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# Judicial Legislation

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**Judicial Legislation**, by Anthony D'Amato\*,  
1 *Cardozo Law Review* 63-97 (1979)

**Abstract:** My argument will be that it is unjust in the broadest view of our legal system for judges to legislate, even if they confine their legislation to the narrowest limits in the closest of cases. To the extent that my argument is successful in diminishing the judicial legislation position, it would tend to serve to corroborate Dworkin's rights thesis

**Tags:** Judicial decisions, judicial legislation, rights thesis, judicial discretion, Cardozo, Dworkin's Rights Thesis

[pg63]\*\* Perhaps the most significant and controversial theory in present-day analytical jurisprudence is the "rights thesis" of Professors Ronald Dworkin and Rolf Sartorius. [FN1] It holds that there is always one correct outcome for any legal dispute, that the litigants have a "right" to this outcome, and that the outcome may be determined by a judge on the basis of existing legal materials including statutes, precedents, rules, principles, and perhaps—as I have attempted to add in one essay—an intuitive sense of justice. [FN2] Professor Dworkin has ably defended his thesis against his critics; [FN3] here I shall not address that controversy directly. Instead, I shall focus upon what the rights thesis argues against. Dworkin early suggested that he was arguing against the view that judges in close or hard cases have discretion to decide either way. [FN4] However, the "discretion" antithesis seems to have been effectively demolished by Professor Kent Greenawalt, who argues that discretion is a vague term having differing meanings in different contexts and thus hardly points to a clear conceptual alternative to the rights thesis. [FN5] A better candidate for the antithetical position would appear to be the notion of "judicial legislation" which Greenawalt to a large extent espouses in his important recent essay. [FN6] Greenawalt begins his essay with a quotation from Benjamin Cardozo's third lecture on *The Nature of the Judicial Process*, entitled *The Judge as a Legislator*. [FN7] Comparing the task of the judge with that of the legislator, Cardozo found that each of them is: [pg64]

legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open space in the law. ... [His] action [is] creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom. [FN8]

In the present essay I shall attempt to examine the judicial legislation position adumbrated by Cardozo and reflected in Greenawalt's essay. Their position seems to be the logical alternative to the rights thesis, inasmuch as Dworkin claims that a judge must find the existing law whereas Cardozo holds that in close cases a judge may create new law as does a legislator. My argument will be that it is unjust in the broadest view of our legal system for judges to legislate, even if they confine their legislation to the narrowest limits in the closest of cases. To the extent that my argument is successful in diminishing the judicial legislation position, it would tend to serve to corroborate Dworkin's rights thesis. [FN9]

### I. CARDOZO'S THEORY OF JUDICIAL LEGISLATION

Although Cardozo wrote a book entitled *The Paradoxes of Legal Science*, [FN10] he does not seem to have considered the notion of judicial legislation paradoxical. He thought that although a judge is obviously not a legislator in general, the judge does legislate new law in

close cases to fill gaps between existing rules. Cardozo offered his theory as a departure from the traditional Blackstonian theory of "pre-existing rules of law which judges found, but did not make." [FN11] The traditional view would suggest that a good negative description of the task of a judge is that, whatever he does, he does not legislate. Adjudicating and legislating seem radically incompatible to each other for the following reasons: (1) a legislator may be blissfully unaware of all existing laws on the books as he writes new legislation—in which case the net effect is merely a change in the law or, at worst, redundant reinforcement—whereas a judge cannot write on a clean slate; (2) a legislator enacts laws prospectively, whereas a judge's decision assigns legal consequences to a past transaction which the parties no longer can avoid; (3) a legislator may have a financial stake in the passage of a bill, whereas a judge must excuse himself if he has a [pg65]personal stake in a case before him; and (4) a legislator may support a bill he believes is unjust or wrong in return for a promise by its sponsors to support his own pet bills, whereas a judge who traded votes with his brethren from one case to another would properly be subject to censure. These characterizations are of course not exhaustive, [FN12] and I shall consider their cognates later in a discussion of Greenawalt's position. [FN13] But they do suggest an initial difficulty in the attempt to explain the judicial process by resort to a term ("judicial legislation") that invokes decisional standards that seem inimical to the idea of adjudication. [FN14]

Nevertheless, Cardozo's writings seem to overcome the initial difficulty suggested by the preceding characterizations by meeting the points directly. Taking them in reverse order, a judge certainly may not trade votes with other judges, and a judge certainly must excuse himself if he has a personal stake in a case. [FN15] Thus, we may say as to items (3) and (4) that, if the judge is a legislator, he is a handcuffed legislator; he is denied both conflicts of interest and vote-swapping. As to item (2), making law retrospectively, Cardozo insists that judges make new rules only when cases are very close; yet, close cases, by definition, lack clear pre-existing rules upon which the parties may have justifiably relied. He writes that "in the vast majority of cases the retrospective effect of judge-made law is felt either to involve no hardship or only such hardship as is inevitable where no rule has been declared." [FN16] Finally, as to item (1), Cardozo's position would appear to be that a judge writes on a clean slate only in those narrow circumstances where he has first examined all pre-existing law and found the law to weigh equally on the side of plaintiff and defendant: it may be a clean slate, but it is a very small slate, not a large black-board.

Yet, if Cardozo's writings *about* judicial decision-making reach the above conclusions, what should be made of the fact that his official output, namely, his opinions in actual cases, fail to reflect the [pg66] notion of "judicial legislation"? Certainly, if Cardozo openly practiced what he taught in his lectures on *The Nature of the Judicial Process*, we would expect to find language in at least some of his opinions that might colloquially be paraphrased as follows: "This is a very close case. All the rules, precedents, and principles are evenly balanced. Therefore, I will invent a new rule which in my opinion will serve the public well in the future. And after stating my new rule, I will apply it to the parties in this case." If judges are legislators in close cases, we would expect to find such language in many judicial opinions; after all, many cases, perhaps even the majority (exclusive of criminal appeals) that are contested at the appellate level are close enough so that the parties did not settle but went ahead and prosecuted the appeal with the expectation on both sides of winning. Yet, the absence of such language in hundreds of thousands of closely

contested appellate cases must give us pause. Could it be that all these opinions are disingenuous—that the judges couch them in terms of finding the law whereas in fact the judges themselves know that they are legislating? Or, are all the judges "sadly deluding themselves," as Sartorius puts it, [FN17] in thinking that they are finding the law when in fact they are making it up? Sartorius suggests ironically that, if Cardozo is right that judges legislate, we must conclude that judges "are either stupid, ignorant of the jurisprudential issues involved, or hypocritical." [FN18] Greenawalt, because he is not trying to be ironical, is more cynical: "How much evidence do opinions constitute of what judges believe? An opinion is written more to justify the result reached than to explain how it was reached." [FN19]

Greenawalt's remark calls to mind those American legal realists [FN20] who have pressed this challenge yet further. Taking an early cue from Cardozo's "realistic" view that judges invent law in close cases, they have claimed that judicial opinions—as well as the entire body of materials we call "law"—amount to elaborate post-hoc rationalizations for judges to window-dress decisions that they have arrived at for personal reasons. [FN21] However, I would contend that the realists are very unrealistic about the function of a judicial opinion, which I believe is symbiotically related to the decision in a case precisely [pg67] because the opinion is the judge's official output that his colleagues will read, law students will study, and the parties to the case will peruse with the greatest care. The judge, in brief, is faced with the task not only of reaching a decision but also of publicly justifying it. In considering what decision he wants to reach in a given case, a judge cannot help but consider the shape of the opinion he will write that will serve to justify the result. If he foresees a conceptual hurdle that would cause him great difficulty in his opinion, he will naturally begin to think of changing his decision to favor the party that he did not originally think he was going to favor. He will think about changing the decision in the case because it will be easier to write the opinion. Rather than attempting to overcome the conceptual hurdle, he will treat it as a rule or principle that simply dictates the new result. [FN22] Of course, the constraints upon the judge resulting from the anticipation of formulating a convincing opinion may not be the only, nor always the most important, motivation in arriving at a decision for one side or the other. The realists may be right that there are extrinsic factors. [FN23] But they should not ignore the most obvious factor—the judge's opinion, stating officially his reasons for his decision. A judge spends a great deal of time drafting his opinions, knowing that his colleagues will criticize him on the basis of their quality. He is well aware that other courts will, on the basis of his opinions, either cite and follow him or ignore him entirely. More significantly, he will recognize himself to be subject to the ultimate slap in the face, reversal by a higher court—unless we are talking about the United States Supreme Court—if his opinion is not a convincing justification for the result. Even a Supreme Court opinion, if unpersuasive, is subject to a form of "reversal": it may be overruled, ignored, or distinguished away by the same Court a few years down the road. Once these criticisms or sanctions are incurred by a judge newly on the bench, he will surely attempt to avoid them in the future. Indeed, he will feel a constraint to reach the result in a given case that is more easily and more persuasively justifiable. [FN24]

[pg68] The problem with the judicial legislation formula previously described is that it is singularly unpersuasive and will not be perceived by the parties, by other judges, or by the appellate court as providing the basis for an adequate justification of a decision. It is indeed as unpersuasive in an opinion as would be the articulation of any of a number of other external motivations suggested by the legal realists. [FN25] Thus, the realist position boils down to

saying that judges are disingenuous, that they camouflage their real motivations in the ritual of writing an opinion, and that the opinion is only a game invented to mislead law students and lawyers. Would it be possible to fashion a similar charge by Cardozo against himself? Can we say that the theory of judicial legislation contained in Cardozo's extra-legal writings and lectures is an admission by Cardozo that his official judicial opinions—which are certainly couched in traditional justificatory language with no suggestion therein that the judge is legislating and applying his new laws retroactively to the parties—are disingenuous?

