberalism	Yes	No	No
Passive legislature	Yes	No	No
Organization of Legal Process			
Specialized functions—no "usurpation"	Yes	Yes	Yes
Judge's function	Discover & apply	Elaborate & apply	Apply
Sources of law	Juristic Science	Shared Values	Democratic Politics
Judicial Review	Yes	Limited	No

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C.

If utopian rationalism in general can be equated with the ideology of the Planner, the particular version of Hart & Sacks represents the ideology of the Liberal Planner in a Mixed Economy. For the nineteenth century rationalist, the role of the judge was to make limited adjustments to the simple ground rules of a market economy and a market society. This system came under intolerable tension when it became clear that under those ground rules "progress" could not be distinguished from social injustice. In the system of Hart & Sacks, the judge has the more complex but analogous function of making marginal adjustments in the far more elaborate ground rules of a mixed economy based on restructured but still private markets. The new system as much as the old identifies the function of law with the maintenance of a rationally worked out structure for free action. Since it is the structure which guarantees equilibrated progress, the new system is as hostile as the old to direct intervention to achieve social objectives. This basic similarity helps to explain one of the oddest but most significant passages in the Legal Process materials:

> The question of equality of general legal capacity needs to be distinguished clearly from questions of equality of economic opportunity and other kinds of de facto equality and inequality.
>
> A slave may be better off in fact than many free men and the acquisition of the status of a free man will be no assurance of itself that he will find himself on a parity with his former master. Some married women had successful business careers in the nineteenth century, while many a married woman fails to make a career for herself in the mid-twentieth. But experience seems to show that equality in general legal capacity, even if it is no guarantee of equality of opportunity in other respects, is at least in the generality of cases a prerequisite to it.
>
> Moreover, many kinds of de facto equality are beyond the capacity of any legal system to secure, and may even be undesirable to try to secure. But every legal system is capable of arriving at the simple ethical, or religious, judgement that the moral worth of one normal human is the same as that of any other. And every system is capable of supporting this judgement by the recognition of formal equality before the law….

This passage was probably intended as a defense of Brown v. Board of Education and the civil rights movement as it existed in the late 1950's. What is significant about it is that, as Professor Deutsch has neatly shown, it was precisely a refusal to accept the "clear distinction" between formal legal equality and more substantive kinds of equality which apparently inspired the Warren Court in the years immediately following 1957. When the distinction began to break down, activism and passivism, which in the Legal Process materials are alternatives not seen as in fundamental conflict, became hostile ideological positions

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impossible to hold simultaneously. If it was felt that the ground rules themselves had become an obstacle to progress, then the method became close to useless, and the activist was left without a plausible defense of judicial independence, let alone judicial review. If it was felt that the integrity of the method, the bulwark of independence and review, was all-important, then it became impossible to support cases like Reynolds v. Sims and Green v. County School Bd.

The parallel with the fate of analytical jurisprudence, with its classical liberal premises and its formal definition of freedom in an age of labor unions and minimum wage legislation, should be obvious--it is implicit in the very structure of utopian rationalist thought. A system of law which is designed to lay out ground rules within which the free play of conflicting interests will automatically generate welfare and progress must have a formal element. If the judge is allowed to decide the particular case with a view to assuring the substantive achievement of all the values which the system is designed to maximize, then we no longer have a market system based on conflicting interests, but a system in which the judge-planner himself directly determines all aspects of the destiny of the individual. The degree of formalism may vary. For the analytical jurists, the proper functioning of the system seemed to require that before the law the laborer was equally free to contract or not to contract with his employer. That facts compelled him to contract was irrelevant. In the Hart & Sacks system, this is nonsense; they can justify the minimum wage, the NLRA and even the closed shop. But their system is still a system of ground rules, and there must therefore be limits to direct intervention or it is meaningless. Once the relations of employer and employee have been restructured to take into account their substantive freedom and unfreedom, it is illegitimate for the judge to intervene to rectify unfair settlements of claims between unions and management.

The formalism inherent in the structure of utopian rationalism has lent a reassuring stability to the form and tone of legal argument in our society. This explains the echoes evoked by Justice Harlan's eloquent language in dissent in Douglas v. California:

> The Equal Protection Clause does not impose on the State "an affirmative duty to lift the handicaps flowing from differences in economic circumstances." To so construe it would read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. The state may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.

