

HERBERT, HERCULES AND THE PLURAL SOCIETY: A "KNOT" IN THE SOCIAL BOND

*"They are playing a game. They are playing at not playing a game. If I show them I see they are, I shall break the rules and they will punish me. I must play their game, of not seeing I see the game."*¹

THE writing, and reading, of yet another article on the judicial process surely requires justification. After all, law is not merely a courtroom phenomenon. Have we not for too long ignored or trivialised the problems of "impact," "access," "enforcement" and "response"? These are indeed priorities but it may yet be worthwhile to attempt to place the judicial process in a wider perspective, one which includes more than court-room, chambers, solicitor's office or even neighbourhood law centre.

Of course the twin paradoxes—of certainty and change and of rules and people—have their own intellectual fascination and Professor Ronald Dworkin's recent contributions to the debate have raised old questions in interestingly novel ways.² Notably he is unwilling to accept simple "either/or" distinctions and he has given new prominence to the problem of controversy. Nevertheless this article argues that controversy has not yet been sufficiently emphasised in explanations of the judicial process. The image of law as an autonomous system ("caused by" or "reflecting" social conditions in the more trendy accounts) has been too powerfully attractive. It suggests a simple dichotomy: on the one hand society, its conditions and demands; on the other, the law.³ Further, the problem for the judge is reduced to either "which horse do I ride?" or "how can I ride both at once?" In either case there are two, and only two, *separate* horses.

By contrast, "society" may be viewed, not as a coherent unity, but as fragmented and deeply divided. On this view the *appearance* of the law as relatively coherent, its ostensible consistency, is problematic, and no less so than the inconsistencies that are the lawyer's more usual concern. To the extent that the law is a product of, and largely reproductive of, a particular social ordering, its autonomy is less absolute than is often thought. Should not the simple dichotomy be rejected as a seriously misleading description which is

¹ R. D. Laing, *Knots* (1971), p. 1.

² They are now collected in Dworkin, *Taking Rights Seriously* (1977) (hereafter "TRS"); see also Dworkin, "No Right Answer?" in Hacker and Raz (eds.), *Law, Morality and Society* (1977), p. 58.

³ Raymond Williams, *Marxism and Literature* (1977) argues that many materialist and idealist accounts share this tendency to naïve dualism (see p. 59). See also Campbell, "Legal Thought and Juristic Values" (1974) 1 *British Journal of Law and Society* 13 and Aubert, "Competition and Dissensus: Two Types of Conflict and of Conflict Resolution" (1963) VII *Journal of Conflict Resolution* 26 at p. 33 *et seq.*

consequently unlikely to produce any worthwhile prescription for contemporary adjudicators? Regrettably the more complex the process the more difficult it is to understand and describe; nevertheless an explanation's mere simplicity is insufficient reason for postponing inquiry. The broad strategy here adopted is first to look at some aspects of social controversy and conflict, then to look at their implications for the fundamental notion of legitimacy and finally to focus on the role of the individual judge in the "hard case," the kind of case which overtly challenges the ostensible consistency and autonomy of the law.

I. A SENSE OF CRISIS

In the first of his 1978 Reith Lectures, Professor A. H. Halsey referred to "the comprehensive proposition that British society faces imminent disaster."⁴ A multitude of less comprehensive perceptions contribute. Entry into the European Economic Communities, the devolution debate and the Labour Government's accommodation with organised labour seem to threaten Parliamentary sovereignty, a once inviolable symbol of the liberal ideal. Party politics are seen to be unrepresentative and bankrupt, bureaucracy to be vast, inefficient, sometimes oppressive, sometimes corrupt. Scientific and technological developments seem to generate new problems as quickly as they solve old ones. The economy cycles ever downwards. In frustration the politics of pressure groups and protest have grown rapidly and now involve the respectable, articulate and influential as well as the underprivileged.⁵ In these politics obedience to the law is no longer axiomatic⁶ and violent confrontations are not infrequent. Racial and religious differences are significantly evident where tensions are greatest. British society is not unique in this respect; in one way or another a sense of crisis pervades the western world.

Our concern here is not with the accuracy of such perceptions. For our purposes it matters only that they exist and are widely felt. In sum they amount to anxiety that the social bond is badly frayed, that the foundations have cracked, that the whole house of cards may soon collapse.

⁴ *The Listener*, January 12, 1978, p. 37.

⁵ See Halsey, "The Rise of Party," *The Listener*, February 2, 1978, p. 144. At the Winchester M.3 public inquiry, Mr. John Thorn, the headmaster of Winchester College, was ejected for disorderly conduct; see *The Times*, July 14, 1976. In a letter to that paper the previous day, he had said, "It is the belief that all this is *not* democracy, is *not* justice, is *not* free speech that has prompted the respectable citizens of Winchester to behave with such uncharacteristic clamour. It is a dangerous weapon they use and they know it." Mr. C. D. Ellis, an old Wykehamist, replied on July 16, 1976, "The tradition of dignified restraint and civilised rationality is one which we must look increasingly to our educational institutions to preserve; if they cannot, who will?"

⁶ See Forer, *The Death of the Law* (1975), Smith, "Is there a Prima Facie Obligation to Obey the Law?" (1973) 82 *Yale L. J.* 950, Kadish and Kadish, *Discretion to Disobey* (1973), Rawls, *A Theory of Justice* (1972), pp. 363-391, Dworkin, *TRS*, pp. 206-222.

In this context "expressive" movements like "modern psychedelic romanticism" are of particular interest.⁷ Not only does the notion that each must "do his own thing," that each is free to "split," appear to be a fundamental threat, but the emergence of such movements also illustrates the difficulty of simple economic explanations for the sense of crisis. It could be argued that such deep tensions were absent in 1959 when we could be convinced that we had "never had it so good." Nevertheless the expressive movements emerged *before* the current economic crisis was widely appreciated. Gouldner argues that they represent not a protest at the failure of a system but the "rejection of success." He comments, "If a system cannot hold loyalties even when it has accomplished what it set out to do, it would seem that it has arrived at a deep level of crisis."⁸

We had the promised land in sight and yet were disappointed. Material plenty and personal desolation seem to go hand in hand. The Marcusean proposition that established society buys its own success by "'delivering the goods' on an increasingly large scale"⁹ cannot explain this. Economic deterioration has probably precipitated the sense of crisis but it is likely that the tensions we now see so clearly were present in some latent form in the halcyon days of Supermac. Nevertheless it is probably no coincidence that the years in which the sense of crisis has grown have also seen a huge increase in interest in the ideas of Karl Marx. Some now search for "radical" solutions, others are deterred by scepticism of the achievements of "socialist States" in increasing personal freedom and by the suspicion that socialism may simply be "the re-institution of the 'company town' on the level of the nation State."¹⁰

II. THE RAW NERVE

For each individual, in any form of society, there is a tension between his need to establish or preserve his own identity and self-respect and the requirement that he yield personal freedom in order to remain a member of the society. Different forms of society may give greater weight to one or other aspect; for some individuals the balance struck may seem ideal, for others it may seem oppressive, but the tension is unavoidable.¹¹ The sense of crisis could thus be restated as reluctance on the part of substantial sections of the community to accept the balance formerly struck and which social convention seems to demand of them, coupled with a fear, mainly

⁷ See Gouldner, *The Coming Crisis of Western Sociology* (1971), pp. 78-80 and Kamenka and Tay, "Beyond Bourgeois Individualism: The Contemporary Crisis in Law and Legal Ideology" in Kamenka and Neale (eds.), *Feudalism, Capitalism and Beyond* (1975), p. 127, at p. 132.

⁸ Gouldner, *op cit.* p. 80.

