FORM AND SUBSTANCE IN PRIVATE LAW ADJUDICATION †

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THIS article is an inquiry into the nature and interconnection of the different rhetorical modes found in American private law opinions, articles and treatises. I argue that there are two opposed rhetorical modes for dealing with substantive issues, which I will call individualism and altruism. There are also two opposed modes for dealing with questions of the form in which legal solutions to the substantive problems should be cast. One formal mode favors the use of clearly defined, highly administrable, general rules; the other supports the use of equitable standards producing ad hoc decisions with relatively little precedential value.

My purpose is the rational vindication of two common intuitions about these arguments as they apply to private law disputes in which the validity of legislation is not in question. The first is that altruist views on substantive private law issues lead to willingness to resort to standards in administration, while individualism seems to harmonize with an insistence on rigid rules rigidly applied. The second is that substantive and formal conflict in private law cannot be reduced to disagreement about how to apply some neutral calculus that will "maximize the total satisfactions of valid human wants." [1] The opposed rhetorical modes lawyers use reflect a deeper level of contradiction. At this deeper level, we are divided, among ourselves and also within ourslves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future.

The discussion proceeds as follows. Sections I and II address the problem of the choice between rules and standards as the form for legal directives, collecting and organizing the wide variety of arguments that have been found persuasive in different areas of legal study. Sections III and IV develop the dichotomy of individualism and altruism, with the hope of bringing a measure of order to the chaotic mass of "policies" lawyers use in justifying particular legal rules. Sections V, VI and VII argue that the

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Colleagues, friends and family too numerous to list helped me generously in the writing of this article; Philip Heymann, Morton Horwitz, Robert Nozick and Henry Steiner were especially profligate of their time and thoughts. Errors are mine alone.

[1] H. HART & A. SACKS, THE LEGAL PROCESS 113 (tent. ed. 1958).

formal and substantive dichotomies are in fact aspects of a single conflict, whose history is briefly traced through a hundred and fifty years of moral, economic and political dispute. Section VIII outlines the contradictory sets of fundamental premises that underlie this conflict. Section IX is a conclusion.

I will use the law of contracts as a primary source of illustrations, for two reasons. I know it better than other private law subjects, and it is blessed with an extraordinary scholarly literature full of insights that seem to beg for application beyond the narrow compass within which their authors developed them. For example, much of this article simply abstracts to the level of "private law" the argument of an article by Stewart Macaulay on credit cards.[2] It may be useful to take, as a beginning text, the following passage from the Kessler and Gilmore *Contracts* casebook: [3]

> The eventual triumph of the third party beneficiary idea may be looked on as still another instance of the progressive liberalization or erosion of the rigid rules of the late nineteenth century theory of contractual obligation. That such a process has been going on throughout this century is so clear as to be beyond argument. The movement on all fronts has been in the direction of expanding the range and the quantum of obligation and liability. We have seen the development of theories of quasi-contractual liability, of the doctrines of promissory estoppel and culpa in contrahendo, of the perhaps revolutionary idea that the law imposes on the parties to a contract an affirmative duty to act in good faith. During the same period the sanctions for breach of contract have been notably expanded. Recovery of "special" or "consequential" damages has become routinely available in situations in which the recovery would have been as routinely denied fifty years ago. The once "exceptional" remedy of specific performance is rapidly becoming the order of the day. On the other hand the party who has failed to perform his contractual duty but who, in the light of the circumstances, is nevertheless felt to be without fault has been protected by a notable expansion of theories of excuse, such as the overlapping ideas of mistake and frustration. To the nineteenth century legal mind the propositions that no man was his brother's keeper, that the race was to the swift and that the devil should take the hindmost seemed not only obvious but morally right. The most striking feature of nineteenth century contract theory is the narrow scope of social

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[2] Macaulay, *Private Legislation and the Duty to Read — Business Run by IBM Machine, The Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1056–69 (1966).

[3] F. KESSLER & G. GILMORE, CONTRACTS, CASES AND MATERIALS 1118 (2d ed. 1970) [hereinafter cited as KESSLER & GILMORE].

duty which it implicitly assumed. In our own century we have witnessed what it does not seem to fanciful to describe as a socialization of our theory of contract.

My purpose is to examine the relationship between the first and last sentences of the quoted passage. What is the connection between the "*erosion of the rigid rules* of the late nineteenth century theory of contractual obligation" and the "*socialization* of our theory of contract?" I will begin by investigating the formal concept of a rigid rule.

I. The Jurisprudence of Rules

The jurisprudence of rules is the body of legal thought that deals explicitly with the question of legal form. It is premised on the notion that the choice between standards and rules of different degrees of generality is significant, and can be analyzed in isolation from the substantive issues that the rules or standards respond to.[4]

A. Dimensions of Form

1. Formal Realizability. — The first dimension of rules is that of formal realizability. I will use this term, borrowed from Rudolph von Ihering's classic *Spirit of Roman Law*, to describe the degree to which a legal directive has the quality of "ruleness." The extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by interven-

[4] The principal sources on the jurisprudence of form with which I am acquainted are: 6 J. Bentham, The Works of Jeremy Bentham 60–86, 508–85 (Bowring ed. 1839); 2 Austin, Lectures on Jurisprudence 939–44 (4th ed. 1873); 3 R. von Ihering, Der Geist des Romsichen Recht § 4, at 50–55 (1883) [available in French translation as R. von Ihering, L'Esprit du Droit Romain (Meulenaere trans. 1877); future citations are to French ed.]; 2 M. Weber, Economy and Society 656–67, 880–88 (Ross & Wittich eds. 1969); Pound, *The Theory of Judicial Decision, III*, 36 Harv. L. Rev. 940 (1923); Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941); von Mehren, *Civil Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 Harv. L. Rev. 1009 (1959); Macaulay, *Justice Traynor and the Law of Contracts*, 13 Stan. L. Rev. 812 (1961); Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 Harv. L. Rev. 755 (1963); Friedman, *Law, Rules and the Interpretation of Written Documents*, 59 Nw. U.L. Rev. 751 (1965); Macaulay, *supra* note 2; Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14 (1967); K. Davis, Discretionary Justice: A Preliminary Inquiry (1969); P. Selznick, Law, Society and Industrial Justice 11–18 (1969); Kennedy, *Legal Formality*, 2 J. Leg. Stud. 351 (1973); R. Unger, Law in Modern Society 203–16 (1976); A. Katz, *Vagueness and Legal Control of Children in Need of Supervision*, in Studies in Boundary Theory (unpublished manuscript on file at Harvard Law Review, 1976).

ing in a determinate way. Ihering used the determination of legal capacity by sole reference to age as a prime example of a formally realizable definition of liability; on the remedial side, he used the fixing of money fines of definite amounts as a tariff of damages for particular offenses.[5]

At the opposite pole from a formally realizable rule is a standard or principle or policy. A standard refers directly to one of the substantive objectives of the legal order. Some examples are good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness. The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.[6]

It has been common ground, at least since Ihering, that the two great social virtues of formally realizable rules, as opposed to standards or principles, are the restraint of official arbitrariness and certainty. The two are distinct but overlapping. Official arbitrariness means the sub rosa use of criteria of decision that are inappropriate in view of the underlying purposes of the rule. These range from corruption to political bias. Their use is seen as an evil in itself, quite apart from their impact on private activity.

Certainty, on the other hand, is valued for its effect on the citizenry: if private actors can know in advance the incidence of official intervention, they will adjust their activities in advance to take account of them. From the point of view of the state, this increases the likelihood that private activity will follow a desired

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[5] *See* 1 R. VON IHERING, *supra* note 4, at 51–56.

[6] *See* H. HART & A. SACKS, *supra* note 1, at 126–29; Friedman, *supra* note 4, at 753–54; Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1042–47 (1976). The extent to which particular words or categories are regarded as sufficiently "factual" to serve as the basis of formally realizable rules changes through time, is subject to dispute at any particular time, and is a matter of degree. For example, the idea of competition may appear to one writer to be capable of generating precise and predictable answers to particular questions of antitrust law, while another may regard it as no more than a standard, unadministrable except though a further body of per se rules. *Compare* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and the Market Division*, 74 YALE L.J. 775 (1965), *with* Turner, *The Principles of American Antitrust Law*, in COMPARATIVE ASPECTS OF ANTITRUST LAW IN THE UNITED STATES, THE UNITED KINGDOM AND THE EUROPEAN ECONOMIC COMMUNITY 9–12 (Int'l & Comp. L.Q. Supp. Vol. 6, 1963). "Best interests of the child" has been subject to a similar dispute. *See* Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 1975 LAW & CONTEMP. PROB. 226. The grandfather of such controversies in Anglo-American law is the "objectivism" issue. Late nineteenth century legal thought claimed that "subjective intent" was no more than a standard, and that legal directives dependent on its determination should be recast as rules referring to "external" aspects of the situation. *See* Kennedy, *supra* note 4, at 364 n.22.

pattern. From the point of view of the citizenry, it removes the inhibiting effect on action that occurs when one's gains are subject to sporadic legal catastrophe.[7]

It has also been common ground, at least since Ihering,[8] that the virtues of formal realizability have a cost. The choice of rules as the mode of intervention involves the sacrifice of precision in the achievement of the objectives lying behind the rules. Suppose that the reason for creating a class of persons who lack capacity is the belief that immature people lack the faculty of free will. Setting the age of majority at 21 years will incapacitate many but *not all* of those who lack this faculty. And it will incapacitate some who actually possess it. From the point of view of the purpose of the rules, this combined over- and underinclusiveness amounts not just to licensing but to requiring official arbitrariness. If we adopt the rule, it is because of a judgment that this kind of arbitrariness is less serious than the arbitrariness and uncertainty that would result from empowering the official to apply the standard of "free will" directly to the facts of each case.

2. *Generality.* — The second dimension that we commonly use in describing legal directives is that of generality vs. particularity. A rule setting the age of legal majority at 21 is more general than a rule setting the age of capacity to contract at 21. A standard of reasonable care in the use of firearms is more particular than a standard of reasonable care in the use of "any dangerous instrumentality." Generality means that the framer of the legal directive is attempting to kill many birds with one stone. The wide scope of the rule or standard is an attempt to deal with as many as possible of the different imaginable fact situations in which a substantive issue may arise.[9]

The dimensions of generality and formal realizability are logically independent: we can have general or particular standards, and general or particular rules. But there are relationships between the dimensions that commonly emerge in practice. First, a general rule will be more over- and underinclusive than a par-

[7] While certainty is now praised through the formal language of efficiency, the idea has been familiar for centuries. Montesquieu put it as follows, speaking of the peasants of the Ottoman Empire in the eighteenth century: "Ownership of land is uncertain, and the incentive for agricultural development is consequently weakened: there is neither title nor possession that is good against the caprice of the rulers." C. DE MONTESQUIEU, LETTRES PERSANES 64 (1721). *See* Kennedy, *supra* note 4, at 365–77.

[8] R. VON IHERING, *supra* note 4, at 54–55.

[9] *See generally* Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 832–35 (1967); Leff, *Contract as Thing*, 19 AMER. U.L. REV. 131, 131–37 (1970). For an illustration of how the issue arises in legal argument, see Meinhard v. Salmon, 249 N.Y. 458, 472, 164 N.E. 545, 549 (1928) (Andrews, J., dissenting). *See also* note 10 *infra*.

ticular rule. Every rule involves a measure of imprecision vis-à-vis its purpose (this is definitional), but the wider the scope of the rule, the more serious the imprecision becomes.

Second, the multiplication of particular rules undermines their formal realizability by increasing the number of "jurisdictional" questions. Even where the scope of each particular rule is defined in terms of formally realizable criteria, if we have a different age of capacity for voting, drinking, driving, contracting, marrying and tortfeasing, there are likely to be contradictions and uncertainty in borderline cases. One general rule of legal capacity at age 18 eliminates all these at a blow, and to that extent makes the system more formally realizable.[10]

Third, a regime of general rules should reduce to a minimum the occasions of judicial lawmaking. Generality in statement guarantees that individual decisions will have far reaching effects. There will be fewer cases of first impression, and because there are fewer rules altogether, there will be fewer occasions on which a judge is free to choose between conflicting lines of authority. At the same time, formal realizability eliminates the sub rosa lawmaking that is possible under a regime of standards. It will be clear what the rule is, and everyone will know whether the judge is applying it. In such a situation, the judge is forced to confront the extent of his power, and this alone should make him more wary of using it than he would otherwise be.[11]

Finally, the application of a standard to a particular fact situation will often generate a particular rule much narrower in scope than that standard. One characteristic mode of ordering a subject matter area including a vast number of possible situations is through the combination of a standard with an ever increasing group of particular rules of this kind. The generality of the standard means that there are no gaps: it is possible to find out something about how judges will dispose of cases that have not yet arisen. But no attempt is made to formulate a formally realizable general rule. Rather, case law gradually fills in the area with rules so closely bound to particular facts that they have little or no precedential value.[12]

3. Formalities vs. Rules Designed to Deter Wrongful Be-

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[10] This phenomenon is discussed in Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 1969 LAW & CONTEMP. PROB. 673, 695–702; Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 374–77, 388–95 (1974).

[11] On the obligation to formulate rules as a check on discretionary power, see K. DAVIS, *supra* note 4, at 52–96; Amsterdam, *supra* note 10, at 416–28.

[12] Chief Justice Shaw gave classic expression to this view in Norway Plains Co. v. Boston & Maine R.R. Co., 67 Mass. (1 Gray) 263, 267 (1854):

> It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which

havior. — There is a third dimension for the description of legal directives that is as important as formal realizability and generality. In this dimension, we place at one pole legal institutions whose purpose is to prevent people from engaging in particular activities because those activities are morally wrong or otherwise flatly undesirable. Most of the law of crimes fits this pattern: laws against murder aim to eliminate murder. At the other pole are legal institutions whose stated object is to facilitate private ordering. Legal institutions at this pole, sometimes called formalities,[13] are supposed to help parties in communicating clearly to the judge which of various alternatives they want him to follow in dealing with disputes that may arise later in their relationship. The law of conveyancing is the paradigm here.

Formalities are premised on the lawmaker's indifference as to which of a number of alternative relationships the parties decide to enter. Their purpose is to make sure, first, that the parties know what they are doing, and, second, that the judge will know what they did. These are often referred to as the cautionary and evidentiary functions of formalities.[14] Thus the statute of frauds is supposed both to make people take notice of the legal consequences of a writing and to reduce the occasions on which judges enforce non-existent contracts because of perjured evidence.

Although the premise of formalities is that the law has no preference as between alternative private courses of action, they operate through the contradiction of private intentions. This is true whether we are talking about the statute of frauds,[15] the parol evidence rule,[16] the requirement of an offer and acceptance,[17]

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would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy modified and adapted to the circumstances of all the particular cases which fall within it.

[13] *See generally* Fuller, *supra* note 4; von Mehren, *supra* note 4.

[14] The limitation of the functions of formalities to the cautionary and evidentiary defies the modern trend, begun by Fuller, to multiply functions almost indefinitely. The cautionary function, as I use it, includes both making the parties think twice about what they are doing and making them think twice about the legal consequences. The evidentiary function includes both providing good evidence of the existence of a transaction and providing good evidence of the legal consequences the parties intended should follow. For our purposes, it is unnecessary to subdivide further. *See* Kennedy, *supra* note 4, at 374–76. More detailed treatment of functions of form can be found in Fuller, *supra* note 4, at 800–04; von Mehren, *supra* note 4, at 1016–17; I. Macneil, Cases and Materials on Contracts, Exchange Transactions and Relationships 1314–19 (1971); Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form,* 43 Ford. L. Rev. 39, 43–69 (1974).

[15] *See* Perillo, *supra* note 14, at 70–77.

[16] *See* note 33 *infra.*

[17] *See, e.g.*, United States v. Braunstein, 75 F. Supp. 137 (S.D.N.Y. 1947); Friedman, *supra* note 4, at 775–76.

of definiteness,[18] or whatever. In every case, the formality means that unless the parties adopt the prescribed mode of manifesting their wishes, they will be ignored. The reason for ignoring them, for applying the sanction of nullity, is to force them to be self conscious and to express themselves clearly, not to influence the substantive choice about whether or not to contract, or what to contract for.

By contrast, legal institutions aimed at wrongdoing attach sanctions to courses of conduct in order to discourage them. There is a wide gamut of possibilities, ranging from outright criminalization to the mere refusal to enforce contracts to perform acts "contrary to public policy" (*e.g.*, contracts not to marry). In this area, the sanction of nullity is adopted not to force the parties to adopt a prescribed form, but to discourage them by making it more difficult to achieve a particular objective.

While the two poles are quite clear in theory, it is often extremely difficult to decide how the concepts involved apply in practice. One reason for this is that, whatever its purpose, the requirement of a formality imposes some cost on those who must use it, and it is often unclear whether the lawmaker intended this cost to have a deterrent effect along with its cautionary and evidentiary functions. Thus the requirement that promises of bequests be in writing may have been aimed to discourage the descent of property outside of the normal family channel, as well as to decrease the probability of perjurious claims.[19]

Another source of difficulty is that there exists an intermediate category of legal institutions that partakes simultaneously of the nature of formalities and of rules designed to deter wrongdoing.[20] In this category fall a vast number of directives applied in situations where one party has injured another, but has not done something that the legal system treats as intrinsically immoral or antisocial. It is generally the case that the parties could have, but have not made an agreement that would have determined the outcome under the circumstances. In the absence of prior agreement, it is up to the court to decide what to do. The following are examples of rules of this kind:

(a) Rules defining nonconsensual duties of care to another, imposed by the law of torts, property, quasi-contract, or

[18] *See, e.g.*, B. CARDOZO, THE GROWTH OF THE LAW 110–11 (1924).

[19] *See* von Mehren, *supra* note 4, at 1016–17.

[20] *See generally* Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); R. NOZICK, ANARCHY, STATE AND UTOPIA 54–87 (1974); E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 68–69, 127–29 (Simpson trans. 1933); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 229–35 (1973). *See also* notes 22, 112 *infra*.

fiduciary relations, or through the "good faith" requirement in the performance of contractual obligations.

(b) Rules defining the circumstances in which violations of legal duty will be excused (*e.g.*, for mistake, impossibility, assumption of risk, contributory negligence, laches).

(c) Rules for the interpretation of contracts and other legal instruments, insomuch as those rules go beyond attempting to determine the actual intent of the parties (*e.g.*, interpretation of form contracts against the drafting party).

(d) The law of damages.

The ambiguity of the legal directives in this category is easiest to grasp in the cases of interpretation and excuses. For example, the law of impossibility allocates risks that the parties might have allocated themselves. Doctrines of this kind, which I will call suppletive, can be interpreted as merely facilitative. In other words, we can treat them *not* as indicating a preference for particular conduct (sharing of losses when unexpected events occur within a contractual context), but as cheapening the contracting process by making it known in advance that particular terms need not be explicitly worked out and written in. The parties remain free to specify to the contrary whenever the suppletive term does not meet their purposes.

On the other hand, it may be clear that the terms in question *are* designed to induce people to act in particular ways, and that the lawmaker is not indifferent as to whether the parties adopt them. This approach may be signalled by a requirement of "clear and unambiguous statement" of contrary intent, or by other rules of interpretation, like that in favor of bilateral rather than unilateral contracts. But it is only when the courts refuse to allow even an explicit disclaimer or modification of the term that we know that we are altogether out of the realm of formalities.[21]

The same kind of obscurity of purpose is present in the legal rules defining liability and fixing damages in tort, property and contract. *Sometimes* it is quite clear that the legal purpose is to eradicate a particular kind of behavior. By granting punitive damages or specific performance, for example, the lawmaker indicates that he is not indifferent as between the courses of action open to the parties. But where damages are merely compensatory, and perhaps even then not *fully* compensatory, there is a problem.

[21] *See* 3 A. CORBIN, CONTRACTS § 534 (1960); 3A *id.* §§ 632, 653; E. DURKHEIM, *supra* note 20, at 123–25; H. HART & A. SACKS, *supra* note 1, at 251–56; Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897). On impossibility, see KESSLER & GILMORE, *supra* note 3, at 742–44; Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413 (1963); Note, *The Economic Implications of the Doctrine of Impossibility*, 26 HAST. L. J. 1251 (1975).

The problem is aggravated when these damages are exacted both for breaches or torts involving some element of fault and for those that are innocent (nonnegligent injury; involuntary breach).

It is nonetheless possible to take a determinedly moralistic view of tort and breach of contract. The limitation of damages to compensation may be seen not as condoning the conduct involved, but as recognizing the deterrent effect that higher damages would have on activity in general, including innocent and desirable activity. It may also reflect qualms about windfall gains to the victims. Liability for involuntary breach and for some nonnegligent injuries are overinclusive from the moralistic point of view, but may be justified by the need to avoid hopelessly difficult factual issues.

The contrary view is that contract and tort liability reflect a decision that, so long as compensation is paid, the lawmaker is indifferent as between "wrongful" and "innocent" behavior.[22] Legal directives defining breach of contract and tortious activity, and fixing damage measures, are then in a special class situated midway between formalities and rules punishing crimes that are *mala in se*. Unlike the rules of offer and acceptance, for example, they reflect a moral objective: that private actors should internalize particular costs of their activities, and have some security that they will not have to bear the costs of the activities of others. But the moral objective is a limited one, implying no judgment about the qualities of tort or breach of contract in themselves. The wrong involved is the failure to compensate, not the infliction of damage.

Along with a limited substantive content, these legal doctrines have limited cautionary and evidentiary functions. They define in advance a tariff that the private actor must pay if he wishes to behave in a particular way. The lawmaker does not care what choice the actor makes within this structure, but has an interest in the choice being made knowingly and deliberately, and in the accuracy of the judicial processes that will assess liability to pay the tariff and determine its amount. Since he is not trying to discourage torts or breaches of contract, it is important to define liability and its consequences in such a way as to facilitate private choice.[23]

B. Relationship of the Formal Dimensions To One Another

The categorization of rules as formalities or as designed to

[22] *See* O. HOLMES, THE COMMON LAW 233–39 (Howe ed. 1963); 2 M. HOWE, JUSTICE OLIVER WENDELL HOLMES 76–80 (1963); Calabresi & Melamed, *supra* note 20; Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29 (1972).

[23] *See, e.g.*, Note, *Once More Into the Breach: Promissory Estoppel and Traditional Damage Doctrine*, 37 U. CHI. L. REV. 559 (1970).

deter wrongdoing is logically independent of the issues of formal realizability and generality. In other words, legal directives designed to deter immoral or antisocial conduct can be couched in terms of general or particular rules, general or particular standards, or some combination. This is equally true, though less obvious in the case of formalities. While it is easy to imagine formalities cast as rules (general or particular) and difficult to see them as standards, there is nothing to prevent a judge from nullifying a transaction in which the parties have failed to use a prescribed mode of communication by applying a standard. For example, Williston favored a general rule that contracts must be definite as to price and quantity, or they were not legally binding.[24] But the UCC takes the general position that an agreement is not void for indefiniteness if the parties intended a contract *and* there is an adequate basis for the provision of a remedy for breach.[25] The judge can still disregard the will of the parties, sanctioning them for failure to observe the formality, but he does so according to criteria patently lacking in formal realizability.[26]

In spite of logical independence, there are conventional arguments pro and con the use of general rules both in the design of formalities and in the design of directives that deter immoral or antisocial conduct. The argument about laws designed to deter wrongdoing focuses on the "chilling" effect of standards on those parties who will come as close to the forbidden behavior as they can without getting caught. That about formalities identifies as the crucial issue the impact of general rules on the parties' willingness to master the language of form.

1. *Directives Designed to Deter Wrongdoing.*[27] — The use of rules, as opposed to standards, to deter immoral or antisocial conduct means that sometimes perfectly innocent behavior will be punished, and that sometimes plainly guilty behavior will escape sanction. These costs of mechanical over- and underinclusion are the price of avoiding the potential arbitrariness and uncertainty of a standard.

As between the mechanical arbitrariness of rules and the biased arbitrariness of standards, there is an argument that bias is preferable, because it will "chill" behavior on the borderline of

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[24] *See* S. WILLISTON, CONTRACTS § 37 (2d ed. 1937).

[25] UNIFORM COMMERCIAL CODE [U.C.C.] § 2-204. For Williston's criticism, see Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 576 (1950).

[26] For another example, see Professor Perillo's proposed revision of the Statute of Frauds in Perillo, *supra* note 14, at 71-77.