One possible explanation, though overly cynical, might be that a judge, like Cardozo, invited to give a series of lectures at Yale University on the nature of the judicial process, wanted to say something interesting to his audience. Since there would be practically nothing of interest to say about the adjudication process if it were simply a painstaking examination in each case of the best fit between the result and the pre-existing body of legal materials, the lecturer might be inclined to give what David Riesman in another context has called the "inside-dopester" view [FN26]—that judges "really" invent law in close cases rather than derive results from prior law. Additionally, once such a view is propounded, the audience will listen with the greatest interest to what the lecturer says about his own psychological preferences and literary likes and dislikes. Throughout Cardozo's lectures and other writings are observations about the nature of the universe, the meaning of life, the requirements of social justice, the writings of ancient Greek dramatists, and, in general, the subject matter of a broadly based liberal education. The audience will be interested in these matters not only for their own sake, but even more importantly, for what they reveal of the judge's true decisional criteria. For if a judge is viewed as a legislator, what he thinks fundamentally—[pg69] what Justice Holmes called his "can't helps" [FN27]—should be of great importance to those who are attempting to predict his decisions. [FN28] All this, of course, makes for interesting lectures and audience involvement, but does not necessarily reveal the truth. [FN29]

A second explanation, perhaps even more cynical than the first, is that Cardozo was attempting in public to persuade himself that he had the right to be a lawgiver rather than a law-finder. A judge understandably may think that many rules and principles on the books are wrong and ought to be corrected; he may want to re-fashion the law in his own image wherever possible; and he may await with hopeful anticipation those close cases where he may flex his legislative muscles. Yet when those cases come up, he seems impelled by the forces I have previously described to reach the result most consistent with prior law and, hence, most justifiable in a written opinion. Thus, when invited to give a public lecture or to write a book, he may want to "test the waters" by propounding a theory that he would prefer to apply to his own judging if he can sufficiently "sell" that theory to his audiences. The "realist" theories in general, and the "judicial legislation" theory in particular, would give the judge much more personal power—the power to invent new rules and to be accountable only to his own conscience. In this view, Cardozo's lectures may in part have been an attempt at self-persuasion. Whether successful in that sense or not depends on how we interpret his subsequent judicial output.

I believe that neither of these preceding explanations are fair to Cardozo. My preferred explanation for the paradox of Cardozo the [pg70] lecturer as opposed to Cardozo the jurist involves a more complex assessment of the interaction between the normative and the empirical. I believe that, in the first instance, Cardozo announced his theory of judicial legislation in an

honest attempt to describe what judges actually do in close cases. In other words, off the bench Cardozo was being scientific and empirical. Looking into his own mind, he knew that in close cases he could not honestly say that his decision was the mere logical function of pre-existing rules and principles. In addition, he realized that his brethren on the bench often disagreed with him. Either their disagreement was the result of a lack of intellectual ability to understand the logic of pre-existing legal materials, or—much more charitably and palatably—they were simply legislating a different rule. Finally, he felt the further necessity of disclosing to his audience his own judicial philosophy. In so doing, he could be exhaustively descriptive of the real bases for his decisions in close cases, so that his audience would not feel that his "legislating" was arbitrary.

Nevertheless, Cardozo stopped short in his lectures of advocating that judges ought to legislate in close cases. So long as he was being descriptive and empirical, he said that they do legislate. But apparently, he could not bring himself to step beyond the empirical to the normative. He had no similar reservations in discussing other legal materials; for example, he believed not only that judges follow precedent but ought to follow precedent. [FN30] But in his lecture on judicial legislation, he took great pains to argue that close cases giving rise to the power of a judge to create new law were "occasional and relatively rare." [FN31] He wrote that judges "have the power, though not the right, to travel beyond the walls of the interstices—the bounds set to judicial innovation by precedent and custom." [FN32] He quoted Corbin who said that "the judge legislates at his peril." [FN33] He admonished that judicial legislation must follow Kant's categorical imperative. [FN34] And, he concluded that a judge, even when free to legislate,

is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to [pg71] vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." [FN35]

These are, of course, vague constraints, no matter how artistically limned. But, they bespeak a reluctance on Cardozo's part to *advocate* judicial legislation, for most judges probably would look upon such a prescription as a license for free wheeling creativity, unconstrained by Cardozo's modesty and self-restraint. One supposes that if Cardozo had been asked whether the judges in a given closely contested case should engage in "legislation," he might have replied: "Are you sure it's a close case? Investigate the precedents and principles more deeply and maybe you'll find that they are not so evenly balanced after all." Certainly this is the inquiry he would have required of himself, for his own judicial opinions sound in adherence to prior law rather than in judicial legislation.

If Cardozo is reluctant to say that judges ought to legislate, and is, in fact, saying that they hardly ever legislate, how can we explain his well-informed description of what judges do in close cases as "legislation"? Apart from the cynical possibilities I suggested earlier, I think that the answer lies in the fact that law is still in the very earliest stages of its scientific elucidation, and that a participant-observer such as Cardozo may well interpret the uncertainties of rules and principles modestly. He may feel that his disagreement with brethren on the bench can be explained by the lack of a consensus as to the weight to be accorded to various relevant pre-existing rules and principles in a given case. For example, in discussing the famous case of

*MacPherson v. Buick Motor Company*, [FN36] Cardozo asked what the law was prior to the decision in that case:

Was there any law on the subject? A mass of judgments, more or less relevant, had been rendered by the same and other courts. A body of particulars existed on which an hypothesis might be reared. None the less, their implications were equivocal. We see this in the fact that the judgment of the court was not rendered without dissent. Whether the law can be said to have existed in advance of the decision, will depend upon the varying estimates of the nexus between the conclusion and existing principle and precedent. [FN37]

[pg72] But the fact that reasonable persons differ or judges dissent does not mean that pre-existing rules are themselves weighted randomly. Rather, it may be that our perceptive tools are not yet calibrated accurately enough. Thus, Dworkin has invented a judge called Hercules, who possesses infinite wisdom and patience to weigh accurately all existing rules and principles and order them lexically within a sound constitutional structure. [FN38] I have suggested elsewhere that the paradigm of a perfect judge might be a computer programmed with a multivariate analysis of existing rules and precedents (although the purpose of my essay was to inquire what "human" elements might be lost in such a program). [FN39] But until that "brave new world" arrives, we have, for the present, human and therefore fallible judges rendering decisions that are more or less enlightened and more or less just depending upon whether the judge is a Cardozo or a party hack.

But then our question remains: will fallible judges feel unguided by existing law in close cases so that they will gravitate toward Cardozo's notion of judicial legislation? My reply at the present stage of legal science is that the close or hard case in fact never occurs. This becomes apparent when we look below the surface of what are called "rules" or "principles" and see those legal materials for what they really are, namely, presumptions or defeasible propositions.

## II. RULES AND PRINCIPLES AS PRESUMPTIONS

For convenience, we tend to apply a Newtonian view of legal norms, rules, and principles: they exist "out there" and they define human transactions, labeling them "torts," "contracts," "trusts," "crimes," "taxable income," and so forth. But upon reflection we see that rules and principles do not work that way. Rather, legal materials are relative to the party affected by them and in turn are affected by the party. We might analogize the process as relative in the Einsteinian sense (time, space, and location are a function of the observer's frame of reference) and reactive in the Heisenberg-Bohr-Schrodinger sense (location and momentum of a particle can never be specified as absolutes independent of the observer's measuring instrument). [FN40] [pg73] Thus, if a client asks an attorney whether a certain document in his possession is a "contract," he has asked the wrong question. The attorney might point out to the client that *if* the client has agreed with someone else to do something or to pay something, and *if* the client believes that the other person has not fulfilled his promise or has failed to perform, and *if* the client has kept or intends to keep his side of the agreement, *then* a court of law may affirmatively help the client by entering a judgment against the other person that the sheriff will enforce, *provided that* the other person has assets that can be levied against, is in the jurisdiction, is not an infant, and that the statute of limitations has not run. The attorney may add that we will find out whether the document is a "contract" only at the end of the case if the client has prevailed, but the client may prevail under a different theory such as restitution; thus it would be a waste of

time to ask whether the document "is" a "contract" since that question is an ultimate question of law for the court. Even if the document is labeled "A Contract," the lawyer might add, the label is not conclusive upon a court; it could instead be a trust agreement, an incomplete contract, and so forth. Suppose the client instead asks the lawyer to draft for him a "contract." Even here, an accurate attorney can say only that he will draft an agreement, label it "contract," and predict with a high degree of conviction (but not certainty) that a future court, if necessary, will uphold the promises contained therein against both parties and enforce its decision by utilizing the police power of the state. [FN41] The rules and principles relating to "contracts," in other words, form a background against which persons and their attorneys may plan their transactions with varying degrees of assurance that the courts will enforce the agreements that are made. Similarly, the laws of tort form a background against which a person who is injured may be able to recover money damages against another person if the injury can be attributed to actions or omissions of that other person. Here, too, a client who asks whether he was the victim of an "assault" or a "slander" would be asking the wrong question. Rather, his attorney will first want to know whether he has been hurt. If he has been hurt, the attorney will next want to know [pg74] whether someone else might be said to have been responsible for the injury. The background rules of assault or slander would be helpful in framing the case and fitting it into the forms of action that courts traditionally recognize in awarding money damages to plaintiffs. But no absolute application of those concepts to the plaintiff's fact situation can be made by the attorney.