⁹ Marcuse, *One-Dimensional Man* (1972), p. 12.

¹⁰ Gouldner, *The Dialectic of Ideology and Technology* (1976), p. 165.

¹¹ See generally Unger, *Law in Modern Society* (1976).

amongst other sections of the community, that no new equilibrium will be found.¹²

The paradox of social order can be more easily stated in poetic terms, for poetry has a transcendental quality. Thus in T. S. Eliot's play about political power, *Murder in the Cathedral*, Thomas says of the fearful chatter of the chorus,

"They speak better than they know, and beyond your understanding.

They know and do not know, what it is to act or suffer.

They know and do not know, that action is suffering

And suffering is action. Neither does the agent suffer

Nor the patient act. But both are fixed

In an eternal action, an eternal patience

To which all must consent that it may be willed

And which all must suffer that they may will it,

That the pattern may subsist, for the pattern is the action

And the suffering, that the wheel may turn and still

Be forever still."¹³

Discussion of the poetic, the transcendental, the metaphysical may appear unscientific. Nevertheless it is apposite for several reasons.

First, to seek transcendental experiences has been a not uncommon reaction to the sense of crisis. The Psychedelic Culture has sought refuge or release in oriental mysticism, drugs and, occasionally, mass hysteria. Christianity, which has always stated a parallel paradox in the doctrine of the simultaneous divine and human status of Christ and in the notion that, through a life of selflessness, the individual may gain for himself eternal happiness, has recently witnessed a wave of so-called "charismatic" activity, which, in its wilder forms, has involved a resurgence of "speaking in tongues" and the like.¹⁴

Secondly, there is good reason to doubt the self-sufficiency of empiricist theory and the proposition that knowledge depends on experience alone. For example, Chomsky's scientific work in the field of linguistics leads him to cite approvingly Peirce's dictum that "man's mind has a natural adaptation to imagining correct theories of some kinds."¹⁵ Modern philosophy, although seemingly preoccupied with the analysis of language, gives important places to imagination and intuition.¹⁶ Roberto Unger has recently argued that

"much of social science has been built as a citadel against metaphysics and politics. . . . But now . . . to resolve its own

¹² Halsey, in "The Reconstitution of Status," *The Listener*, January 26, 1978, at p. 105 says that "we all have the sense that the social contract is being renegotiated."

¹³ (1938), p. 21. See also R. D. Laing, *op. cit.*, p. 82.

¹⁴ See Philipians, II, 5-8, and Romans, II, 7. Wimberley *et al.*, "Conversion in a Billy Graham Crusade: Spontaneous Event or Ritual Performance?" (1975) 16 *Sociological Quarterly* 162, found evidence that revival conversions are ritualistic, integrative events.

¹⁵ Chomsky, *Problems of Knowledge and Freedom* (1972), p. 45.

¹⁶ See R. M. Hare, *Freedom and Reason* (1963), pp. 219-222 and Rawls, *op. cit.* pp. 34-45.

dilemmas, social theory must once again become, in a sense, both metaphysical and political. It must take a stand on issues of human nature for which no 'scientific' elucidation is, or may ever be, available."¹⁷

Thirdly, notions of this "unscientific" character are vital to the understanding of one aspect of the problem of order. The particular (often unequal) sacrifices of personal freedom demanded of individuals by their membership of a society are rendered more or less acceptable, not merely by the perceived (unequal) benefits of community membership, but also by processes of ideological explanation and mystification from which ideas about the legal system cannot be separated. We may desire a "pure science" of law, but we are bound therein to be frustrated.¹⁸

III. THE LIBERAL IDEAL

Societies of all the major types¹⁹ must cope with some degree of consciousness of the tensions between individual and community interests. Such tensions are least problematic in "tribal" society where human experience lacks the variety necessary fully to alert the critical faculty.²⁰ Nevertheless, in all societies, to the extent that the tension is perceived, so ideology must purport to explain or serve to distract.²¹ The identification by dominant groups of self-interest with the social and political status quo lightens ideology's burden considerably; the most articulate and influential groups have little desire for change. However, a "liberal" society is characterised by competition for dominance amongst two or more groups, by "group pluralism." Historically this state of affairs is usually the result of the self-assertion of a substantial and articulate middle

¹⁷ *Op. cit.*, p. 266.

¹⁸ Berman, "The Origins of Western Legal Science" (1977) 90 *Harv. L. Rev.* 894, concludes, at p. 942, that "the new Western legal science was much more than an intellectual achievement. . . . Its criteria were moral as well as intellectual. The 'form' expressed 'substantive' values and policies." See also Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 *Harv. L. Rev.* 1685.

¹⁹ Unger identifies "tribal," "aristocratic," "traditionalistic" and "revolutionary socialist" societies as well as "liberal" societies; *op. cit.* pp. 137-153 and 223-234. Clearly different groupings may be equally valid; see e.g. Miller, *Social Justice* (1976), pp. 253-257. Goody has noted the dichotomous tendency of these taxonomies. He emphasises the significance of the development of literacy; see *The Domestication of the Savage Mind* (1977).

²⁰ Unger *op. cit.* p. 153, argues that it is never entirely absent; cf. Goody, *op. cit.* pp. 41-51. See also Llewellyn, "Legal Tradition and Social Science Method," in *Jurisprudence* (1962), p. 77, at p. 96, "Concepts do not wholly condition observation—else we could never add to what we know."

²¹ Any explanation of power must, to be accepted, fit the facts to some extent. Williams, *op. cit.* p. 55, distinguishes three senses of the term "ideology." "(1) A system of beliefs characteristic of a particular class or group; (2) a system of illusory beliefs—false ideas or false consciousness—which can be contrasted with true or scientific knowledge; (3) the general process of the production of meanings and ideas." It is perhaps unwise to think of these as entirely separable. Similarly Gouldner argues that "Our own private interests . . . cannot be pursued successfully as *our* interests, but must be redefined as impersonal interests of general concern." *op. cit.* (1976), p. 219. Cf. Minogue, "Natural Rights, Ideology and the Game of Life," in Kamenka and Tay (eds.), *Human Rights* (1978), pp. 13-35.

class. Neither an emerging middle class, nor the traditional ruling class which it challenges, is prepared to concede the other's domination. Thus the achievement of equilibrium demands the generation of the most sophisticated ideologies.

The very identification of pluralism might seem strongly catalytic or demystifying when contrasted with older "organic" views. Not so; in fact pluralists also perceive society in basic equilibrium, not an organic unity, but a nonetheless stable balance between groups actively competing for power. Pluralism thus obscures the way in which these groups taken together form a larger grouping which dominates the less articulate, and usually poorer, groups. This hegemony shapes and limits people's views of themselves and their world. It is an active process, a to and fro between dominant and subordinate, in which the dominant culture produces and limits the forms of counter culture. The exchange of ideas about law is one of the contexts in which this process takes place, but the process saturates the whole process of living "to such a depth that the pressures and limits of what can ultimately be seen as a specific economic, political and cultural system seem to most of us the pressures and limits of simple experience and common sense."²² As hegemonic domination is discovered where previously it had passed unremarked, so the taken-for-granted is transformed into ideological mystification.