[27] For a comprehensive discussion of this general subject in the context of administrative law, see Gifford, *Communication of Legal Standards, Policy Development, and Effective Conduct Regulation*, 56 CORNELL L. REV. 409 (1971).

substantive obnoxiousness. For example, a measure of uncertainty about when a judge will find a representation, or a failure to disclose, to be fraudulent may encourage openness and honesty. Rules, on the other hand, allow the proverbial "bad man" to "walk the line," that is, to take conscious advantage of underinclusion to perpetrate fraud with impunity.

There are three familiar counterarguments in favor of rules. First, a standard will deter desirable as well as undesirable conduct.[28] Second, *in terrorem* general standards are likely to be paper tigers in practice. Uncertainty about whether the sanction will in fact materialize may lead to a lower level of actual social control than would occur if there were a well defined area within which there was a high probability of even a mild punishment. Death is likely to be an ineffective penalty for theft.[29]

Third, where the substantively undesirable conduct can be deterred effectively by *private* vigilance, rules alert, or should alert the potential victims to the danger. For example, a formally realizable general rule of caveat emptor should stimulate buyers to take all kinds of precautions against the uncommunicative seller. It is true that the rule will also allow many successful frauds. But these may be *less* numerous in the end than those that would occur if buyers knew that there was the possibility, however uncertain, of a legal remedy to save them from their sloppiness in inspecting the goods. Likewise, the rigid rule that twenty-one year olds are adult for purposes of contractual capacity makes their change of status more conspicuous; it puts them on notice in a way that a standard (*e.g.*, undue influence) would not.[30]

These arguments apply to suppletive terms and to the rules defining civil liability and damage measures, at least in so far as we regard those institutions as designed to deter wrongdoing. For example, expectation damages should discourage breach of contract more effectively than would a reliance recovery. Reliance is difficult to measure and to prove, whereas in many situations the expectancy can be determined almost mechanically. While our real concern may be with the promisee's out-of-pocket loss from breach, the occasional imprecision of expectation damages may be justified at least in commercial situations, on the grounds of superior deterrent power.[31]

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[28] *See* Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

[29] *See* Hay, *Property, Authority and Criminal Law*, in ALBION'S FATAL TREE 17–26 (1975).

[30] *See* Kessler, *The Protection of the Consumer under Modern Sales Law, Part I*, 74 YALE L.J. 262, 266–67 (1964); Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1178–82 (1931).

[31] *See* Fuller & Perdue, *The Reliance Interest in Contract Damages*, I, 46 YALE L.J. 52, 60–63 (1936).

2. Formalities. — Here, as in the area of immoral or antisocial conduct, the main disadvantage of general rules is their over-and underinclusiveness from the point of view of the lawmaker's purposes. In the context of formalities the problem is that general rules will lead to many instances in which the judge is obliged to disregard the real intent of the parties choosing between alternative legal relationships. For example, he will refuse to enforce contracts intended to be binding (underinclusion), and he will enforce terms in agreements contrary to the intent of one or even both parties (overinclusion).[32] Since we are dealing with formalities, this is an evil: the lawmaker has no substantive preferences about the parties' choice, and he would like to follow their wishes.

(*a*) *The Argument for Casting Formalities as Rules.* — The response is that the problem of over- and underinclusiveness has a special aspect in the case of formalities because the lawmaker can enlist the energies of the parties in reducing the seriousness of the imprecision of rules. The parties have an interest in communicating their exact intentions to the judge, an interest that is absent when they are engaged in activity the legal system condemns as immoral or antisocial. But this communication has a cost and involves risks of miscarriage. The lower the cost, and the greater the probability that the judge will respond as expected, the more the parties will invest in getting the message across.

The lawmaker can take this private calculus into account in designing the formalities. He can reduce the cost of learning the language of form by making his directives as general as possible. A "technical" system composed of many different rules or standards applying to closely related situations will be difficult to master and confusing in practice. For example, Williston's formulation of the parol evidence rule involves a rule of "plain meaning of the writing on its face" to determine whether a given integration embodies the total agreement of the parties. But this is subject to exceptions for fraud and duress. Another rule applies in determining whether the integration was intended to be "final," and yet another to the problem of agreements whose enforceability was meant to be conditional on the occurence of events not mentioned in the document. It is hard to imagine a layperson setting out to master this doctrinal tangle.[33]

If generality can reduce the cost of formal proficiency, formal realizability should reduce the risk that the exercise of judicial

[32] This is the consequence of adopting an "objective" theory of contract to deal with problems like mistake and parol evidence. *Compare* Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85 (1919), *with* Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CALIF. L. REV. 441 (1929).

[33] *See* S. WILLISTON, CONTRACTS §§ 631–47 (2d ed. 1937); Calamari & Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333 (1967).

discretion will bring formal proficiency to naught. Standards discourage investment in two ways. The uncertainty of the outcome if the judge is at large in finding intent, rather than bound to respond mechanically to ritual acts like sealing, will reduce the payoff that can be expected from being careful. Second, the dangers of imprecision are reduced because the judge may bail you out if you blunder. The result *may* be a slippery slope of increasing informality that ends with the legal system treating disputes about wills as though they were automobile accidents litigated under a fault standard.

If general rules lead people to invest in formal proficiency, at least as compared to standards, the result should be the reduction of their over- and underinclusiveness. In other words, the application of the rule should only very rarely lead to the nullification of the intent of the parties. The rare cases that do occur can then be written off as a small cost to pay for the reinforcement of the sanction of nullity. People will miss fewer trains, the argument goes, if they know the engineer will leave without them rather than delay even a few seconds. Standards, by contrast, are dynamically unstable. Rather than evoking private action that compensates their inadequacies, they stimulate responses that aggravate their defects.

Finally, rules encourage transaction in general. If an actor knows that the use of a formality guarantees the execution of his intentions, he will do things that he would not do if there were a risk that the intention would be defeated. In particular, actors will rely on enforcement of contracts, trusts, and so forth, in making investments. Since we are dealing with formalities, it is a matter of definition that the legal system is anxious to encourage this kind of activity so long as private parties desire to engage in it.[34]

Suppletive rules and the general principles of tort and contract liability can be treated, as we have seen already, either as primarily aimed to suppress breach of contract and tortious injury or to structure private choice between injury *cum* compensation and no injury. If we choose to analogize the tortfeasor to a testator or a bond indenture lawyer, it is easy to argue that formally realizable general rules are as important in torts as they are in the area of pure formalities.

If the rules are clear, people will invest time and energy in finding out what they are. They will then adjust their behavior so that they commit torts only up to the point at which what they gain is equal to what they have to pay in compensation. A regime of standards, on the other hand will "chill" private activity by making its consequences less certain. At the same time uncertainty

[34] *See* Fuller & Perdue, *supra* note 31, at 60–63; Kennedy, *supra* note 4, at 365–77.

reduces the incentive to find out the nature of one's duties and then choose rationally between performing them and paying damages.

(*b*) *The Critique of the Argument for Rules.* — The argument for casting formalities as rules rests on two sets of assumptions, each of which is often challenged in discussions of actual legal institutions. The first set of assumptions concerns the impact on real participants in a real legal system of the demand for formal proficiency. If the argument for rules is to work, we must anticipate that private parties will in fact respond to the threat of the sanction of nullity by learning to operate the system. But real as opposed to hypothetical legal actors may be unwilling or unable to do this.[35]

The contracts of dealers on produce exchanges are likely to use the most exquisite and most precisely manipulable formal language. Poor consumers, by contrast, are likely to be formally illiterate. Somewhere in between lie the businessmen who have a highly developed understanding of the mechanics of their deals, yet persistently — and perfectly rationally, given the money cost of lawyers and the social and business cost of legalism — fail to master legal technicalities that return to plague them when things go wrong. We must take all the particular variations into account. In the end, we may decide that a particular formal system works so smoothly that a refusal to fill the gaps with general rules would be a wanton sacrifice of the parties to a judicial prima donna. But others work so badly that little is lost by riddling them with loopholes.

This problem of differing degrees of responsiveness to the sanction of nullity can be generalized to the intermediate category of rules defining tort and contract liability in the absence of party specification. It can be argued that private activity is only rarely and sporadically undertaken with a view to legal consequences. The law intervenes only when things have gone so far astray that all the private mechanisms for adjusting disputes have been tried and failed. It is therefore unwise to treat the judicial decision process as though it could or should legislate effectively for all or even most contract or tort disputes, let alone all contracts or torts. The parties have an immediate interest in a resolution that will be neither under- nor overinclusive from the point of view of the lawmaker's purposes. The countervailing interest in telling others clearly what will happen in their hypothetical future lawsuits is weak, because it is so unlikely that "others" will listen.[36]

In those situations in which some parties *are* responsive to the

[35] See the literature on contracts of adhesion collected in Leff, *supra* note 9, at 140–44; Friedman, *supra* note 4, at 759–61, 771–72, 779.

[36] *See* Macaulay, *The Use and Non-Use of Contracts in the Manufacturing Industry*, 9 PRACTICAL LAWYER 13 (1963).

legal system, a regime of formally realizable general rules may intensify the disparity in bargaining power in transactions between legally skilled actors who use the legal system constantly, and unskilled actors without lawyers or prior experience.[37] At one extreme there is a kind of fraud that is extremely difficult to police effectively: one party knows that the other party does *not* know that the contract must be in writing if it is to be legally binding. At the other is the bargaining confrontation in which the party with the greater skills legitimately relies on them to obtain a result more favorable than would have occurred if everyone knew that the issue *had* to be left to the judge's discretion.

The second set of assumptions underlying the argument for rules concerns the practical possibility of maintaining a highly formal regime. A great deal of legal scholarship between the First and Second World Wars went into showing that legal directives that looked general and formally realizable were in fact indeterminate.[38] Take, for example, the "rule" that a contract will be rescinded for mutual mistake going to the "substance" or "essence" of the transaction, but not for mistakes as to a "mere quality or accident," even though the quality or accident in question was the whole reason for the transaction. We have come to see legal directives of this kind as invitations to sub rosa balancing of the equities. Such covert standards may generate more uncertainty than would a frank avowal that the judge is allocating a loss by reference to an open textured notion of good faith and fair dealing.[39]

In other situations, a "rule" that appears to dispose cleanly of a fact situation is nullified by a counterrule whose scope of application seems to be almost identical. Agreements that gratuitously increase the obligations of one contractual partner are unenforceable for want of consideration. *But*, such agreements may be binding if the judge can find an implied recission of the old contract and the formation of a new one incorporating the unilaterally onerous terms. The realists taught us to see this arrangement as a smokescreen hiding the skillful judge's decision as to duress in the process of renegotiation, and as a source of confusion and bad law when skill was lacking.[40]

[37] *See generally* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974); Perillo, *supra* note 14, at 70–71.

[38] *See generally* Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431 (1930); Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581 (1940).

[39] *See* Thayer, *Unilateral Mistake and Unjust Enrichment as a Ground for the Avoidance of Legal Transactions*, in HARVARD LEGAL ESSAYS 467 (1934).

[40] See the cases and notes collected in KESSLER & GILMORE, *supra* note 3, at 478–508; U.C.C. § 2–209; RESTATEMENT (SECOND) OF CONTRACTS § 89D.

The critic of the argument for rules can often use this sort of analysis to show that what looks like a rule is really a covert standard. It is also often possible to make a plausible claim that the reason for the "corruption" of what was supposed to be a formal regime was that the judges were simply unwilling to bite the bullet, shoot the hostages, break the eggs to make the omelette and leave the passengers on the platform. The more general and the more formally realizable the rule, the greater the equitable pull of extreme cases of over- or underinclusion. The result may be a dynamic instability as pernicious as that of standards. There will be exceptions that are only initially innocuous, playing with the facts, the invention of counterrules (*e.g.*, waiver and estoppel), the manipulation of manifestations of intent, and so forth. Each successful evasion makes it seem more unjust to apply the rule rigidly in the next case; what was once clear comes to be surrounded by a technical and uncertain penumbra that is more demoralizing to investment in form than an outright standard would be.[41]

II. Types of Relationship Between Form and Substance

The jurisprudence of form presented in the last section is common to legal thinkers of many times and places. There seems no basis for disputing that the notions of rule and standard, and the idea that the choice between them will have wide-ranging practical consequences, are useful in understanding and designing legal institutions. But there is more to the matter than that.

The discussion presented a pro-rules position and a pro-standards position, but there was nothing to suggest that these were truly incompatible. A hypothetical lawmaker with undefined purposes could approach the problem of form with no bias one way or another. He could use the analysis to identify the likely benefits of using rules by applying the pro-rules position to the particular circumstances that concerned him. He could then review the opposed position to get an idea of the costs of using rules and the advantages of standards. He might make up his mind to adopt one form, or the other, or one of the infinite number of intermediate positions, by assessing the net balance of advantage in terms of his underlying legislative objective.

[41] *See, e.g.*, Gellhorn, *Contracts and Public Policy*, 35 Colum. L. Rev. 679, 683–84 (1935); C. Kaysen & D. Turner, Antitrust Policy: An Economic and Legal Analysis 235 (1959); Perillo, *Restitution in a Contractual Context*, 73 Colum. L. Rev. 1208 (1973). On the development of promissory estoppel as an alternative contract cause of action through which damages can be recovered without compliance with formal requirements, see G. Gilmore, The Death of Contract 66, 90 (1974).

From this starting point of "value neutral" description of the likely consequences of adopting rules or standards, there are two quite different directions in which one might press the analysis of legal form. One alternative is to attempt to enrich the initial schema by contextualizing it. This approach involves being more specific both about the particular situations in which lawmakers operate and about the different objectives that they try to achieve in those situations. The first part of this section provides some illustrations of this line of investigation.

The second, and I think more important, approach ignores both the question of how rules and standards work in realistic settings and the question of how we can best solve the problem of fitting form to particular objectives. The purpose of the second line of investigation is to relate the pro-rules and pro-standards positions to other ideas about the proper ordering of society, and particularly to ideas about the proper substantive content of legal rules. The second part of this section describes this approach, as a preliminary to its pursuit in Section III.

A. Contextualization

There are two primary modes of contextualization, which might be called the social engineering and the social science approaches, respectively. The first aims to develop principles that will guide the legislator in deciding when to use rules and when standards. The second eschews normative judgments, preferring simply to describe the various effects, legitimate and illegitimate, that follow from the choice of form.

1. Social Engineering. — It seems that the first self-conscious general statement of principles for the choice of form, at least by an American, is Pound's *Theory of Judicial Decision*, published in 1923. The thesis of the article is simple: "rules of law. . . which are applied mechanically are more adapted to property and to business transactions; standards where application proceeds upon intuition are more adapted to human conduct and to the conduct of enterprises." [42]

If we ask the criterion of "adaptedness," Pound had a ready but from today's perspective vacuous answer: "for the purposes of today our picture should be one, not . . . of a body of unchallengeable deductions from ultimate metaphysically-given data at which men arrived a century ago in seeking to rationalize the social phenomena of that time, . . . but rather a picture of a process of social engineering. Such a picture, I venture to think, would represent the social order as an organized human endeavor

[42] Pound, *supra* note 4, at 951.

to satisfy a maximum of human wants with a minimum of sacrifice of other wants." [43]

Pound was explicit that "individualization" of law through the use of standards was inappropriate where "security of transaction" was the paramount value. At the same time, he made free use of the argument that the certainty of rules was often illusory. Where he favored standards, he claimed that the special nature of the circumstances made "the sacrifice of certainty . . . more theoretical than actual." [44]

There are few areas of law in which there has not been, since Pound's article, an attempt to generalize about what form best suits the peculiar nature of the subject matter. In family [45] and labor law,[46] in antitrust [47] and tax law,[48] in juvenile delinquency [49]

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[43] *Id.* at 954.

[44] *Id.* at 952. The following is his most complete statement:

> Social engineering may not expect to meet all its problems with the same machinery. Its tasks are as varied as life and the complicated problems of a complex social order call for a complicated mechanism and a variety of legal implements. This is too large a subject for discussion in the present connection. Suffice it to say that conveyance of land, inheritance and succession, and commercial law have always proved susceptible of legislative statement, while no codification of the law of torts and no juristic or judicial defining of fraud or of fiduciary duties has ever maintained itself. In other words, the social interests in security of acquisitions and security of transactions — the economic side of human activity in civilized society — call for rule or conception authoritatively prescribed in advance and mechanically applied. These interests also call peculiarly for judicial justice. Titles to land and the effects of promissory notes or commercial contracts cannot be suffered to depend in any degree on the unique circumstances of the controversies in which they come in question. It is one of the grave faults of our present theory of judicial decision that, covering up all individualization, it sometimes allows individualized application to creep into those situations where it is anything but a wise social engineering. On the other hand, where we have to do with the social interest in the individual human life and with individual claims to free self-assertion subsumed thereunder, free judicial finding of the grounds of decision for the case in hand is the most effective way of bringing about a practicable compromise and has always gone on in fact no matter how rigidly in theory the tribunals have been tied down by the texts of codes or statutes.

Id. at 956–57.

[45] *See* Mnookin, *supra* note 6; Katz, *supra* note 4.

[46] *See* Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955). The administration of the NLRA requirement of bargaining in good faith has also been the subject of debate. *See, e.g.*, H.K. Porter v. NLRB, 397 U.S. 99 (1970); NLRB v. General Electric, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); H. WELLINGTON, LABOR & THE LEGAL PROCESS 52–63 (1968).

[47] *See* C. KAYSEN & D. TURNER, *supra* note 41, at 234–45; Bork, *supra* note 6; Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 295–98 (1960); Turner, *supra* note 6, at 9–12.

[48] It has been argued that the judicial use of a general standard of "prevention of tax avoidance" in interpreting the Tax Code has rendered the Code more certain. *See* Surrey, *supra* note 10, at 694–95; 2 S. SURREY, W. WARREN, P. MCDANIEL & H. AULT, FEDERAL INCOME TAXATION 633–34 (1973).

[49] *See In re* Gault, 387 U.S. 1 (1967); McKeiver v. Pennsylvania, 403 U.S.

and sentencing of criminals,[50] there have been fluctuations from one model to the other and back again. The same is true of administrative law,[51] civil procedure,[52] and the law of contracts.[53]

The social engineering approach has not produced convincing results beyond the confines of particular fields. Generalizations that at first seem highly plausible turn out on further examination to be false, or at least no more convincing than diametrically opposed counterprinciples. For example, Larry Tribe has recently argued, as a matter of constitutional right, that the treatment of unwed motherhood is "an area in which the need to reflect rapidly changing norms affecting important interests in liberty compels an individualized determination, one not bound by any pre-existing rule of thumb within the zone of moral change." [54] But a recent article by Heymann and Holtz takes the position that the existence of moral flux makes it overwhelmingly important that we use rigid per se rules in defining "personhood" for purposes of decisions about the treatment of severely defective newborn infants.[55] Perhaps the positions can be reconciled in terms of a more abstract principle, but none comes to mind.

The difficulty of arriving at a consensus about the optimal social role of rules is best illustrated by the case of Article 2 of the Uniform Commercial Code, which governs commercial contracts. According to a persistent line of theorizing associated with Max Weber,[56] this should be an area prototypically adapted to rules. The "social function of maintaining the market" supposedly requires a formal approach here, if anywhere. Yet the drafters of Article 2 proceeded on the conviction that general commercial law was prototypically adapted to standards. This choice was explicitly based on the claim that ideas like "reasonableness" and

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528 (1971); Griffiths, *Ideology in Criminal Procedure, or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 399–404 (1970).

[50] *See* Dershowitz, *Background Paper*, in FAIR AND CERTAIN PUNISHMENT 67–100 (Report of the Twentieth Century Fund Task Force on Criminal Sentencing, 1976).

[51] *See generally* Gifford, *supra* note 27; K. DAVIS, *supra* note 4.

[52] *See* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 562–64 (Milsom ed. 1968); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[53] *See* Friedman, *supra* note 4, at 777–79; L. FRIEDMAN, CONTRACT LAW IN AMERICA (1965); Perillo, *supra* note 14, at 41–42.

[54] Tribe, *Structural Due Process*, 10 HARV. CIV. RIGHTS — CIV. LIB. L. REV. 269, 307 (1975).

[55] Heymann & Holtz, *The Severely Defective Newborn: The Dilemma and the Decision Process*, 23 PUBLIC POLICY 381, 410–16 (1975).

[56] 2 M. WEBER, *supra* note 4; Macaulay, *supra* note 4; Friedman, *supra* note 4, at 764–77; Macaulay, *supra* note 2 at 1056–69; Friedman, *supra* note 53; Friedman, *supra* note 9.

"good faith" provide greater predictability in practice than the intricate and technical rule system they have replaced.[57]

2. The Social Science Approach. — Efforts like those of Pound have a legislative focus and are therefore concerned with the impact of rules on generalized "social interests" or "functions" assertedly important regardless of the "partisan" or "political" objectives of particular groups. The social science approach is not restricted in this way. The "scientist" as opposed to the "engineer" can ask how the choice of form will favor the interests of some participants in a conflict and disfavor others. My aim here is simply to illustrate this perspective rather than to investigate it fully or develop it. For this purpose, it may be useful to make the following subdivision among types of conflict to which the choice of form is relevant:

(a) Conflict between lawmakers within a single institution, particularly that between "reform" and the status quo, however those may be defined.

(b) Conflict between lawmakers and a group that is supposed to execute the law (*e.g.*, the police) or to obey it (the citizenry).

(c) Conflict between lawmakers within one institution (*e.g.*, the courts) and those in other institutions (*e.g.*, the legislature, the jury) which have a parallel or overlapping jurisdiction.

(a) Standards as Instruments of Change. — Imagine a court with a rule that legislative interference with freedom of contract is unconstitutional. Some newly appointed judges disapprove of this policy. They *might* come up with a new rule: the question of whether or not to interfere with freedom of contract is inherently legislative, and not open to judicial review. But they might find it preferable to argue for a rule that only "unreasonable" interference is forbidden. Some reasons for such a posture have to do with the relationship between court and legislature as competing institutions, but others might be internal to the court.

First, the standard might represent a substantive compromise between all and nothing. The reformers might support it because they lacked the power to impose their ideal solution. Second, the standard could be adopted without overruling any earlier cases. Previous invalidations of statutes could simply be reinterpreted as findings of unreasonableness. Third, the reformers might themselves be unsure of how far they wanted to go. Experience under a

[57] *See* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT, ch. 12 (1973); Danzig, *A Comment on The Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975).

standard might lead with time to the emergence of the knowledge necessary to formulate a more precise rule than that of blanket deference to the legislature.

Of course, the reformers might adopt other tactics, such as undermining the formal realizability of the existing rule, proposing exceptions or counterrules, or developing jurisdictional limitations on effective legal challenges to legislation. All one can say is that standards *may* be advocated because they fit a political strategy for dealing with conflict rather than for reasons intrinsic to the social situation in which they will be applied, or to the substantive content of the law in question.[58]

(*b*) *Rules as a Means to Control Action.* — A court charged with laying down rules for police behavior in investigating crimes may be convinced that the police have a tendency to place an impermissibly low value on the rights of suspects to be secure against unreasonable searches and seizures and to refrain from testifying against themselves. This difference in valuation arises, let us suppose, both from a substantive disagreement about the content of constitutional guarantees and from inherent tendencies of large bureaucratic organizations.

In this situation, a court might believe that formally realizable general rules (notification of legal rights prior to interrogation) would function much better than standards to force the executive agency to put the court's view of the issue into practice. A standard might be much preferable to a rule if the court could itself apply it in every case, but the necessity of delegation of the application function creates an excessive danger of de facto nullification.[59]

Similar dilemmas arise in the relation of courts to juries, to legislatures, to inferior tribunals, and to private parties. In each of these relationships, there may be an unquestioned consensus that the court is the legitimate lawmaker, and that the other party has no other duty than to carry out judicial directives. But given a standard of "fair compensation" juries may habitually award punitive damages, leading judges to impose detailed rules about how damage *must* be measured in typical fact situations.[60] "One

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[58] *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 36–40. On vagueness in contracts as the outcome of compromise, see Macaulay, *supra* note 36, at 14–17. On legislative standards, see Friedman, *supra* note 9, at 835–36.

[59] *See* Miranda v. Arizona, 384 U.S. 436, 455–70 (1966); Amsterdam, *supra* note 10, at 429–39. On the use of detailed rules by the legislature as a means to curb judicial discretion, *see* Friedman, *supra* note 4, at 752 n.4.