All the rules and principles that guide our lives can never be applied with certainty to our everyday actions. Rather, they exist as presumptions. They shape our conduct, but they may be defeasible in ways that can never be totally specified or anticipated—in ways that will vary according to the infinite richness of human choice. Take for example one of the simplest of all human laws—the traffic signal. A steady red light means "stop and remain stopped until the light changes to green, at which point you may proceed through the intersection." Some language, more formally drafted, may be found similar to this directive in all municipal traffic codes. Yet experienced motorists sooner or later come across a situation where the traffic light stays on the "red" for three or four or five minutes. Nothing in the code takes care of this situation, and sometimes drivers don't know what to do. I recall one such situation, out of about a half-dozen in my driving experience, that occurred in Boston, which normally is characterized by utter anarchy as far as its traffic is concerned. But on this particular occasion, a driver had stopped at a red light that did not change, tying up many cars to his rear. Motorists began honking, but the car did not budge. Finally, cars had to swing out from behind the stopped car into the oncoming lane, pass the car, and go across the intersection. As I, too, passed the stopped car, I marvelled at the law-abiding and literal nature of the driver who was not going to "run" a red light even if the light remained stuck the rest of the day. I also wondered what would happen if one of the cars passing the stopped car got into an accident; would the driver of the stopped car be guilty of blocking traffic and causing the accident? Could the driver defend on the ground that it would have been a violation of a statute to go through the red light? Much would turn on what drivers reasonably would think and do in such a situation. Is there an implied exception to the rules of traffic which says that when a traffic signal is obviously malfunctioning, drivers may ignore it? But if there were such an exception, wouldn't drivers take advantage of it by "running" red lights that last fractionally longer than the average red light? How could anyone prove that a traffic signal is stuck? Suppose a parade was going to come down that street, and the municipality turned all the lights to red and left them that way? Or, suppose a sewer under the street had

undermined the road and the next car through would [pg75] cave in; wouldn't a red light that did not turn to green be an intentional way to prevent all cars from crossing? Imagine how complicated a code that tried to anticipate and distinguish all these situations would have to be. Yet, clearly, lights will on rare occasions malfunction, and it would be unreasonable to expect all motorists to remain stopped. In short, the red light is a presumptive rule. It is defeasible in several well-known situations—the appearance of an ambulance or fire engine, the commandeering of your car by a policeman chasing another car, or an emergency that calls for rushing a patient to a hospital. And, it is defeasible in principle in unforeseeable situations. [FN42] A motorist who has never imagined that a red light might malfunction and who finds himself facing one will have to be his own "lawyer," and perhaps will reach the conclusion that, after waiting a reasonable amount of time, he has a right to go through. [FN43]

What is true of a very clear rule, such as a traffic signal, is *a fortiori* true of other legal rules and principles which normally are not quite so clear. A person receives a check every month; is it "income" for the purpose of the income tax code? Presumptively so, but it may turn out to be Social Security payments which are "income" but not income for the purpose of the income tax. Was the Buick Motor Company, prior to the decision in the *MacPherson* case, free to manufacture a car negligently in so far as the ultimate consumer of the car was concerned? A very acute lawyer conceivably could have advised Buick prior to 1916 that "presumptively you would be liable because the customer's injury is attributable to your negligence in the sense that but for your negligence he would not have been injured; however, you might be able to avoid paying damages because of another legal doctrine which we might be able to import for this occasion, namely, a lack of privity between you and the consumer." Of course this advice is constructed by hindsight, yet it still points up the primacy of an injury and the background constellation of rules that may guide one's actions in terms of anticipated future judicial decisions. Perhaps a more stark example, which I have examined at greater [pg76] length elsewhere, [FN44] would be that of a landlord asking his attorney whether he should take out additional insurance for an injury to a fetus in a jurisdiction where the common-law rule totally bars recovery by a mother on behalf of a fetus. The attorney might say that although the current legal rule would appear to make such insurance unnecessary, if someone is injured on the landlord's premises due to his negligence and there is injury to a fetus, a court might use his case to abolish the old rule and institute instead the more "modern" rule that a fetus may recover damages. In that case, what is operative is a presumptive rule allowing recovery to an injured party for negligence, as in the *MacPherson* situation, with defeasibility based upon *stare decisis*. The prudent thing to do would be to take out the additional insurance.

The old common-law forms of pleading accurately reflected the presumptiveness and defeasibility of legal rules. Although these forms of action have been abolished in "modern" rules of civil and criminal procedure, Professor Richard Epstein has made a convincing case that they nevertheless underlie and give structure to any litigation. [FN45] Epstein was addressing problems of burden of proof with respect to facts in a given litigation, but I think that his point may be generalized to the proof of law itself. For if my previous argument is correct in stating that rules and principles impinge upon us in our everyday lives as presumptive propositions that are defeasible, it arguably follows that judges ought to treat all the legal rules and principles relevant to a case as subject to proof by the party asserting them. For only in this fashion will courts accurately reflect the "real world" of presumptive rules and principles. To illustrate this

point, let us consider Epstein's example of the way pleadings should be framed in a case of an infant's contract. [FN46]

A plaintiff alleges that he delivered goods to the defendant but the defendant failed to pay him the agreed-upon price. The defendant raises a plea in avoidance, stating that he is an infant. Then the plaintiff pleads further that he provided the defendant with necessities and is again entitled to recover. However, if this is the last valid plea in the case shown to be true, the measure of damages will not be the agreed-upon price but rather the value of the plaintiff's performance to the defendant. In Epstein's example, these pleadings not only allocate the burden of proof of facts at the trial, but also in part [pg77] help clarify the substantive law—in this case, the law relating to the appropriate measure of damages. Yet if we reflect upon how the relevant rules arose in the first instance in the common law, the pleadings represent a capsule history of defeasible propositions. In the first place, there was a legal proposition to the effect that a person could deliver goods to another in return for the latter's promise to pay, and that courts would enforce that promise. Second, courts came to realize that unfairness would result if infants' promises were enforced, because infants could be tricked into buying things they did not need, and at inflated prices. Thus, the first proposition became defeasible by an infant. Third, courts realized that, if infants could not be forced to pay for anything, people might withhold from them absolute necessities of life. Hence, the second proposition became defeasible upon a showing that a person could recover the value of necessities provided to an infant. These propositions and their exceptions all had to be asserted and argued when the common law was growing and becoming more complex, and in the very first cases in which they arose there were by definition no clear rules that specified the scope of the propositions. Yet that does not mean that those cases were "close" cases or "hard" cases. They present no greater occasion for judicial legislation than does any case today that contemplates a minor exception to a complex rule. Let us reconstruct what might have happened in the second and third cases of the infant. In the second case, an infant agreed to pay a high price for a trinket, and when sued, argued to the court that it did not realize what it was doing. The court could have said that a bargain is a bargain, that all promises must be enforced, and that the defendant infant must pay. But instead it found that the infant's argument was enough to shift the burden of proof back to the plaintiff, on the ground that courts do not enforce literal contracts or promises. In effect, the court's reasoning proceeds through several layers of presumptions. The first presumption is that contracts and promises are enforced by courts in order to be fair to people who have entered into mutually advantageous agreements in good faith. Under this presumption, this contract, an unfair contract, would not be enforceable. But the second presumption arises, undercutting the first—it is difficult to assess fairness in all cases. In turn the second yields to yet a third—unfairness is easily discerned when traceable to the fact that the defendant is an infant. As a result, the defendant should prevail, and the court's opinion should reflect that a contract is, in general, defeasible by an infant. In the third case, we can imagine a plaintiff successfully arguing to the court that there should be an exception to the no-infant-contracts rule when the infant is provided with necessities, [pg78] since objectively the infant got what it needed. The infant may have rejoined by arguing that even necessities can be sold to infants at inflated prices. Hence, the court decided not to make a further exception to the contracts rule, but rather to allow the plaintiff to recover the value of the necessities to the defendant. Otherwise there not only would be unfairness to the plaintiff in this case, but unfairness to future infant-defendants in other cases since unless there was recovery an infant might not be able to procure necessities. Indeed, the plaintiff who delivered the goods to the

infant-defendant may have anticipated the presumption that would bar his recovery of the agreed upon price from the infant, but figured that, at worst, the court would recognize a second and mitigating presumption that would allow him the value of the goods to the infant. Similar reasoning could occur to a motorist facing a stopped red light; he can reason that a court would justify his going ahead on the ground that otherwise he would be blocking traffic and perhaps be responsible for an accident. If the court later were to "legislate" a rule that after a four minute wait any driver may proceed through a red light, it would merely be recognizing the reasonable presumptions that were already implicit in the situation and not legislating at all.

But why, it may be asked, should a party have to "prove" the law? May we not have a legal system where parties simply present facts to the court, and the court, perhaps with help of counsel, assigns legal consequences to those facts? I would contend that courts exist to redress imbalances that occur in the "real world"—the world outside the courtroom. A plaintiff who files a case is complaining that something unjust or unfair happened to him, causing him injury, and that the state ought to force the defendant to make restitution. (The same is true in a criminal case, where the "people," through the prosecutor, want the defendant to make restitution by serving a jail sentence for the injury he caused the public.) In the very first cases in the common law where there were no pre-existing rules, the mere allegation in the form of a complaint that the defendant injured the plaintiff was enough to get the case tried. When the first courts awarded damages to the innovative plaintiffs, they justified their decisions by indicating various "rules" that seemed to fit the facts of the case and also seemed to be generalizable such that future cases on similar facts would be governed by the same rules. These rules probably were first articulated by the plaintiff's counsel in the course of the litigation, in answer to the general question by the court, "yes, you've been injured, but why should we grant you damages?" No matter how complex a case might be today, the party with the burden of proof has to articulate rules and principles sufficient to permit [pg79] recovery. Certainly the other side has no duty to indicate such rules, [FN47] and although the court may discover some on its own initiative, the party with the burden of proof can hardly complain if the court is not diligent in its own research. In sum, the initiating party wants the court to do something to redress a real-world imbalance; it wants the court to act. Hence, it must prove sufficient facts and demonstrate sufficient legal rules and principles to convince the court that the burden of persuasion has shifted to the other side. Once the court discerns a shift, it asks the other side for facts or rules that will again shift the burden back to the first party. An obvious analogy would be a net-type sport such as tennis. When the ball lands safely in your court, you have the burden of hitting it so that it lands safely in your opponent's court; if you fail, you lose the point. Similarly, in a trial, the side that last fails to shift back the burden loses the case. Under this view, a case that is evenly balanced under pre-existing law should be as rare as a point in tennis that cannot be awarded to either side because the tennis ball comes to rest on the top of the net and fails to fall on either side.