In the re-examination of ideas about social science, objectivity and impartiality have been unmasked, sometimes in a way that lends support to "manipulative" or "conspiracy" theories of class domination. Thus opposition to the Vietnam war led to the discovery of patently "political" considerations determining research appointments and the allocation of research funds.²³ However we should not fail to notice that social science claims a scientific legitimacy that can mislead in subtler ways. As a science it is concerned with "facts" and "facts" have to be measurable. The "hard" data thus tend to obscure the "soft" data.²⁴ Gouldner goes further in discussing the ostensibly "technical" concerns of "methodology." He asserts that "it is commonly infused with ideologically resonant assumptions about what the social world is, who the sociologist is, and what the nature of the relation between them is."²⁵

²² Williams, *op. cit.* p. 110 and see pp. 108-114. Milton Friedman, in *Capitalism and Freedom* (1971), p. 26, makes the same point with specific reference to the notion of property, which "has become so much a part of us that we take it for granted, and fail to recognise the extent to which just what constitutes property and what rights the ownership of property confers are complex social creations rather than self-evident propositions."

²³ See Chomsky, *op. cit.* pp. 53 and 57-60 and *American Power and the New Mandarins* (1969).

²⁴ See Tribe, "Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality" (1973) 46 S.Cal.L.Rev. 617, "Trial by Mathematics: Precision and Ritual in the Legal Process" (1971) 84 Harv.L.Rev. 1329, 1361-1365 and 1389-1390 and Boyer, "Alternatives to Administrative Trial-type Hearings for Resolving Complex Scientific, Economic and Social Issues" (1972) 71 Mich.L.Rev. 111, 150-164.

²⁵ *Op. cit.* (1971), pp. 50-51, and, more generally, pp. 27-60.

Science has provided the model for some political theories. It has lent them legitimacy but has not ensured impartiality. Thus evolutionary natural science aided evolutionary political science, social Darwinism. Its individualistic tendencies are clearly illustrated in the popularised philosophy of Samuel Smiles. "What some men are, all without difficulty might be. Employ the same means and the same results will follow."²⁶

Equality of opportunity is a convenient tool in the explanation of material inequality. The democratic ideal employs it in an especially significant way, and has become a cherished device for the resolution of the conflict between individual and community interests. By this means the individual may be supposed to be satisfied, even when his immediate interests have suffered, simply because he has had the chance to participate, usually very indirectly, in the decision making process. In combination with evolutionary gradualism the effect is powerfully homeostatic.

The democratic ideal is probably essential to the maintenance of a liberal society, but it was not essential to its genesis. Of greater significance, because it is historically exclusive to liberal societies, is the notion of an autonomous, general, public and positive legal order, the ideal of the "rule of law."²⁷ Here too the tension between "process" and "outcome," between formal and substantive justice, is of fundamental importance.²⁸ The essentially formal thrust of the Western ideal is well illustrated by the pledge taken by the graduate of the University of Chicago Law School by which he undertakes

"to weigh [his] conflicting loyalties and guide [his] work with an eye to the good less of [himself] than of justice and of the people; and to be at all times, even at personal sacrifice, a champion of fairness and due process, in court or out, and for all, whether the powerful or envied or [his] neighbours or the helpless or the hated or the oppressed."²⁹

Its tendency to obscure substantive inequality is apparent when it is contrasted with this statement from the third world.

"The rule of law is a dynamic concept . . . which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions

²⁶ Quoted in Miller, *op. cit.* at p. 291. Miller discusses the philosophy of Herbert Spencer at pp. 180-208.

²⁷ See Unger, *op. cit.* pp. 66-86. Nevertheless most influential movements were democratic in the sense of being "against governments and social orders whose aim is to prolong gross forms of inequality"; Gallie, "Essentially Contested Concepts" (1955-56) 56 *Proceedings of Aristotelian Society* 167, 184.

²⁸ See Summers, "Evaluating and Improving Legal Processes—A Plea for Process Values" (1974) 60 *Cornell L. Rev.* 1, Trubeck, "Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought about Law" (1977) 11 *Law and Society Review* 529 and Lawrence Friedman, "On Legalistic Reasoning—A Footnote to Weber" [1966] *Wis.L.Rev.* 148.

²⁹ The full text is re-printed in Llewellyn, *op. cit.*, note 20 *supra*, at p. 395.

under which his legitimate aspirations and dignity may be realised."³⁰

Formal equality before the law entails no participatory element. The subordinate need not be involved at all in the making of decisions. Their substantive claims can be completely excluded from consideration. The scope of the rule of law ideal's *impartial* operation is thus profoundly limited. It is confined to issues about which disputants do not disagree fundamentally.³¹ Scarcity may generate conflicts of interest but these are less fundamental than conflicts of values. As between disputants who share a particular ethos, the merely formal concerns of due process suffice to produce a sense of resolution and satisfaction at the outcome. In terms of fundamental values the loser does not disagree with his opponent and he does not feel aggrieved that these values have not been debated.³²

By contrast a disputant may reject the ethos of his opponent. Such conflicts (which are occurring more frequently and are thus contributing to our sense of crisis) are of values. The rule of law and *formal* impartiality are inadequate for the resolution of these conflicts. As Professor Milton Friedman has put it, "Fundamental differences in basic values . . . ultimately . . . can only be decided, though not resolved, by conflict."³³ The rule of law ideal loses its efficacy when too many demand that the rules be changed.

IV. EATING CONCEPTS IS WRONG

The "rule of law" is thus a myth³⁴ that could only flourish in the absence of challenge. Once seriously challenged it becomes the rallying call for the dominant groups. Challenge has, for a time, been deflected by the power of the myth, but western man has become results oriented and less willing to accept justifications that are directed essentially at "process" rather than "outcome." As a utilitarian he evaluates everything by its effects; as a consumer he asks "what has been produced?" (and not "how has it been pro-

³⁰ *The Rule of Law in a Free Society: A Report on the International Congress of Jurists* (International Commission of Jurists, 1960); see Marsh, "The Rule of Law as a Supra-National Concept" in Guest (ed.), *Oxford Essays in Jurisprudence* (1961), p. 223 at p. 261, note 2.

³¹ See Unger, *op. cit.*, pp. 176-181. Sarat, in "Studying American Legal Culture: An Assessment of Survey Evidence" (1977) 11 *Law and Society Review* 427, argues that equality is widely regarded as fundamental to justice and the legitimacy of the legal system, but this is a demand not to be "less equal" than others, not for the "less equal" to be equal.

³² See Aubert, *op. cit.* pp. 27-30 and Barton, "Behind the Legal Explosion" (1975) 27 *Stan.L.Rev.* 567. Barton notes, at p. 575, that formalism is one kind of response to dissensus that is tempting for the judge.

³³ Milton Friedman, *op. cit.* p. 24. Thus what appears to be "lag" from one standpoint is a threat to important values from another standpoint; see Lawrence Friedman and Ladinsky, "Social Change and the Law of Industrial Accidents" (1967) 67 *Colum.L.Rev.* 50, 72-77.

³⁴ "Myth" does not equal "lie"; see note 21 *supra* and Trubek, *op. cit.* at p. 553 and p. 557. See generally Hurst, "Problems of Legitimacy in the Contemporary Legal Order" (1971) 24 *Okla.L.Rev.* 224.

duced? "); in a world built on profit he asks "what is in it for him?" In a sense we are all Marxists now and as such we may be too apt to throw out the baby with the bathwater.³⁵

This results orientation is a threat to *any* ideology and yet the societal need for legitimate authority, and hence for *some* ideology, to harmonise where there is discord is as great as ever before. Scarcity and the division of labour will continue to produce inequality and our ideological imagination seems all too limited. Liberal society is in crisis partly because its ideology (of which the "rule of law" is a prominent part) is being exposed as ideology. The emergent middle class had demanded an ideology that would emphasise individual freedom; the rule of law ideal, the democratic ideal, the theory of individual human rights, were thus born of a spirit of criticism and a desire for change. Now these ideologies have turned both parricidal and cannibal; the principles that exposed the self-interest of the aristocrat have exposed the self-interest of the merchant, the scientist, the lawyer and the intellectual and have nearly destroyed themselves in the process.