[60] *See* KESSLER & GILMORE, *supra* note 3, at 1016–21; Friedman, *supra* note 4, at 778; Horwitz, *The Emergence of an Instrumental Conception of American Law*, in 5 PERSPECTIVES IN AMERICAN HISTORY 287, 323 (1971).

man, one vote" may seem the only feasible mechanism for policing reapportionment although the judges believe strongly that a standard of "fair representation" would better reflect their own and the nation's political philosophy. A court with no desire to punish innocent employers may nonetheless hesitate to read a "good faith" defense against back pay awards into an equal employment opportunity statute.[61]

But it will not always be true that the best way for the lawmaking institution to control the subordinate is through rules. The very widespread acceptance of the proposition appears to be based on implicit assumptions about the bureaucratic costs of direct control through the application of standards. Where these costs are low or non-existent, it is common to argue that the superior will prefer the ad hoc approach because it maximizes his discretion. By refusing to enunciate anything but a standard, the superior with powers of review can induce the inferior to follow its wishes with an attentiveness and submissiveness born of insecurity. If the executive agency experiences "reversal" as a serious sanction, and will try to avoid it by sensitivity to all the subtle overtones and cues provided by the reviewing institution's applications of the standard, the use of rules may be counterproductive. Indeed, rules may foster a sense of bureaucratic (or private) autonomy and provide a basis of independent executive power that would be absent under a regime of standards.[62]

(*c*) *Rules and the Legitimacy of Judicial Action.* — In many situations that arise in our legal system, it is open to argument whether substantive norms of conduct ought to be laid down by the courts or by some other, more "democratically legitimate" institution, such as the legislature, the jury, or private parties pursuing their own objectives through institutions like contract or corporate law. Judges making law in these situations have to

[61] *See* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). For a discussion of the impact of the choice of form in out-of-court settlement, see Macaulay, *supra* note 2, at 1065. On reapportionment, see Friedman, *supra* note 9, at 815–20.

[62] See the discussion of the "non-directive functions of rules" in A. GOULDNER, PATTERNS OF INDUSTRIAL BUREAUCRACY 157–81 (1955). Even the highly qualified generalization in the text is open to serious question. For example, Gifford, *supra* note 27, argues that the use of standards may be characteristic of underfunded administrative agencies that know that an accurate description of what they intend to do would reveal their weakness and encourage violators.

The idea that rules guarantee private actors an area of "autonomy" from judicial control is developed in Friedman, *supra* note 4, at 754–55, 764–74, and in Kennedy, *supra* note 4, at 366–77. Weber argues that the trend to standards in modern law reflects the desire of judges and lawyers to reassert their power and prestige relative to legislatures and private parties grown independent under the protection of a regime of rules. 2 M. WEBER, *supra* note 4, at 886.

worry not only about conflict within the judiciary and about effectively controlling subordinate agencies but also about the question of whether they will be seen as "usurping" the jurisdiction of other institutions. In short, there may be conflict about who is the superior and who the inferior legal actor in the premises.

In disputes about the judicial role, the parties appeal to stereotyped images of what courts, legislators, juries, and private right holders "ought" to do. A very deepseated idea of the judicial function is that judges apply rules. It follows that there will often be a great tactical advantage, for a court which wants to expand its power at the expense of another institution, in casting the norms it wants to impose in the rule form. The object is to draw on the popular lay notion that "discretion" and "value judgments" are the province of legislatures, juries, and private parties, while judges are concerned with techniques of legal reasoning that are neutral and ineluctable, however incomprehensible.

There are two different ways in which the rule form shores up the legitimacy of judicial action. First, the discretionary elements in the choice of a norm to impose are obscured by the process of justification that pops a rule out of the hat of policy, precedent, the text of the Constitution, or some other source of law. Second, once the norm has been chosen, the rule form disguises the discretionary element involved in applying it to cases. A standard is often a tactically inferior weapon in jurisdictional struggle, both because it seems less plausible that it is the only valid outcome of the reasoning process and because it is often clear that its application will require or permit resort to "political" or at least non-neutral aspects of the situation.[63] For example, the Supreme Court in the 1950's adopted a "balancing test" for the interpretation of the first amendment to the Constitution. The issue was typically whether or not the Court should nullify a statute that the legislature claimed was necessary to protect "national security." The proponents of the balancing test attempted to "weigh the interest in free speech against the interest in national security" as a means to deciding whether the statute was constitutional.

The Justices who favored this procedure were quite explicitly concerned to prevent the Court from encroaching on legislative power. They argued that the use of a standard would enhance both judicial and legislative awareness of the inherently discretionary nature of the Court's jurisdiction.[64] The opposed position

[63] *See* Note, *Civil Disabilities and the First Amendment*, 78 YALE L.J. 842, 851–52 (1969).

[64] The literature on balancing is collected in Note, *supra* note 63, at 842–52. *See, e.g.*, Dennis v. United States, 342 U.S. 494, 524–25, 542–43 (1951) (Frankfurter, J., concurring); P. FREUND, THE SUPREME COURT OF THE UNITED STATES 44 (1949).

was that the first amendment was an "absolute," meaning that it was a rigid rule. The absolutists bottomed their claim on the very nature of legal as opposed to discretionary justice.[65] They also admitted on occasion that the trouble with balancing was that "it will be almost impossible at this late date to rid the formula of the elements of political surrender with which it has long been associated. The very phrase, balancing of interests, has such a legislative ring about it that it undermines judicial self-confidence unduly." [66]

Nonetheless, there are limits to the usefulness of the rule form as a tactical weapon, as the Supreme Court has discovered in the controversies both about the one-man-one-vote decision [67] and about its specific time limits for different aspects of the regulation of abortion.[68] It seems to be the case that while judges are expected to deal in rules, the rules are not expected to be *quantitatively* precise. Like "value judgments," the choice between 30 days and 31 days is thought of as political or administrative. The reason, presumably, is that quantitatively precise rules are obviously compromises: the cases close to the line on either side have been disposed of arbitrarily in order to *have* a line. This makes it implausible that precedent or "legal reasoning" were the only elements entering into the decision.[69]

We might contextualize indefinitely. The problem of form, in this perspective, is never more than one of political tactics, analogous to the reformer's problem of choosing between gradualist and confrontational lines of attack, or between centralized and decentralized emphases in organization. Tactics are rigidly subordinate to the choice among goals, form follows function, and the main lesson to be drawn is that one should have no a priori biases in choosing among the possibilities. In assessing a proposal to change a regime of rules to standards, or vice versa, we should ignore all claims about the intrinsic merits of formal positions and demand an accounting of effects. What is the substantive objective? How does the choice of form affect the likelihood of embodying the objective in law? Who will implement the rule or

[65] *See, e.g.*, Frantz, *Is the First Amendment Law? A Reply To Professor Mendelson*, 51 CALIF. L. REV. 729 (1963).

[66] M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 103 (1966).

[67] Reynolds v. Sims, 377 U.S. 533 (1964).

[68] Roe v. Wade, 410 U.S. 113 (1973).

[69] *See generally* Friedman, *supra* note 9, at 820–25. On abortion, see Tribe, *Supreme Court, 1972 Term — Foreword: Toward A Model of Roles in the Due Process of Life & Law*, 87 HARV. L. REV. 1, 4, 26–29 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 924–26 (1973). On reapportionment, see A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 151–73 (1970).

standard? How can it be evaded? How will the choice of form affect the lawmaker's claim to institutional legitimacy?

B. Form as Substance

The main problem with contextualization as I have presented it thus far is that it leaves out of account the common sense that the choice of form is seldom purely instrumental or tactical. As they appear in real life, the arguments pro and con the use of rules have powerful overtones of substantive debates about what values and what visions of the universe we should adopt. In picking a form through which to achieve some goal, we are almost always making a statement that is independent or at least distinguishable from the statement we make in choosing the goal itself. What we need is a way to relate the values intrinsic *to* form to the values we try to achieve *through* form.

The different values that people commonly associate with the formal modes of rule and standard are conveyed by the emotive or judgmental words that the advocates of the two positions use in the course of debate about a particular issue. Here is a suggestive list drawn from the vast data bank of casual conversation. Imagine, for the items in each row, an exchange: "Rules are A." "No, they are B." "But standards are C." "On the contrary, they are D."

Rules		Standards	
Good	*Bad*	*Bad*	*Good*
Neutrality	Rigidity	Bias	Flexibility
Uniformity	Conformity	Favoritism	Individualization
Precision	Anality	Sloppiness	Creativity
Certainty	Compulsiveness	Uncertainty	Spontaneity
Autonomy	Alienation	Totalitarianism	Participation
Rights	Vested Interests	Tyranny	Community
Privacy	Isolation	Intrusiveness	Concern
Efficiency	Indifference	Sentimentality	Equity
Order	Reaction	Chaos	Evolution
Exactingness	Punitiveness	Permissiveness	Tolerance
Self-reliance	Stinginess	Romanticism	Generosity
Boundaries	Walls	Invasion	Empathy
Stability	Sclerosis	Disintegration	Progress
Security	Threatenedness	Dependence	Trust

This list suggests something that we all know: that the preference for rules or standards is an aspect of opposed substantive positions in family life, art, psychotherapy, education, ethics, politics and economics. It is also true that everyone is to some degree ambivalent in his feelings about these substantive conflicts. There are only a few who are confident either that one side is

right or that they have a set of metacategories that allow one to choose the right side for any particular situation. Indeed, most of the ideas that might serve to dissolve the conflict and make rational choice possible are claimed vociferously by both sides:

RULES		STANDARDS	
Good	*Bad*	*Bad*	*Good*
Morality (playing by the rules)	Moralism (self-righteous strictness)	Moralism (self-righteousness about own intuitions)	Morality (openness to the situation)
Freedom			Freedom
Fairness	Mechanical arbitrariness	Arbitrariness of subjectivity	Fairness
Equality (of opportunity)	of right to sleep under the bridges of Paris	of subjection to other people's value judgments	Equality (in fact)
Realism	Cynicism	Romanticism	Realism

So long as we regard the debate about form as a debate only about means, it is a debate about facts, and reality can be conceived as an ultimate arbiter to whose final decision we must submit if we are rational.[70] But if the question is whether "real" equality is equality of opportunity or equality of enjoyment of the good things of life, then the situation is different. Likewise if the question is whether human nature "is" good or bad, or whether people "do" act as rational maximizers of their interests. For this kind of question, whether phrased in terms of what is or what ought to be, we accept that there is no arbiter (or that he is silent, or that the arbiter is history, which will have nothing to

[70] The associations and contradictions in my two lists pose no special problem for the contextualizer. First, it is sometimes possible simply to ignore the values that seem implicit in the choice of form on the ground that the people involved don't care about them, or that the substantive values at stake are vastly more important. The opponent of mechanical rules in family life may think it absurd to worry about mechanicalness when the issue is enforcing a minimum wage law. Second, and more important, we can incorporate the values that inhere in different formal arrangements into the substantive decision process. Instead of deciding first what we want and then how to get it, we can treat the "how" as an aspect of the "what." The decisionmaker formulates his objectives "subject to the constraint" that he will be able to use only acceptable means to achieve them. Or he engages in a back-and-forth process of investigating goals, then means, then returning to reformulate goals in light of the new information. Or he integrates the whole process, treating processual or formal values as indistinguishable from those relating to outcomes. *See* Tribe, *Policy Science: Analysis or Ideology*, 2 PHIL. & PUB. AFF. 66 (1972); Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1317–25 (1974).

say until we are all long dead).[71] Thus the pro-rules and pro-standards positions are more than an invitation to a positivist investigation of reality. They are also an invitation to choose between sets of values and visions of the universe.

The great limitation of the method of contextualization is that it is useless in trying to understand the character of such a choice. The contextualizer takes values and visions of the universe as given, and investigates their implications in particular situations. Yet it is not impossible or futile to talk about the choice of goals, or about their nature and interrelationship. We do this constantly, we change in consequence, and these changes are neither random nor ineffable. The rest of this essay is an example of this sort of discussion. Its premise is that we will have a better understanding of issues of form if we can relate them meaningfully to substantive questions about what we should want and about the nature of humanity and society.[72] There are two steps to the argument. The first is to set up the substantive dichotomy of individualism and altruism, and to show that the issue of form is one of its aspects. The second is to trace historically and analytically the course of the conflict between the two larger positions.

The method I have adopted in place of contextualization might be called, in a loose sense, dialetical or structuralist or historicist or the method of contradictions.[73] One of its premises is that the experience of unresolvable conflict among our *own* values and ways of understanding the world is here to stay. In this sense it is pessimistic, one might even say defeatist. But another of its premises is that there is order and meaning to be discovered even within the sense of contradiction. Further, the process of dis-

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[71] Two introductions to the American literature are M. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (2d ed. 1957), and E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973). For law, see Hart, *Positivism and Separation of Law and Morals*, 71 HARV. L. REV. 593, 620–29 (1958); HART & SACKS, *supra* note 1, at 126–29.

[72] *See* P. SELZNICK, *supra* note 4.

[73] Some important works in the tradition I am referring to are G. HEGEL, PHILOSOPHY OF RIGHT (Knox trans. 1952); K. MARX, *On the Jewish Question*, in EARLY WRITINGS (Benton trans. 1975); R. VON IHERING, *supra* note 4; F. POLLOCK & D. MAITLAND, *supra* note 52; Lukacs, *Reification and the Consciousness of the Proletariat*, in HISTORY AND CLASS-CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS (Livingstone trans. 1971); K. MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE (1936); H. MARCUSE, REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY (1941); C. LEVI-STRAUSS, THE SAVAGE MIND (1966); R. UNGER, KNOWLEDGE AND POLITICS (1975); A. KATZ, *supra* note 4. Not all of these works, or even most of them, are based on the premises about the permanence of contradictions in consciousness that are described in the text following this note. My position is closest to that of Mannheim and Levi-Strauss. It is also close to that of Griffiths, *supra* note 49, and Katz, *supra* note 4.

covering this order and this meaning is both good in itself and enormously useful. In this sense, the method of contradiction represents an attitude that is optimistic and even utopian. None of which is to say that any particular attempt will be worth the paper it is printed on.

III. Altruism and Individualism

This section introduces the substantive dichotomy of individualism and altruism. These are two opposed attitudes that manifest themselves in debates about the content of private law rules. My assertion is that the arguments lawyers use are relatively few in number and highly stereotyped, although they are applied in an infinite diversity of factual situations. What I have done is to abstract these typical forms or rhetorical set pieces and attempt to analyze them. I believe that they are helpful in the general task of understanding why judges and legislators have chosen to enact or establish particular private law doctrines. For that reason this section and the next should be useful independently of their immediate purpose, which is to establish a substantive legal correlate for the dichotomy of rules and standards. Later sections attempt to link attitudes in the formal dimension to those in the substantive, and then to identify the contradictory sets of premises that underlie both kinds of conflict.

A. The Content of the Ideal of Individualism

The essence of individualism is the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested. The form of conduct associated with individualism is self-reliance. This means an insistence on defining and achieving objectives without help from others (*i.e.*, without being dependent on them or asking sacrifices of them). It means accepting that they will neither share their gains nor one's own losses. And it means a firm conviction that I am entitled to enjoy the benefits of my efforts without an obligation to share or sacrifice them to the interests of others.[74]

[74] Some interesting nineteenth century treatments of self-reliance are R. Emerson, *Self-Reliance*, in Essays, First Series 37 (1847) and H. Spencer, Justice (1891). A judicial classic in the individualist vein is Smith v. Brady, 17 N.Y. 173 (1858).

My definition of individualism owes much to A. Dicey, Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century (1905). The American legal realists used the term extensively to describe the "spirit" of 19th century private and public law. *See, e.g.*,

It is important to be clear from the outset that individualism is sharply distinct from pure egotism, or the view that it is impos-

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Hamilton, *Property — According to Locke*, 41 YALE L.J. 864 (1932). This usage is still current; *see* Dawson, *supra* note 6, at 1047.

On the intellectual history of individualism, see R. MCCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE (1951); R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT, 1860–1915 (1944); E. KIRKLAND, DREAM AND THOUGHT IN THE BUSINESS COMMUNITY, 1860–1900 (1956); S. FINE, LAISSEZ-FAIRE AND THE GENERAL-WELFARE STATE, A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865–1901 (1956); R. WIEBE, THE SEARCH FOR ORDER, 1877–1920 (1967).

The rhetoric of self-reliance is a permanent theme of American public discourse: " 'We must strike a better balance in our society,'[said President Ford.] 'We must introduce a new balance in the relationship between the individual and the Government, a balance that favors a greater individual freedom and self-reliance.' " N. Y. Times, July 18, 1976, at 24, col. 2.

The individualist ethic is reflected in a perennial strain of economic theorizing that emphasizes the natural and beneficial character of economic conflict and competition. According to this view, social welfare, *over the long run*, will be maximized only if we preserve a powerful set of incentives to individual activity. The argument is that the wealth and happiness of a people depend less on natural advantages or the wisdom of rulers than on the moral fiber of the citizenry, that is, on their self-reliance. If they are self-reliant, they will overcome obstacles, adjust easily to changes in fortune, and, above all, they will generate progress through the continual quest for personal advantage within the existing structure of rights.

The classic statement of this position is J. BENTHAM, THE THEORY OF LEGISLATION 119–22 (Ogden ed. 1931). On the nineteenth century United States, see J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956). *See also* the works of intellectual history cited in this note. A representative modern statement is A. OKUN, EQUALITY AND EFFICIENCY, THE BIG TRADEOFF (1975). Economic individualism, as I am using the term, is not synonymous with nineteenth century laissez-faire. It appeals to the beneficial effects of competition and self-reliance within whatever structure of rights and regulations the state may have set up. *See* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 57–58 (1962); E. ROSTOW, PLANNING FOR FREEDOM 10–45 (1959).

The political expression of individualism is the concept of a regime that secures liberty within a structure of legal rights. Liberty or freedom or autonomy is conceived as a good in itself, because it is synonymous with the ability to pursue one's own conception of the good to the best of one's ability. The function of the state (its only primary and intrinsically legitimate function) is to enforce the like rights of all members of the body politic. The state guarantees that so long as one remains within the area of autonomy for the individual free will, one will receive the benefits and suffer the ill consequences of one's chosen course of action. Thus rights simultaneously protect us in the possession of the fruits of our activities and prevent us from demanding that others participate in our misfortunes.

The progenitor of American theories of this kind is J. LOCKE, TWO TREATISES OF GOVERNMENT (Laslett ed. 1960). An example of the nineteenth century version is H. SPENCER, JUSTICE 176 (1891). The modern conservative version is best represented by F. HAYEK, THE CONSTITUTION OF LIBERTY (1960). The modern civil libertarian version is all around us but has no master expositors. *See* Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

sible and undesirable to set any limits at all to the pursuit of self-interest. The notion of self-reliance has a strong affirmative moral content, the demand for respect for the rights of others. This means that the individualist ethic is as demanding in its way as the counterethic of altruism. It involves the renunciation of the use of both private and public force in the struggle for satisfaction, and acquiescence in the refusal of others to behave in a communal fashion.

Individualism provides a justification for the fundamental legal institutions of criminal law, property, tort, and contract. The function of law is the definition and enforcement of rights, of those limits on the pursuit of self-interest that distinguish an individualist from a purely egotistical regime. The great preoccupation of individualist legal philosophy is to justify these restrictions, in the face of appetites that are both boundless and postulated to be legitimate.[75]

A pure egotist defends the laws against force on the sole ground that they are necessary to prevent civil war.[76] For the individualist, the rules against the use of force have intrinsic rightness, because they are identified with the ideal of self-reliance, the economic objective of security for individual effort, and the political rhetoric of free will, autonomy, and natural rights.[77] Rules against violence provide a space within which to realize this program, rather than a mere bulwark against chaos.

Some level of protection of person and property against nonviolent interference (theft, fraud, negligence) is also desirable from the point of view of self-reliance. First, the thief is violating the injunction to rely on his own efforts in pursuing his goals. Second, the self-reliant man will be discouraged if he must devote all his energies to protecting the fruits of his labor. The rationale for contract is derivative from that of property. The law creates a property in expectations. One who breaches deprives the promisee in a sense no less real than the thief.

Beyond these fundamental legal institutions, the individualist program is much less clear. Moreover, it has varied greatly even within the two hundred year history of individualism as an organizing element in American public discourse. The next section presents a synopsis of these historical variations that should give both this concept and that of altruism more concreteness.

Just as there are a multitude of implications that legal thinkers of different periods have drawn from individualism, there are

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[75] On the problem and the conventional solutions, see J. RAWLS, A THEORY OF JUSTICE 3–43 (1971). *See also* Kennedy, *supra* note 4, at 361–62.

[76] T. HOBBES, LEVIATHAN 109–13 (Oxford ed. 1957).

[77] J. LOCKE, *supra* note 74, at § 13, §§ 123–26.

a number of more abstract ideas that are possible bases for adopting it as an attitude and as a guide in formulating legal rules. What this means is that the idea of the "legitimacy" of the pursuit of self-interest within a framework of rights is ambiguous, and different thinkers have given it different contents.

The simplest explanation of the legitimacy of self-interestedness is that it is a moral good in itself. When the law refuses to interfere with its pursuit, it does so because it approves of it, and disapproves of people's attempts at altruism. Since this approach seems to flatly contradict the basic precepts of the Judaeo-Christian ethic, even in its most secularized form, it is not surprising that it is more common to find social thinkers justifying individualism in more circuitous, if sometimes less convincing ways.

The first of these is the notion of the invisible hand transforming apparent selfishness into public benefit. In this view, the moral problem presented by the law's failure to interfere with unsavory instances of individualism is apparent rather than real. If we are concerned with the ultimate good of the citizenry, then individualists are pursuing it *and will achieve it*, even when they are most convinced that they care only about themselves.

A much more common justification for individualism in law might be called the "clenched teeth" idea. It is that the refusal to consult the interests of others is an evil, and an evil not redeemed by any long-term good effects. But for the *state* to attempt to suppress this evil would lead to a greater one. As soon as the state attempts to legislate an ethic more demanding than that of individualism, it runs up against two insuperable problems: the relative inability of the legal system to alter human nature, and the tendency of officials to impose tyranny behind a smokescreen of morality. The immorality of law is therefore the necessary price for avoiding the greater immoralities that would result from trying to make law moral.

A third view is that there is a viable distinction to be made between the "right" (law) and the "good" (morals). Since the criterion for the legitimacy of state intervention is radically different from that for moral judgment, one can favor an individualist legal system while remaining opposed to the behavior that such a system permits or even encourages. This view is often associated with the claim that individuals have inalienable rights whose content can be derived from fundamental concepts like freedom or human personality. The individual can set these up in his defense when the state claims the power to make him act in the interests of others.[78]

[78] *See* R. NOZICK, ANARCHY, STATE AND UTOPIA 149–82 (1974).

B. *The Content of the Ideal of Altruism*

The rhetoric of individualism so thoroughly dominates legal discourse at present that it is difficult even to identify a counter-ethic. Nonetheless, I think there is a coherent, pervasive notion that constantly competes with individualism, and I will call it altruism. The essence of altruism is the belief that one ought *not* to indulge a sharp preference for one's own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful. It has roots in culture, in religion, ethics and art, that are as deep as those of individualism. (Love thy neighbor as thyself.)

The simplest of the practices that represent altruism are sharing and sacrifice. Sharing is a static concept, suggesting an existing distribution of goods which the sharers rearrange. It means giving up to another gains or wealth that one has produced oneself or that have come to one through some good fortune. It is motivated by a sense of duty or by a sense that the other's satisfaction is a reward at least comparable to the satisfaction one might have derived from consuming the thing oneself. Sharing may also involve participation in another's losses: a spontaneous decision to shift to oneself a part of the ill fortune, deserved or fortuitous, that has befallen someone else. Sacrifice is the dynamic notion of taking action that will change an ongoing course of events, at some expense to oneself, to minimize another's loss or maximize his gain.[79]

[79] There is a large literature about altruism, much of it concerned with the question of whether the concept can have any meaning at all. If I sacrifice or share, can I be said to behave altruistically, given that presumably I preferred sacrifice or sharing to the alternatives? Wouldn't it be better to speak of "internalizing another person's utility function"? For my purposes, it makes no difference how one answers these questions. In the cases that I deal with, there is no problem in distinguishing self-interested from altruistic behavior in the rough way suggested in the text. On the "larger" issue, see T. NAGEL, THE POSSIBILITY OF ALTRUISM (1970).