If we turn from the utopian rationalist's preoccupation with the maximization of values to his concern to justify judicial independence, there are further parallels between Hart & Sacks and their predecessors. I have argued above that the Hart & Sacks system represents a transformation of analytical jurisprudence necessitated by the successful Realist attack on both the substantive content and the institutional theory of formalism. In the area of substantive law, classical liberalism gives way to New Deal liberalism. In that of institutions, the formalist "discover/make" duality is abandoned and we get a new duality based on the notion that both courts and legislatures "make:" "elaborate/adapt." But what was the origin of the distinction made by the analytical jurists?

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Blackstone was of the opinion that judges differed from legislators in that the former were "oracles of the law," while the latter simply imposed their will on society. Heavily influenced by Natural Law philosophy, he set about to show that the body of substantive law produced by the Oracles could be conceived as the working out of a transcendent Reason; indeed that the Common Law was synonymous with Reason. The idea that the existing substantive law of the early nineteenth century embodied Reason speaking through the mouths of Oracles was systematically and brilliantly debunked by Jeremy Bentham, who managed in the process to instill in Anglo-Saxon legal thinkers an enduring contempt for the whole notion of Natural Law. Bentham insisted that judges not directly controlled by statutes were free (arbitrary) and that under the Common Law system their decisions were acts of will imposed by force indistinguishable from those of legislatures. He also argued that the substantive law made by the judges using their free (arbitrary) power amounted to congealed injustice, utterly failing to serve the needs of a nascent commercial/industrial society devoted to maximizing social progress through free market mechanisms. As a consequence, he favored the complete codification of the Common Law by a legislature which would retain the closest possible control over its content. His proposed Civil Code began with the following provision:

> The judges have no share in the legislative power. Appointed for the express purpose of enforcing obedience to the laws, their duty is to be foremost in obedience. Any attempt on the part of a judge to frustrate or unnecessarily retard the efficacy of what he understands to have been the decided meaning of the legislature shall be punished with forfeiture of his office.

The parallel between the position of the Blackstonians confronted with a Benthamite assault and the position of the analytical jurists assaulted by the Realists could be multiplied. Bentham favored the election of the judiciary. His proposed reforms of substantive law abolished all the privileges of the upper classes and placed them on the same footing as the commercial middle class. The important point, however, is that against this background the analytical jurists can be conceived as attempting to do for their time exactly what Hart & Sacks attempted for theirs: they agreed with the attackers that the substantive law must be brought into harmony with emerging social conditions and contemporary consciousness; they disagreed that in the process it was desirable to eliminate the independence and power of the judiciary by subjecting it to the legislature. In effect, they adopted Bentham's program of laissez-faire, free contract and property rights, but managed to salvage the institutional status quo.

As with Hart & Sacks, the trick turned on the New Method. Where Blackstone had made the judge an Oracle "declaring" the law which pre-existed his intervention, the nineteenth century formulation was that he "discovered" it. In effect, it was conceded that the judge was as much as the legislator a promulgator and imposer of law which had not previously been enforced, but this function was then subdivided. As a discoverer, the judge was arguably no more "free" (arbitrary) than had been the Blackstonian Oracle. He was controlled by his universal premises and his logico-deductive method where the Oracle was presumably controlled by the Spirit whose intermediary he was.

If the above description is accurate, then Blackstone, the analytical jurists, and Hart & Sacks can be conceived as a series of three transformations within a single system of utopian rationalist thought.

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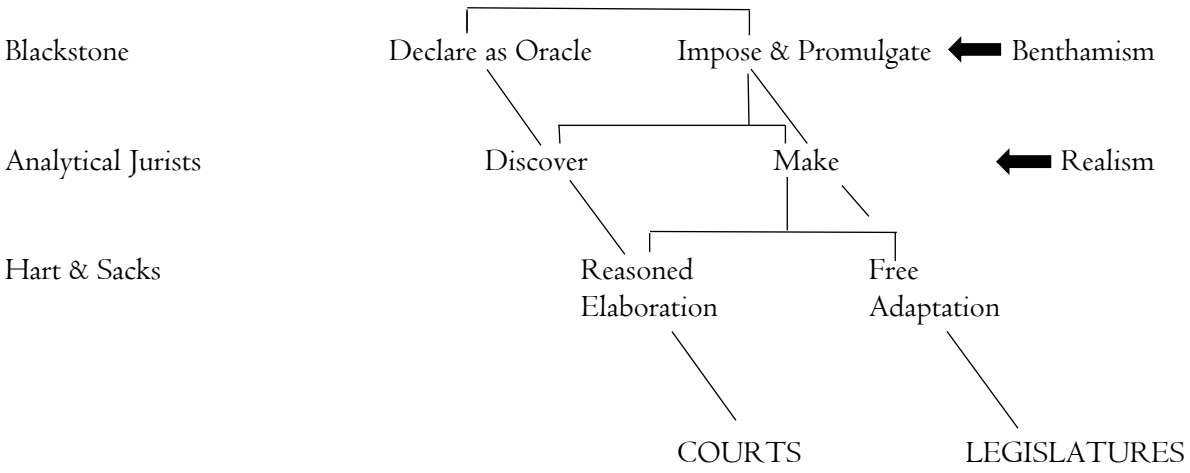
Figure 2