The cannibalistic tendency is inherent but not altogether spontaneous. It is in part the inevitable result of a wider propagation of liberal values through educational systems, but with a more imaginative view of their self-interest by the now dominant groups the process might at least have been slower.³⁶ Racial inequality, the conflicts in Ireland and Vietnam, the Watergate, Poulson and Lockheed affairs, have each provided avoidable stimulation.

How then can governments cope? Are there any ideals worth espousing or is an attempt to play off one group against another the only course? The new self-assertiveness of subordinate groups, in combination with a strong results orientation, renders the "divide and rule" tactic hazardous. Each group is a sometime loser. Hence each will have cause to expose the machiavellian character of government. Losers can be indiscriminating; they may attack both "process" and "outcome." The way forward may lie not in the invention of new ideological concepts but in the critical re-examination of existing concepts. Somewhat after the manner of the Frankfurt school, government, aided by lawyers and a host of others, might measure reality by the claims implicit in "democracy" and the "rule of law." If reality were to prove the claims false that very demonstration might provoke change. If government were to

³⁵ See Goldthorpe, Lockwood *et al.*, *The Affluent Worker Studies* (1968 and 1969) and Gouldner *op. cit.* (1976), pp. 238-249. In their attack on "liberal lawyers," Bankowski and Mungham, *Images of Law* (1976), pp. 1-6, move close to the position that something must be wrong simply because someone is suited. Chomsky's comment, *op. cit.* p. 63, is apposite; "those who oppose a programme of social action merely on the grounds that it might be 'co-opted' doom themselves to paralysis: they are opposed to everything imaginable."

³⁶ See Hare, *op. cit.* Bertrand Russell, *Sceptical Essays* (1928), pp. 52-53, defines "rationality in practice" as "the habit of remembering all our relevant desires, and not only the one which happens at the moment to be strongest."

help to initiate the critical process it could implement the changes in a manner that would enhance its own legitimacy.³⁷

What view of "democracy" might be taken by this government that has suddenly become more critical than its critics? The democratic ideal can have substantive effects. *Who* decides affects *what* is decided. However, whilst "democracy" is perhaps less bankrupt than the "rule of law," it does have a strong *majoritarian* aspect³⁸ which is not well suited to dealing with conflicts in which the protagonists include substantial, self-assertive *minorities*. It devalues democracy for these minorities to be dismissed as "undemocratic" simply because they are minorities.

Nevertheless the *participatory* aspect³⁹ of the democratic ideal could be emphasised. Governments can hardly be expected to adopt anarchist programmes, but less secretive and less manipulative government is not unimaginable.⁴⁰ Were decision makers to make clear the nature of rival claims and the difficulty or impossibility of reconciling them, there would of course still be complaints that the wrong outcome had been chosen, but losers might justifiably feel that they had been taken seriously and be consoled by the notion that we cannot all have prizes. To avoid mere mystification⁴¹ there must be more than a right to a hearing; there must be a duty to listen to and weigh *all* the substantive claims.

This amounts to a revolutionary strategy.⁴² Dominant groups may not have sacrificed much control when the links between property and franchise were severed, but the control implicit in the essentially bourgeois conceptions of "monetised" and "intellectual" property (with their close relatives, "confidentiality" and "privilege") would be directly threatened by "open" government. Tokenism is more likely than a voluntary surrender of privilege. David Trubeck sounds a warning note for government when he contends that "a State cannot maintain legitimacy for long periods of time if the reality of its behaviour is in marked contradiction with the claims it makes for legitimacy." He argues that "the need to maintain legitimacy will impel the State to make changes when the gap between ideal and reality becomes apparent."⁴³ Since gov-

³⁷ See Trubeck, *op. cit.*, p. 559 and *cf.* Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of Law" (1977) 11 *Law and Society Review* 571, 581-582 and note 9.

³⁸ Gallie, *op. cit.* pp. 184-185, lists three examples of contesting conceptions of democracy. The first two, the power of the people to remove a government and equal rights to take office, etc., are majoritarian.

³⁹ Gallie's third example, *op. cit.* p. 185, is "the continuous active participation of citizens in political life at all levels."

⁴⁰ Ronald Dworkin has argued (*New Society*, June 24, 1976, pp. 679-680) that the traditional view that assumes that Cabinet secrecy is justifiable should be rejected. "It says that confidentiality must be guaranteed so that reasons that are not justifications can be given to cabinet without fear that they will be given to the public as well. . . . Decisions become more decisive when they are taken by institutions that are more representative."

⁴¹ Or mere "co-optation"; see Chomsky, *op. cit.* p. 63.

⁴² It is not seriously advocated by the three traditional British political parties; see Halsey, *op. cit.* at note 5 *supra*.

⁴³ Trubeck, *op. cit.* p. 558.

ernments are amongst those most convinced of, and most misled by, dominant ideologies, such changes are likely to be too late and too small.

V. THE HIGH PRIESTS

If such is the gloomy outlook for government, what of the judges, the high priests of the rule of law? They seem especially vulnerable to the process of demystification and rejection. The rule of law ideal postulates "a realm somewhere within the mystical haze beyond the courts, where all our dreams of justice in an unjust world come true."⁴⁴ Since men cannot agree about justice, is it not all too easy to strip the priests of their regalia and to expose them as the agents of class dominance?

Acceptance of judicial legitimacy has not been carefully investigated in this country.⁴⁵ Some United States studies suggest that ignorance of what courts do, and of how they operate, is widespread. They also note fairly high levels of respect for courts as institutions.⁴⁶ There is little reason to imagine that the United Kingdom situation differs greatly. Most attacks on the authority of the judiciary have been directed, not at the judiciary as an institution, but at specific (usually lower ranking) judges in connection with their treatment of a specific case or issue.⁴⁷ Two questions arise. First, how has judicial legitimacy survived thus far? Secondly, what is the outlook? Is a storm about to break?

Judges are probably seen primarily as adjudicators, and as such *contrasted* with legislators. Since legislation is an obviously discretionary activity, adjudication may be generally perceived as mechanistic. There is some evidence to suggest that the rather diffuse support for the courts as institutions is linked with a widespread acceptance of the myth of mechanical jurisprudence, the rule of laws *and not men*.⁴⁸ Casey argues that this myth is so deeply embedded that it is not easily dispelled.⁴⁹ Familiarity, however, does seem to breed contempt. Direct contact with the courts seems to bring disillusion. Close contact with individual practitioners and judges challenges the mechanistic myth.⁵⁰ Far more work is needed

⁴⁴ Arnold, "Symbols of Government" in Aubert (ed.), *The Sociology of Law* (1969), p. 47. On the religious analogy, see Balbus, *op. cit.* p. 579. Cf. Jerome Frank's notion of "legal magic" in *Courts on Trial* (1949), pp. 37-79.

⁴⁵ Evidence of the extent to which it has been taken for granted; *cf.* note 21 *supra*.

⁴⁶ The evidence is reviewed by Sarat, *op. cit.* at pp. 438-441.

⁴⁷ Sentencing policy, or lack of it, is frequently a target, possibly because it raises rather obvious questions of equality; *cf.* note 31 *supra*. See also the experiences of Judge Argyle in the *Oz Trial* of 1971, of Melford Stevenson J., who took the unusual step of calling a press conference to defend himself after widely publicised criticism of some of his decisions by Lord Widgery C.J. (see *The Times*, February 21, 1976), and of Donaldson J. as judge of the ill-fated National Industrial Relations Court. Judge McKinnon Q.C., has asked to be relieved of cases raising racial issues following the outcry with which his remarks in the *Read* case were met; see *The Times*, January 7, 1978 and January 14, 1978.