For an example of a typically altruistic but decidedly non-socialistic program of legal reform, see Pound, *The New Feudalism*, 35 COMMERCIAL L.J. 397 (1930). For more typical examples of altruist thinking about economic and social life, see, *e.g.*, A. GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL (Nicolaus & Ortiz trans. 1964); Hamilton, *Competition*, in 4 ENCYCLOPEDIA SOC. SCI. 141 (1931); H. GEORGE, PROGRESS AND POVERTY (1879). *See also* M. RICHTER, THE POLITICS OF CONSCIENCE, T.H. GREEN AND HIS AGE 267–91 (1964). On the conservative element in nineteenth century altruism, see Dicey, *supra* note 74, at 220–40; J. RUSKIN, UNTO THIS LAST: FOUR ESSAYS ON THE FIRST PRINCIPLES OF POLITICAL ECONOMY (1862). On the conservative aspects of modern reform, see G. KOLKO, THE TRIUMPH OF CONSERVATISM (1963); J. WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900–1918 (1968); E. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (1966).

The polar opposite concept for sharing and sacrifice is exchange (a crucial individualist notion). The difference is that sharing and sacrifice involve a vulnerability to non-reciprocity. Further, this vulnerability is undergone out of a sense of solidarity: with the hope of a return but with a willingness to accept the possibility that there will be none. Exchange, on the contrary, signifies a transfer of resources in which equivalents are defined, and the structure of the situation, legal or social, is designed in order to make it unlikely that either party will disappoint the other. If there is some chance of disappointment, then this is experienced as a risk one must run, a cost that is unavoidable if one is to obtain what one wants from the other. The difference is one of degree, and it is easy to imagine arrangements that are such a thorough mixture, or so ambiguous, that they defy characterization one way or the other.[80]

Individualism is to pure egotism as altruism is to total selflessness or saintliness. Thus the altruist is unwilling to carry his premise of solidarity to the extreme of making everyone responsible for the welfare of everyone else. The altruist believes in the necessity and desirability of a sphere of autonomy or liberty or freedom or privacy within which one is free to ignore both the plights of others and the consequences of one's own acts for their welfare.

Just as the individualist must find a justification for those minimal restraints on self-interest that distinguish him from the pure egotist, the altruist must justify stopping short of saintliness. The basic notion is that altruistic duties are the product of the interaction of three main aspects of a situation. First, there is the degree of communal involvement or solidarity or intimacy that has grown up between the parties. Second, there is the issue of moral fault or moral virtue in the conduct by A and B that gives rise to the duty. Third, there is the intensity of the deprivation that can be averted, or of the benefit that can be secured in relation to the size of the sacrifice demanded by altruism. Thus we can define a continuum. At one extreme, there is the duty to make a small effort to save a best friend from a terrible disaster that is no fault of his own. At the other, there are remote strangers suffering small injuries induced by their own folly and remediable only at great expense.

At first glance the usefulness of the concept of altruism in describing the legal system is highly problematic. A very common view alike in the lay world and within the legal profession is that law is unequivocally the domain of individualism, and that

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[80] *See* the discussions in I. MACNEIL, *supra* note 14, at 68–79; Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691, 797–800 (1974).

this is true most clearly of the private law of property, torts, and contract. Private legal justice supposedly consists in the respect for rights, never in the performance of altruistic duty. The state acts through private law only to protect rights, not to enforce morality.

Of course, there are institutions, like the progressive income tax, that seem to have an unmistakable altruistic basis. But these are exceptional. They are after-the-fact adjustments to a pre-existing legal structure that has its own, individualist, logical coherence. Likewise, social security or the minimum wage or pure food and drug laws are often seen as designed to force people with power to have a due regard for the interests of others. Many lay people see the employer's share of social security payments as designed to redistribute income from bosses to workers. But all of this takes place against a background of private law rules whose altruistic content is invisible if it exists at all.

Nonetheless, it is easy enough to fit fundamental legal institutions into the altruist mold. The rules against violence, for example, have the *effect* of changing the balance of power that would exist in the state of nature into that of civil society. The strong, who would supposedly dominate everyone if there were no state, are deprived of their advantages and forced to respect the "rights" of the weak. If altruism is the sharing or sacrifice of advantages that one might have kept for oneself, then the state forces the strong to behave altruistically. Further, the argument that the prohibition of theft is based on the ethic of self-reliance is weak at best. The thief is a very paragon of self-reliance, and the property owning victim has failed to act effectively in his own defense. The point for the altruist is not that the thief is a slacker, but that he is oblivious to any interest but his own. The law, as the expression goes, "provides him a conscience."

The rules of tort law can likewise be seen as enforcing some degree of altruism. Compensation for injuries means that the interests of the injured party must be taken into account by the tortfeasor. In deciding what to do, he is no longer free to consult only his own gains and losses, since these are no longer the only gains and losses for which he is legally responsible. Likewise in contract, when I want to breach because I have found a better deal with a new partner, the law makes me incorporate into my calculation the losses I will cause to the promisee. If my breach is without fault because wholly involuntary, I may be excused for mistake or impossibility.

There are two intuitively appealing objections to this way of looking at the legal order. The first is that "rights" and "justice" are much more plausible explanations of the rules than altruism. But as we will see, in this century at least, individualists have had a

hard time showing that "rights" are anything more than after-the-fact rationalizations of the actual rules. Contemporary legal thinkers tend to agree that we decide whether I have a right to performance of a contract by examining the rules, rather than deciding what rules to have by first defining and then "protecting" the right. The distinction between justice and morality has proved no less problematic.[81]

The second objection is that the rules fall so far short of imposing the outcomes required by our moral sense that there must be some other way to account for them. If the solution is not "rights" in the abstract, then perhaps it is "the social function of maintaining a market economy." Or perhaps the rules simply carry into effect the objectives of the dominant political or economic groups within society.[82]

Each of these propositions has a great deal of truth to it, but neither is a valid objection to the point of view I am suggesting. First, it is important to distinguish the use of the concept of altruism as a direction in an altruism-individualism continuum from its use as an absolute standard for judging a situation. The way I am using the term, we can say that even a very minimal legal regime, one that permitted outcomes extremely shocking to

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[81] *See* Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931). *See also* E. DURKHEIM, *supra* note 20, at 121–22:

> It is customary to distinguish carefully justice from charity; that is, simple respect for the rights of another from every act which goes beyond this purely negative virtue. We see in the two sorts of activity two independent layers of morality: justice, in itself, would only consist of fundamental postulates; charity would be the perfection of justice. The distinction is so radical that, according to partisans of a certain type of morality, justice alone would serve to make the functioning of social life good; generous self-denial would be a private virtue, worthy of pursuit by a particular individual, but dispensable to society. Many even look askance at its intrusion into public life. We can see from what has preceded how little in accord with the facts this conception is. In reality, for men to recognize and mutually guarantee rights, they must, first of all, love each other, they must, for some reason, depend upon each other and on the same society of which they are a part. Justice is full of charity, or, to employ our expressions, negative solidarity is only an emanation from some other solidarity whose nature is positive. It is the repercussion in the sphere of real rights of social sentiments which come from another source. There is nothing specific about it, but it is the necessary accompaniment of every type of solidarity. It is met with forcefully wherever men live a common life, and that comes from the division of social labor or from the attraction of like for like.

[82] The master of the social function approach is Max Weber. For an introduction, see Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720; A. GOULDNER, THE COMING CRISIS OF WESTERN SOCIOLOGY 341–70 (1970). An example of the typical modern combination of the social function and class interest ideas is L. FRIEDMAN, A HISTORY OF AMERICAN LAW 14–15 (1973). *See generally* Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Historiography*, 10 LAW & SOC. REV. 9 (1975). The criticism offered in the text following this note is similar to that of E. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 258–69 (1975).

our moral sense, would impose more altruistic duty than a regime still closer to the state of nature. In this near tautological sense, virtually *all* the rules of our own legal regime impose altruistic duty, because they make us show greater regard for the interests of others than we would if there were no laws. Only rules *prohibiting* sacrifice and sharing are truly anti-altruistic, and of these there are very few.

Second, to describe a given legal regime as more altruistic than another should suggest nothing about the motives of those who impose the regime. Every change in legal rules produces a pattern of changes in benefits to different affected parties. It is often a good inference that those who seemed likely to gain were influential in bringing the change about. It may nonetheless be useful to describe the change as one increasing or decreasing the degree of legally enforced altruistic duty.

Third, the "social function of maintaining the market" or the interests of dominant groups are, as tools, simply too crude to explain the detailed content of, say, the law of contracts. The vast majority of issues that arouse sharp conflict within contract law are either irrelevant to these larger considerations or of totally problematic import. Take the question of the "good faith" duties of a buyer in a requirements contract when there is a sudden price increase. The buyer may be able to bankrupt the seller and make a large profit by sharply increasing his requirements, supposing that the item in question accounts for much of his own cost of manufacture, or that he can resell it without using it at all.

The buyers and sellers in these situations do not seem to line up in terms of any familiar categories of political or economic power, and the effects on "the market" of deciding one way or another are highly problematic. Yet there is clearly something important at stake. The possible solutions range from a minimal buyer's duty not to "speculate" against the seller's interests to a good faith duty to absorb some loss in order to avoid a larger loss to one's contractual partner.[83] The notion of altruism captures the court's dilemma far better than either class struggle or the needs of a market economy.[84] There are hundreds of such problems in private law.

Finally, it is a familiar fact that for about a century there has been a movement of "reform" of private law. It began with the imposition of statutory strict liability on railroads for dam-

[83] See the cases collected in KESSLER & GILMORE, *supra* note 3, at 337–62.

[84] Weber himself was forced to recognize this difficulty by the "case of England," which attained a high level of economic development under a legal regime which, as he saw it, was profoundly irrational. *See* 2 M. WEBER, *supra* note 4, at 890–92. *See also* Trubek, *supra* note 82, at 746–48.

age to cattle and crops, and has persisted through the current redefinition of property law in the interests of the environment. In the battles and skirmishes of reform, across an enormous variety of particular issues, it has been common for conservatives to argue that liberals are consciously or unconsciously out to destroy the market system. Liberals respond that the conservative program is a cloak for the interests of big business.

Yet it is perfectly clear that all the changes of 100 years have not "destroyed the market," nor would further vast changes throughout property, torts, and contracts. It is equally clear that the nineteenth century rules the liberals have been attacking form a complex intellectual system whose vitality even in the last quarter of the twentieth century is as much or more the product of its ideological power as of the direct material dominance of particular economic or political interests. If the concepts of individualism and altruism turn out to be useful, it is because they capture something of this struggle of contradictory utopian visions. It is this dimension that the ideas of class domination and of social function cannot easily grasp. The approaches should therefore be complementary rather than conflicting.

The last objection I will consider is that to characterize fundamental legal institutions like tort or contract in terms of altruism is wrong because it is nonsense to speak of forcing someone to behave altruistically. True, the notion requires the *experience* of solidarity and the voluntary undertaking of vulnerability in consequence. It therefore implies duties that transcend those imposed by the legal order. It is precisely the refusal to take all the advantage to which one is legally, but not morally entitled that is most often offered as an example of altruism. It follows that when the law "enforces" such conduct, it can do no more than make people behave "as if" they had really experienced altruistic motives. Yet nothing could be clearer than that, in many circumstances, this is exactly what we want the law to do. One idea of justice is the organization of society so that the outcomes of interaction are equivalent to those that would occur *if* everyone behaved altruistically. I take this as a given in the rest of the discussion.[85]

C. Methodological Problems

There are many problems with the use of concepts like individualism and altruism. Both positions have been assembled from diverse legal, moral, economic, and political writings, and I can give no plausible description of the principle of selection at work. As a result, it is impossible to "prove" or "disprove" the validity

[85] *See* R. UNGER, *supra* note 4, at 214–16.

of the two constructs. They are neither falsifiable empirical statements about a determinate mass of data, nor logically pure "models" totally abstracted from reality.

Nonetheless, I hope that the reader will find that the bits and pieces fit together into two intuitively familiar, easily recognizable wholes. Not being a systematic nominalist, I believe that there really *is* an altruist and an individualist mode of argument. More, I believe that the rhetorical modes are responsive to real issues in the real world. They are opposed concepts like Romanticism *vs.* Classicism, Gothic *vs.* Renaissance, toughminded *vs.* tenderminded, shame culture *vs.* guilt culture, or *Gemeinschaft vs. Gesellschaft*. As with Romanticism, we can believe in the usefulness of the notion of altruism without being able to demonstrate its existence experimentally, or show the inevitability of the association of the elements that compose it.

Methodological difficulties of this kind color all of the analysis that follows. One must keep constantly in mind that the individualist arguments are drawn from the same basic sources as the altruist ones. The same judge may, in a single opinion, provide examples of each mode. Over time, a single judge may provide complete statements of both positions. In other words, a person can use the arguments that compose the individualist set without being an "individualist character." When I speak of "altruist judges" or "altruist legislators," I mean only the proponents of particular arguments that fall within one set or the other. I have no intention of characterizing these proponents as *personalities*.

When we set out to analyze an action, and especially a judicial opinion, it is only rarely possible to make a direct inference from the rhetoric employed to the real motives or ideals that animate the judge. And it is even harder to characterize outcomes than it is personalities or opinions. It will almost always be possible to argue that, if we look hard at its actual effects on significant aspects of the real world, a particular decision will further both altruist and individualist values, or neither. I will therefore avoid talking about "altruist outcomes" as much as possible.

Given that individualism and altruism are sets of stereotyped pro and con arguments, it is hard to see how either of them can ever be "responsible" for a decision. First, each argument is applied, in almost identical form, to hundreds or thousands of fact situations. When the shoe fits, it is obviously not because it was designed for the wearer. Second, for each pro argument there is a con twin. Like Llewellyn's famous set of contradictory "canons on statutes," the opposing positions seem to cancel each other out.[86] Yet somehow this is not *always* the case in practice. Al-

[86] *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521–35 (1960).

though each argument has an absolutist, imperialist ring to it, we find that we are able to distinguish particular fact situations in which one side is much more plausible than the other. The difficulty, the mystery, is that there are no available metaprinciples to explain just what it is about these particular situations that make them ripe for resolution. And there are many, many cases in which confidence in intuition turns out to be misplaced.

These are problems of a kind familiar in some other fields.[87] Lawyers don't usually confront them, because lawyers usually believe that their analytic skills can produce explanations of legal rules and decisions more convincing than any that employ such vague, "value laden" concepts. The typical legal argument at least pretends that it is possible to get from some universally agreed or positively enacted premise (which may be the importance of protecting a "social interest") to some particular desirable outcome through a combination of logic and "fact finding" (or, more likely, "fact asserting").

Yet most contemporary students of legal thought seem to agree that an account of adjudication limited to the three dimensions of authoritative premises, facts and analysis is incomplete.[88] One way to express this is to say that "policy" plays a large though generally unacknowledged part in decisionmaking. The problem is to find a way to describe this part. My hope is that the substantive and formal categories I describe can help in rendering the contribution of "policy" intelligible. Although individualism and altruism can be reduced neither to facts nor to logic, although they cannot be used with any degree of consistency to characterize personalities or opinions or the outcomes of lawsuits, they may nonetheless be helpful in this enterprise.

The ultimate goal is to break down the sense that legal argument is autonomous from moral, economic, and political discourse in general. There is nothing innovative about this. Indeed, it has been a premise of legal scholars for several generations that it is impossible to construct an autonomous logic of legal rules. What is new in this piece is the attempt to show an orderliness to the debates about "policy" with which we are left after abandonment of the claim of neutrality.

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[87] *See* R. UNGER, *supra* note 73, at 12–16, 106–19; A. GOULDNER, *supra* note 73, at 20–60. For an early nineteenth century attempt to deal with the problem, see Coleridge, *Essays on the Principles of Method*, 1 THE FRIEND 448–524 (Rooke ed. 1969).

[88] For a useful summary, see Christie, *Objectivity in Law*, 78 YALE L.J. 1311, 1312–26 (1969). The most striking recent formulation of the problem is Deutsch, *Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968). *See also* Gordon, *supra* note 82.

IV. Three Phases of the Conflict of Individualism and Altruism

Eighteenth century common law thinking does not seem to have been afflicted with a sense of conflict between two legal ideals. Positive law was of a piece with God's moral law as understood through reason and revelation. In Blackstone, for example, there is no suggestion of recurrent conflicts either about the nature of legal morality or about which of two general utilitarian strategies the legislator had best pursue.[89] The sense of a conflict between systems of thought emerged only at the beginning of the nineteenth century. It has had three overlapping phases, corresponding roughly to the periods 1800–1870, 1850–1940, and 1900 to the present.[90]

A. The Antebellum Period (1800–1870): Morality vs. Policy

Individualism was at first not an *ethic* in conflict with the ethic of altruism, but a set of pragmatic arguments perceived as in conflict with ethics in general. Antebellum judges and commentators referred to these pragmatic arguments by the generic name of "policy," and contrasted it to "morality." A crucial fact about the legal order was that it stopped short of the full enforcement of morality. Counsel in an 1817 Supreme Court case defended his client's failure to reveal crucial information to a buyer as follows: [91]

> Even admitting that his conduct was unlawful, in foro conscientiae, does that prove that it was so in the civil forum? Human laws are imperfect in this respect, and the sphere of morality is more extensive than the limits of civil jurisdiction. The maxim of caveat emptor could never have crept into the law, if the province of ethics had been co-extensive with it.

The explanation for the distinction between laws of perfect and imperfect obligation was that imposing high standards of conduct in contract and tort, and then granting large damage judgments for violating those standards, would discourage economic development.[92] This is a prototypically individualist posi-

[89] *See* 1 W. Blackstone, Commentaries *38–*61. An English judge could write the following even in 1828: "It has been argued that the law does not compel every line of conduct which humanity or religion may require; but there is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England." Bird v. Holbrook, 29 Rev. R., 657, 667 (Ct. Com. Pleas 1828).

[90] The discussion in this section is a compressed version of a larger work tentatively called *The Rise and Fall of Classical Legal Thought: 1850–1940*. Copies of the completed chapters are on file at the office of the Harvard Law Review.

[91] Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178, 193 (1817).

[92] *See generally* M. Horwitz, The Transformation of American Law: 1780–1860, ch. 3 (forthcoming in 1977).

tion. The "morality" that opposed this program of limited liability was the first systematic version of common law altruism. The idea was that the purpose of law and the source of its legitimacy was that it forced people to behave toward one another in a substantively equitable fashion. The contraction of liability amounted to permitting or encouraging people to disregard the impact of their actions on those around them, and was therefore unjustifiable.

The antebellum conception of the conflict is perhaps most perfectly expressed by Parsons (1855) in his discussion of the law of fraud. He distinguished between: [93]

> that kind and measure of craft and cunning which the law deems it impossible or inexpedient to detect and punish, and therefore leaves unrecognized, and that worse kind and higher degree of craft and cunning which the law prohibits, and of which it takes away all the advantage from him by whom it is practised.
>
> The law of morality, which is the law of God, acknowledges but one principle, and that is the duty of doing to others as we would that others should do to us, and this principle absolutely excludes and prohibits all cunning; if we mean by this word any astuteness practised by any one for his own exclusive benefit. But this would be perfection; and the law of God requires it because it requires perfection; that is, it sets up a perfect standard, and requires a constant and continual effort to approach it. But human law, or municipal law, is the rule which men require each other to obey; and it is of its essence that it should have an effectual sanction, by itself providing that a certain punishment should be administered by men, or certain adverse consequences take place, as the direct effect of a breach of this law. If therefore the municipal law were identical with the law of God, or adopted all its requirements, one of three consequences must flow therefrom; either the law would become confessedly, and by a common understanding, powerless and dead as to a part of it; or society would be constantly employed in visiting all its members with punishment; or, if the law annulled whatever violated its principles, a very great part of human transactions would be rendered void. Therefore the municipal law leaves a vast proportion of unquestionable duty to motives, sanctions, and requirements very different from those which it supplies. And no man has any right to say, that whatever human law does not prohibit, that he has a right to do; for that only is right which violates no law, and there is another law besides human law. Nor, on the other hand, can any one reasonably insist, that whatever one should do or should abstain from doing, this may properly be made a part of the municipal law, for this law must neces-

[93] T. PARSONS, THE LAW OF CONTRACTS *767–78 (1855).

sarily fail to do all the great good that it can do and therefore should, if it attempts to do that which, while society and human nature remain what they are it cannot possibly accomplish.

In this early nineteenth century view, the law aimed at and usually achieved the imposition of a high level of altruistic duty, but had an occasion to make concessions to individualism. Here are a few examples:

Negotiability: It was common to argue that it was immoral to force the maker of a note to pay a holder in due course after failure of the consideration: the law was requiring the maker to pay for something he never got. But the policy of encouraging transactions dictated the cutting off of defenses.[94]

Incorporation: It was a Jacksonian objection to limited corporate liability that it allowed stockholders to escape their share of the debts of the corporation. The law obliged partners to live up to their moral obligations, but allowed stockholders to behave dishonorably. The answer was the policy in favor of the pooling of resources.[95]

Consideration: The common law refused to enforce promises whose performance was dictated by the most solemn moral obligation when they lacked consideration. The reason was the policy against the multiplication of lawsuits and the legalization of family life.[96]

Breaching Plaintiff's Suit for Restitution: Most courts refused to honor the breaching plaintiff's claim for restitution even when the result was a windfall unjust enrichment of the defendant. To allow recovery would have created a dangerous incentive to lax performance.[97]

Bankruptcy: Bankruptcy laws sanctioned and even encouraged the dishonorable conduct of refusing to pay one's debts. The reason was the policy against demoralizing economic actors by eliminating the incentive of self-enrichment.[98]

Still, there was no question which of the ethics was primary: we would achieve a social order according to the law of God if we could. We can't, because the ideal is too demanding. We therefore validate a certain amount of conduct inconsistent with altruism but consistent with individualism, hoping that by accepting to this extent the imperfections of human nature we will at least

[94] *See* M. HORWITZ, *supra* note 92, ch. 7, § 1.

[95] *See* J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780–1970, at 31–32 (1970).

[96] *See, e.g.*, Mills v. Wyman, 20 Mass. (3 Pick.) 207 (1825).

[97] *Compare* Britton v. Turner, 6 N.H. 481 (1834), *with* Smith v. Brady, 17 N.Y. 173 (1858).

[98] 2 J. KENT, COMMENTARIES ON AMERICAN LAW *391 n.(a), *394 n.(a) (1826).

forestall pure egotism, while at the same time promoting economic growth.

B. Classical Individualism (1850–1940): Free Will

Modern legal thought is preoccupied with "competing policies," conflicting "value judgments" and the idea of a purposive legal order, and to that extent has much in common with pre-Civil War thinking. One major difference is the total disappearance of religious arguments, and the fading of overtly moralistic discussion. More important for our purposes, the modern situation has been conditioned by the post-Civil War triumph of what I will call Classical individualism,[99] which represented not just a rhetorical shift away from the earlier emphasis on altruism, but the denial that altruism had anything at all to do with basic legal doctrines.

The reasons for this conceptual revolution will not concern us here. It is enough to say that they were complex, involving the triumph of particular economic interests, the desire to establish an apolitical scientific justification for the power of judges and lawyers, and autonomous movements in all the different areas of late nineteenth century thought. What does concern us is the structure of the Classical individualist position, since this structure forms the backdrop for the modern discussion.

Classical individualism rejected the idea that particular rules represented an ad hoc compromise between policy and altruist morality. Rather, the rules represented a fully principled and consistent solution *both* to the ethical and to the practical dilemmas of legal order. The contraction of liability that occurred over the course of the nineteenth century was thereby rationalized, and shielded from the charge that it represented the sacrifice of equity to expediency.

The Classical position can be reduced to three propositions concerning the proper definition of liability. First, the fundamental theory of our political and economic institutions is that there should exist an area of individual autonomy or freedom or liberty within which there is no responsibility at all for effects on others.[100] Second, the meaning of this political and economic theory for private law is that there are only two legitimate sources

[99] The legal thought of this period is generally referred to as formal or formalist. *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 38–40 (1960); G. GILMORE, *supra* note 41; Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEG. HIST. 251 (1975); Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 547 (1974).