A different way of stating the conclusion just reached is to say that there are no "gaps" in the law. The judge who follows Cardozo's principle of "legislating" between gaps would never get a chance to legislate. The no-gaps conclusion certainly coheres with Dworkin's rights thesis, and indeed Dworkin has recently written an article that contends that there are no gaps in the law. [FN48] However, he did not use the presumptions and burden of proof approach suggested here, but rather echoed some of the arguments that have been used against the contention that there are gaps in international law. The international law example raises the question whether assigning

the burden of proving rules of law is arbitrary, depending upon who is nominally plaintiff in the case. [FN49] Counsel for Great Britain in the *Anglo-Norwegian Fisheries Case* [FN50] made such an argument before the International Court of Justice, claiming that where an asserted rule was hard to prove, the Court arbitrarily held failure to prove it against Great Britain. [FN51] He claimed that Great Britain could have "maneuvered" itself into a defendant's position on the issue, in which case [pg80] failure to prove would have been held against Norway. The contention acquires a surface plausibility when it is realized that often in international law states are reluctant, because of great concern for "sovereignty," to admit that they are suing other states in international courts. Thus, when disputes arise, states often submit their disputes to an international court under *a compromis* that lists neither side as plaintiff or defendant. This practice might seem to make it difficult for the court to assign burden of proof. However, international courts in fact have not had difficulty, because the factual situation that gives rise to the controversy plainly indicates which party is aggrieved on which issue. Thus, in the *Fisheries Case*, a closer analysis indicates that Great Britain could not have maneuvered itself into the position of defendant on the point at issue without having completely changed the facts of the case. If Great Britain had acted differently, then maybe a dispute would not have arisen; or at least, if it did, it would have been an entirely different dispute from the one that the Court was called upon to resolve. [FN52]

But even if there are no gaps—the seamless-web view of law [FN53]—does not my argument merely reduce to the proposition that a close or hard case is defined as one in which the judges find it difficult to tell whether the ball has been hit over the net? In other words, the plaintiff has proven some rules and principles, and the defendant others, and they seem to meet close enough to the center that a judge cannot tell whether the burden of proof has shifted. If that is so, is not my argument simply a verbalism?

I offer these responses to the foregoing objection. First, many cases are very close on the facts, and indeed any given case often has many disputed facts for which there is evidence on both sides. Nevertheless, juries and/or judges are able to make judgments, guided by the general proposition that if the evidence is exactly balanced then the burden of proof has not been discharged. [FN54] It should be no more difficult for a judge appraising a brief that contends the existence of various rules and principles. If the plaintiff shows that it is fractionally better than fifty-fifty that existing rules and principles [pg81] make out a legal theory for recovery by the plaintiff, then the judge turns to the defendant's arguments; but if the plaintiff only gets to fifty-fifty, he loses. Once the burden shifts to the defendant, the same principle applies. If the judge is not convinced that the defendant has succeeded in shifting the burden back to the plaintiff, the defendant should lose. There is no room here for judicial legislation; the judge simply decides whether the defendant has presented a sufficiently convincing set of arguments to shift the burden back to the plaintiff. [FN55] Of course, in many modern cases, particularly those before the United States Supreme Court which are often accompanied by numerous amici briefs that occasionally are difficult to discern as being clearly on one side or the other, arguments get muddled and judges may lose track of the shifting burden of persuasion. The unstructured arguments often lead to a noticeable lack of quality in the court's resulting opinions. But my point is a theoretical one: the adversary system and the idea of a court as a redresser of real-world imbalances creates the presumptiveness of rules. The shifting burden of persuasion constitutes the internal structure of a case even if judges in fact take their eye off the ball.

Second, there is in my opinion a great practical importance in viewing rules and principles as a function of the side that has the burden of proving them. For it means that judges should not legislate. I will attempt to spell out the implications of this contention in the final section of this essay in an examination of the theories of Professor Greenawalt.

### [pg82] III. GREENAWALT'S THEORY OF JUDICIAL LEGISLATION

Since Professor Greenawalt's essay is devoted to criticizing the rights thesis of Dworkin and Sartorius, his own position in favor of judicial legislation is presented indirectly as a contrast to the rights thesis. However, I believe the following two-stage characterization of his position is a fair reading of his essay:

1. The judge should determine whether existing rules and principles are "clear" in favoring one side or the other.

2. (a) If clear, the judge is bound by them to give the decision to the side favored by the rules and principles.

(b) If unclear, the judge may engage in judicial legislation. [FN56] Under this formula, how many cases might be characterized as lacking in clearly determinative rules? I would suspect that Greenawalt would have to include most contested cases that reach appellate courts since the parties probably would have settled had the rules been clear. My suspicion may perhaps be corroborated by a summation statement of Greenawalt's that appears to equate those cases in which existing rules and principles are unclear with those in which "informed lawyers disagree about the proper result." [FN57] Greenawalt would probably protest my conclusion that, under his theory, nearly all appellate court cases should be decided according to the legislative whim of the judges. Yet, I do not see how he would exclude any significant number of such cases from his rather amorphous formulation.

The point is important enough to use numerical examples. Suppose existing rules favor the plaintiff by sixty percent to forty percent. Greenawalt probably would say such a case was "clear"; I would say that it probably would be settled before reaching argument on the appellate level. But what if the rules favor the plaintiff fifty-three percent to forty-seven percent? Or fifty-one percent to forty-nine percent? These would be too close to call under Greenawalt's theory, and thus they would invite judicial legislation. In other words, if the plaintiff is "ahead" on the law by only two or four percentage points difference, he is no longer entitled to a win. The judge, legislating now in a way that favors the defendant, allows the defendant to prevail even though the defendant has the poorer case. I would contend that such a result would always be unjust. The unfairness is particularly manifest if we adopt the presumptive view of rules. If, after [pg83] arguments are raised and met and shifted back and forth, the burden of proof winds up on the defendant's side and the defendant cannot muster a sufficiently persuasive statement of rules, principles, and even considerations of justice to shift the burden back to the plaintiff, then under Greenawalt's theory the defendant may nevertheless prevail. Greenawalt might say, if he adopted the presumptive view, that the defendant has *almost* succeeded in shifting the burden of legal proof back to the plaintiff and hence *almost* is good enough. Of course, such a position might destroy the basis for the adversary system since either side in a case can only strive to establish a *better* legal position than the other. A case is a contest for the better legal position; it is not a battle for absolutes; hence, the system would fail if it included a principle that the side

that has the poorer legal position could nevertheless win. [FN58]

Moreover, Greenawalt's formula in practice might engender a noticeable dulling of legal debate and a growing unconcern for existing law—rules upon which the parties to a case presumably had relied. Counsel might perceive it as advantageous to muddy the waters sufficiently so that the judge would find that it is not a "clear" case. The lawyers could then begin to argue social policy and urge results that would make the court "look good," results that would elicit popular favor. In short, lawyers' arguments would shade into the kinds of presentations that are made to legislative committees. Amicus briefs would be invited, whose sheer number might impress the judges as to the constituencies behind a point of view. Moreover, judges, impelled by a desire to legislate in terms of broad social policy, might seek to be relieved of the burden of examining and analyzing statutes and case law to determine which side is the better case. Rather, they will gravitate toward finding any given case close enough to open the path for judicial legislation. The path might be made yet more accessible by virtue of an increasing judicial tendency to limit sharply the [pg84] amount of time for oral argument, thus ensuring that complex cases are reduced to a broadside clash of generalities. Judges might also limit the number of pages in the briefs, often simply by "letting it be known" that they will not *read* a brief that contains more than the usual number of pages. Such practices create a disincentive for lawyers to follow through lines of argument and to rebut the other side's contentions logically and in detail.

Greenawalt might object that "in very difficult cases . . . neither litigant is 'entitled' to the result he wants." [FN59] He might argue that, where the plaintiff has only succeeded in establishing a preponderance of the proof of law of fifty-two percent compared to the defendant's forty-eight percent, the plaintiff is not clearly entitled to win.

However, the abandonment of any notion of entitlement in close or difficult cases and the broad tolerance for judicial legislation that such abandonment engenders create additional problems that extend beyond the confines of the courtroom. For every difficult case, there are hundreds of thousands of difficult legal decisions that people with or without benefit of counsel make in their daily lives. Yet, in all these legal decisions taking place in the real world, attorneys and clients must have a reasonably dependable point of reference. Consequently, they follow the principle that anything over fifty percent of the presumptiveness content of a rule dictates adherence to that rule. One example might be the motorist waiting at the stuck red light—at some point in his mind the presumption that the light has indeed malfunctioned crosses the fifty-fifty probability level and he then proceeds into the intersection. Similarly, consider a taxpayer who wants to know whether he should report a sum of money received as "income" on his federal income tax form. His attorney says that in her judgment he should report the item as income, for even though it is a fairly close case, the Internal Revenue Code as she construes it, more likely than not, regards the item as income. The taxpayer then asks what would happen if he does not report it, the government finds out about it, and the case is litigated. The attorney replies that she could muster up a fairly strong case, maybe even forty- eight percent or forty-nine percent in the taxpayer's favor, but no higher than that, and thus the result would be that the litigation would waste time and money. Note that this private decision has important consequences for the efficacy of the rule of law in society. For if the taxpayer does not report the item on his income tax form, the chances are fairly good that the government might not ever find

out about it. Yet the [pg85] attorney insists upon his reporting the item (or else she would not sign the return and might even drop him as a client) because it is her judgment that the item is more likely "income" than not—even if by only an extremely slight amount. On the other hand, if her reading of the Internal Revenue Code convinced her that the item was not "income" by the slightest preponderance of statutory construction and sound argumentative principles, then she could advise him that he could legally exclude it from his return. For practical purposes, therefore, whether the government gets its tax on that item depends upon the lawyer's finely tuned judgment as to the proper construction of the Code.

Lawyers, as well as the public at large, need a sense of certainty that existing law can be counted upon and plans can be made grounded in legal research and thought. The idea of judicial legislation creates a hole in the system, into which is poured the unpredictable lawmaking preferences of whichever judge happens to be sitting in a given case. The hole widens when lawyers, counseling clients, perceive that an issue is sufficiently close for a future judge to make up a new rule governing it. Uncertainty grows, and it spawns more and more litigation. Soon there are gaps everywhere, and judges become lawmakers—unelected, unaccountable, and unrestrained by whatever rules and principles of law the parties relied upon in the first place.