⁴⁸ See Sarat *op. cit.* pp. 439-440. The studies are predominantly of the United States Supreme Court.

⁴⁹ "The Supreme Court and Myth" (1974) 8 *Law and Society Review* 385.

⁵⁰ See Sarat, *op. cit.*, p. 439; but the studies here are of inferior courts.

before these connections can be fully understood. Nevertheless we might hypothesise that, at present, judicial legitimacy is in substantial part dependent on a popular ignorance which permits the survival of a mechanistic view of the judicial process as impartial, consistent and autonomous.

Can this ideology survive an onslaught of cases brought not by members of dominant groups against members of subordinate groups, nor by members of dominant groups against their fellow members, but by the representatives of subordinate groups?⁵¹ The current paradigm of the judicial process is the adjudication of (pre-existing) rights, not a "give a little, get a little" process of mediation or conciliation. It is a "winner takes all" process. Those who were accustomed to losing (or were so sure that they would lose that a claim was not worth making) are becoming less docile. The main deterrent to litigation (*viz.* the need to avoid a zero sum game because one has to continue some co-operative relationship with one's opponent⁵²) does not affect these "loser-groups." The opponents in these cases will not share a common ethos. Their contests will be of values and not merely of interests. The judicial decision will be seen, *whoever* wins, as favouring the values of the winner. Hence judicial discretion will be more obvious and more controversial. The claim to even-handedness will be exposed as false.

Parliament can be expected to bear some part of this burden. Judges may say that Parliament made the law, or that it is for Parliament to change it, but "loser-groups" will come closer to the judicial process and have reason to look more closely at buck-passing arguments. They may regard a test-case strategy as an important step in securing rule change.⁵³ If they lose a case, that judicial decision becomes the focus for an attack on the rule. If

⁵¹ See Barton, *op. cit.* Rosenberg, in "Devising Procedures that are Civil to Promote Justice that is Civilised" (1971) 69 Mich.L.Rev 797, comments, at p. 812, "if irate losers cannot vent their disappointment in their votes for legislators they will turn upon the judges and courts whenever they get the chance . . . wrongly or rightly, the voters regard the courts with less confidence if they think that the courts are making political decisions they ought not to be making." For a review of the expansion of *locus standi* that has accompanied the United States "legal explosion," see Orren, "Standing to Sue: Interest Group Conflict in the Federal Courts" (1976) 70 Am.Pol.Sci.Rev. 723. On the question of "who, typically, sues who?" see Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law and Society Review* 95, Galanter, "Afterword: Explaining Litigation" (1975) 9 *Law and Society Review* 347, Consumer Council, *Justice Out of Reach: A Case for Small Claims Courts* (1970), Macauley, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 *American Sociological Review* 55, Macauley, "Elegant Models, Empirical Pictures and the Complexities of Contract" (1977) 11 *Law and Society Review* 507 and Beale and Dugdale, "Contracts between Businessmen: Planning and the Use of Contractual Remedies" (1975) 2 *British Journal of Law and Society* 45.

⁵² See Macauley, *op. cit.* (1977). Collective organisation can solve the problems of financing litigation and ignorance of "rights." Problems of doubt as to the rules and *locus standi* remain. See Orren, *op. cit.*, and *Gouriet v. U.P.O.W.* [1977] 3 All E.R. 70.

⁵³ See Smith, "Discretion or Legislation" (1974) 124 New L.J., 219, Partington, "Some Thoughts on 'Test-Case Strategy'" (1974) 124 New L.J. 236 and Galanter, *op. cit.* (1974) pp. 135-139.

they win, the judicial decision becomes the focus for a counter-attack by the newly displaced dominant group. In either event the judicial decision is publicly attacked because of its substantive outcome. In a world that is in conflict about substantive values, no decision can enhance judicial legitimacy by virtue of its outcome alone. Despite an almost universal results orientation, we are driven back to process.⁵⁴

To talk of "legitimacy through process" is to speculate, but the issues are nonetheless important. Barry Boyer has asked, "Is the battle atmosphere of trial proceedings truly cathartic, in the sense of relieving tensions and aggressions that would otherwise find more destructive outlets, or does it instil an aggressive approach to problems that is incompatible with the need to compromise and co-operate in the vast majority of interpersonal contacts?"⁵⁵ The analysis above, based on the theoretical speculation of Vilhelm Aubert and a little empirical work by Stewart Macauley, suggests that the latter is more likely in the case initiated by the "loser-group." The former is perhaps the case in "mere" conflicts of interest.⁵⁶ However, "there is no more an enduring function of a court than there is an enduring function of a king."⁵⁷ New problems might demand new processes. We can at least review the range of possibilities.

Judges might throw caution to the wind and become consciously and overtly political. Amongst the lower ranks of the French and Italian career judiciaries, some judges have committed themselves to the values of campaigning loser-groups.⁵⁸ The United States Supreme Court has been accused of similarly "political" activity.⁵⁹

⁵⁴ Rosenberg, *op. cit.* at p. 797, believes "that the road to court-made justice is paved with good procedures." Summers, *op. cit.* at p. 39, comments, "Consider how often laymen seem ready to dismiss procedural rules as 'mere technicalities' even though these are the very rules which secure most process values." Recruitment and training are important variables which may be included in this notion of "process."

⁵⁵ *Op. cit.* p. 149, note 139. See also Devlin, "Judges and Law-Makers" (1976) 39 M.L.R. 1, 3-4, and Llewellyn's comment, in "On Reading and Using the Newer Jurisprudence" (1940) 40 Colum.L.Rev. 581, 610, "An impressive ceremonial has a value in making people *feel* that something is being done; and there is some value in an institution which makes men content with their fate whatever that fate may be." "Ostentatious impartiality" plays a role in this process; see Paterson, "Judges: A Political Elite?" (1974) 1 *British Journal of Law and Society* 118 at pp. 126-127 and Griffith, *The Politics of the Judiciary* (1977).

⁵⁶ Aubert, *op. cit.* (1963), p. 31, notes the tendency of court procedures to push the parties to a dispute further apart, but Macauley, *op. cit.* (1977), pp. 515-517, cites examples of litigation promoting compromise. The "loser pays all" rule as to costs, the payment into court system and formal requirements for conciliation in employment, matrimonial and discrimination disputes indicate the complexity of this question.

⁵⁷ Lawrence Friedman, "Legal Rules and the Process of Social Change" (1967) 19 *Stam.L.Rev.* 786, 798.

⁵⁸ See Harlow, "'Red' Judges, White Collars and Bail" (1976) 6 *Kingston L.Rev.* 67 and Treves (1974) 1 *British Journal of Law and Society* 200, 203.

⁵⁹ See for example the "Declaration on Integration" of March 12, 1956, which is the considered response of 96 Southern Congressmen to *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). The Declaration points to parents' rights and describes the decision as an "unwarranted exercise of power by the Court,"

Dominant group backlash is the obvious risk and process can provide no protection. Alternatively judges might indulge more in the kind of politics alleged to inhabit smoke-filled rooms. They might mediate or conciliate, seeking to promote compromise. The more doctrinaire loser-groups will be impatient with this, and the incremental gains of the less fanatical will nevertheless aggravate opponents.