Transformation of Utopian Rationalist Thought



The rightward drift of Figure 2 represents a consistent response of "confession and avoidance" by utopian rationalists when their systems come under attack. In effect, the creator of a new system goes beyond the abandonment of a superannuated body of substantive law; he also freely admits that the old distinction between courts and legislatures did not hold water, and that courts are closer to legislatures than had previously been thought. Yet in each case a new distinction is made to spring from the ashes of the old, and judicial independence is re-justified. The reasons for the direction of change are not too hard to identify. There is the long term trend toward the conception of law as a flexible instrument of human will, the process of secularization. There is the fact that in order to install a new body of substantive law, old law must be changed—even if this means only the repeal of a host of "restrictive" statutes. The process of change draws attention to the judge's freedom. Perhaps more important, there is the growth of a totally secular, relativistic attitude toward human action. The Oracle is altogether passive; the Discoverer is an actor, but acts in relation to an object altogether external to him; the product of the Elaborator is clearly his and his alone, although the elements of his creation are given him.

Given such a series of transformations, the question inevitably arises whether we should expect, or hope for, yet another utopian rationalist "solution" to save the ideal of the rule of law from drowning in polemics. The disintegration of the New Deal system of restructured and regulated markets is obvious all around us—from the staggering increase in urban welfare rolls, to the uproar over ecological suicide, to the invention of para-political forms of dissent. The judicial method of reasoned elaboration, consisting of the perfecting and rationalizing of the old ground rules, has proved ineffective even in the hands of judges not interested in active intervention to achieve social justice. Henry Hart's article, The Time Chart of the Justices, was a dirge for its passing. As for the activists, in the absence of a new invention they have turned to an eclecticism in which even the pure formalist rhetoric of the l930's has its place:

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> Mr. Justice ROBERTS: 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.
>
> Chief Justice WARREN: We have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment.

It may be true that the question "What is the function of law?" is "tearing at the vitals of the law faculties and the bar associations of America," to borrow Professor Jaffe' s Vivid Phrase. But if the analysis thus far is correct, the time for a rebirth of utopian rationalism is not yet. To begin with, utopian rationalism flowers between crises, not within them. Its apostles emerge at times when, as in the 1950's, 1870's and 1760's, it is possible for very intelligent men to believe that all the big problems of social organization have been settled, and that no one cares desperately about the smaller problems they set out to solve. Perhaps for this reason they should be called panglossian rather than utopian. In any case, even after the thunderstorm has passed it takes time for them to push up their roots. Blackstone wrote 80 years after the Glorious Revolution; the analytical jurist bloomed forty years after the Repeal of the Corn Laws; Hart & Sacks put together the Legal Process materials twenty years after the last great battle of the New Deal. We are nowhere near that point today.

There is another problem. Today's activists have been in power to one extent or another for fifteen years, hurtling ipse dixits from their thunder cloud at will. When they began, they had little to work with, either in the way of a sustained critique of American substantive law as it had emerged from the New Deal nor in the way of arguments to use against the then ultra-respectable rhetorical techniques of Justice Frankfurter. By contrast, when Cardozo wrote Stewart Machine Co. v. Davis, inaugurating the era of the Roosevelt Court, he had available the fruits of twenty or thirty years of unsuccessful Brandeis briefs and volumes of mockery of formalist jurisprudence. For this reason, the demise of the Warren Court may be a blessing for the nascent utopian rationalists, however much a disaster for the country. They will have some time to work out a better answer to Professor Jaffe's question about the function of courts than: "The protection of minority groups."

Whatever that answer may be, it seems overwhelmingly likely that it will be only partial: it will explain more or less convincingly how the judge should behave until the next crisis, but will leave him to choose an unsatisfactory activism or an unsatisfactory passivism when it arrives. This puts the point weakly. Crises do not just "arrive;" in our legal system they tend to occur only after a gradual building up of the feeling that "legality" is in fundamental conflict with "equity." Of course such a conflict is inherent to some degree in any system we would care to call legal, as a consequence of the requirement that laws be to some extent "general" as to their addressees. (If all law-making were by bill of attainder, we would have abandoned law.) Montaigne takes from Plutarch and applies to his own time the notion that "il est force de faire tort en detail qui veut faire droiet en gros, et injustice en petites choses qui veut venir a chef de faire justice es grandes." (II Essais 523, Garnier ed.) Utopian rationalist systems based on maximization through free (arbitrary)

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private action must have to a particularly striking degree what I have been calling a formal element, and the tension between legality and equity is correspondingly pronounced.