If appellate court judges become legislators, they would not automatically be susceptible to the same kinds of pressures put upon ordinary legislators. Certainly judges would continue to rescue themselves if they have a financial interest in a given case or if they have a personal relationship with either party. Nor are there any signs that they would swap votes with other judges on the bench so as to get their "pet" cases decided a certain way. On the other hand, the attitude that a judge may legislate could shade imperceptibly into some of these conflicts of interest. A judge who owns shares of stock might find that, once he is legislating for the good of society, social policy requires that corporations should tend to prevail in litigation against private persons or the government. A judge who has heavily invested in the stock market and who has a personal fortune that is dependent on good business conditions might well be inclined to favor decisions that are supportive of a good business environment. [FN60] These kinds of factors may have a powerful effect upon a judge who feels that [pg86] in close cases he is freed from the burden of finding the law and instead is called upon to make wise new rules for the social good.

But suppose we could rule out all the preceding dangers, as Greenawalt seems to indicate that we might. [FN61] There are other kinds of factors that legislators properly take into account and which therefore might be taken into account by judges in close cases. Greenawalt has identified some of these legislative-type factors in judicial decision-making. Each of them departs from what Greenawalt labels the "purist" view (*i.e.*, the rights thesis). [FN62] Let us briefly consider each of the factors Greenawalt lists:

1. Greenawalt cautiously aligns himself with writers such as the late Professor Bickel in suggesting that judges might manipulate doctrines of standing and justiciability to avoid socially unpopular decisions on the merits. [FN63] To the contrary, following upon my previous argument that there are no "gaps" in the law, I would contend that any decision to avoid deciding a case has the same force and effect for the parties as does a decision on the merits. [FN64] Greenawalt questions, for example, "whether an issue like the legality of a war is appropriate for judicial decision or is committed without review to the political branches." [FN65] Yet, consider

the case of a soldier ordered to serve in Vietnam bringing legal action against the President and the Secretary of Defense. [FN66] The soldier's core contention is that the President's order as Commander-in-Chief is invalid because it cannot trace its validity to the Constitution. The soldier is not arguing that the "war" is "illegal," [FN67] as Greenawalt summarizes it. The soldier's [pg87] case, properly characterized, is in form and substance no different from many cases that courts handle routinely. Thus, when American courts during the Vietnam era decided to duck such a case by invoking legally shaky doctrines such as standing, justiciability, and political questions, in fact they were deciding the cases against the plaintiffs. [FN68] For the result was that the soldiers had to report for duty in Vietnam or face court-martial. When the courts deny redress to a class of plaintiffs, they are giving legal clearance to a class of defendants. All that they avoid by using doctrines of standing and justifiability is the need to write a reasoned opinion on the merits. [FN69] Similar arguments can be made against Bickel's support of the Supreme Court's desegregation decisions. [FN70]

Going beyond standing and justiciability, Greenawalt suggests that in close cases judges might possibly take into account the immediate social acceptability of decisions. [FN71] To an extent, it is possible that, if judges perceive that a possible decision would be extremely unpopular, that perception might stimulate them to inquire whether they may be perceiving the issue in the case too broadly or, perhaps, whether that decision is indeed the most compatible with existing precedents. For example, the prospect of massive resistance that a very unpopular decision could engender might convince the judge to do further research into the scope of his equity powers. But if Greenawalt is suggesting that a factor in tipping a close case could be the perceived popularity of the decision, then it would appear both that he has articulated a true "legislative" factor and that "justice" is no longer a goal for judges. For the fundamental notion of [pg88] "justice" is that someone is entitled to what he deserves even against society as a whole. [FN72] A person who says things that upset or stimulate others is entitled to first amendment protection even if a court's decision on his behalf is very unpopular. [FN73] Just as an attorney may have an ethical obligation to represent an unpopular client, so too courts, if they are dispensing justice instead of seeking politically palatable results, must vindicate the rights of unpopular litigants. To say that courts may look to immediate social acceptability of decisions in close cases is to give them a license to create law and apply it retroactively at the expense of unpopular litigants or litigants advocating unpopular ideas.

(2) Another factor that Greenawalt suggests might tip the scales in a close case is avoidance of the "widespread uncertainty that may result from a badly divided court." [FN74] Hence a judge might change his vote so that the resulting decision would have more popular acceptability due to its unanimity or near unanimity. Such a factor seems close to legislative logrolling, yet there is no doubt that in crucial cases such as *Brown v. Board of Education* [FN75] the price of unanimity was a compromise opinion that was arguably the worst thing the Court could have done short of voting for segregated schools. [FN76] Even apart from strategic wisdom, a judge who compromises what he thinks is right in order to ease the public's acceptance of judicial decisions is acting very much like a politician with a public relations adviser in tow. In the extreme, if the judges and courts were to continually water down what is right in order to purchase goodwill for the judiciary, of what use would this reservoir of goodwill ultimately be?

[pg 89] (3) A complex question is raised by a third factor suggested by Greenawalt: whether "judges may base decisions on their assessment of which results are socially more desirable." [FN77] The very complexity of the question poses a special challenge to students of legal philosophy to unravel it. Greenawalt qualifies the question in two ways. First, judges properly consider the consequences of various rules, particularly "in the sense of administrability and likely effectiveness." [FN78] I would not quarrel with this assertion, but I would suggest that such "consequences" are not necessarily synonymous with "social desirability." Rather, a simpler and more traditional theory to explain why judges look to the probable consequences of rules is that they are charged with giving people equal protection of the law (a requirement of justice even apart from the Constitution). [FN79] A rule, within the classifications it sets up, must be general in applicability. [FN80] Thus, when a rule is being articulated in a case, a judge ought to take into account the question whether the same rule in the future will be administered in a way that would produce similar consequences for others as it yields for the litigants in the present case. [FN81] Second, Greenawalt suggests that judges ought to refrain [pg90] from erecting new standards on the basis of social desirability in those areas of the law in which the legislature is consistently active. [FN82] He contrasts this to those areas of the law "in which the legislature has little interest." [FN83] There is a certain rough descriptive appeal in what Greenawalt says; we all recognize that legislatures are not too interested in matters such as the finer points of the law of restitution or trusts. But how can a judge draw the line that Greenawalt sets up? How much is "little interest" by a legislature? Suppose the legislature enacted a code twenty years ago that dealt with the law of restitution? Is that a little interest or a lot of interest? Additionally, does Greenawalt mean to suggest that in areas of broad social policy where the legislature has evinced a great deal of interest and activity, courts should not attune their decision-making to the legislative goals in cases that do not fall clearly under the statutes in that area? If so, he would be swinging to a restrictive version of the rights thesis which he otherwise criticizes. In any event, it is hard to see how a line as vague as "little interest" can aid a judge in determining whether he has the freedom to legislate.

On the other side of the vague line, Greenawalt would want courts to take into account social consequences of decisions and the social desirability of certain decisions. [FN84] I would contend that problems that are almost completely intractable arise when one tries to give any content to Greenawalt's notion of social desirability. Suppose that a judge were charged with the responsibility of deciding each case according to a "standard of social desirability." Suppose in a given case the judge decides that the defendant's position is more socially desirable; for example, the plaintiff is suing to enforce a contract for the shipment of a quantity of DDT, and if the defendant wins, the DDT will not be shipped to the plaintiff, who in turn will not be able to use it on his crops, and in turn the crops will not be contaminated by a substance that might be carcinogenic. If the [pg91] contract terms are not entirely clear as to whether the plaintiff may enforce the contract in court, should the judge, looking at what the contract is about (i.e., the shipment of DDT), decide in favor of the defendant? Such a decision might be socially desirable, according to the judge, but isn't there an equivalent social desirability in the impartial enforcement of private contracts according to their terms and not according to the particular goods or services contracted for? Cardozo displays an awareness of the same clash between individual rights and social welfare in *The Nature of the Judicial Process*: [FN85]

The final cause of law is the welfare of society. The rule that misses its aim cannot permanently

justify its existence. . . . I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance. We are not to forget, said Sir George Jessel, in an often quoted judgment, that there is this paramount public policy, that we are not lightly to interfere with freedom of contract. So in this field, there may be a paramount public policy, one that will prevail over temporary inconvenience or occasional hardship, not lightly to sacrifice certainty and uniformity and order and coherence. All these elements must be considered. They are to be given such weight as sound judgment dictates. They are constituents of that social welfare which it is our business to discover. [FN86]

This passage finesses the clash between social welfare and individual contractual rights by asserting that it is a "paramount" social policy to preserve the freedom of contract. But when one side asserts that a decision in its favor would be more socially desirable, may not the other side similarly raise its own claim of rights to a "paramount" level of social policy? If so, what does that do for the social-desirability "test" proposed by Greenawalt? [FN87]

[pg92] Pushing the factor even harder for a moment, can we be certain that legislators themselves enact laws that are socially desirable? Is the legislative push for nuclear-power plants in the social interest or in the narrow interest of utility companies? Will the answer depend upon whether some day several cities are buried under radioactive debris resulting from a breakdown-meltdown in one of those plants? Of course, we do not normally propose a "test" of the validity of any legislative act according to whether it is socially desirable; rather, we simply assume that most legislation is majoritarian, and that if the public doesn't find it to be in their self-interest they may vote out the incumbents at the next election. It follows that we do not criticize a legislator for voting according to any standard or lack thereof that he wants. If he votes for a nuclear-power plant because the utility company in his district contributed heavily to his election campaign, that may simply be a reason for some voters to vote against him the next time around. On the other hand, some voters will say that any person who did not return a favor would be a reprehensible sort of person, so that the legislator did the "right" thing in voting in favor of the utility company's interests. The looseness of the notion of "social desirability" in connection with legislatures, as well as the great flexibility in interpreting and evaluating the performance of a legislator, should argue strongly against adopting a "legislative" model for the judiciary. [FN88]