A "scientific" or "rational" approach is a further, and "apolitical," possibility. Its viability is suspect because value conflicts are not susceptible of resolution by these techniques.⁶⁰ Instead, such problems tend to be polycentric, the various kinds of "hard" data are not easily commensurable and the "soft" data are even more problematic.⁶¹ Scientific reasoning is not inappropriate to the determination of policy, but in these cases reasoning is employed, not merely determinatively, but persuasively (or contentiously) and as justification.⁶² The manner in which a *specific* dispute raises a *general* issue is also a strong pressure to an incremental "try a little and see" approach that does not involve the comprehensive seeking and reviewing of data that a scientific approach would seem to demand.⁶³ This approach, whilst making a claim to "legitimacy through process," is thus unlikely to be proof against the attack of those who will use their own data and calculations to reach opposite conclusions. They will explain the discrepancy not in scientific but in political terms.

These three approaches are not "legal" in the sense of depending on the recognition of legal rules and principles as a special class of exclusionary reasons constituted under an authoritative practice or institutional system.⁶⁴ The "political" and "scientific"

the exercise of "naked judicial power" and the substitution of "personal political and social ideas for the established law of the land." It commends the motives of those States which have declared "the intention to resist forced integration by any lawful means." See Lewis, "The Supreme Court and its Critics" (1961) 45 *Minn.L.Rev.* 305, Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 *Harv.L.Rev.* 1. Defences of the Court include Black, "The Lawfulness of the Segregation Decisions" (1960) 69 *Yale L.J.* 421. See also Pollack, "Securing Liberty through Litigation" (1973) 36 *M.L.R.* 113 and Dworkin, *TRS*, pp. 130-149.

⁶⁰ Advocates include Siedman, "The Judicial Process Reconsidered in the Light of Role-theory" (1969) 32 *M.L.R.* 516. For an interesting hybrid approach, see Bolding, "Reliance on Authorities or Open Debate? Two Models of Legal Argumentation" (1969) XIII *Scandinavian Studies in Law* 61. Rawls argues, in "Two Concepts of Rules" (1955) 64 *Philosophical Review* 3, 30, that "Under the influence of the *summary* conception [of rules] . . . one fails to see that a general discretion to decide on particular grounds is incompatible with the concept of a *practice*" (emphasis added).

⁶¹ See Fuller, "Collective Bargaining and the Arbitrator" [1963] *Wis.L.Rev.* 3. Fuller argues that mediation and conciliation roles and the adjudicatory role are difficult to combine (p. 26). On "polycentric," see pp. 30-35, Jowell, "The Legal Control of Administrative Discretion" [1973] *P.L.* 178, 213-215 and Boyer, *op. cit.* pp. 150-164.

⁶² See Tribe, *op. cit.* (1973), p. 630 and Perelman, "What is Legal Logic?" (1968) 3 *Israel Law Review* 1, 3.

⁶³ See Shapiro, "Stability and Change in Judicial Decision-Making: Incrementalism or *Stare Decisis*?" (1965) 2 *Law in Transition Quarterly* 134.

⁶⁴ See Rawls, *op. cit.* (1955), Raz, *Practical Reason and Norms* (1975) and MacCormick, "Law as Institutional Fact" (1974) 90 *L.Q.R.* 102.

approaches might purport to generate rules, but only on the balance of broad utilitarian considerations, and not because of the normative force of peculiarly authoritative rules which claim to be reasons for disregarding all other reasons. Ironically, any rules generated by these alternative approaches will, in order to operate normatively, have to make a claim to the status of exclusionary reason. Without this status there is no reason not to decide each subsequent case *de novo*. Without such reasons there can be no very specific rules in the normative sense. The "scientific" and "political" approaches would seem to make the claim to generate specific rules and to be weakened therein by their own independence from rules.

Rules, in the form with which lawyers are currently familiar, are unlikely to disappear. Even systems of self-regulation are likely to be set up by, or allowed to continue at, the will of some institutionalised government. Such practices, like mediation and conciliation, will be "rule-supported" if not "rule-enforcing." The possibility of the "enforcement" of the "supporting" rules in jurisdictional disputes and the like will not be eliminated. More importantly, the main pressure on the present system comes, not from anarchists, but from loser-groups whose complaint is that they do not have enough of the action. These groups do not want to destroy but to re-divide or gain for themselves the power of the State which will remain "the principal prize in the perpetual conflict that is society."⁶⁵ They are not against rules; on the contrary, they want rules which favour them.

VI. HERBERT'S EXAMPLE

Loser-groups will thus make two kinds of claim with which a system that is to some extent an affair of rules (and principles) must cope. First, they will demand directly that the rules be changed. Should judges become widely recognised as legislators they, and not only Parliament, will be asked to change the rules. Secondly, loser-groups will contend that the rules have been consistently misinterpreted. They will use well-established formalistic techniques to argue for revolutionary results. They will interpret statutes and judgments as they have never been interpreted before.⁶⁶

In both kinds of case judges will need the ability to explain their role to themselves, to those who contest before them and to those who observe them. In this sense they require an ideology which explains the relationship between adjudication and legislation, between adjudicator and legislator. Their problem is not remote from that of the contemporary judge in the "hard case."

Professor Dworkin has recently offered us a model of errors in

⁶⁵ Chambliss and Seidman, *Law, Order and Power* (1971), p. 4.

⁶⁶ Consider, for example, *London Borough of Southwark v. Williams* [1971] 2 All E.R. 175 and *Nothman v. Barnet London Borough Council* [1977] I.R.L.R. 489.

the form of Herbert J.⁶⁷ Herbert is an honest fellow who sees his function in hard cases as filling in the gaps. When the rule-guidance runs out, Herbert believes that he is on his own. He is thus torn between a democratic respect for majority opinion and his *personal* opinion on the moral question involved. This role of deputy legislator⁶⁸ is fraught with problems. On many issues the state of majority opinion may be indeterminable or contentious. Furthermore, loser-groups will have little respect for a majority opinion that does not coincide with their own and will have developed plausible arguments based on human rights. A hard case is thus a straightforward clash of opinion between Herbert J. and the loser-groups.

Herbert's method and its hazard is exemplified in the recent case of *D. v. N.S.P.C.C.*⁶⁹ in part of the judgment of Scarman L.J. (as he then was). Having formalistically rejected the claim by the N.S.P.C.C. that it should not, on the ground of "public interest," be compelled to disclose informants' names,⁷⁰ he was faced with a narrower argument which exploited the regard for consistency which is deep in the common lawyer. Counsel for the N.S.P.C.C. argued that, because the Society is authorised to bring care proceedings pursuant to section 1 of the Children and Young Persons Act 1969, it stands for these purposes in the same position as the police. The police are able to make an effective offer of confidentiality to potential informants because they cannot be compelled to reveal an informant's name.⁷¹ The N.S.P.C.C. should be able to do likewise. Scarman L.J. said, in giving his fourth reason for rejecting this argument,

"Nevertheless it has to be accepted that some may be deterred from giving information to the N.S.P.C.C., if Crown privilege cannot be claimed. This is a loss which could be damaging to the public interest. But the damage has to be considered in a wider context even than the welfare of children. What sort of society is the law to reflect? If it be an open society, then

⁶⁷ TRS, pp. 125 *et seq.*

⁶⁸ TRS, p. 82.

⁶⁹ [1976] 3 W.L.R. 124; [1976] 2 All E.R. 993; *refs. infra* to W.L.R.; see also [1977] 1 All E.R. 589 (H.L.).

⁷⁰ "for one reason only . . . I can find in the cases no departure from the historic link between the interest of the public service of the State and Crown privilege." (p. 137 D, emphasis added). The N.S.P.C.C., a voluntary, independent body, is nevertheless incorporated by Royal Charter and "authorised," along with the police and local authorities, under s. 1 (1) of the Children and Young Persons Act 1969, to bring "care proceedings" in respect of children. One of the Society's inspectors had called on the plaintiff, following up what was apparently a totally unfounded report that her 14-month-old child had been maltreated. The plaintiff suffered nervous shock and claimed damages in negligence from the Society. The N.S.P.C.C. thereupon applied for an order forbidding the disclosure of documents in their possession revealing, or capable of revealing, the name of its informant. Without this information the plaintiff's case would be difficult to establish.