[100] For an illustration, see M. Fuller, Chief Justice of the United States, *Address in Commemoration of the Inauguration of George Washington*, Dec. 11, 1889 (G.P.O. 1890).

of liability: fault, meaning intentional or negligent interference with the property or personal rights of another, and contract. As between strangers, there are no duties of mutual assistance; there are only duties to abstain from violence and negligence. Contract adds new duties, and these are enforced as a matter of right, rather than of judicial discretion.[101] The content of contractual duty is strictly limited by the intent of the parties. The third proposition is that the concepts of fault and free will to contract can generate, through a process of deduction, determinate legal rules defining the boundaries and content of tort and contract duties.[102]

The important thing about the Classical position, from our point of view, is that it presented the choice between individualism and altruism as one of all-or-nothing commitment to a complete system. One might accept or reject the individualist claim that our institutions are based on liberty, private property and bodily security. But if one once subscribed to these ideas, a whole legal order followed inescapably. To reject the particular applications was a sign either of error or of bad faith, since they were no more than the logical implications of the abstract premises.

If one believed in the first principles and in the possibility of deducing rules from them, then it was easy to believe that the Classical regime was both morally and practically far superior to the state of nature. The restrictions on pure egotism imposed by that regime did not represent a concession to the utopian ideal of altruism. They embodied the individualist morality of self-reliance, the individualist economic theory of free competition, and the individualist political philosophy of natural rights, which set well-defined boundaries to the demand that people treat the interests of others as of equal importance with their own.

For example, the contract law of 1825 was full of protective doctrines, such as the incapacity of married women, infants, lunatics and seamen. The consideration doctrine often functioned to enforce an altruist contractual morality, as did the doctrines of fraud, mistake, duress, undue influence and unconscionability. Jury discretion in setting damages provided a further vehicle for importing community standards of fair conduct. For antebellum legal thought, there was not much difficulty in explaining all of this: the doctrines represented the legal enforcement of straightforward moral norms, but raised questions of policy in so much as

[101] For an illustration, see Ames, *Undisclosed Principal — His Rights and Liabilities*, 18 YALE L.J. 443 (1909).

[102] For an illustration, see J. BRADLEY, *Law, Its Nature and Office as the Bond and Basis of Civil Society*, in MISCELLANEOUS WRITINGS 226–66 (1901).

an insistence on policing bargains might be harmful to the goal of economic development.[103]

During the latter part of the century, some of these doctrines were cut back, and others expanded somewhat. But *all* of the doctrines were recast as implications of the fundamental idea that private law rules protect individual free will. The basis of restrictions on capacity is that infants and those like them lack free will; duress is the overbearing of the will, undue influence its subversion; fraud leads to a consent that is only apparent; mistake meant that the wills of the parties had miscarried; the measure of damages was defined by the will of the parties with respect to the extent of liability.[104]

Recast in terms of will, the rules of contract law still represented a moral as well as a practical vision, but that vision was no longer perceptibly altruist. The new premise was that people were responsible for themselves unless they could produce evidence that they lacked free will in the particular circumstances. If no such evidence was available, then they were bound to look to their own resources in performing what they had undertaken. In place of a situational calculus of altruistic duty and an equally situational calculus of economic effects, there was a single individualist moral-political-economic premise from which everything else followed.

We could trace a similar process of development in torts or property or corporate law. In each case, there was a central individualist concept representing a substantial limitation on the total freedom of the state of nature. In each case, the concept defined an area of autonomy, of "absolute right," and also provided the basis for limiting the right. Since the basis of tort law, for example, was the enforcement of compensation for wrongful injury, it followed that there could be no tort liability without fault. Existing instances, such as strict liability in trespass or respondeat superior, must either be rationalized in terms of the will theory or rejected as anachronistic.[105]

It is common to equate late nineteenth century thought with conceptualism, that is with my third proposition about the possibility of a *deductive* process of defining the boundaries and content of liability. This is misleading to the extent that it suggests that the concepts were just "there," as abritrary starting points for judicial reasoning. They were, on the contrary, crucial components in the larger individualist argument designed to link the very

[103] *See* Horwitz, *Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974).

[104] For an illustration, see S. AMOS, A SYSTEMATIC VIEW OF THE SCIENCE OF JURISPRUDENCE 85–92, 176–213 (London 1872).

[105] For an illustration, see F. POLLOCK, THE LAW OF TORTS 1–15 (1887).

general proposition, that the American system is based on freedom, with the very concrete rules and doctrines of the legal order. "Free will" in law followed from, indeed was simply the practical application of, the freedom of individualist political, moral and economic theory.[106]

C. *Modern Legal Thought (1900 to the present): The Sense of Contradiction*

In private law, modern legal thought begins with the rejection of Classical individualism. Its premise is that Classical theory failed to show either that the genius of our institutions is individualist or that it is possible to deduce concrete legal rules from concepts like liberty, property or bodily security. For this reason, morality and policy reappear in modern discussions, in place of first principles and logic. The problem is that morality is no longer unequivocally altruist — there is a conflict of moralities. Nor is policy any longer unequivocally individualist — there are arguments for collectivism, regulation, the welfare state, along with the theory of economic development through laissez-faire. This conflict of morality with morality and of policy with policy pervades every important issue of private law.

1. The Critique of Classical Individualism. — This is not the place for a description of the argumentative strategies by which more or less altruist thinkers, working in many different fields,[107] disintegrated the Classical individualist structure. I will make do with some flat assertions. First, modern legal thought and especially modern legal education are committed to the position that no issue of substance can be resolved merely by reference to one of the Classical concepts. This applies to liberty, free will, property, fault, proximate cause, the "subject matter of the contract," title, cause of action, privity, necessary party, "literal meaning," "strictly private activity," and a host of others.

Second, the problem with the concepts is that they assert the possibility of making clear and convincing on-off distinctions among fact situations, along the lines of free vs. coerced; proximate vs. remote cause; private vs. affected with a public interest. In modern legal thought, it is a premise that any real fact situation will contain elements from both sides of the conceptual polarity. The problem of classification is therefore that of locat-

[106] The classic illustration is the majority opinion in Coppage v. Kansas, 236 U.S. 1 (1915).

[107] For useful treatments of American thought during the period in question, see E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973); White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Twentieth Century America*, 58 VA. L. REV. 999 (1972).

ing the situation on a continuum. This process is not self-executing: people are certain to disagree strongly about how to classify, according to their purposes in making the distinction in the first place, and there is no "objective" or "absolute" standard of correctness for resolving these disagreements.[108]

Third, given the indeterminacy of the concepts, their inherent ambiguity as criteria of decision, it is implausible to describe the total body of legal rules as implicit in general principles like "protection of property" or "freedom of contract." Since it is not possible to move in a deductive fashion from concept to implications, we need some other way to account for the process of judicial lawmaking. That explanation will be found in the judge's moral, political and economic views and in the idiosyncracies of his understanding of the character of the fact situation.[109]

Fourth, there are numerous issues on which there exists a judicial and also a societal consensus, so that the judge's use of his views on policy will be noncontroversial. But there are also situations in which there is great conflict. The judge is then faced with a dilemma: to impose his personal views may bring on accusations that he is acting "politically" rather than "judicially." He can respond to this with legalistic mumbo jumbo, that is, by appealing to the concepts and pretending that they have decided the case for him. Or he can take the risks inherent in acknowledging the full extent of his discretion.[110]

2. The Sense of Contradiction. — The death of conceptualism has brought on a new phase of the conflict of individualism and altruism. To begin with it has reduced them to the same argumentative level. While he still believed in the Classical system, the individualist had no problem in defining and justifying his position on any given issue. He could derive everything from the concepts. The altruist, on the other hand, had no deductive system that explained where she would stop short of total collectivism. She was obliged to argue in an ad hoc manner from the injustice, immorality or irrationality of particular individualist outcomes.

But modern individualism presents itself not as a deductive system, but as a pole, or tendency or vector or bias, in the debate with altruism over the legitimacy of the system of rules that emerged in the late nineteenth century. As a consequence, altru-

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[108] *See* Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Cohen, *On Absolutisms in Legal Thought*, 84 U. PA. L. REV. 681 (1936); R. UNGER, *supra* note 73, at 29–144; A. KATZ, *supra* note 4.

[109] *See* Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931).

[110] *See* Deutsch, *supra* note 88; A. BICKEL, *supra* note 69.

ists can argue for the establishment of legal institutions like zoning, workmen's compensation, social security, compulsory collective bargaining, products liability and no-fault automobile insurance without being vulnerable to the charge of subverting a logical structure. They admit that such institutions are anti-individualist, and also that they have no principles capable of logically determining where, short of total collectivism, they would stop the expansion of legally enforceable altruistic duty. But given the death of the concepts, the individualists no longer have any principles that determine where, short of the state of nature, *they* would stop the *contraction* of altruistic duty. They are open to the charge of dissolving society, or of stacking the rules in favor of particular blackguards.

This parity in argumentative positions is the starting point of the modern debate about what to do with the rule structure Classical individualism created through deduction from first principles. The new scepticism destroyed the presumptive legitimacy of the old system, creating a vast number of difficult legal problems, but solving none of them. Rules that referred directly to the discredited concepts (duress equals overbearing of the will) were recognized as indeterminate, and had to be replaced or reconceived as vague standards. More concrete rules that had been derived from the abstract premises (silence cannot be acceptance) had to be justified in their own right or rejected. The new, more altruistic institutions like labor law, consumer protection, social insurance and securities regulation immediately became a battleground. Their boundaries and internal structure had to be defined by the courts. A thoroughgoing individualist interpretation of altruist statutes might have constricted them to the point of de facto nullification.

In private law, this modern phase of conflict occurs over three main issues, which I will call, somewhat arbitrarily, community vs. autonomy, regulation vs. facilitation, and paternalism vs. self-determination.[111] Each particular debate has a stalemated quality that reflects the inability of either individualism or altruism to generate a new set of principles or metaprinciples to replace the late lamented concepts.

(*a*) *Community vs. Autonomy.* — The issue here is the extent to which one person should have to share or make sacrifices in the interest of another in the absence of agreement or other manifestation of intention. At first sight this issue may seem largely confined to torts and quasi-contract, but it arises in identical form in

[111] The general idea of categorizing legal doctrines in the way suggested here owes much to I. MACNEIL, *supra* note 14; Macaulay, *supra* note 2; Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1 (1932).

many other areas as well. The law must define the reciprocal rights of neighboring land holders through the law of easements, and the rights of third party beneficiaries and assignees against obligors. Within consensual arrangements, it must decide how to dispose of the multitude of possible controversies not covered or ambiguously covered by the parties themselves. There is the issue of the scope and intensity of the duties of fiduciaries to beneficiaries, including duties of directors and officers of corporations to shareholders. There is the whole apparatus of interpretation, excuses and damage measures in the law of contracts. And there is the borderline area of pre- or extra-contractual liability represented by the doctrine of promissory estoppel.

The conflict of community and autonomy is the modern form of the early nineteenth century debate about the impact on economic growth of extending or contracting nonconsensual altruistic duties. The legal institutions involved are those that I characterized in Section I as intermediate between pure formalities (where the law is indifferent as to which of a number of courses of action the parties undertake) and rules designed to deter wrongdoing. We noted there that this category could be regarded either as designed to deter tort and breach of contract as wrongful in themselves, or, in the more common mode, as designed to offer a choice between no injury and injury *cum* compensation.

The adoption of the second view represents a decision to place *general* limits on the ability of the legal system to enforce altruistic duty. If damages are a tariff, the "wrongdoer" is authorized to consult his own interest exclusively, so long as he is willing to make the payment that secures the other party's rights. This may well involve two distinct breaches of altruistic duty.

First, even if compensation is perfect, the injuring party is forcing the injured party to take compensation, rather than specific performance or freedom from tortious interference. Second, the injuring party is under no obligation to share the excess over the compensation payment that he may derive from inflicting the injury. Once I have paid the expectation damage measure, *all* the windfall profits from breach of contract go to me.[112]

Given the decision to regard contract and tort law as compensatory rather than punitive, the altruist and individualist have disagreements at three levels:

> *Scope of obligation*: Given a particular relationship or situation, is there any duty at all to look out for the interests of the other?

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[112] *See* R. NOZICK, *supra* note 78, at 63–71; Ames, *Law and Morals*, 22 HARV. L. REV. 97, 106 (1909); Wellington, *supra* note 20, at 229–33.

Intensity of obligation: Given duty, how great is the duty on the scale from mere abstention from violence to the highest fiduciary obligation?

Extent of liability for consequences: Given breach of duty, how far down the chain of causation should we extend liability?

The individualist position is the restriction of obligations of sharing and sacrifice. This means being opposed to the broadening, intensifying and extension of liability *and* opposed to the liberalization of excuses once duty is established. This position is only superficially paradoxical. The contraction of initial liability leaves greater areas for people to behave in a self-interested fashion. Liberal rules of excuse have the opposite effect: they oblige the beneficiary of a duty to share the losses of the obligor when for some reason he is unable to perform. The altruist position is the expansion of the network of liability and also the liberalization of excuses.

(*b*) *Regulation vs. Facilitation.* — The issue here is the use of bargaining power as the determinant of the distribution of desired objects and the allocation of resources to different uses. It arises whenever two parties with conflicting claims or interests reach an accomodation through bargaining, and the stronger party attempts to enforce it through the legal system. The judge must then decide whether the stronger party has pressed her advantage further in her own interests than is acceptable to the legal system. If she has not, then the agreement will be enforced; if she has, a sanction will be applied, ranging from the voiding of the agreement to criminal punishment of the abuse of bargaining power.[113]

There are many approaches to the control of bargaining power, including:

Incapacitation of classes of people deemed particularly likely to lack adequate bargaining power (children, lunatics, etc.) with the effect that they can void their contracts if they want to.

Outlawing particular tactics, such as the use of physical violence, duress of goods, threats to inflict malicious harm, fraudulent statements, "bargaining in bad faith," etc.

Outlawing particular transactions that are thought to involve great dangers of overreaching, such as the settlement of debts for less than the full amount or the making of unilaterally beneficial modifications in the course of performance of contracts.

Control of the competitive structure of markets, either by atomizing concentrated economic power or by creating countervailing centers strong enough to bargain equally.

[113] The classic treatment is Dawson, *Economic Duress — An Essay In Perspective*, 45 MICH. L. REV. 253 (1947).

Direct policing of the substantive fairness of bargains, whether by direct price fixing or quality specification, by setting maxima or minima, or by announcing a standard such as "reasonableness" or "unconscionability."

The individualist position is that judges ought not to conceive of themselves as regulators of the use of economic power. This means conceiving of the legal system as a limited set of existing restraints imposed on the state of nature, and then refusing to extend those constraints to new situations. The altruist position is that existing restraints represent an attempt to achieve distributive justice which the judges should carry forward rather than impede.

(*c*) *Paternalism vs. Self-Determination.* — This issue is distinct from that of regulation vs. facilitation because it arises in situations not of conflict but of error. A party to an agreement or one who has unilaterally incurred a legal obligation seeks to void it on the grounds that they acted against their "real" interests. The beneficiary of the agreement or duty refuses to let the obligor back out. An issue of altruistic duty arises because the obligee ought to take the asserted "real" interests into account, both at the bargaining stage, if he is aware of them, and at the enforcement stage, if he only becomes aware of them then. On the other hand, he may have innocently relied on the obligor's own definition of his objectives, so that he will have to sacrifice something of his own if he behaves mercifully.

No issue of bargaining power is necessarily involved in such situations. For example:

Liquidated damage clauses freely agreed to by both parties are often voided on grounds of unreasonableness.

Express conditions unequivocal on their face are excused on grounds of forfeiture or interpreted out of existence.

Merger clauses that would waive liability for fraudulent misrepresentations are struck down or reinterpreted.

No oral modification clauses are held to be waived by actions of the beneficiary or disallowed altogether.

Modifications of contract remedy such as disclaimers of warranty or of liability for negligence, limitations of venue, waiver of defenses, and limitations on time for complaints are policed under various standards, even where they apparently result from conscious risk allocation rather than from mere superior power.

Persons lacking in capacity are allowed to void contracts that are uncoerced and substantively fair.

Consideration doctrine sometimes renders promises unenforceable because there was no "real" exchange, as in the cases of the

promissory note of a widow given in exchange for a discharge of her husband's worthless debts, or that of a contract for "conjuring."

Fraud and Unconscionability doctrine protect against "unfair surprise" in situations where a party is a victim of his own foolishness rather than of the exercise of power.

The individualist position is that the parties themselves are the best and only legitimate judges of their own interests, subject to a limited number of exceptions, such as incapacity. People should be allowed to behave foolishly, do themselves harm, and otherwise refuse to accept any other person's view of what is best for them. Other people should respect this freedom; they should also be able to rely on those who exercise it to accept the consequences of their folly. The altruist response is that the paternalist rules are not exceptions, but the representatives of a developed counterpolicy of forcing people to look to the "real" interests of those they deal with. This policy is as legitimate as that of self-determination and should be extended as circumstances permit or require.

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One way of conceiving of the transition from Classical to modern legal thought is through the imagery of core and periphery. Classical individualism dealt with the issues of community vs. autonomy, regulation vs. facilitation and paternalism vs. self-determination by affirming the existence of a core of legal freedom which was equated with firm adherence to autonomy, facilitation and self-determination. The existence of countertendencies was acknowledged, but in a backhanded way. By its "very nature," freedom must have limits; these could be derived as implications *from* that nature; and they would then constitute a periphery of exceptions to the core doctrines.

What distinguishes the modern situation is the breakdown of the conceptual boundary between the core and the periphery, so that all the conflicting positions are at least potentially relevant to all issues. The Classical concepts oriented us to one ethos or the other — to core or periphery — and then permitted consistent argument within that point of view, with a few hard cases occurring at the borderline. Now, each of the conflicting visions claims universal relevance, but is unable to establish hegemony anywhere.

V. The Correspondence Between Formal and Substantive Moral Arguments

This and the two following sections develop the connection

between the formal dimension of rules and standards and the substantive dimension of individualism and altruism. This section deals with the issue at the level of moral discourse; those that follow deal with the economic and political issues. The three sections also have a second purpose: to trace the larger dispute between individualism/rules and altruism/standards through the series of stages that lead to the modern confrontation of contradictory premises that is the subject of Section VIII. We began this intellectual historical task in the last section, in the course of explicating the substantive conflict. The historical discussions in the next two sections are likewise designed both to illustrate the analytic arguments linking form and substance, and to fill in the background of the current situation.

One might attempt to link the substantive and formal dimensions at the level of social reality. This would involve investigating, from the points of view of individualism and altruism, the actual influence of private law decisions on economic, social, and political life. One could then ask how the form in which the judge chooses to cast his decision contributes to these effects, being careful to determine the *actual* degree of formal realizability and generality of the rule or standard in question.[114] This method is hopelessly difficult, given the current limited state of the art of assessing either actual effects of decisions or their actual formal properties. *Theories* of the practical importance of deciding private law disputes in one way or another abound, but ways to test those theories do not. This gives most legal argument a distinctly unreal, even fantastic quality that this essay will do nothing to dispel. Rather, my subject is that often unreal and fantastic rhetoric itself. This is no more than a first step, but it may be an important one.

There is a strong analogy between the arguments that lawyers make when they are defending a "strict" interpretation of a rule and those they put forward when they are asking a judge to make a rule that is substantively individualist. Likewise, there is a rhetorical analogy between the arguments lawyers make for "relaxing the rigor" of a regime of rules and those they offer in support of substantively altruist lawmaking. The simplest of these analogies is at the level of moral argument. Individualist rhetoric in general emphasizes self-reliance as a cardinal virtue. In the substantive debate with altruism, this means claiming that people *ought* to be willing to accept the consequences of their own actions. They ought not to rely on their fellows or on government when things turn out badly for them. They should recognize that they must look to their own efforts to attain their objectives. It is

[114] The closest thing we have to such a study is L. FRIEDMAN, *supra* note 51.

implicit in this idea that they are entitled to put others at arms length — to refuse to participate in their losses or make sacrifices for them.

In the formal dispute about rules and standards, this argument has a prominent role in assessing the seriousness of the over- and underinclusiveness of rules. Everyone agrees that this imprecision is a liability, but the proponent of rules is likely to argue that we should not feel too badly about it, because those who suffer have no one to blame but themselves. Formally realizable general rules are, by definition, knowable in advance. A person who finds that he is included in liability to a sanction that was designed for someone else has little basis for complaint. Conversely, a person who gains by the victim's miscalculation is under no obligation to forego those gains.

This argument is strongest with respect to formalities. Here the meaning of underinclusion is that because of a failure to follow the prescribed form, the law refuses to carry out a party's intention to create some special set of legal relationships (e.g. voiding a will for failure to sign it). Overinclusion means that a party is treated as having an intention (e.g. to enter a contract) when he actually intended the opposite. The advocate of rules is likely to present each of these adverse results as in some sense deserved, since there is no good reason why the victim should not have engaged in competent advance planning to avoid what has happened to him.[115]

The same argument applies to rules that are designed to enforce substantive policies rather than merely to facilitate choice between equally acceptable alternatives. Like formalities, these rules are concerned with intentional behavior in situations defined in advance. When one enters a perfectly fair contract with an infant, one has no right to complain when the infant voids it for reasons having nothing to do with the law's desire to protect him from his own folly or from overreaching.

The position of the advocate of rule enforcement is unmistakably individualist. It is the sibling if not the twin of the general argument that those who fare ill in the struggle for economic or any other kind of success should shoulder the responsibility, recognize that they deserved what they got, and refrain from demanding state intervention to bail them out. The difference is that the formal argument is interstitial. It presupposes that the state has already intervened to some extent (*e.g.*, by enforcing contracts rather than leaving them to business honor and nonlegal sanctions). It asserts that *within* this context, it is up to the parties to look out for themselves. The fact of altruistic sub-

[115] *See* Macaulay, *supra* note 2, at 1067.

stantive state intervention does not ipso facto wipe out the individual's duty to take care of herself.

The argument of the advocate of "relaxation," of converting the rigid rule into a standard, will include an enumeration of all the particular factors in the situation that mitigate the failure to avoid over- or underinclusion. There will be reference to the substantive purpose of the rule in order to show the arbitrariness of the result. But the ultimate point will be that there is a moral duty on the part of the private beneficiary of the over- or underinclusion to forego an advantage that is a result of the other's harmless folly. Those who take an inheritance by course of law because the testator failed to sign his will should hand the property over to those the testator wanted to receive it. A contracting party *ought not* to employ the statute of frauds to void a contract honestly made but become onerous because of a price break.

This argument smacks as unmistakably of altruism as the argument for rules smacks of individualism. The essential idea is that of mercy, here concretized as sharing or sacrifice. The ethic of self-reliance is rejected in both its branches: the altruist will neither punish the incompetent nor respect the "right" of the other party to cleave to her own interests. Again, the difference between the substantive and the formal arguments is the area of their application. It may well be that the structure of rules falls far short of requiring the level of altruistic behavior that the altruist would prefer. But within that structure, whatever it may be, there are still duties of sharing and sacrifice evoked by the very operation of the rules.

It is important to note that the altruist demand for mercy will be equally strong whether we are dealing with formalities, or with rules designed to deter substantively undesirable behavior (crimes, unconscionable contracts). The party who tries to get out of a losing contract because of failure to comply with a formality is betraying a contractual partner, someone toward whom he has assumed special duties. The infant who voids the same contract although it was neither foolish nor coerced is behaving equally reprehensibly.

VI. The Correspondence Between Formal and Substantive Economic Arguments

The correspondence between the formal and substantive economic arguments is more intricate and harder to grasp than the moral debate. I have divided the discussion into two parts: an abstract statement of the structural analogy of the formal and substantive positions, and an historical synopsis of how the positions got to their present state.

A. An Abstract Statement of the Analogy

1. Nonintervention vs. Result-Orientation. — Suppose a situation in which the people who are the objects of the lawmaking process can do any one of three things: X, Y and Z. The lawmaker wants them to do X, and he wants them to refrain from Y and Z. If he does not intervene at all, they will do some X, some Y and some Z. As an individualist, the lawmaker believes that it would be wrong to try to force everyone to do X all the time. He may see freedom to do Y as a natural right, or believe that if he forbids Z, most people will find themselves choosing X over Y as often as if it were legally compelled. Or he may take the view that the bad side effects of state intervention to prohibit Y outweigh the benefits.