To argue that a judge ought in close cases to "legislate" with social desirability in view may have the practical effect of freeing a judge from prior legal constraints, including the duty to determine which side has ultimately failed to discharge its burden of legal proof, and of encouraging the judge to think of himself as representative of the interests of a majority within his political community. Suppose a judge is attempting to decide a close case in which it is alleged that an oligopoly has operated in violation of the antitrust laws. One of the defendant companies is a large employer in the judge's community. When the judge is honestly unsure of whether existing law covers or does not cover this particular oligopoly situation, should he resolve his doubt in favor of the defendant because the defendant company is, in some sense, socially useful to his community? (We certainly can expect the judge not to assign that as a reason for his decision, [pg93] but we are talking about his decision-making processes, which he-might later rationalize in a decision.) Or suppose, on the contrary, that in a similar case the

defendant company is engaged in processing nutritionless breakfast cereals; might that become a motivating reason for a judge to find that the company should lose an antitrust case? Legislators feel no constraint in supporting companies that are prominent in their political communities, or in advocating laws that may hurt companies whose products they personally dislike. They may even rationalize such attitudes as being "democratic" in the best sense. To argue, as does Greenawalt, that judges should legislate in close cases and that they should take into account social desirability of decisions is to argue for a removal of a large part of the legal restraints—a sort of legal lobotomy—that urge judges to decide cases according to the pre-existing rights of the parties. [FN89]

(4) Finally, Greenawalt argues that unprincipled judicial decisions, like the decisions of a legislator, may accord better with community sentiment than decisions that attempt to ground themselves in general principles because of the possibility of self-deception of judges who engage in abstract reasoning. To illustrate this point, Greenawalt gives an example which subsequently has been cited by other writers and thus merits quotation and examination here:

For example, if he looks at actual eating habits, a vegetarian must admit he is in a minority. But if he is allowed reference to higher concepts like the sanctity of life and to more peripheral evidence like legal protections against cruelty to animals and the general displeasure most people feel if they see animals slaughtered, he may convince himself that most members of society are "latent" vegetarians who do not realize what they "really" believe. [FN90]

This parody of abstract judicial deliberation is unconvincing. Is Greenawalt contending that the vegetarian's initial admission—that he is in a minority—is the premise that is subject to revision based upon the subsequent abstract reasoning? If so, the vegetarian would undoubtedly conclude that most people are in fact vegetarians, an absurd conclusion that carries its own refutation. But then, should we [pg94] conclude that they are "latent" vegetarians? If we do, what is a "latent" vegetarian? Is it a person who eats meat even though he prefers not to? If so, what force drives him to eat meat against his own preferences? Perhaps a latent vegetarian is a person who would rather not eat meat except for one thing—that he enjoys eating it. But then we have difficulty giving content to the phrase "rather not eat meat." The problem with Greenawalt's example is that it makes it appear as if judges resort to abstract principles in order to change their initial premise, *i.e.*, to turn the vegetarian minority into a majority.

The legitimate use of abstract generalization is quite different. Suppose a statute forbids cruelty to animals and a prosecutor brings an action against a slaughterhouse contending that the procedures it uses to kill animals inflict upon them unnecessary suffering. [FN91] Let us suppose that this becomes a very close case since the statute only arguably was intended to cover such a situation and since there are some arguments that it would cost the slaughterhouse more money to kill the animals painlessly. The defendant then argues that since most people eat meat, society obviously does not care about cruelty to animals and thus the statute should be construed strictly to apply only to those particular cases the legislature had in mind in enacting it. But the prosecutor rejoins that the issue of whether people are vegetarians or meat-eaters is not logically linked to the more abstract issue of whether society (and hence the legislature) wanted a broad construction to the prohibition against cruelty to animals. There are two possible choices—killing animals for food painlessly or killing them painfully. The court must determine which of these two choices it should follow, a decision that is not governed by whether people are or are

not vegetarians.

Nor does Greenawalt's other abstract generalization, that of "sanctity of life," fare any better. Meat-eaters may point out that carnivorous animals have existed for millions of years and yet life has persisted, that if humans eat meat they are not in this sense doing anything unnatural or contrary to the possibility of life on earth, and in particular that if human beings raise the animals whose meat they intend to eat, those animals would not have existed had it not been for the end that the humans had in mind. Vegetarians may counter these arguments by emphasizing that the sanctity of life encompasses all forms of life and thus nothing alive should be killed and eaten. [pg95] Meat-eaters may rejoin that sanctity of life does not mean that, but instead means that pain and suffering should be avoided. Surely there is nothing wrong with a judge investigating these arguments to determine what general purpose the legislature may have had in mind in enacting the statute. [FN92] But the judge is not necessarily misled as he or she proceeds to higher levels of abstraction, any more than it is self-deceptive to ask precisely what each of these generalizations means and what context gives them meaning. An investigation of notions of "sanctity of life" and "cruelty to animals" may, or may not, dictate the result in a close case. But it is hardly likely that having recourse to broader generalizations will lead the judge astray; the opposite is equally, if not more, likely.

Greenawalt's very discomfiture with the notion that judges proceed to look at more abstract levels of reasoning in hard cases indicates that he is at bottom a legislator. For he is apparently denying the very thing that makes "law" possible—the fair and equal application of general principles. The more general our principles become—that is, the more we lift ourselves from the specific case and find rules that apply to other cases as well—the more we have a system whose decisions are based upon "law." Greenawalt, instead, favors an "ad hoc basis." [FN93] He might equally well have used the term "arbitrary." For ultimately he cannot be a legislator either, if by "legislation" we mean the enactment of general rules of general applicability. Rather, he would apparently want a system where the legislature is constantly in session, constantly passing upon each and every case or controversy that comes up. In that way the legislature can enact new rules to fit each case without worrying about the possibility of self-delusion in future cases if the attempt is made to "apply" its present enactments to those cases. The ultimate thrust of his article (and many other less explicit versions of the same thing by other writers) is to convince us that we already have such a system, and that the constant legislator is the person we call a "judge."

#### IV. CONCLUSION

If a judge is indeed a legislator, even if only in hard cases, our idea of "law" and what we study when we study "law" undergoes a significant change. We begin to look at the judge rather than at his [pg96] decisions; we study his opinions rather than the results in the cases; we treat what he says off the bench in the way that medieval subjects paid attention to the remarks of lords and princes. Professor Greenawalt gives considerable attention in his essay to the opinions of judges as opposed to the "mere" results they reach in cases, and offers judicial opinions as evidence that judges are legislators. [FN94] For his students, Greenawalt's ideas must constitute a self-fulfilling prophecy. If they must take the opinions seriously, then on their examinations they must cite judicial preferences and attitudes equally if not more than the results reached in

the cases. In many undergraduate courses in constitutional law, a similar result must follow if we look at the various textbooks used in those courses. Often the books will have slabs of Supreme Court opinions quite divorced from the facts as to who were the plaintiffs or defendants—considered, no doubt, to be "technical" material for law students. What the student receives in such a course is a hunk of opinionated legislative-looking material. What he is asked to assimilate is what the Supreme Court says the Constitution is, and what he is asked to conclude is that the Constitution is what the Supreme Court says the Constitution is. He or his teacher may "disagree" with the Court's *policy*, but the materials as edited leave no room for disagreement with the result or the reasoning.

My contention in this essay is that such an approach is out of touch with reality. Judicial opinions are not collections of personal policy preferences (though sometimes poor opinions are just that). Rather, they are part of the constraints upon judges to reach results that accord with the law. What is important is that the judge must justify the results he reaches. The *need* to write an opinion is, thus, more important than the opinion that is written. And the resulting decision is more important than the opinion, just as a brick of a building is more important than the reasoning that went into its selection and emplacement. As beginning law students soon discover, judges are sometimes wrong in what they say; the "law" is not to be easily found in the pronouncements of courts.

Of course, theoretically we could have a different system. We could all agree that once a judge determines that a case is a hard or a close case, he may sail off on legislative seas of his own charting. In that event, the "judicial legislation" thesis would accurately reflect reality. But 999 out of 1,000 judicial decisions do no such thing, and most [pg97] people expect judges to know the law and not invent it. Although Cardozo tested the waters of judicial legislation in his lectures, his official opinions are a testament to the sound judicial practice of finding and applying existing law—not "laws" in the sense of rules, necessarily, but "Law" in the sense of the rules and the principles that animate them and give them a purpose in the ordering of human affairs.

## FOOTNOTES

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\*\*Numbers in the format pg63, etc. refer to the pagination of the original article.

[FN1]. See Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975), reprinted in R. DWORKIN, TAKING RIGHTS SERIOUSLY at 81, 82-90 (1977); R. SARTORIOUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 181-210 (1975).

[FN2]. See D'Amato, *Elmer's Rule: A Jurisprudential Dialogue*, 60 IOWA L. REV. 1129, 1143 (1975). Cardozo had said that the "logic" of the decision recounted in this article, *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889), was the one that "led to justice." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 41 (1921) [hereinafter cited as JUDICIAL PROCESS].

[FN3]. See Dworkin, *Seven Critics*, 11 GA. L. REV. 1201 (1977).

[FN4]. See Dworkin, *The Model of Rules I*, 35 U. CHI. L. REV. 14 (1967), reprinted in R. DWORKIN, *TAKING RIGHTS SERIOUSLY* at 14; Dworkin, *Judicial Discretion*, 60 J. PHIL. 624 (1963).

[FN5]. Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 361 (1975) [hereinafter cited as *Discretion and Judicial Decision*].

[FN6]. *Id.* at 363.

[FN7]. *Id.* at 359.

[FN8]. B. CARDOZO, *JUDICIAL PROCESS*, *supra* note 2, at 113-15 (footnotes omitted).

[FN9]. But not entirely; I do not share Dworkin's positivistic insistence upon existing (in the sense of previously articulated) rules and principles, an insistence which, to a considerable extent, is Greenawalt's as well.