⁷¹ At least in civil proceedings; see *Marks v. Beyfus* (1890) 25 Q.B.D. 494, *per* Bowen L.J. at p. 500, and Lord Denning M.R. in *D. v. N.S.P.C.C.* at p. 133 D-F. For a justification of the differential treatment of civil and criminal cases, see Palley [1968] P.L. 93, 95, "The liberty of the subject is more important than the candour of communications, whereas the right to damages may not be so regarded."

men must face the consequences of giving information to bodies such as the N.S.P.C.C. . . . If it be a society in which as a general rule, informers may invoke the public interest to protect their anonymity, the law may be found to encourage a Star Chamber world wholly alien to the English tradition."⁷²

Reasoning of this style does nothing to avoid a head-on clash of opinion between those who feel that the N.S.P.C.C. should be in this sense privileged and those who do not. Opponents of Scarman L.J.'s view would point to the inaccuracy or naïvety of the reference to "an open society" and contend that this was a far more legitimate case for secrecy than some already accepted in law. The important point is the implication of the quoted passage that Scarman L.J. regarded himself as free to decide the case differently if he so wished. The apparent reason for the decision is thus his *personal preference*.⁷³

An attempt could be made to claim some "scientific" legitimacy for such value-judgments. A judge might use his legalistic skill to determine whether or not he has a choice and his skill as a social scientist to make the choice.⁷⁴ This proposition is open to the objections already discussed. "Scientific" legitimacy is not impregnable against a critical attack which is determined to find evidence of factional interest. Judges would have to secure some training in social science methods, but above all they would have to be ever-vigilant that they did not imagine those methods to be in any sense "pure," "objective" or "value-free." They should present them simply as the best available tools of the social engineer.

Nevertheless, as social engineers, they could insist on considering appropriate data. They could avoid making assertions of "social fact" without adequate supporting evidence. For example, the acceptance in *D. v. N.S.P.C.C.* of the Society's evidence that its sources of information would dry up if it was compelled to disclose informants' names was crucial to the decision in the Society's favour.⁷⁵ However, our small pilot investigation suggests that this claim may be hard to establish.⁷⁶ The Brandeis brief shows that this kind

⁷² p. 141 D-F. His other reasons are (i) "that the police have a special position, because they perform an essential function of government" (p. 139 E-F) (which is formalistic; in this class of case the N.S.P.C.C. is performing the same function whether or not they are properly called functions of government), (ii) that there is other protection for confidences which the court will remove only if the information is "relevant and necessary to enable justice to be done," and (iii) that in any event the privilege could, if it were to exist, be set aside by the court. The possibility that the court can lay down some general principles as to when it would order disclosure (e.g. never in a civil case) weakens (ii) and (iii).

⁷³ His other reasons are not open to this objection, see note 72 *supra*. Reasons (ii) and (iii) are attempts at the Herculean method, see section VII *infra*. Cf. *Ex p. Church of Scientology of California*, *The Times*, February 21, 1978.

⁷⁴ Cf. Seidman, *op. cit.* and Bolding, *op. cit.*

⁷⁵ The House of Lords was also concerned at the risk to legitimacy in comparison with their earlier decision concerning the Gaming Board in *R. v. Lewes Justices, ex p. Secretary of State for Home Department* [1973] A.C. 388; see, *per* Lord Diplock, [1977] 1 All E.R. 589, 595 d-e.

⁷⁶ Radford and Weaver, *The Decision to Report: Low Visibility in the Courts* (available from the authors). A questionnaire was administered by student inter-

of evidence can be accommodated within our present adversary system.⁷⁷

Because of fundamental weaknesses, small gains are all that can be expected. But, if nothing else, judges might become circumspect in their use of "public interest rhetoric." Mitnick has pointed out that "central to the concept of 'interest' is the notion of 'preference.'" ⁷⁸ In the kind of case we are considering it is fatuous to talk of "what the public prefers." Such rhetoric can easily be exposed as an inept attempt to conceal factional interest.

VII. THE STRENGTH OF HERCULES

To point the error of Herbert's ways, Professor Dworkin offers us a "superjudge," Hercules.⁷⁹ Like Herbert, Hercules acknowledges the effect of his personal convictions on the outcome of hard cases, but he denies them any totally independent force. By recognising that rule guidance does not simply run out leaving a gap, that it is "not incomplete, like a book whose last page is missing,"⁸⁰ Hercules purports to avoid the dichotomy between personal opinion and democratic decision.

The clearest advantage is gained in statutory interpretation, for it is there that the relationship with the legislature is most obvious. Hercules does not simply say that a statute is ambiguous and then proceed to fill the gap as some kind of deputy legislature, but instead proceeds to search for the political theory that best justifies the particular statute. The interpretation he adopts is the one which best serves the end of that political theory, and not the one which best serves his personal preference. He may in fact regard the result as undesirable.⁸¹ Thus the opportunity for loser-groups to attack Hercules, without at the same time attacking the legislature and themselves appearing undemocratic, is reduced. They may of course be able to argue that Hercules picked the wrong interpretation, that he "misapplied" his own technique. That "misapplication" will

viewers to 115 addresses in the Faraday Ward of the London Borough of Southwark. The response rate was 69.5 per cent. Social Services departments proved to be the agency to which most of our sample would refer a case of suspected child abuse (57.5 per cent.). The N.S.P.C.C. (45 per cent.) and the police (40 per cent.) proved to be important agencies of secondary resort. There is thus little support for the main element in the reasoning of Scarman L.J. (see note 72 (i) *supra*). Our questions on the effects of confidentiality on potential informants did not provide any very clear results. When asked whether they themselves would be deterred from making a report by fear of "legal trouble" 72.5 per cent. replied negatively. Nevertheless as many as 69 per cent. thought that "people in general" would be deterred. As the question was hypothetical in both instances, one is left wondering whether interviewees' desires to show themselves to be responsible and upright citizens may have led them to overestimate their own willingness to report without guarantees of confidentiality, and whether their estimation of the likely conduct of others may not in fact be a more reliable indicator of their own likely conduct.

⁷⁷ *Muller v. State of Oregon* 208 U.S. 412 (1908).

⁷⁸ "A Typology of Conceptions of the Public Interest" (1976) 8 *Administration and Society* 5, 11.

⁷⁹ *TRS*, p. 105.

⁸⁰ *TRS*, p. 103, citing Gallie, *op. cit.*

⁸¹ *TRS*, pp. 107-110.

be thought of as some kind of "Freudian slip," revealing a fundamental bias; but the Herculean method stretches the technical skills of the loser-groups in making out such arguments a little more than Herbert's method does.

Except in constitutional cases, there are no arguments as to whether a statute, properly processed by the legislature, is or is not law. The argument is solely over meaning. Common law hard cases are essentially different; "the argument *for* a particular rule may be more important than the argument *from* that rule to the particular case."⁸² When dealing with arguments *for* a rule the judge must decide the direction and strength of the "gravitational force" of previous decisions. "Judges and lawyers do not think that the force of precedents is exhausted, as a statute would be, by the linguistic limits of some particular phrase."⁸³ Instead the questions are of a different order. They can be represented schematically as "Granted that the courts have compelled A to do act 'Z,' should B be required to do act 'Z'?" In deciding such questions Hercules claims that he is guided by the principle of consistency. His personal *judgment* is inevitable, but it is not simply a matter of personal *preference*.