There is still the problem of the *form* of the injunction against Z. There may be a number of tactical considerations that push in the direction either of a rule or of a standard. For example, if the law appliers are very strongly in favor of compelling X, then they may use the discretion inherent in a standard to ban both Z *and* Y, thus smuggling in the substantive policy the lawmaker had rejected. On the other hand, it may be that the nature of the Y-Z distinction defies precise formulation except in terms of rules that will lead to the arbitrary inclusion of a very large amount of Y in the Z category, so that a standard seems the only workable formal mechanism.

In spite of these contextual factors, there is a close analogy between the substantive individualist position and the argument for rules. The individualist claims that we must achieve X through a strategy that permits Y. The rule advocate claims that we can best achieve the prohibition of Z through a rule that not only permits some Z (underinclusion) but also arbitrarily punishes some Y (overinclusion).

What ties the two arguments together is that they both reject result orientation in the particular case in favor of an indirect strategy. They both claim that the attempt to achieve a total ordering in accord with the lawmaker's purpose will be counterproductive. More success will be achieved by limited interventions creating a structure that influences the pattern of private activity without pretensions to full realization of the underlying purpose. In short, the arguments for rules over standards is inherently noninterventionist, and it is for that reason inherently individualist.

The main difficulty with seeing rules as noninterventionist is that they presuppose state intervention. In other words, the issue of rules vs. standards only arises after the lawmaker has decided against the state of nature and in favor of the imposition of some

level of duty, however minimal. The point is that *within this structure*, whatever it may be, rules are less result oriented than standards. As with the moral argument, the economic individualism of rules is interstitial and relative rather than absolute.

2. Tolerance of Breach of Altruistic Duty: The Sanction of Abandonment. — In the economic area, the analogy between the arguments for rules and those for substantive individualism goes beyond their common noninterventionism. Both strategies rely on the sanctioning effect of nonintervention to stimulate private activity that will remedy the evils that the state refuses to attack directly.

The fundamental premise of economic individualism is that people will create and share out among themselves more wealth if the state refuses either to direct them to work or to force them to share. Given human nature and the limited effectiveness of legal intervention, the attempt to guarantee everyone a high level of welfare, regardless of their productivity, would require massive state interference in every aspect of human activity, and still could not prevent a precipitous drop in output. On the other hand, a regime which convincingly demonstrates that it will let people starve (or fall to very low levels of welfare) before forcing others to help them will create the most powerful of incentives to production and exchange.

The self-conscious use of the sanction of abandonment as an incentive to production expresses itself on two different levels of the legal system. In private law, it means that people are authorized to refuse to share their superfluous wealth with those who need it more than they do. The most elementary doctrines of property law carry out this idea: trespass and conversion are not excused by need, short of *actual* starvation, and even then subject to a duty of restitution. In public law, the individualist opposes welfare programs financed through the tax system as a form of compulsory collective altruism that endangers the wealth of society.

The advocate of rules as the proper form for private law proposes a strategy that is exactly analogous to that of substantive individualism. The sanction of abandonment consists of not adjusting legal intervention to take account of the particularities of the case. The enforcement of the rule in situations where it is plainly over- or underinclusive involves condoning a violation of altruistic duty by the beneficiary. The motive for this passivity in the face of a miscarriage of the lawmaker's goal is to stimulate those subject to the rules to invest in formal proficiency, and thereby indirectly reduce the evil tolerated in the particular case.

In the area of formalities, the sanction of nullity works in the

same fashion as the sanction of starvation in the substantive debate. The parties are told that unless they use the proper language in expressing their intentions, they will fail of legal effect. The result will be that a party who thought he had a legally enforceable agreement turns out to be vulnerable to betrayal by his partner. The law will tolerate this betrayal, although the whole purpose of instituting a regime of enforceable promises was to prevent it. In the area of rules designed to deter wrongdoing, the analogue of the sanction of abandonment is reliance on a rule to alert the potential victims to their danger. Caveat emptor and the rule of full legal capacity at 21 years are supposed to reduce wrongdoing, in spite of their radical underinclusiveness, because they induce vigilance where a standard would foster a false sense of security. Again, the theory is that permitting A to injure B may be the best way to save B from injury.

For the intermediate category consisting of suppletory directives (interpretation, excuses) and directives defining liability (fault, breach, damages), the decision to use rules rather than standards has a similar justification. Here the sanction is the imposition of liability on the actor who is not morally blameworthy, as for example for a breach of contract that is involuntary, but not within the doctrine of impossibility, or for a violation of an objective rule of tort liability. The result is a gain to the other party that he has an altruistic duty to disgorge. The motive for condoning the refusal to perform this duty, for enforcing the rule, is to stimulate people to make accurate advance calculations of those impacts of their activities on others that the law regards as justifying compensation. The thesis of the advocate of rules is that people will learn to make rational choices between abstention from injury and injury *cum* compensation only under a regime that tolerates occasional over- and undercompensation.

The basic notion behind these arguments for rules is that ability to manipulate formalities, vigilance in one's interests and awareness of the legally protected rights of others are all economic goods, components of the wealth of a society. The same considerations apply to them as apply to wealth in general. The best way to stimulate their production is to sanction those who fail to acquire them, by exposing them to breach of altruistic duty by those who are more provident. The rule advocate may affirm that "this hurts me more than it does you" as she administers the sanction. But the refusal to tolerate present inequity would make everyone worse off in the long run.

3. *Transaction in General.* — There is a third element to the abstract parallel between substantive and formal dimensions. The argument is that both rules and the substantive reduction of

altruistic duty will encourage transaction in general.[116] The classic statement of the substantive position is that of Holmes: [117]

> A man need not, it is true, do this or that act, — the term act implies a choice, — but he must act somehow. Furthermore, the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.
>
> The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. As between individuals it might adopt the mutual insurance principle pro tanto, and divide damages when both were in fault, as in the rusticum judicium of the admiralty, or it might throw all loss upon the actor irrespective of fault. The state does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the status quo. State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise.

This is not a simple argument. Holmes does not explain why the activity encouraged by permitting breach of altruistic duty should lead to a public good. Presumably he would not have generalized his position to cover all such duties, although a return to the state of nature would certainly stimulate a vast amount of activity now deterred by fear of legal intervention. Further, the limitation of duty should have an inhibiting effect on the activity of those subjected to uncompensated injury. Holmes simply assumes that these inhibiting effects on desirable activity (or stimulating effects on undesirable activity) do not cancel out the gains from the "liberation of energy."

The implicit premise seems to be that the aggressive action of the injurers, looked at as a class, has greater social value than the activity of the injured inhibited by the removal of protection. In Holmes's thought, this premise is linked to Social Darwinism and the belief in the desirability of conflict in general.[118] As he saw

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[116] *See* pp. 1725–27 *supra*; M. HORWITZ, *supra* note 92, ch. 3. For a typical application of the theory to the case of Hadley v. Baxendale, 156 Eng. Rep. 145 (1854), see Patterson, *The Apportionment of Business Risks Though Legal Devices*, 24 COLUM. L. REV. 335, 342 (1924); Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEG. STUD. 249 (1975).

[117] O. HOLMES, *supra* note 22, at 77.

[118] See the discussion of Holmes' overall position in R. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 227–68 (1968).

it, the outcome of bargaining under individualist background rules would be to place control of productive resources, and therefore of investment, in the hands of those most likely to use them for the long-run good of the community. Regulatory, paternalist and communitarian objectives are all less important than secular economic growth. The management of growth requires exactly those capacities for aggressive self-reliance that are rewarded under an individualist regime of contract and fault. Regulation, paternalism and communitarian obligation shift economic power from those who know how to use it to those who do not.[119]

The parallel argument about rules is that "security" encourages transaction in general. The minimization of "judicial risk" (the risk that the judge will upset a transaction and defeat the intentions of the parties) leads to a higher level of activity than would occur under a regime of standards. Of course, some people will be *deterred* from transacting by fear of the mechanical arbitrariness of a system of formally realizable general rules. But their activity is less important, less socially desirable than that of the self-reliant class of actors who will master and then rely on the rule system.

The formal argument rests on the same implicit Social Darwinism as the substantive. Security of transaction is purchased at the expense of tolerating breach of altruistic duty on the part of the beneficiary of mechanical arbitrariness. The liberation of that actor's energy is achieved through a kind of subsidy based on a long term judgment that society gains through the actions of the aggressive and competent even when those actions are directly at the expense of the weak.

B. Rules as an Aspect of Classical Laissez-Faire

The conclusion of the abstract consideration of the relationship of form and substance is that there is a sound analytical basis for the intuition of a connection between individualism and rules. The connection is structural rather than contextual. It is *not* a connection that is necessary in practice, or even verifiable empirically. It consists in the exact correspondence between the structures of the two arguments.

For all one can tell from the discussion so far, this structural similarity is an interesting historical accident. On the basis of the analogy we might hazard a guess that particular values or premises that make substantive nonintervention attractive will tend to make formal nonintervention attractive as well. But this would be no more than a psychological speculation (of a type

[119] O. HOLMES, *Economic Elements*, in COLLECTED LEGAL PAPERS 279–83 (1920).

which I will undertake at some length in the last section of this essay).

But there is also an historical dimension to the problem. Economic individualism was once much more tightly linked to advocacy of rules than it is today, because they were both parts of a larger intellectual entity: the Classical theory of laissez-faire. That theory asserted that economics could discover general laws about the welfare consequences of particular legal regimes looked at as wholes. The scientific study of such regimes suggested that the best was that in which the state systematically refused to intervene ad hoc to achieve particular economic results.

The study of the theory of laissez-faire has intrinsic interest, but it is also useful for our particular purposes. Modern altruism is in large part a critique of the premises on which it was based, rather than a developed countertheory. As a result of the altruist critique, the modern individualist will admit that *sometimes* rules don't work, and standards do. But because the critique is *only* a critique, the altruist will concede that rules are sometimes necessary. This pragmatic reasonableness on both sides conceals the fact that the disputants reached their similar positions by different routes.

The individualist has reached the pragmatic position after abandoning a general theory of why rules are rationally required by the laws of economic science. The altruist has arrived in the same place after abandoning a more tentative and (among legal thinkers) much less widely shared vision of a social harmony so complete as to obviate the need for any rules at all. We can ignore the existence of these divergent historical paths so long as we ourselves are interested in a purely instrumental understanding of the issue of form. But if we are interested in the values intrinsic *to* form, in the fundamental conflict of visions of the universe that underlies instrumental discussion, then it is dangerous to make a sharp distinction between where we are and how we got here.

1. *Laissez-Faire.* — It is not easy to reconstruct the Classical individualist economic vision, especially if we want to understand it from the inside as plausible, rather than absurd or obviously evil. While there were several strands of argumentation, the most important seems to have been the idea that the outcome of economic activity within a common law framework of contract and tort rules mechanically applied would be a natural allocation of resources and distribution of income.

The outcome was natural because it was a reflection of the real bargaining power of the parties, given the supply and demand conditions in the market in question. No legal intervention could change it except in the direction of making everyone worse off, unless the reformer was willing to establish full collectivism. It

was simply an implication of the immutable laws of economics that piecemeal reform must be self-defeating or counterproductive.

The refusal to enforce contracts or contract terms because of disapproval of the abuse of bargaining power is a case in point. Each party was willing to exchange on the designated terms; each therefore thought he would profit. Refusal to enforce deprives each of that profit. It does *not*, however, modify their bargaining power. If we refuse to enforce a particular term, they will readjust the rest of the bargain, and the stronger will exact in the form of a higher price, or whatever, the advantage that can no longer express itself in an allocation of a risk. The net result will be to drive some of the buyers out of the market, because they cannot afford to pay the higher price imposed by regulation. The victims of exclusion from the market are likely to be precisely those poorer buyers the regulator was trying to help.

If we respond by trying to fix the price directly, the result will be an imbalance of supply and demand, since the prices we are trying to change were those necessary to clear the market. If we want to prevent the disappointment of sellers or buyers, we will have to establish rationing or compulsory contracts. These cannot be enforced without a degree of supervision of individual businesses that amounts to socialism de facto, if not de jure.[120]

The assertion of the "naturalness" of economic interaction under property and contract rules is not plausible for us. Its plausibility in 1900 was based on the combination of the belief that the substantive content of the common law rules was an embodiment of the idea of freedom with the belief that official intervention to enforce the rules was nondiscretionary. The basis of the first belief, as we have seen, was conceptualism. The second notion expressed itself through a complex of doctrines, including stare decisis, the nondelegation doctrine, the void for vagueness doctrine, objectivism in contracts, the reasonable person standard in torts, the distinction between questions of law and questions of fact, and the general idea that law tended to develop toward formally realizable general rules.

If one could believe that the common law rules were logically derived from the idea of freedom and that there was no discretionary element in their application, it made sense to describe the legal order itself as at least neutral, nonpolitical if not really "natural." The economy was regulated, if one compared it to the state of nature, but it was regulated in the interests of its own

[120] *See generally* the works on laissez-faire cited in note 90 *supra*, and L. ROBBINS, THE THEORY OF ECONOMIC POLICY IN ENGLISH CLASSICAL POLITICAL ECONOMY (1952); W. SAMUELS, THE CLASSICAL THEORY OF POLITICAL ECONOMY (1966); Coppage v. Kansas, 236 U.S. 1 (1915); West Coast Hotel v. Parrish, 300 U.S. 379, 400–14 (1937) (Sutherland, J., dissenting).

freedom. What happened to economic actors when they exercised that freedom had almost as much claim to being natural as what would have happened if there was no state at all.

2. The Altruist Attack on Laissez-Faire. — The altruist attack on laissez-faire denied the neutrality of the outcomes of bargaining within the background rules. The altruists began from the proposition that outcomes are heavily conditioned by the legal order in effect at any given moment. Those who enforce that legal order must accept responsibility for the allocation of resources and distribution of income it produces. In particular, bargaining power is a function of the legal order. All the individualist rules restrain or liberate that power. Changes in the rules alter its pattern. The outcome of bargaining will therefore be radically different according to whether we allow a state of nature, enforce a much more regulatory individualist regime, or a still more regulatory altruist one. All the outcomes are equally "natural." The question is which one is best.

The persuasiveness of the altruist attack depended heavily on discrediting both conceptualism and the claim that the legal order is composed of rules judges merely apply. As long as one believed in these two ideas, one could distinguish easily enough between an individualist regime and either the state of nature or a more altruist welfare state. Only the individualist regime was based on freedom. Under that regime, economic actors were never subjected to political restraints or to interference based on altruism. The rules that governed conduct depended neither on legislative consensus nor on a utopian morality, but on deduction from first principles acceptable to everyone. They were applied without the exercise of discretion by judges who had no power to inject their own politics or morals into the process.

The altruists attempted to show that neither conceptualism nor the idea of law as rules had any reality at all as a basis for defining a truly individualist legal order. As we have seen, the charge against conceptualism was that it was a mystification: there simply was no deductive process by which one could derive the "right" legal answer from abstractions like freedom or property.[121] The attack on the claimed objectivity of the law-applying process covered the whole complex of doctrines that supposedly eliminated the discretionary element from official intervention.[122] The aim was to show that as a matter of fact most

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[121] *See* p. 1732 *supra*.

[122] On stare decisis, *see* Dewey, *supra* note 108, and the sources cited in Christie, *supra* note 88, at 1317 n. 27. On nondelegation, *see* Jaffe, *Law Making By Private Groups*, 51 HARV. L. REV. 201 (1937); K. DAVIS, *supra* note 4, ch. 2. On law and fact, *see* H. HART & A. SACKS, *supra* note 1, at 366–85. On objectivism, see Costigan,

rules were standards. The legal order, in this view, was shot through with discretion masquerading as the rule of law.

If the judges had neither derived the common law rules from the concepts nor applied them mechanically to the facts, then what *had* they been doing? The altruist answer was that they had been legislating and then enforcing their economic *biases*. The legal order represented not a coherent individualist philosophy, but concrete individualist economic interests dressed up in gibberish.[123] This once recognized, the next target was the argument that interference with the "free market" (market regulated by conceptually derived groundrules mechanically applied) would necessarily make everyone worse off.

The altruists demonstrated that no single general analysis could predict the effects of legal intervention in the economy. Everything depended on the structure of the particular market, which in turn depended on the legal system. It was quite true that attempts to regulate the exercise of economic power by interfering with particular terms of bargains *might* be self-defeating, if the market was perfectly competitive (so that price was equal to cost), or if the stronger party could shift his exactions from one term to another. But this was not *always* the case. Compulsory standardized terms in insurance policies might reduce the bargaining power of the sellers by increasing the buyers' understanding of the transaction.

Even supposing that the result of intervention is to force most people to transact on the new set of terms at a higher price while driving the rest out of the market, this might be justified on paternalist grounds. According to the new, post-conceptual mode of analysis, the common law was already full of paternalism, that is, of rules like those of capacity, which could no longer be rationalized through the will theory. The extension of the protective policy to, say, disclaimer of warranties to consumers would not represent any radical break with common law tradition.

It was also possible to relativize the argument about direct price regulation: its impact was a function of the whole situation,

Implied-in-Fact Contracts and Mutual Assent, 33 HARV. L. REV. 376 (1920). *See also* pp. 1700–01 *supra*.

[123] The single greatest statement of this position is the first: Marx's theory of the fetishism of commodities. K. MARX, CAPITAL 81–96 (Moore & Aveling transl. 1906). For a modern Marxist statement, *see* Perlman, *The Reproduction of Daily Life* in "ALL WE ARE SAYING . . . ," THE PHILOSOPHY OF THE NEW LEFT 133 (Lothstein, ed. 1970). The major works in the American, non-Marxist critique of the Classical theory of economic policy as applied to law are R. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH (1914); J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924). The clearest statement of the general position is Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

rather than of any general maxim about supply and demand. For example, where sellers cannot easily withdraw from the market, a compulsory price reduction may not reduce supply, except over the long, long run. A monopolist who is forced to reduce his price may *increase* supply in order to maintain the highest possible level of profit.

Finally, there were many ways to influence economic outcomes in an altruist direction without directly regulating outcomes, and there was no reason at all to believe that these would reduce welfare. The optimizing tendencies of the market will work, within the leeways we choose to leave for them, no matter how we make the initial definition and allocation of property rights. For example, we can limit the tactics employers can use in bargaining with employees. This changes the balance of power that existed under the old rules about what people could do with their property. But it does not "impede the functioning of the market" any more or less than we impeded it by imposing the rules of property and contract in the first place.[124]

This line of altruist argument applies with exactly equal force to changes in form and to changes in substance. For example, a working class automobile buyer may be highly skilled at price bargaining but have neither the time nor the education to argue successfully about warranties. Competition may not force the seller to translate his self-interested warranty terms into a lower price, because there may be no competition.

The normal rule that parties are bound to their contracts whether or not they read and understand them has obvious advantages in many situations, but here it will allow the seller to dictate to the buyer. The judge may reduce the seller's bargaining power if he adopts a more flexible approach based on a "reasonable understanding of a prudent lay buyer in all the circumstances." The result may be that there is a net increase in protection for buyers, a change whose cost is absorbed by the seller out of his monopoly profits.

It *may* be that the judge can counteract the ill effects of the

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[124] The critique of the Classical welfare propositions has two strands. One of these is institutional economics, an American outgrowth of the German rejection of *Classical* economics. On institutionalism, see B. SELIGMAN, MAIN CURRENTS IN MODERN ECONOMICS, PT. I (1962) and 3 J. DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION, 1865–1918 (1949). The second strand was the neo-classical formalization and positivization of Classical economic theory, which aimed to rob categories like value, equilibrium, competition, efficiency, and the free market of their ethical overtones. Useful discussions will be found in J. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS (1954) and E. ROLL, A HISTORY OF ECONOMIC THOUGHT (3d ed. 1954). The starting point for modern discussion is L. ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE (2d ed. 1935).

normal rule about intent through substantive doctrines about duress, fraud, unconscionability or whatever. But there will be formal problems with these doctrines as well. They may be underinclusive in ways that are desirable in general but deprive them of efficacy in this situation (*e.g.*, failure to explain the boilerplate is not fraud because there has been no false statement of fact). A series of highly particularized applications of a general standard of "reasonable understanding" may be the only effective way to deal with the problem, short of the more intrusive approach of judicially constructed compulsory terms.

The choice between the old "strict" rule, a standard of "reasonable understanding," and compulsory terms cannot be made in a neutral fashion. Each choice affects the balance of economic power, to the advantage of one side and the disadvantage of the other. Since these effects are directly attributable to the legal order, the judge must take responsibility for choosing among them. He is an "interventionist" no matter what he does.[125]

Stripped to essentials, the altruist substantive and formal arguments are identical. Legislative, administrative and judicial action based on a detailed knowledge of particular situations can achieve paternalist and regulatory objectives without paralyzing private economic energies. The state should move directly to implement "the public interest" rather than relying on the combination of property and contract rules with private activity to produce a social maximum. At the substantive level of lawmaking, the altruist rejects the individualist position that it is necessary to tolerate inequality of bargaining power and other abuses of altruistic duty as between large social groups. The economic argument for standards is the formal version of the same proposition. It is that we can sometimes enforce our substantive values in particular cases, as well as in general, without the disastrous consequences the individualist predicts.

VII. The Political Arguments About Judicial Result Orientation

Thus far, we have dealt with a moral confrontation between the ethic of self-reliance and that of sacrifice and sharing. We then took up an economic dispute that opposed equity in adjudication (defined in terms of the lawmaker's purposes) to the achievement of the general welfare through non-intervention. Here we take up the political confrontation, in which the opposed slogans are rights and powers. The advocate of rules argues that the cast-

[125] *See* p. 1700 & note 37 *supra*.

ing of law as standards is inconsistent with the fundamental rights of a citizen of a democratic state.

There are two branches to the argument. I will call them the institutional competence and the political question gambits. The premise of the institutional competence argument is that judges do not have the equipment they would need if they were to try to determine the likely consequences of their decisions for the total pattern of social activity. In other words, rational result orientation requires factual inquiries that are at once particularized and wide-ranging. Only the legislature is competent to carry out such investigations. Judges should therefore restrict themselves to *general* prescriptions.

The premise of the political question gambit is that there is a radical distinction between the activity of following rules and that of applying standards. Standards refer directly to the substantive values or purposes of the community. They involve "value judgments." Since value judgments are inherently arbitrary and subjective, they should be made only according to majority vote. By contrast, formally realizable rules involve the finding of facts. Factfinding poses objective questions susceptible to rational discussion. So long as the rulemaking process is democratically legitimate, there is no political objection to the delegation of rule application to judges.[126]

Of course, so long as the judge has the power to formulate a new rule rather than applying an old one, it is clear that he has a measure of political or legislative power. The argument for rules, in the form in which we will consider it, is therefore a matter of degree. But rulemaking followed by rule application should be *less* political than proceeding according to standards. Both rulemaking and rule application limit discretion, by publicizing it at the legislative stage and by providing criteria for criticizing it at the stage of application.

Together, the institutional competence and political question arguments would produce a regime in which judges did nothing but formulate and apply formally realizable general rules. This procedure would minimize both the institutionally inappropriate investigation of the likely results of decision and the inherently legislative activity of making value judgments. A regime of standards would have the opposite effect. Every case would require a detailed, open-ended factual investigation *and* a direct appeal to values or purposes.

It seems intuitively obvious that both of these gambits are prototypically individualist. Each is an argument for noninter-

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[126] *See* Macaulay, *supra* note 2, at 1065–69.

vention, for judicial passivity in the face of breach of altruistic duty. It would therefore seem reasonable to expect that we would find an exactly parallel substantive claim that the judge should not attempt to impose a high standard of altruistic duty because he has neither the knowledge nor the democratic legitimacy required for the enterprise. Such an argument does in fact exist. It is the central thesis of the modern conservative attack on judicial activism in both public and private law.[127] Indeed, in this area the formal and substantive arguments are so close to identical that I will treat them as a unit.

Because the institutional competence and political question gambits apply so clearly both to form and to substance, they pose more sharply than the economic arguments the underlying question of the relationship of individualism and altruism in modern legal thought. But before we can take up this issue, we must deal with a difficult historical problem.

The modern forms of the institutional competence and political question gambits are the inventions of pre-World War II altruism, rather than of individualism. Their first application was to the U.S. Supreme Court's activist use of the due process clause to strike down social legislation. Men who devoted most of their lives to furthering communitarian, paternalist and regulatory goals within the legal system are responsible for the most powerful statement of the political case for judicial nonintervention in public *and* private law. One purpose of this section is to show that in private law the gambits are nonetheless "essentially" individualist. Their adoption by the altruists in the constitutional context of 1936 was an unfortunate, if perhaps necessary tactic. The long-run result has been that modern altruists spend much of their rhetorical energy defending themselves against their own analysis of forty years ago.