[FN10]. B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928).

[FN11]. B. CARDOZO, *JUDICIAL PROCESS*, *supra* note 2, at 131.

[FN12]. See Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1044-47 (1977) [hereinafter cited as *Policy, Rights*] for other examples of the differences between adjudicating and legislating.

[FN13]. See notes 56-91 and accompanying text *infra*.

[FN14]. Of course, the distinction between "legislator" and "judge" depends upon denotations and connotations that have been assigned to these terms in the course of hundreds of years of political and legal history. Thus, Sartorius can be confident of his definitional grounds when he says: "A 'legislator' who is not entitled to appeal to anything other than pre-established authoritative legal standards in justification of his decisions is simply not a legislator." R. SARTORIUS, *supra* note 1, at 204.

[FN15]. See B. CARDOZO, *JUDICIAL PROCESS* *supra* note 2, at 120-21.

[FN16]. *Id.* at 146.

[FN17]. R. SARTORIUS, *supra* note 1, at 195.

[FN18]. Sartorius, *Social Policy and Judicial Legislation*, 8 AM. PHIL. Q. 151, 158 (1971), *quoted in* Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 383. *Cf.* J. FRANK, *LAW AND THE MODERN MIND* 37 (1930) (denial of judge-made law is viewed as a myth, a form of

self-deception in which judges indulge).

[FN19]. Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 383 (footnote omitted).

[FN20]. *See, e.g.*, J. FRANK, *COURTS ON TRIAL* (1949); K. LLEWELLYN, *JURISPRUDENCE* (1962).

[FN21]. *See*, Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 435 (1934).

[FN22]. Sartorius forcefully stated the reasons why a litigant is entitled to a decision grounded in existing law: "[A] litigant before a court of law is not in the position of one begging a favor from a potential benefactor, but rather in that of one demanding a decision as a matter of right—as something to which the law entitles him." R. SARTORIUS, *supra* note 1, at 189.

[FN23]. But they have been unsuccessful in pinpointing or quantifying these extrinsic factors. *See, e.g.*, L. FULLER, *THE LAW IN QUEST OF ITSELF* 53- 65 (1940). The failure may be due to internal inconsistencies. *See* D'Amato, *The Limits of Legal Realism*, 87 YALE L.J. 468, 506-13 (1978) [hereinafter cited as *Legal Realism*].

[FN24]. Professor Harry Jones is one realist who admits that the need to justify a result may constrain a judge's decision. *See* Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1025, 1033 (1974).

[FN25]. For example, suppose a judge announced that the main reason behind his decision was that the town's leading politician told him to vote that way. *See* D'Amato, *Legal Realism*, *supra* note 23, at 503. *See generally* Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972).

[FN26]. D. RIESMAN, *THE LONELY CROWD* 199-209 (1950). Riesman's book is a study of American social character. *Id.* at v. The "inside-dopester" is characterized as a political style.

[FN27]. It should be noted that although Holmes' phrase "can't helps" is not in any of his published works, it is attributed to him. *See, e.g.*, Freund, *Social Justice and the Law*, in *SOCIAL JUSTICE* 110 (R. Brandt ed. 1962).

[FN28]. *See* Wu, *The Juristic Philosophy of Mr. Justice Holmes*, 21 MICH. L. REV. 523, 530-31 (1923). In discussing Holmes' view that the law is a science of prediction, Wu made the apt comment that "people do not study cases for pleasure, but generally with a view to anticipating what the courts will do when future cases arise." *Id.* at 530, *quoted in* B. CARDOZO, *THE GROWTH OF THE LAW* 45 (1924) [hereinafter cited as *GROWTH*].

[FN29]. According to Greenawalt, when "respected judges, like Cardozo, whose opinions resemble those of other judges, write off the bench about judges' legislative functions, and we note that their views are not often challenged by other judges," we should give credence to the judicial- legislation theory. Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 384. To the contrary, I think that most judges would not take issue with Cardozo for a different reason: that there isn't very much to say other than that he is wrong. For reasons given in the text,

the judicial-legislation theory is interesting and it opens the door to general philosophizing; in contrast, adhering to existing law is a method, the content of which is specific to the case at hand. Additionally, judges, of all people, might take more seriously what Cardozo does in his official opinions than what he says about the judicial process off the bench. Finally, some judges, less introspective than Cardozo, might think they are "legislating" when all they are doing is articulating, in a new way, rules that they infer from pre-existing legal materials.

[FN30]. See B. CARDOZO, *JUDICIAL PROCESS*, *supra* note 2, at 149.

[FN31]. *Id.* at 128.

[FN32]. *Id.* at 129.

[FN33]. *Id.* at 135 (quoting Corbin, *The Offer of an Act for a Promise*, 29 *YALE L.J.* 767, 772 (1920)).

[FN34]. *Id.* at 139.

[FN35]. *Id.* at 141 (footnote omitted).

[FN36]. 217 *N.Y.* 382, 111 *N.E.* 1050 (1916).

[FN37]. CARDOZO, *GROWTH*, *supra* note 28, at 41.

[FN38]. See R. Dworkin, *Hard Cases*, *supra* note 1, at 105-06.

[FN39]. See D'Amato, *Can/Should Computers Replace Judges?*, 11 *GA. L. REV.* 1277 (1977).

[FN40]. The mathematics of relativity or quantum mechanics, however, remains invariant, as do certain rules such as the Lorentz transformation in relativity theory. Analogously, scholarly writings in law are invariant in the sense that they are not intrinsically affected by the circumstances-position of the author or the specific facts of the cases referred to. Were it not for this fact, there would be no hope for making law clear and determinable. Despite a popular misapprehension, Einstein's theory did not say that everything is relative (if it did, it would be immediately self-contradictory). The speed of light, for example, does not vary according to the speed of an observer relative to the source of light—an "absolute" which would have seemed absurd to Newtonian physicists. The theory of relativity was a search for absolutes to encompass observables that were relative to the observer. A theory of law, similarly, should search for invariances to encompass the relativity of a rule to the person affected by the rule.

[FN41]. See D'Amato, *Legal Realism*, *supra* note 23, at 477-95. The attorney's prediction of official behavior is an expression of his degree of confidence that past official behavior will continue to be consistent as to a similar set of facts. Moreover, the lawyer's prediction is "law" to his client.

[FN42]. The infinite possibilities of unforeseeable defeasibilities are what make rules

presumptions instead of result-forcing dictates. Language is necessarily permeable when used as a directive to shape future human behavior. *Cf.* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 84 (3d ed. 1968) ("the application of a word is not everywhere bounded by rules").

[FN43]. The Supreme Court recognized the impact upon everyday decisions of the burden of proving the law in *Speiser v. Randall*, 357 U.S. 513 (1958). In reversing a state supreme court finding that required the petitioners to show the lawfulness of their speech in order to qualify for a tax exemption, the Court stated: "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Id.* at 526.

[FN44]. *See* D'Amato, *Legal Realism*, *supra* note 23, at 478-82.

[FN45]. *See* Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973).

[FN46]. *Id.* at 570.

[FN47]. This would be qualified by any duty imposed by the Code of Professional Responsibility. *See, e.g.*, ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(B)(1) (1976).

[FN48]. *See* Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978).

[FN49]. *See* The S.S. Lotus, [1927] P.C.I.J., ser. A, No. 10, at 4.

[FN50]. [1951] I.C.J. Rep. 116.

[FN51]. 4 Fisheries Case, I.C.J. Pleadings, Oral Arguments, Documents 395- 98 (1951).

[FN52]. For an expansion and elaboration of this argument, *see* A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 177-86 (1971).

[FN53]. As one Northwestern law student put it, neatly summing up centuries of Anglo-American jurisprudence, "The law is a seamless mistress."

[FN54]. *See* J. WIGMORE, THE SCIENCE OF JUDICIAL PROOF (3d ed. 1937); McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955).

[FN55]. This view of the function of a judge may make life less interesting for a judge; conversely, a judge who ponders "social policy" and feels free to "legislate" may have a happier time on the bench. But consider the following interview of former dean and legal scholar Edward Levi upon leaving the office of Attorney General of the United States in 1977. The reporter noted that as Levi was

talking about how he would take the discretionary sentencing power away from judges today, he raised an eyebrow and out came one of those bemused but biting lines of his. "The judges tell me it isn't interesting if

they are just there to hand out sentences. I tell them, "The legal system is not designed to make life interesting for you."

G.A. Geyer, *Levi: Man of Principle Sought Reachable Good*, Chicago Daily News, Jan. 1-2, 1977, at 7, col. 6. Does Greenawalt think that judicial opinions are designed to make life interesting for law professors and their students? He writes, "The academic community is filled with scholars who believe Justice Harlan was an outstanding judge even though they think he voted the 'wrong way' in the great majority of important constitutional law cases on which he sat." Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 385. Presumably that academic community includes Professor Higgins, who in *My Fair Lady* quipped, "The French don't actually care what you say, so long as you pronounce it properly." These triumphs of form over substance indicate a certain kind of academic mind—divorced from the reality, the pains and sufferings, the unjust losses of real people in the real world.

[FN56]. See Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 368, 378.

[FN57]. *Id.* at 386.

[FN58]. Greenawalt might rejoin that a judge cannot determine anything so close and precise as a 51-49 case. My reply has already been suggested in the text. First, it is Greenawalt himself (as well as Dworkin) who talks about close cases; how does he know when a case is "close"? Second, under the presumptive view of rules, a 51-49 determination is in principle no different from a 60-40 one; in neither has the burden of proof switched to the other side. Inexperienced juries make such determinations all the time with respect to proof of facts; are we unwilling to allow judges to make similar determinations with respect to proof of law? Third, if we have a close case, its very closeness should trigger further study. Further research may convince the judge that a case that looked close is not so close after all. On the other hand, the danger of Greenawalt's position is that once a judge decides that a case is close, he may feel free to abandon further researches into the law and turn instead to the more interesting task of making up some law.

[FN59]. Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 385.