If all common law hard cases were as simple as that question, Hercules could not make out his claim. Either result could easily be reconciled with A's case, and would beg the question of justification. However, the structure is invariably more complex. The question might more realistically be represented as, "Granted that the courts have compelled A to do act 'Z,' C to do act 'Z,' D to act 'Y,' E to do act 'X,' etc., should B be required to do act 'Z'?" The consistency principle now narrows the range of alternative theories substantially. By "searching for principles rather than collating decisions,"⁸⁴ Hercules will again attempt to construct a *political* theory.⁸⁵ His choices will be constrained by the need to construct a theory which explains all the cases of A, C, D, etc., which are not in his view mistaken.⁸⁶ Again he will claim that his decision does not simply reflect his own opinion. Unfortunately loser-groups may suspect that the principle he has chosen is the one he prefers. They will be encouraged by his classification of one previous decision as mistaken to suspect that his felt obligation to give weight to other decisions in formulating his principle is the result, not of regard for consistency, but of personal preference.

Hercules does not really exist and we are thus in some doubt as to whether his "superhuman skill, learning, patience and acumen" provide him merely with the ability to describe what his human brethren do in fact, or whether his method is offered as a prescription, an ideal to which his human brethren should aspire.⁸⁷

⁸² TRS, p. 112.

⁸³ TRS, p. 113.

⁸⁴ Per Lord Kilbrandon, *Norwich Pharmacal Co. v. Commissioners of Customs and Excise* [1973] 2 All E.R. 943, 974 E.

⁸⁵ TRS, pp. 115-118.

⁸⁶ TRS, pp. 118-123.

⁸⁷ TRS, p. 105; see Marshall, "Postivism, Adjudication, and Democracy" in Hacker and Raz (eds.), *op. cit.* p. 132, 133.

Viewed as description, the primacy given to consistency suggests, somewhat misleadingly, that there is some "right answer" which can be mechanistically determined.⁸⁸ However, the judicial process is not mechanical in the way that a computer, once programmed, has the capacity to generate correct answers. It is closer to a computer that is incrementally and automatically re-programmed every time it is asked a question and every time it answers a question. Legal rules (and, indirectly, principles) are incrementally reconstituted in the very process of their application. Consistency emphasises the *causal* at the expense of the *constitutive*.⁸⁹

Further, there are cases which the Herculean method seems totally inept to describe. For example, the interpretation of paragraph 10 (b) of Schedule 1 to the Trade Union and Labour Relations Act 1974 in *Nothman v. Barnet London Borough Council*⁹⁰ as eliminating sex differences in the age limits for employment protection amounts to the substitution of preference for (legal) principle. Reliance on consistency with the spirit of the Sex Discrimination Act 1975 is fatuous. That Act was passed *after* the 1974 Act and constituted an opportunity for Parliament to do something to standardise the age limits for employment protection which it did not take. The explanations offered recently in this journal by Kerr J. of the innovatory decisions to allow judgment in currencies other than sterling and to grant injunctions restraining defendants from removing their assets out of the jurisdiction are essentially practical commercial explanations.⁹¹ Their contact with legal principle is at such a level of abstraction (fairness and equity) that consistency has little explanatory or justificatory force. We are reminded instead that legal principles are "the meeting point of rules and values."⁹² Such cases may well be examples of judges' "best judgment about what [the parties'] rights *are*,"⁹³ but they are at the same time statements of their best judgment of what the parties' rights *ought* to be.

Dworkin seeks to legitimate the judicial contribution by confining it to questions of "principle" (*i.e.* concerned with individual or group rights⁹⁴). He argues that judges characteristically do not, and ideally should not, deal in "policy" (*i.e.* the formulation of goals for the community as a whole⁹⁵). The instances already given deny this

⁸⁸ See Dworkin, "No Right Answer" in Hacker and Raz (eds.), *op. cit.* p. 58. Compare the attitudes to statutory interpretation in *Fitzleet Estates Ltd. v. Cherry* [1977] 3 All E.R. 996 and *Terry v. East Sussex C.C.* [1977] 1 All E.R. 567, 571g. See also *Priddle v. Dibble* [1978] 1 All E.R. 1058, 1059g and *W. Devis & Sons Ltd. v. Atkins* [1977] 3 All E.R. 40, 43g-f.

⁸⁹ See Tribe, *op. cit.* (1973).

⁹⁰ See note 66, *supra*.

⁹¹ "Modern Trends in Commercial Law and Practice" (1978) 41 M.L.R. 1, 9-15. See also Grey, "In re Vandervell: The Jurisprudential Aspects" (1975) 21 McGill L.J. 160.

⁹² MacCormick, *op. cit.* p. 127.

⁹³ TRS, p. 104.

⁹⁴ TRS, p. 82.

⁹⁵ TRS, p. 84; cf. Marshall, *op. cit.* pp. 135-137 and the discussion of similar distinctions drawn by Rawls in Barry, *The Liberal Theory of Justice* (1973), pp. 134-143.

as description. United States constitutional cases, being in essence contests between different "conceptions" of the various "concepts" employed in declaring the constitutional principles in the sacred text, might properly be described as concerned with "principles" and not "policies." However, in common law decision making there is no sacred text, and without one the principles/policies distinction seems unworkable. In hard cases, under loser-group pressure, one man's "principle" will be another man's "policy."⁹⁶

The distinction between "concepts" and "conceptions" (and the parallel distinctions between the "symbolic" and "enforcement" levels and between "law in the books" and "law in action") might be more fruitful.⁹⁷ It provides a means by which controversy can be accommodated and not simply confined to the gaps. Nevertheless, like the rule of law ideal, it has important misleading tendencies. It can provide the illusion of agreement at an abstract level and thereby mask real conflict at the specific or operational level.⁹⁸ The outcomes of hard cases focus attention on these conflicts and the "concept" may be brought into disrepute. A principle of formal consistency can then be of no further assistance, despite Herculean attempts to discover the "right" answer. More important will be an emphasis on consistency as an aid to substantive justice; not consistent reasoning from incidents of inequality but honest and serious attempts to understand both the new and the old claims. Judges will have to make imaginative leaps, to empathise. The manner in which the judicial process is conducted might then encourage the parties to disputes to indulge in the same activity. Consistency in this sense is akin to the notion of "universalizability" in the moral philosophy of R. M. Hare⁹⁹ and to the "original position" of John Rawls.¹ In this sense it is not a mere philosophical procedure but a process to be valued and which, like the controversial rights it produces, should be taken seriously.²

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⁹⁶ Dworkin himself says, "The same phrase might describe a right within one theory and a goal within another"; see *TRS*, p. 92.

⁹⁷ *TRS*, pp. 134-136.

⁹⁸ See Trubeck *op. cit.*, p. 544. Galanter, *op. cit.* (1974) at p. 145, points out that "'unreform"—that is ambiguity and overload of rules, overloaded and inefficient institutional facilities, disparities in the supply of legal services, and and disparities in the strategic position of parties—is the foundation of the 'dualism' of the legal system. It permits unification and universalism at the symbolic level and diversity and particularism at the operating level." Abel, in "A Comparative Theory of Dispute Institutions in Society" (1973) 8 *Law and Society Review* 217, 288, also comments, "social heterogeneity compels the development of more abstract, more universal, norms capable of reconciling the values of different segments of the population."

⁹⁹ *Op. cit.* pp. 10-13 and 193-198.

¹ *Op. cit.* (1972), pp. 118-192; the parallels between Hare and Rawls are noted by Barry, *op. cit.*, pp. 10-14. Dworkin discusses Rawls in *TRS*, pp. 150-183.

² *TRS*, pp. 184-205 and 279-290.

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