A. The Origins of the Institutional Competence and Political Question Gambits

1. The Classical Individualist Position on Judicial Review. — We have seen already that a particular definition of the judicial role was an important component of the Classical individualist vision of the nature and function of the legal order. We might

[127] *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967). The connection between public and private law is made explicitly in Wellington, *supra* note 20, *passim*.

call it the "rule of law" model.[128] The two operations that defined it were the deduction of legal rules from first principles, and the mechanical application of the rules to fact situations. Each operation was strictly rational or objective; the judge could and should exclude his own political or economic values from the process of judgment. Other doctrines (nondelegation, vagueness, law vs. fact, stare decisis, etc.) [129] fleshed out the model so that it could be used to describe virtually all acts of officials impinging on the rights of citizens.

This theory of the judicial role played an especially important part in the Classical theory of judicial review. In that theory, the Constitution was law like any other law, except higher. Judicial review consisted of the deductive elaboration of its principles and their application to particular statutes. As such, the task was wholly rational and objective. It made no sense to accuse the judges of usurping the political powers or functions of the legislature, because there was nothing political (prudential, discretionary) about what the judges were doing.[130]

While this much went back to Marshall,[131] the Classical individualist thinkers added a new dimension. They were possessed of the post-Civil War theory of *private* law as a set of deductions from the concept of free will, whereas in Marshall's time the dominant jurisprudence presented private law rules either as given through the forms of action or as the outcome of the conflict between morality and policy. What the Classical thinkers did was to equate the "liberty" secured by the due process clause of the federal and state constitutions with the "free will" from which they believed they could deduce the common law rules.

This bold stroke integrated public and private law. It provided a set of tests of the constitutionality of legislation that had the assumed neutrality of private law to back them up against the charge that the courts were overstepping themselves. For example, the "liberty" of the constitutions meant liberty of contract. It followed that the state *must* enforce the set of legal rules that were implicit in the very idea of contract. In particu-

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[128] On the "rule of law" see A. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION 179–201 (8th ed. 1915); F. HAYEK, THE CONSTITUTION OF LIBERTY 162–233 (1960); Kennedy, *supra* note 4.

[129] *See* pp. 1748–49 & note 122 *supra*.

[130] This was the position of *both* liberals and conservatives in the conflict about the constitutionality of social legislation. *Compare* the dissent of Harlan, J., *with* the majority opinion in Lochner v. New York, 198 U.S. 45, 52–65 (Peckham, J.), 65–74 (Harlan, J., dissenting) (1905).

[131] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

lar, an injunctive remedy against union attempts to organize workers bound by "yellow dog contracts" was constitutionally required.[132] Conversely, an attempt by the legislature to expand the law of duress to ban contracts that "really" represented free will was unconstitutional and void.[133]

Applied to the hilt, this approach would have meant freezing into the legal system the whole structure of laissez-faire that the Classical individualists claimed to be able to derive deductively from the concepts. But even in the 1920's, the heyday of activist judicial review, no court attempted anything so radical. In practice, the individualist argument was as much historical and pragmatic as purely conceptual, drawing on the idea that American law had always been committed to free enterprise, which was the only policy short of socialism that accorded with the "laws of economic science."

We can take Justice Sutherland's dissenting opinion in *West Coast Hotel Co. v. Parrish* [134] as an example. The issue was the constitutionality of a statute establishing a commission with power to fix minimum wages for different categories of women workers in the District of Columbia. Sutherland argued that the due process clause made freedom of contract a constitutional right. Its enforcement against attempts at legislative abridgment was the duty of the judiciary, indistinguishable from the duty to enforce private law rules in contests between the lowliest private parties.

The right was subject to legislative control, but a control strictly limited to paternalist interventions, such as specification of the mode of payment or maximum hours. Here, by contrast, the object was regulatory: to eliminate the actual bargaining power of worker and employer as the determinant of the wage rate. Unlike earlier legislation that let the parties adjust the wage rate to reflect state imposed conditions of labor, this law threw state power into the contest on the side of the worker. It therefore amounted to forcing the employer to donate a part of his income to support the worker at a minimum level of welfare. The measure of the subsidy was the difference between the minimum wage and what the worker could have earned in the "free market."

The goal, according to Sutherland, might be laudable, but the means adopted amounted to a taking of the employer's property without compensation, combined with a violation of the employee's freedom of contract, all to the detriment of everyone

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[132] *See* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917).
[133] *See* Coppage v. Kansas, 236 U.S. 1 (1915).
[134] 300 U.S. 379, 400–14 (1937).

involved. First, the plaintiff employee had lost her job because she was not allowed to make a contract that was satsifactory to her. She had been denied her constitutional rights with no compensating gain whatever, since the statute had impoverished her rather than guaranteeing her a minimum level of welfare. Second, where the statute succeeded in making workers better off, it did so through an arbitrary redistribution of income between particular employers and workers, allocating the burden of maintaining welfare in such a way as to have a maximum negative impact on the incentive to create wealth and employment.

2. The Altruists Accept the Individualist Theory of the Judicial Role. — In retrospect, there appear to have been two plausible lines of altruist attack on the individualist attempt to constitutionalize the groundrules of laissez-faire. The road not taken was the more radical. It involved accepting the analogy of private and public law, and then arguing that *both* were inherently "political," in the sense of requiring the judge to make choices between the rival social visions of individualism and altruism. The altruists could then have argued for judicial deference to altruist social legislation either on the ground that judges are the constitutional inferiors of the legislature, or on the ground that the particular legislation in question was affirmatively just and desirable, retaining the option of striking down any future legislation that infringed fundamental human rights.

In fact, the altruist response was fragmented and evasive. There are hints of the more radical argument in some opinions,[135] and in the *Carolene Products* [136] footnote about the role of the judiciary in protecting minorities. But the dominant strain was different. It consisted of an attempt to distinguish the inescapably "political" role of the judges in reviewing legislation from more conventional aspects of the judicial function, such as private law adjudication. Nonetheless, it drew inconsistently on altruist arguments developed in the private law context.

First, the altruists pointed out that the individualist public law position was conceptualist. Individualism claimed to deduce a theory of judicial review from the mere fact that the Constitution was "law," and that the court was "judicial." It asserted that "liberty" had a single meaning from which it was possible to deduce rules of review that would distinguish in a nonpolitical fashion between regulatory statutes. In the background was the claim that common law rules could serve as a benchmark of constitutionality because they represented deductions from free will.

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[135] *See, e.g.*, Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).
[136] United States v. Carolene Prods., 304 U.S. 144, 152–53 n.4 (1938).

The altruists attacked this position on both historical and analytic grounds. Paternalist and regulatory intervention had been common throughout the antebellum period,[137] and no one had ever supposed that it violated the due process clause.[138] The conceptual arguments about the logical implications of the words "law," "judge" and "liberty" were meaningless. Any state intervention, however minimal, represented a step along the path toward altruism and away from the state of nature. Once one recognized this, it was clear that the courts had upheld dozens and dozens of regulatory and paternalist statutes (*e.g.*, regulation of the mode of payment) on the basis of conceptualist quibbles whose only real meaning was that the Constitution validates *both* individualist and altruist ideals.[139]

In the case of the minimum wage, for example, the altruists made the by now familiar argument that there was no way to deduce the effects of the law from first principles. There was no such thing as "natural" bargaining power or worth of labor in the "free market," since the market was already heavily regulated through private law institutions. The impact of this particular statute could be determined only through a complex, specific factual inquiry into the supply and demand conditions and competitive structure of the market for unskilled women workers in the District of Columbia in the mid-1930's.[140]

The crucial step in the altruist argument was the next one: Since the Constitution embodied both altruist and individualist ideals, and the impact of the statute on those ideals was obscure, the question of its validity was political and therefore inappropriate for judicial determination. It was not that the altruist position was correct in this case that made the statute valid. Rather, the issue of validity was inherently legislative. Judicial attempts to define rightness and wrongness in areas of legislative intervention to achieve communitarian, paternalist or regulatory objectives were inappropriate, because *any* decision required one to choose between conflicting values.[141]

The altruists thus accepted the individualist dichotomy between legislative and judicial functions. Although their purpose

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[137] *See, e.g.*, O. & M. HANDLIN, COMMONWEALTH — A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–1861 (rev. ed. 1969).

[138] *See* Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 460 (1911).

[139] *See* pp. 1731–37 *supra*; R. MCCLOSKEY, THE AMERICAN SUPREME COURT 101–79 (1960).

[140] *See* pp. 1745–51 *supra*.

[141] *See* Nebbia v. New York, 291 U.S. 502 (1934); Powell, *The Judiciality of Minimum Wage Legislation*, 37 HARV. L. REV. 545 (1924).

was to defend altruistic intervention in the economy, they cast their position in the form of an argument against intervention by the judiciary in cases that involved the conflict of individualism and altruism. The basis for the position was that judicial review of social legislation was sui generis in terms of the judicial role. The reformers were implicitly contrasting it with the unequivocally judicial task of private law adjudication when they spoke of "inquiries for which the judiciary is ill equipped," and the "necessity for choice between rival political philosophies." [142]

3. *The Inconsistency of the Altruist Distinction Between Public and Private Law.* — Hindsight suggests that this formulation of the distinction between public and private law was a misrepresentation of the real positions of the altruist reformers. It may have been essential in the political task of mobilizing opposition to the Nine Old Men. It permitted an appeal to the ideal of legality in defense of legislative supremacy, thereby avoiding a polarized confrontation between those who believed in the total politicization of everything and those who believed in rights as well as in democracy. But it was intellectually dishonest.

The problem was that the altruist *private law* theorists had been busy for years in showing that common law adjudication was not one whit less "political" or "value laden" than judicial review. Moreover, they had confronted the institutional competence and political question gambits as they apply to private law, and concluded that they led to a theory of the judicial role that was both false in itself and intrinsically biased toward individualist outcomes. At the very same time that their public law allies were stressing the neutrality of private law adjudication by way of contrast to the political character of judicial review, the private law theorists were undermining the basis for such a distinction and attacking its implications. It is their arguments, rather than those developed in the public law context, that are important for our purposes here.

First, Classical individualist private law was no less dependent on conceptualism than public law for its claim to neutrality and legitimacy. It was equally open to the charge that the judges had used the ambiguity of the concepts to smuggle in their biases.[143] Second, a major strand in the public law argument was precisely that common law rules of property, tort and contract represented a massive state intervention in the economy. These private law rules, rather than "natural" or "real" strength, were the basis of the bargaining power the altruists were trying to regulate.

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[142] United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (Stone, J.).

[143] *See* pp. 1700–01, 1731–37 *supra*.

Exactly the same "choice between rival philosophies" as in public law was necessary, after the death of the concepts, in deciding how state force should be used to structure economic conflict. And the institutional competence gambit was, if anything, stronger for private than for public law.[144]

Take the case of the judge asked to declare disclaimers of power lawnmower warranties void as against public policy. To begin with, there is the question of how his action will affect the price of mowers and of how a change in price will affect demand. Then there are the "inherently political" questions: (a) should we overrule the choices of those who prefer a cheaper mower without a warranty; (b) should we drive those who can't afford the mower with a warranty out of the market; (c) supposing that we can eliminate disclaimers without causing a fully compensating price hike, is it either ethically or economically *desirable* thus to shift the balance of economic power toward the consumer at the expense of the manufacturer? Finally, can the court successfully impose its decision on the market in question, given consumer ignorance, the limited impact of the sanction of nullity, the court's inability either to publicize its view or to enforce it through continuing supervision, the decentralization of the decision process, and so forth.

It is possible to argue that the warranty case is an exception, because it involves judicial interference with freedom of contract, and that most of contract and tort law is at least relatively nonpolitical. This is true in the sense that it is not generally *perceived* as political, but it is plainly false if the assertion is that it does not involve "value judgments" of the kind that are supposed to be inherently legislative. Much of the altruist scholarly tradition in contracts, for example, is devoted precisely to politicizing the most apparently mundane doctrinal issues, as the quotation in the Introduction to this Article sweepingly illustrates.

To take one of a series of examples that could be extended indefinitely, it is not possible to decide when a breach of contract is "substantial," and therefore justifies recission by the nonbreaching party, without taking a position on a basic individualist-altruist conflict. The judge who is not mechanically applying a rule must look to the degree of risk that the victim will undergo if forced to perform and then sue for damages, and weigh it against the reliance loss or unjust impoverishment that will befall the breaching party if the other takes his marbles and goes home. Fault will be inescapably relevant, as will the degree of involvement or intimacy of the parties prior to the mishap. The under-

[144] *See* Hale, *supra* note 123.

lying issue is that of the degree of altruistic duty we want to impose on the nonbreaching party, and this can be determined "rationally" only on the basis of a detailed factual inquiry, followed by a "choice between rival philosophies."[145]

Thus there is really a single altruist critique of constitutional *and* common law judicial lawmaking. The institutional competence and political question gambits apply to both or to neither. The altruist argument can not be that some law is political while other law is neutral. If the gambits are valid in public but not in private law, it must be because we should draw different conclusions from the discovery of the political element according to whether we are dealing with the Constitution or with common law institutions.

B. The Individualist Character of the Gambits in Private Law

This is not the place to try to develop an altruist theory of judicial review. It is enough for our purposes to show that in private law, the institutional competence and political question gambits have a distinctively individualist character.

Judicial private lawmaking takes place precisely in those marginal and interstitial areas of the legal system where there is no unequivocal, or even extremely suggestive indication of legislative will. The judge is asked to add to the corpus of common law rules and standards by deciding how to fill a gap, resolve a contradiction, or harmonize an old doctrine with new perceptions. It follows that the institutional competence and political question doctrines have a special meaning. They do *not* demand deference to legislative will because there is none in the premises. Rather, they enjoin the judge to perform his lawmaking in such a way as not to usurp legislative power by *performing legislative functions*.[146]

This is a good deal more than an injunction to avoid nullifying the decisions of the elected representatives of the people. The argument is the general one that the judge will be acting both ineffectively and illegitimately if he attempts, at the margin or in the interstices, to implement the community's substantive purposes with respect to individualism and altruism. The formal corollary, that he should cast his resolution of marginal and interstitial disputes as formally realizable general rules, follows directly from the premise that he should not behave politically.

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[145] *See* Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921).

[146] *See* International News Serv. v. Associated Press, 248 U.S. 215, 248–67 (1918) (Brandeis, J., dissenting).

In this individualist argument, the judge has a legitimate function as a marginal and interstitial lawmaker, and as a law applier, so long as he eschews result orientation. The problem for the individualist is to describe to him exactly how he is to decide without taking results into account. The Classical answer was that the common law is a gapless, closed system of Classical individualist principles. According to this view, it is possible to distinguish between two kinds of common law adjudication, one involving the application of these existing principles to a new situation, and the other the introduction of new principles. The activity of applying existing principles to new situations is the noncontroversial core of the judicial role. But the creation of new principles is political and therefore legislative. For example, it would be inappropriate for a judge to outlaw disclaimers of warranties on power lawnmowers, because that would require him to create a new exception to the existing common law principle of freedom of contract. Since the only basis for doing this is the political one of furthering altruism, the judge has no basis for acting.

It is implicit in this view that the judge does have a basis for enforcing the disclaimer by throwing out an injured user's suit for damages. Likewise, he would have a basis for applying the general rules of offer and acceptance to power lawnmower contracts whenever a case of first impression should arise. But he would be usurping legislative power if he were to create, on particularistic altruist grounds, special lawnmower contract doctrines. In other words, there are three tiers of activity. First, the private parties interact, and someone acquires a grievance. Second, the judge applies the system of Classical individualist common law rules, and either grants or denies a remedy. Third, the legislature, if it wishes, but not the judge, imposes altruistic duties that go beyond the common law system of remedies.[147]

The altruist response is that the three tiered system leads to deference to *private power*, rather than to the legislature. The judge is not deferring to the legislature because the legislature has said nothing. The will that the judge is enforcing when he refuses to interfere with freedom of contract is the will of the parties, or of the dominant party, if the relationship is an unequal one. Such a program is quintessentially individualist. Unless he is willing with Austin, to embrace the fiction that no sparrow falls without the legislature's tacit consent, the judge cannot claim that he has no responsibility for this "political" outcome.

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[147] *See, e.g.*, Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

Furthermore, the individualist proposal assumes that the common law system, defined in terms of some point in the past, has the qualities of internal consistency necessary to allow the judge to distinguish between usurpation and the simple extension of existing principles. The whole altruist analytic assault on conceptualism was designed to show that the real, historical common law lacked these qualities. First, the concepts that were supposedly the basis for the rules were useless as grounds of decision. Second, the actual pattern of outcomes reflected an unstable compromise somewhere in between pure egotism and total collectivism.

Once one accepts such a conception, the three tiered structure collapses. The judge, by hypothesis, cannot appeal to a legislative command, and the common law with which she is to harmonize her result points in both directions at the same time. Certainly it falls far short of imposing the altruist's vision of social duties of sharing and sacrifice. Yet it is possible to argue that *all* of its doctrines point in that direction, *i.e.*, toward collectivization and away from the state of nature. The trouble is that the glass may be half empty rather than half full. It is just as plausible to see the common law, as we have inherited it, as the manifesto of individualism against feudal and mercantilist attempts to create an organic relationship between state and society. There is nothing left of the three tiers but a field of forces. In order to decide cases, the judge will have to align herself one way or the other. But there can be no justification for her choice — other than a circular statement of commitment to one or the other of the conflicting visions.

C. Two Proposed Solutions to the Political Dilemma

While in 1940 one might reasonably have asserted that the net effect of individualist-altruist conflict in private law had been to deprive the judge of any basis for deciding cases beyond personal orientation to results, there have since been two major attempts to help him out of this embarrassing situation, and to restore the prestige of law by vindicating its claim to autonomy from politics. The first of these is based on the assertion of immanent, nonpolitical rationality in the social order, or of immanent moral consensus among the citizenry. The second is based on the premise that if the judge leaves all issues of distributive justice to the legislature there will remain a rational science of resource allocation that can serve as a clear guide to marginal and interstitial lawmaking.

It is impossible to sum up these two movements in a para-

graph or two, but that is what I will try to do, beginning with the more recent. The law and economics movement,[148] insomuch as it purports to offer a theory of what judges should do, is an attempt to formalize the three-tiered system while at the same time substituting the authority of economic science for that of the historical common law. The distinction between legislative and judicial questions rests squarely on the institutional competence and political question gambits, here cast in the economist's language of allocation and distribution. The point that the common law is in fact distributive is answered by the assertion that it ought not to be.

The problem with this position, even supposing that one accepts its revolutionary rejection of the common law tradition, is that efficient resource allocation cannot provide a determinate answer for the judge's dilemma as to what law to make. The theory tells him only that the outcomes of free bargaining — efficient by definition — are preferable to state-directed outcomes, because they generate gains which could make everyone better off if redistributed.

But free bargaining presupposes an existing definition and distribution of property rights. The basic insight of the critics of classical individualism was that *all* legal rules go into the definition of initial bargaining positions — *all* rules are property rules in that sense. By hypothesis, the judge is trying to decide a marginal or interstitial question concerning those rules. Whatever he decides, subsequent bargaining will produce an efficient outcome. It is therefore circular to suggest that he can decide on the basis of efficiency. Another way to put the same point is to say that the outcome of bargaining would be efficient even in the state of nature. All interventions are distributively motivated.[149]

It follows that the elimination of the effects of transaction costs on the allocation of resources cannot provide an independent objective criterion for judicial lawmaking. It is only possible to decide that these effects are bad if we can establish that the outcome under some initial regime of legal rules, without transaction costs, would be good. But this cannot be done through criteria of efficiency, since *all* initial regimes meet that test. Before he starts applying the transaction cost analysis, the judge must therefore decide just how altruistic the background regime ought to be.

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[148] R. POSNER, ECONOMIC ANALYSIS OF LAW (1972); G. CALABRESI, THE COSTS OF ACCIDENTS (1970).

[149] *See* Calabresi, *Transaction Costs, Resource Allocation and Liability Rules*, 11 J. LAW & ECON. 67 (1968); Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 32 n.56 (1975).

Even supposing that he has done this, the steps required before the analysis can yield a determinate result involve a whole series of "value judgments." [150]

The alternative proposal, that the judge engage in "reasoned elaboration" of the immanent social purposes of the legal order, or that he decide on the basis of a "moral discourse," rejects the dichotomy of factual judgments and value judgments.[151] But it also creates a three-tiered structure. There is the outcome of private activity. There is judicial intervention *via* reasoned elaboration. And there is legislative intervention in pursuit of goals that the judge must ignore. As with the Classical individualist and law and economics solutions, the judge must define his jurisdiction through the institutional competence and political question gambits to avoid usurpation. As with the other solutions, usurpation means result orientation, here defined as going beyond the immanent rationality or immanent social morality of the legal order.

This proposal represents the recognition that the altruist analysis of the economic and political content of common law rules led into a dilemma. If the judge could not escape a role as an autonomous lawmaker, there seemed to be only two alternatives. He might retreat into passivity, and thereby behave in an objectively individualist way by facilitating the exercise of private power. Or he might take responsibility for imposing his "subjective value judgments" on the populace.

The proposed way out is a *partial* rejection of both the institutional competence and political question gambits. *Some* kinds of complex factual questions are appropriate for the judiciary; others are not. *Some* social values or purposes are capable of reasoned elaboration by judges; others are not, and must be left

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[150] This formulation owes much to a conversation with Tom Heller of the University of Wisconsin Law School. *See generally* Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655 (1974); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Baker, *supra* note 149; Mishan, *Pangloss on Pollution*, 73 SWED. J. ECON. 113 (1971).

[151] *See* H. HART & A. SACKS, *supra* note 1, at 116–20; Dworkin, *supra* note 4; L. FULLER, THE MORALITY OF LAW (1964); Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Hart, *The Supreme Court, 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); K. LLEWELLYN, *supra* note 99; P. SELZNICK, *supra* note 4; Wellington, *supra* note 20. For a recent piece of analysis in this mode, see Dawson, *supra* note 6. For criticisms of this approach, see Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961); Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960); Kennedy, *supra* note 4, at 395–98.

to the legislature. On the formal level, there is eclecticism about when we should use rules and when standards. *Sometimes* it will be true that we can trust the judge to apply the purposes of the legal order directly to the particular facts, without worrying either about arbitrariness or about the inefficiencies generated by uncertainty. Sometimes, on the other hand, we will want him to distinguish clearly between his lawmaking and law-applying roles.

This attempted compromise is a coherently incoherent response to the individualist's last ditch insistence on the institutional competence and political question gambits. The individualist can counter only with a reassertion of the ontological first principle that facts and values are radically distinct. It is simply *true* of all values that they are subjective and arbitrary. Immanent rationality, according to the individualist, is an illusion or a contingency based on an accidental and unstable social consensus, and the judge's role is therefore inevitably discretionary in the fullest sense.[152] The postulate of democracy then requires the judge to restrict his lawmaking to the narrowest possible compass by adopting a regime of formally realizable general rules.

But a compromise of this kind is as hostile to the altruist program of result orientation as it is to individualism. Like the other three tiered structures, it asserts that there are some effects of decision that the judge cannot take into account. To relativize the distinction between legislative and judicial questions is a very different thing from abolishing it altogether. The reasoned elaborator is the ally of the individualist in asserting that there are some values that can be enforced only through legislation.

The essence of the immanent rationality approach is that it attempts to finesse the confrontation of opposing philosophies by developing a middle ground. The strategy is predicated on the belief that individualism and altruism lead to conflict only on a fringe of disputed questions, leaving a fully judicial core within which there is consensus. Marginal and interstitial lawmaking within the core favors neither of the competing ideologies. It is only if the judge makes the mistake of moving into the "political" periphery that he will find himself obliged to make a choice between them.

There is no logical problem with this way of looking at the legal order. The question is whether it is more or less plausible than the vision, shared by individualist and altruist alike, of

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[152] *See* Arnold, *supra* note 151; Clark & Trubek, *supra* note 151; Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Nagel, *Fact, Value and Human Purpose*, 4 NATURAL LAW FORUM 26 (1959).

a battleground on which no foot of ground is undisputed. The reasoned elaborator can protest to the individualist that he has gained the principle of judicial restraint in exchange for admitting a limited number of altruist principles into the legal core. To the altruist he will point out that the sacrifice of full result orientation is well worth it, given that some altruist principles have been legitimated as a source of judicial lawmaking.