If, in spite of this tension, Anglo-Saxon utopian rationalists had been able to fully impose their systems on the substantive and institutional law in force in their times; we could say that they fail only to account for the crises which overwhelm their systems--and that we might forgive them. But the fact is that the tension affects the law in force even when the systems appear triumphant. This is expressed in the conflicting ideologies which coexist in case law at any given moment of time. This subject was discussed at some length in Part I above. Since the examples given there were old ones, I will add some contemporary ones. In the Henningsen case, the court seems to embed in the law of New Jersey the notion that the fairness of a bargain may be evaluated by a court by reference to the relative bargaining power of the parties. Given that no rules, in the strong sense, are available for measuring bargaining power, no new body of substantive law was created. Rather, an inchoacy came into existence, representing not a marginal increase in the inconsistency or rationality of the existing body of law, but the potential overthrow of that system. To be sure, the new system may be based on freedom of contract, but if so it will be freedom of contract within a new set of ground rules. The Supreme Court recently held that pre-strike labor injunctions are permissible under the NLRA. Yet the whole purpose of the NLRA was to restructure the law governing the industrial bargaining situation so as to eliminate forever the use of the labor injunction. Griffin v. Illinois is a classic example in the constitutional field: the refusal to accept the "clear distinction" between formal legal and substantive equality can be rationalized only in terms of the new system for the administration of the criminal law which the Court has since created.

Cases like these exist in every period. The utopian rationalists of their time disapprove them. The utopian rationalists of the immediately succeeding era approve them, but argue that all future cases will be consistent with them. They in turn are confronted with new cases inconsistent with their system, and disapprove them, thus opening the way for their successors. The conclusion seems inescapable that if the utopian rationalist is successful, even for his own moment in history, in justifying the independence and power of the judiciary, it is the independence of a judiciary which we have never known, are unlikely ever to know, and do not want to know.

Parts V and VI of this paper (*never written*) explore the implications of this conclusion, but do so on the basis of an assumption: I will take it for granted that the perennial alternative to utopianism within the rationalist tradition can be ignored. This alternative may be called Benthamism, or extreme positivism or Realism. Its perennial nature is illustrated by the fact that Thurman Arnold turned it with equally devastating effect first on the formalism of the analytical jurists and then on Hart & Sacks. Hart's statement of his position (in his article The Time Chart of the Justices) and Arnold's answer sum up the dilemma of rationalism so beautifully that I will close this section by quoting them at length.

Hart:

> Only opinions which are grounded in reason and not mere fiat or precedent can do the job which the Supreme Court of the United States has to do. Only opinions of this kind can be worked with by other men who have to take a judgement rendered on one set of facts and decide how it should be applied to a cognate but still different set of facts. Only opinions of this

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> kind can carry the weight which has to be carried by the opinions of a tribunal which, after all, does not in the end have the power either in theory or practice to ram its personal preferences down other people's throats. Thus the Court is predestined in the long run not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law and impersonal and durable principles for the interpretation of statutes and the resolution of difficult issues of decisional law.

Judge Arnold:

> Certainly /Professor Hart/ is a first rate lawyer and a great teacher of legal dialectic.... Legal theorists like Professor Hart design the clothes which conceal the person of the king and which give him his authority and public acceptance. It is inevitable in the development of any growing system that there comes a time when the clothes do not fit. It is equally inevitable that technical theory stands at such times in the way of progress. The growth of the law is a painful process….
>
> These are the clothes which the Court must wear in order to retain its authority and public appearance. I do not question the tremendous importance of this ideal of which the Supreme Court is our greatest symbol. Without a constant and sincere pursuit of the shining but never completely attainable ideal of the rule of law above men, of "reason" above "personal preference," we would not have a civilized government. If that ideal be an illusion, to dispel it would cause men to lose themselves in an even greater illusion, the illusion that personal power can be benevolently exercised. Unattainable ideals have far more influence in molding human institutions toward what we want them to be than any practical plan for the distribution of goods and services by executive fiat.

Do the dualities

Reason----------Personal Preference
Reality----------Unattainable Ideal
Law-------------Fiat

really exhaust the possibilities in discussion of the judicial process?

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