[FN60]. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* (1977), explores instances of judicial legislation in the 19th century which operated to nurture new business interests.

[FN61]. See Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 1046.

[FN62]. *Id.* at 388. Chayes, *The Role of the Judge in Public Law Litigation* 89 HARV. L. REV. 1281 (1976), addresses the question whether judicial procedures in public law litigation approach those of legislators or administrators. Perhaps new language is needed to describe what judges do when they assert traditional equitable or remedial powers, but "legislation" seems too strong a term even for Professor Chayes' purposes for reasons similar to those I have tried to suggest in this article.

[FN63]. Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 388 (citing A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962)). See Gunther, *The Subtle Vices of the 'Passive*

*Virtues'*—A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1 (1964).

[FN64]. Cf. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 210-16 (1972) (arguing that when the Supreme Court, in reviewing cases involving foreign affairs, has invoked the "political question" doctrine, it has nevertheless reviewed the merits of a case and found them constitutionally acceptable).

[FN65]. Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 388.

[FN66]. See, e.g., Mora v. McNamara, 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967); A. D'AMATO & R. O'NEIL, THE JUDICIARY AND VIETNAM 24-32 (1972). For a discussion of the political question doctrine in the Vietnam context, see *id.* at 51-58.

[FN67]. A. D'AMATO & R. O'NEIL, *supra* note 66, at 89-97. Indeed, as Professor O'Neil and I argue, the war in Vietnam may have been unconstitutional in so far as inducted soldiers were concerned, though arguably constitutional for volunteers. The latter argument is based on the militia clauses of the Constitution, U.S. CONST. art. I, § 8, cls. 15-16. Cf. United States v. O'Brien, 391 U.S. 367, 389 (1968) (Douglas, J., dissenting) (Congressional power "to classify and conscript manpower for military service" may be "beyond question" only when "by declaration of Congress, the Nation is in a state of war". 391 U.S. at 389. Justice Douglas argued that a conviction for draft-card burning cannot be reviewed without considering the underlying congressional power to require classification and conscription during peacetime.) The distinction between inducted soldiers and volunteers demonstrates that it is the plaintiff's own case that a court should be concerned about and not an abstract question.

[FN68]. See D'Amato, Velvel, Sager, Vandyke, Freeman & Cummings, *Brief for Constitutional Lawyers' Committee on Undeclared War as Amicus Curiae, Massachusetts v. Laird*, 17 WAYNE L. REV. 79 (1971).

[FN69]. In one Vietnam case, the Supreme Court found no way to write a reasoned opinion denying original jurisdiction. The result was that for the first time in the history of the Supreme Court in its original jurisdiction docket, jurisdiction was summarily denied without an opinion. See *Massachusetts v. Laird*, 400 U.S. 886, 886 (1970) (Douglas, J., dissenting). See also A. D'AMATO & R. O'NEIL, *supra* note 66, at 45.

[FN70]. Professor Wasby, Ms. Metrailler, and I have made such an argument at length elsewhere. See S. WASBY, A. D'AMATO, & R. METRAILLER, DESEGREGATION FROM BROWN TO ALEXANDER: AN EXPLORATION OF SUPREME COURT STRATEGIES 104-07, 124-30, 374-77 (1977).

[FN71]. Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 389.

[FN72]. J. FEINBERG, DOING AND DESERVING 55-94 (1970). See D. MILLER, SOCIAL JUSTICE 17-31 (1976).

[FN73]. Compare Justice Douglas' dissent in *Dennis v. United States*, 341 U.S. 494, 581 (1951),

with Justice Frankfurter's concurrence, *id.* at 517. Frankfurter, adopting a deferential posture toward the legislature, becomes a judicial legislator himself when he reduces the first amendment's flat prohibition against a congressional law abridging the freedom of speech to a mere "interest" that is deserving of some, but not too much, judicial protection. The opinion becomes a form of senatorial courtesy from one legislator to another, with Frankfurter ignoring the fact that his deference is to a law that under the Constitution, Congress had no right to enact.

[FN74]. Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 389.

[FN75]. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

[FN76]. For example, the "legislative" quality of the "all deliberate speed" order meant in effect that Southern schools would remain almost completely segregated for a generation of students. *See Alexander v. Holmes County*, 396 U.S. 19 (1969); S. WASBY, A. D'AMATO, & R. METRAILER, *supra* note 70, at 102-04, arguing in detail as to the perceived effect of the *Brown* decision and concluding that the price of unanimity was too high. My own preference would have been for an unqualified decision that segregated schools violate the Constitution. Implementation would then be left to future lawsuits where the contentions could be based upon constitutional rights and not policy.

[FN77]. Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 391. It is important to recognize that there exist two possible ways of assessing social desirability: applying one's own notions of social good, or attempting to ascertain community values. Greenawalt suggests that judges may "perform better" if they look to their own moral values in close cases, "except when they know their positions to be clearly out of line with generally accepted institutions and values." *Id.* at 396. The difficulties with evaluating Greenawalt's position as to the nature of the moral contribution of the judiciary are best deferred to future discussion.

[FN78]. *Id.*

[FN79]. *See* E. BODENHEIMER, *TREATISE ON JUSTICE* 75-88 (1967); Dworkin, *What Rights Do We Have?*, in R. DWORKIN, *TAKING RIGHTS SERIOUSLY* at 266, 272-78; H.L.A. HART, *THE CONCEPT OF LAW* 155-58 (1961).

[FN80]. *See* L. FULLER, *THE MORALITY OF LAW* 46-49 (rev. ed. 1969), where the author argues that generality is the first requirement of a legal system which is defined as subjecting human conduct to the governance of rules.

[FN81]. In addition, Greenawalt offers as a variation on the judicial administrability theme the perceived effect of a rule upon those it is primarily designed to protect. He cites the late Harry Kalven's suggestion that a rule providing a tort remedy for embarrassing publications of true facts might be futile because embarrassed people will not sue and further publicize their embarrassment. Greenawalt suggests that, if such assumptions "could be established" (he does not say how one would go about "establishing" them), that would be a "weighty argument against judicial extension of the tort right of privacy to those situations." Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 392. However, we might well inquire into the underlying

assumptions of Kalven and Greenawalt. Are they assuming that judges "extend" such a tort remedy by legislative fiat in a case having nothing to do with embarrassing publications? If so, they are only tilting against the worst sort of dicta. On the other hand, if the matter arises in a tort action for damages for an embarrassing publication, then obviously the plaintiff has already decided to further publicize his or her embarrassment. It would consequently be absurd to argue, in the teeth of this concrete case, that no one would sue because a suit would cause further embarrassment. In short, in the only case that can arise in which the theory could be propounded, the case contradicts the theory. The situation illustrates the tendency among some legal scholars to adopt a legislative mode in their teaching and writing, trying to outdo the judicial-legislator.

[FN82]. *Id.* at 393.

[FN83]. *Id.*

[FN84]. *Id.* at 393-94. Subsequent to the Greenawalt essay I am considering here, there was an exchange between Greenawalt and Dworkin on "social policy" as a factor in judicial decision-making. *See* Greenawalt, *Policy, Rights, supra* note 12; Dworkin, *Seven Critics*, 11 GA. L. REV. 1201 (1977). Both Greenawalt and Dworkin seem to assume that social policy is determinable by a judge, Greenawalt contending that the judge should factor it in and Dworkin answering that only the legislature may properly do so.

[FN85]. The "clash" is evidenced in the very definition of social policy given by Dworkin: "Arguments of policy attempt to justify a decision by showing that, in spite of the fact that those who are benefited do not have a right to the benefit, providing the benefit will advance a collective goal of the political community." Dworkin, *Seven Critics, supra* note 84, at 1204.

[FN86]. B. CARDOZO, *JUDICIAL PROCESS, supra* note 2, at 66-67 (citing *Printing and Numerical Registering Co. v. Sampson*, L.R. 19 Eq. 462, 465 (1875)).

[FN87]. I would not make a claim that "justice" is similarly vacuous. *See* D'Amato, *Review of Power, Law, and Society*, 1974 WASH. U.L.Q. 375. But a problem similar to the one in the text arises when one compares macro-justice with micro-justice. *See generally* R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 204-13 (1974); J. RAWLS, *A THEORY OF JUSTICE* 352-53 (1971). Or, if a utility-maximization principle is substituted for "justice," we encounter similar problems; cf. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 104 (2d ed. 1977) ("A parent who loves his child in the sense that the parent derives as much utility from the utility experienced by the child (over its lifetime) as does the child will seek to maximize the child's lifetime utility by investing optimally in his [sic] upbringing."). On this theory, why cannot every human being more or less derive utility from other human beings, thus rendering vacuous the concept of utility?

[FN88]. This may be true even in procedural matters in public law litigation. *See* note 62 *supra*.

[FN89]. Greenawalt has made an important distinction between describing what a judge does for jurisprudential purposes and describing what he does for "political" purposes; the latter might tend to encourage judges to be "less conscientious in judging." Greenawalt, *Discretion and Judicial Decision, supra* note 5, at 362. My point in the text is different: that if we purport to be

accurately describing what judges do as "legislating," then we should understand that the mind-set of a legislator might be, or even ought to be, absorbed by the judge. But if we are uncomfortable with the consequences, we ought to reexamine the premises.

[FN90]. Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 397.

[FN91]. Cf. C.D. STONE, SHOULD TREES HAVE STANDING? 50-51 (1974) (arguing that expanding our concern for the well-being of animals and the environment engenders a deeper understanding of our own place within the scheme of nature, thereby reshaping our already changing view of the natural world.)

[FN92]. I use "purpose" in Fuller's sense here. See Fuller, *Human Interaction And The Law*, 14 AM. J. JURIS. 1 (1969). See generally D'Amato, *Towards a Reconciliation of Positivism and Naturalism: A Cybernetic Approach to a Problem of Jurisprudence*, 14 W. ONT. L. REV. 171, 188-97 (1975).

[FN93]. See Greenawalt, *Discretion and Judicial Decision*, *supra* note 5, at 397.

[FN94]. *Id.* at 378-81.