My own view is that the ideologists offer a convincing description of reality when they answer that there is no core. Every occasion for lawmaking will raise the fundamental conflict of individualism and altruism, on both a substantive and a formal level. It would be convenient, indeed providential, if there really were a core, but if one ever existed it has long since been devoured by the encroaching periphery.

If this is the case, then there is simply no way for the judge to be neutral. It is not that the concepts, liberty, equality, justice, welfare, that are supposed to motivate him are utterly without meaning or possible influence on his behavior. They are deeply ingrained in culture and for most of us it is impossible to make sense of the world without them. The problem is that they make two senses of the world, one altruist and the other individualist. This is true alike for issues of form and issues of substance. Indeed, I hope I have shown that the dimension of rules vs. standards is no more than a fourth instance of the altruist-individualist conflict of community vs. autonomy, regulation vs. facilitation and paternalism vs. self-determination. What remains is to explore the level of contradiction that lies below the conflict as it manifests itself in debates about the form and substance of legal rules.

VIII. Fundamental Premises of Individualism and Altruism

Whatever their status may have been at different points over the last hundred years, individualism and altruism are now strikingly parallel in their conflicting claims. The individualist attempt at a comprehensive rational theory of the form and content of private law was a failure. But altruism has not emerged as a comprehensive rational counter theory able to accomplish the task which has defeated its adversary.

Nonetheless, the two positions live on and even flourish. The individualist who accepts the (at least temporary) impossibility of constructing a truly neutral judicial role still insists that there is a rational basis for a presumption of non-intervention or judicial passivity. The altruist, who can do no better with the problem of neutrality, is an activist all the same, arguing that the judge

should accept the responsibility of enforcing communitarian, paternalist and regulatory standards wherever possible.

In this section, I will argue that the persistence of these attitudes as organizing principles of legal discourse is derived from the fact that they reflect not only practical and moral dispute, but also conflict about the nature of humanity, economy and society. There are two sets of conflicting fundamental premises that are available when we attempt to reason abstractly about the world, and these are linked with the positions that are available to us on the more mundane level of substantive and formal issues in the legal system.

Individualism is associated with the body of thought about man and society sometimes very generally described as liberalism. It is not necessary (in a logical or any other sense of necessity) for an individualist to hold to the liberal theory.[153] It is possible to believe passionately in the intrinsic moral rightness of self-reliance and in the obvious validity of the practical arguments for an individualist bias in law, and yet reject the liberal premises. It is a fact, however, that liberal theory has been an important component of individualism in our political culture at least since Hobbes. The whole enterprise of Classical individualist conceptualism was to show that a determinate legal regime could be deduced from liberal premises, as well as derived from individualist morality and practicality.

The same is true on the altruist side. The organicist premises with which the altruist responds to the liberal political argument are on another level altogether from the moral and practical assertions we have dealt with up to now. Yet, as is the case with individualism, there is both an historical connection and a powerful modern resonation between the levels of argument.

The importance of adding this theoretical dimension to the moral and practical is that it leads to a new kind of understanding of the conflict of individualism and altruism. In particular, it helps to explain what I called earlier the sticking points of the two sides — the moments at which the individualist, in his movement towards the state of nature, suddenly reverses himself and becomes an altruist, and the symmetrical moment at which the altruist becomes an advocate of rules and self-reliance rather than slide all the way to total collectivism or anarchism.

A. Fundamental Premises of Individualism

The characteristic structure of individualist social order consists of two elements.[154] First, there are areas within which

[153] On the methodological problem, see p. 1724 & note 87 *supra*.

actors (groups or individuals) have total arbitrary discretion (often referred to as total freedom) to pursue their ends (purposes, values, desires, goals, interests) without regard to the impact of their actions on others. Second, there are rules, of two kinds: those defining the spheres of freedom or arbitrary discretion, and those governing the cooperative activities of actors — that is, their activity outside their spheres of arbitrariness. A full individualist order is the combination of (a) property rules that establish, with respect to everything valued, a legal owner with arbitrary control within fixed limits, and (b) contract rules — part supplied by the parties acting privately and part by the group as a whole acting legislatively — determining how the parties shall interact when they choose to do so.[155]

The most important characteristic of an order with this structure is that individuals encounter one another in only three situations.

(a) *A* is permitted to ignore *B* and carry on within the sphere of his discretion as though *B* did not exist. *A* can let *B* starve, or, indeed, kill him, so long as this can be accomplished without running afoul of one of the limits of discretion.

(b) *A* and *B* are negotiating, either as private contracting parties or as public legislators, the establishment of some rules to govern their future relations. These rules will be binding whether or not based on agreement between *A* and *B* about what ends they should pursue or even about what ends the rules are designed to serve. *A* and *B* are working only toward binding directives that will benefit each *according to his own view of desirable outcomes.*

(c) *A* and *B* are once again permitted to ignore one another, so long as each follows the rules that govern their cooperative behavior. Although they are working together, neither need have the slightest concern for the other's ends, or indeed for the other's person, so long as he executes the plan.

Thus an individualist social order eliminates any necessity for *A* and *B* to engage in a discussion of ends or values. They can achieve the most complex imaginable interdependence in the domains of production and consumption, without acknowledging any interdependence whatever as moral beings. If we define freedom as the ability to choose for oneself the ends one will pursue, then an individualist order maximizes freedom, within the constraints of whatever substantive regime is in force.

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[154] *See* K. MARX, *supra* note 73; R. UNGER, *supra* note 73; A. KATZ, *supra* note 4 for analysis of a similar kind.

[155] For a similar conception, see E. DURKHEIM, *supra* note 20, at 115–32.

The creation of an order within which there are no occasions on which it is necessary for group members to achieve a consensus about the ends they are to pursue, or indeed for group members to make the slightest effort toward the achievement of other ends than their own, makes perfect sense if one operates on the premise that values, as opposed to facts, are inherently arbitrary and subjective. Like the relationship between the other components of individualism (or of Romanticism, Classicism, etc.), the link between the two sets of ideas is more complicated than one of logical implication. But it is enough for our purposes to mention briefly some of the ways in which the idea of the subjectivity and arbitrariness of values reinforces or resonates the rule/discretion structure.

The *subjectivity* of values means that it is, by postulate, impossible to verify directly another person's statement about his experience of ends. That is, when *A* asserts that for him a particular state of affairs involves particular values in particular ways, *B* must choose between accepting the statement or challenging the good faith of the report. *B* knows about the actual state of affairs only through the medium of *A*'s words and actions. She cannot engage *A* in an argument about *A*'s values except on the basis of that information.[156]

The postulate of the *arbitrariness* of values means that there is little basis for discussing them. Even supposing that values were objective, so that we could all agree which ones were involved in a particular situation, and how they were involved, it would still be impossible to show by any rational process how one ought to change that objective situation. Our understanding of the existence of values, according to the postulate, is not founded on rational deductive or inductive processes. Values are simply *there* in the psyche as the springs of all action. And since we cannot explain — except by appeal to behavioristic notions like those of learning theory — why or how they *are* there, we cannot expect to converse intelligently about what they ought to be or become.

Given these conditions, it seems likely that mechanisms of social order dependent on consensus about ends will run into terrible trouble. If, by providential arrangement (or perhaps by conditioning) everyone's values turn out to be identical (or to

[156] On this basis alone it may be easy to show that *A*'s statement of his experience of values is self-contradictory, and this may cause *A* such discomfort that he will actually undertake to rectify the orderliness of his values. *B*'s conduct still resolves itself into (a) rational, objective discourse about facts (showing *A*'s self-contradiction) and (b) a-rational, subjective exhortation about values (urging *A* to attain consistency on the ground that consistency is "good").

produce identical effects), then all is well; if there is disagreement, chaos ensues. This expectation is reinforced by the other major postulate of liberal theory: that people enter groups in order to achieve ends that pre-exist the group, so that the group is a means or instrument of its members considered as individuals.

Once again, this idea is *logically* connected neither with the postulate of the arbitrariness of values nor with the characteristic rule/discretion structure of an individualist social order. It merely "resonates" these allied conceptions. Thus, if the state is only an instrument each party adopts to achieve his individual purposes, it is hard to see how it would ever make sense to set up state processes founded on the notions of changing or developing values. If the state is truly only a means to values, and all values are inherently arbitrary and subjective, the only legitimate state institutions are *facilitative*. The instant the state adopts change or development of values as a purpose, we will suspect that it does so in opposition to certain members whose values other members desire to change. The state then becomes not a means to the ends of all, but an instrument of some in their struggle with others, supposing that those others desire to retain and pursue their disfavored purposes.

The individualist theory of the judicial role follows directly from these premises. In its pure form, that theory makes the judge a simple rule applier, and rules are defined as directives whose predicates are always facts and never values. So long as the judge refers only to facts in deciding the question of liability, and the remedial consequences, he is in the realm of the objective. Since facts are objective rather than subjective, they can be determined, and one can assert that the judge is right or wrong in what he does. The result is both the certainty necessary for private maximization and the exclusion of arbitrary use of state power to further some ends (values) at the expense of others.

Classical late nineteenth century individualism had to deal with the argument that it was impossible to formulate a code of laws that would deal with all situations in advance through formally realizable rules. The response was that the truly common, though minimal, ends that led to the creation of the state could be formulated as concepts from which formally realizable rules could be deduced. The judge could then deal with gaps in the legal order — with new situations — by deductively elaborating new rules. The process of elaboration would be objective, because rational, just as the application of rules was objective because referring only to facts.

Modern individualism accepts that this enterprise was a failure, but it does not follow that the judge is totally at large. There

is still a rational presumption in favor of nonintervention, based on the fundamental liberal premises. These have been strengthened rather than weakened by the failure of the Classical enterprise, which asserted that there was at least enough consensus about values to found an aggressive theory of the "right," if not of the good.

Nonintervention is consistent with the liberal premises because it means the refusal of the group to use the state to enforce its vision of altruistic duty against the conflicting visions of individuals pursuing their self-interest. The judge should be intensely aware of the subjectivity and arbitrariness of values, and of the instrumental character of the state he represents. He may not be able to frame a coherent theory of what it means to be neutral, and in this sense the legitimacy of everything he does is problematic. All reason can offer him in this dilemma is the injunction to respect autonomy, to facilitate rather than to regulate, to avoid paternalism, and to favor formal realizability and generality in his decisions. If nothing else, his action should be relatively predictable, and subject to democratic review through the alteration or prospective legislative overruling of his decisions.

B. Fundamental Premises of Altruism

The utopian counter-program of altruist justice is collectivism.[157] It asserts that justice consists of order according to shared ends. Everything else is rampant or residual injustice . The state, and with it the judge, are destined to disappear as people come to feel their brotherhood; it will be unnecessary to make them act "as if." The direct application of moral norms through judicial standards is therefore far preferable to a regime of rules based on moral agnosticism. But it still leaves us far from anything worthy of the name of altruistic order. The judge, after all, is there because we feel that force is necessary. Arbitrators are an improvement; mediators even better. But we attain the goal only when we surmount our alienation from one another and share ends to such an extent that contingency provides occasions for ingenuity but never for dispute.

Altruism denies the arbitrariness of values. It asserts that we understand our own goals and purposes and those of others to be at all times in a state of evolution, progress or retrogression, in

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[157] *See* K. MARX, *Economic and Philosophical Manuscripts* (1844), in EARLY WORKS 322–34, 345–58 (Benton trans. 1975); S. AVINERI, THE SOCIAL AND POLITICAL THOUGHT OF KARL MARX 65–95 (1968); E. DURKHEIM, *supra* note 20 at 193–99. For a recent attempt to develop similar notions in the context of American constitutional law, *see* Tribe, *supra* note 54, at 310–14.

terms of a universal ideal of human brotherhood. The laws of this evolution are reducible neither to rules of cause and effect, nor to a logic, nor to arbitrary impulses of the actor. We do not control our own moral development in the sense that the mechanic controls his machine or legal rules control the citizen, but we do participate in it rather than simply undergoing it. It follows that we can speak meaningfully about values, perhaps even that this is the highest form of discourse.

Altruism also denies the subjectivity of values. My neighbor's experience is anything but a closed book to me. Economists make the simplifying assumption of the "independence of utility functions," by which they suppose that *A*'s welfare is unaffected by *B*'s welfare. This notion is at *two* removes from reality: *A*'s utility function is not only dependent on *B*'s, it cannot truthfully be distinguished from *B*'s. Quite true that we suffer *for* the suffering of others; more important that we suffer directly the suffering of others.

For the altruist, it is simply wrong to imagine the state as a means to the pre-existing ends of the citizens. Ends are collective and in process of development. It follows that the purposes that form a basis for moral decision are those of man-in-society rather than those of individuals. The administration of justice is more than a means to the ends of this whole. It is a part of it. In other words, judging is not something we have to *tolerate*; it is not a *cost* unavoidable if we are to achieve the various individual benefits of living together in groups.

Good judging, in this view, means the creation and development of values, not just the more efficient attainment of whatever we may already want. The parties and the judge are bound together, because their disputes derive an integral part of their meaning from his participation, first imagined, later real. It is desirable rather than not that they should see their negotiations as part of a collective social activity from which they cannot, short of utopia, exclude a representative of the group. A theory that presents the judge as an instrument denies this. Recognizing it means accepting that private citizens do or do not practice justice. It is an illusion to think that they only submit to or evade it.

Perhaps as important, an instrumental theory of judging lies to the judge himself, telling him that he has two kinds of existence. He is a private citizen, a *subject*, a cluster of ends "consuming" the world. And he is an official, an *object*, a service consumed by private parties. As an instrument, the judge is not implicated in the legislature's exercise of force through him. Only when he chooses to make his own rules, rather than blindly apply those given him, must he take moral responsibility. And then, that

responsibility is asserted to be altogether individual, his alone, and therefore fatally close to tyranny. The judge must choose alienation from his judgment (rule application) or the role of God (rule making).

By contrast, altruism denies the judge the right to apply rules without looking over his shoulder at the results. Altruism also denies that the only alternative to the passive stance is the claim of total discretion as creator of the legal universe. It asserts that we can gain an understanding of the values people have woven into their particular relationships, and of the moral tendency of their acts. These sometimes permit the judge to reach a decision, after the fact, on the basis of all the circumstances, as a person-in-society rather than as an individual.[158] Though these faculties do not permit him to make rules for the future, that they permit him to decide is enough to make decision his duty. He must accept that his official life is personal, just as his private life, as manipulator of the legal order and as litigant, is social. The dichotomy of the private and the official is untenable, and the judge must undertake to practice justice, rather than merely transmit or invent it.

Altruism offers its own definitions of legal certainty, efficiency, and freedom. The certainty of individualism is perfectly embodied in the calculations of Holmes' "bad man," who is concerned with law only as a means or an obstacle to the accomplishment of his antisocial ends. The essence of individualist certainty-through-rules is that because it identifies for the bad man the precise limits of toleration for his badness, it authorizes him to hew as close as he can to those limits. To the altruist this is a kind of collective insanity by which we traduce our values while pretending to define them. Of what possible benefit can it be that the bad man calculates with certainty the contours within which vice is unrestrained? Altruism proposes an altogether different standard: the law is certain when not the bad but the *good* man is secure in the expectation that if he goes forward

[158] Of course there must be a selection among "all the circumstances," or the judge would never get beyond the collection of his facts. And of course the selection is intimately guided by *criteria* (or concepts) of some kind. And of course those criteria in turn are closely linked to the criteria of justice to be applied (why gather facts irrelevant to the issue at hand). But it does *not* follow that because we can select *a mass* of relevant facts from among the larger mass available, we can determine how *particular* facts, capable of founding per se rules, will define the circumstances of justice in the future. I am here asserting the existence of a grey area, a slippage, a no-man's land, between two quite clearly defined aspects of the situation. Yes, it *is* true that there are criteria of justice well enough defined to orient the search for relevant facts. No, it is *not* true that these are now or seem to have any tendency to become the kind of criteria that constitute a formal system. The world is intelligible, *but not intelligible enough*.

in good faith, with due regard for his neighbor's interest as well as his own, and a suspicious eye to the temptations of greed, then the law will not turn up as a dagger in his back. As for the bad man, let him beware; the good man's security and his own are incompatible.

"Efficiency" in the resolution of disputes is a pernicious objective unless it includes in the calculus of benefits set against the costs of administering justice the moral development of society through deliberation on the problem of our apparently disparate ends. Indeed, attempts to achieve the efficiency celebrated by individualism are likely to make these true benefits of judging unattainable, and end in a cheaper and cheaper production of injustice and social disintegration.

The "freedom" of individualism is negative, alienated and arbitrary. It consists in the absence of restraint on the individual's choice of ends, and has no moral content whatever. When the group creates an order consisting of spheres of autonomy separated by (property) and linked by (contract) rules, each member declares her indifference to her neighbor's salvation — washes her hands of him the better to "deal" with him. The altruist asserts that the staccato alternation of mechanical control and obliviousness is destructive of every value that makes freedom a thing to be desired. We can achieve real freedom only collectively, through *group* self-determination. We are simply too weak to realize ourselves in isolation. True, collective self-determination, short of utopia, implies the use of force against the individual. But we experience and accept the use of physical and psychic coercion every day, in family life, education and culture. We experience it indirectly, often unconsciously, in political and economic life. The problem is the conversion of force into moral force, in the fact of the experience of moral indeterminacy. A definition of freedom that ignores this problem is no more than a rationalization of indifference, or the velvet glove for the hand of domination through rules.

C. The Implications of Contradictions Within Consciousness

The explanation of the sticking points of the modern individualist and altruist is that both believe quite firmly in both of these sets of premises, in spite of the fact that they are radically contradictory. The altruist critique of liberalism rings true for the individualist who no longer believes in the possibility of generating concepts that will in turn generate rules defining a just social order. The liberal critique of anarchy or collectivism rings true for the altruist, who acknowledges that after all we have not

overcome the fundamental dichotomy of subject and object. So long as others are, to some degree, independent and unknowable beings, the slogan of shared values carries a real threat of a tyranny more oppressive than alienation in an at least somewhat altruistic liberal state.

The acknowledgment of contradiction does not abate the moral and practical conflict, but it does permit us to make some progress in characterizing it. At an elementary level, it makes it clear that it is futile to imagine that moral and practical conflict will yield to analysis in terms of higher level concepts. The meaning of contradiction at the level of abstraction is that there is no metasystem that would, if only we could find it, key us into one mode or the other as circumstances "required."

Second, the acknowledgment of contradiction means that we cannot "balance" individualist and altruist values or rules against equitable standards, except in the tautological sense that we can, as a matter of fact, decide if we have to. The imagery of balancing presupposes exactly the kind of more abstract unit of measurement that the sense of contradiction excludes. The only kind of imagery that conveys the process by which we act and act and act in one direction, but then reach the sticking point, is that of existentialist philosophy. We make commitments, and pursue them. The moment of abandonment is no more rational than that of beginning, and equally a moment of terror.

Third, the recognition that both participants in the rhetorical struggle of individualism and altruism operate from premises that they accept only in this problematic fashion weakens the individualist argument that result orientation is dynamically unstable. Given contradiction at the level of pure theory, the open recognition of the altruist element in the legal system does not mean an irrevocable slide down the slope to totalitarianism, any more that it would lead to the definitive establishment of substantive justice in the teeth of the individualist rule structure.

Individualism, whether in the social form of private property or in that of rules, is *not* an heroically won, always precariously held symbol of man's fingernail grip on civilized behavior. That is a liberal myth. In any developed legal system, individualist attitudes, and especially the advocacy of rules, respond to a host of concrete interests having everything to lose by their erosion. Lawyers are necessary because of rules; the prestige of the judge is professional and technical, as well as charismatic and arcane, because of them; litigants who have mastered the language of form can dominate and oppress others, or perhaps simply prosper because of it; academics without number hitch their wagonloads of words to the star of technicality. Individualism is the structure of the status quo.

But there is more to it even than that. In elites, it responds to fear of the masses. In the masses, it responds to fear of the caprice of rulers. In small groups, it responds to fear of intimacy. In the psyche, it responds to the ego's primordial fear of being overwhelmed by the id. Its roots are deep enough so that one suspects an element of the paranoid in the refusal to recognize its contradictory sibling within consciousness.

Finally, the acknowledgement of contradiction makes it easier to understand judicial behavior that offends the ideal of the judge as a supremely rational being. The judge cannot, any more than the analyst, avoid the moment of truth in which one simply shifts modes. In place of the apparatus of rule making and rule application, with its attendant premises and attitudes, we come suddenly on a gap, a balancing test, a good faith standard, a fake or incoherent rule, or the enthusiastic adoption of a train of reasoning all know will be ignored in the next case. In terms of individualism, the judge has suddenly begun to act in bad faith. In terms of altruism *she has found herself*. The only thing that counts is this change in attitude, but it is hard to imagine anything more elusive of analysis.

IX. Conclusion

There *is* a connection, in the rhetoric of private law, between individualism and a preference for rules, and between altruism and a preference for standards. The substantive and formal dimensions are related because the same moral, economic and political arguments appear in each. For most of the areas of conflict, the two sides emerge as biases or tendencies whose proponents have much in common and a large basis for adjustment through the analysis of the particularities of fact situations. But there is a deeper level, at which the individualist/formalist and the altruist/informalist operate from flatly contradictory visions of the universe. Fortunately or unfortunately, the contradiction is as much internal as external, since there are few participants in modern legal culture who avoid the sense of believing in both sides simultaneously.

Even this conclusion applies only so long as it is possible to abstract from the context of compromises within the mixed economy and the bureaucratic welfare state. In practice, the choice between rules and standards is often instrumental to the pursuit of substantive objectives. We cannot assess the moral or economic or political significance of standards in a real administration of justice independently of our assessment of the substantive structure within which they operate.

It follows that the political tendency of the resort to standards, as it occurs in the real world, cannot be determined a priori. The most barbarous body of law may be rendered "human," and therefore tolerable, by their operation. Indeed, the "corruption" of formality by informality may be the greatest source of strength for an oppressive social order. Or equally plausibly, standards may be a vehicle for opposition to the dominant ideology (opposition *within* a particular judge as well as opposition among judges), keeping alive resistance in spite of the capture of the substantive order by the enemy. These currents of resistance may be reactionary or revolutionary, reformist or mildly conservative.[159] Standards may even be accepted into the predominant conception of how a rule system works, treated as an area of "inchoacy" or of "emerging rules," as though altruist justice were inevitably the prelude to a higher stage of individualism.

How should a person committed to altruism in the contradictory fashion I have been describing assess the significance of informality in our actual law of contracts, for example? I have only a little confidence in my own answer, which is that the case for standards is problematic but worth making. There is a strong argument that the altruist judges who have created the modern law of unconscionability and promissory estoppel have diverted resources available for the reform of the overall substantive structure into a dead end. There is an argument that individualist judges are restrained from working social horrors only by a mistaken faith in judicial neutrality that it would be folly to upset. It might be better to ignore contract law, or to treat it in an aggressively formal way, in order to heighten the level of political and economic conflict within our society.

Nonetheless, I believe that there is value as well as an element of real nobility in the judicial decision to throw out, every time the opportunity arises, consumer contracts designed to perpetuate the exploitation of the poorest class of buyers on credit. Real people are involved, even if there are not very many whose lives the decision can affect. The altruist judge can view himself as a resource whose effectiveness in the cause of substantive justice is to be maximized, but to adopt this attitude is to abandon the crucial proposition that altruistic duty is owed by one individual to another, without the interposition of the general category of humanity .

Further, judges like Skelly Wright are important actors in a symbolic representation of the conflict of commitments.[160] Given

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[159] *See* Hay, *supra* note 29.

[160] *See, e.g., Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

the present inability of altruism to transform society, it is only a dramatic production, ancillary to a hypothetical conflict that would be revolutionary. As such, the judge is a cultural figure engaged in the task of persuading adversaries, in spite of the arbitrariness of values. More, he is at work on the indispensable task of imagining an altruistic order. Contract law may be an ideal context for this labor, precisely because it presents problems of daily life, immediate and inescapable, yet deeply resistant to political understanding. It seems to me that we should be grateful for this much, and wish the enterprise what success is possible short of the overcoming of its contradictions.