
Five Types of Judicial Decision

Anthony R. Blackshield

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Article

Citation Information

Blackshield, Anthony R.. "Five Types of Judicial Decision." *Osgoode Hall Law Journal* 12.3 (1974) : 539-567.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol12/iss3/3>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

FIVE TYPES OF JUDICIAL DECISION

By ANTHONY R. BLACKSHIELD*

I. INTRODUCTION

The purpose of this article is to offer as a tool for the study of judicial decision-making a typology substantially devised by the late Howard Becker (1899-1960) as a sociological tool for the study of "sacred" and "secular" value-systems and societies. To produce the version here to be used, Becker's concepts have had to be systematized, reconstructed, punched and pummelled, partly truncated and partly expanded.¹ Nevertheless, the scheme here offered remains distinctively his. The application of it to the study of law might be justified in several ways.

A. *Law and Religion*

First, one might dwell on those features of law which most closely resemble the "sacred", in the popular sense of that term. It is true that the esoteric traditions of the legal profession have, in recent centuries, had more to do with the medieval craft guild than with the priestly cultivation of religious mysteries; but the resulting posture of lawyers — one of careful cultivation of a special body of knowledge, and a jealous guarding of that knowledge from unseemly lay intrusions — often wears a decidedly hierocratic air. *Ius dicitur ars boni et aequi, cuius merito quis nos sacerdotes appellat: iustitiam namque colimus et sacra jura ministramus.*²

An air of sanctity and mystery, too, is carefully preserved in the courtroom — not merely in the solemn ceremonial use of robes and rituals³ (though those on the bench are often quite as elaborate as any before the altar), but in the inward and spiritual attitudes of which these are but the outward and visible sign. Sir Owen Dixon, while Chief Justice of the High Court of Australia, is reported to have told a journalist (in a rare interview) that "a certain mystery should surround the judiciary in its higher reaches."⁴ That attitude may seem old-fashioned. But when the turmoil of the sixties erupted into the courtroom, not only in attempts to disrupt the courts but in attempts to use them, even the more enlightened judicial responses invoked notions of

* Associate Professor of Law, University of New South Wales (on leave); Visiting Professor of Law, Osgoode Hall Law School of York University, January-June 1974.

¹ See *infra*, text accompanying notes 21-30. For his own final version, here mainly relied on, see H. Becker, "Current Sacred-Secular Theory and its Development", in H. Becker & A. Boskoff ed., *Modern Sociological Theory in Continuity and Change* (New York: Holt, Rinehart & Winston, 1957) at 133 [hereinafter Becker (1957)].

² Dig. I.ii.; see Bracton, f. 2b, 3.

³ For Becker the use of ceremonials is the most obvious and most pervasive hallmark of every variety of "sacredness". See Becker (1957), at 149-52; and see *infra*, text accompanying note 28.

⁴ I have been unable while in Canada to verify this quotation. A reference to the Melbourne *Age* for 1959 would be half-memory, half-guess.

institutional sanctity and dignity, of contempt of court and abuse of process, which went far beyond any *functional* needs either of doctrinal tradition, or of institutional role.⁵ And although, in less dramatic respects, many lawyers and judges have sought to "modernize" laws and courtroom procedures — to render them more functional, more accessible, and above all more human — such efforts are still best understood as pitting a *secularizing* trend against an ongoing *sacred* tradition.

In many other ways, too, the growth of the world's great legal systems has been closely analogous to that of the great religious systems. Historically, the main role of all such systems has been as agencies of social control:⁶ as complex sets of institutional and doctrinal devices for the elaboration and transmission of norms of conduct, and for backing these norms with the compelling force of "authority" — both through the assertion of institutional power to give rulings which *must* be accepted, and through the purported demonstration that particular norms are *justified* as grounded in higher values. This functional preoccupation with social control, whether the relevant norms are "justified" or (as it were) "mustified", has led servitors of law and religion alike to deep entanglements (on the whole unhappy ones) with tasks of *moral* guidance and exhortation, and often also with tasks of (largely ritual) disapproval, and (far from ritual) punishment, of conduct perceived as *immoral*. At best, these moralizing tasks evoke rather simple and homespun manifestations of kindness; at worst, they evoke a formidable authoritarianism. The line between the fatherly and the paternalistic is often a fine one; and, either way, such moralistic adventures are distractions (albeit inescapable ones) from the single-minded pursuit of the loftier truths and ideals to which men, in espousing law or religion, had thought they were dedicating themselves. The result, in both law and religion, is much uneasy juggling and awkward compromise between a range of moral activities in a sense irrelevant, but at least (for good or ill) having some direct functional social impact, and a range of dedications to some inner kind of reality whose importance may not be measurable in functional impact at all.

Finally, even in these inner dedications, law and religion are deeply divisive as amongst those who serve them. Perhaps any earnest commitment which is also an intellectual quest *must* lead in the end to conflict between the commitment and the questing. However that be, it is certainly clear that

⁵ Undoubtedly the most tangled and dramatic case was the trial before Judge Julius Hoffman of the "Chicago Seven". See now *In re Trials of Pending & Future Criminal Cases*, 306 F. Supp. 333 (N.D. 111. 1969); *U.S. v. Seale*, 461 F. 2d 345 (7th Cir. 1972); *In re Dellinger*, 461 F. 2d 389 (7th Cir. 1972). Other modern *loci classici* are (in Britain) *Morris v. Crown Office*, [1970] 2 Q.B. 114 (C.A.); (in Canada) *A.G. Quebec v. Charbonneau* (1974), 13 C.C.C. (2d) 226 (Que. C.A.); (in Australia) *Ex p. Tuckerman; Re Nash*, [1970] 3 N.S.W.R. 23 (C.A.). And see Theodore Becker ed., *Political Trials* (Indianapolis: Bobbs-Merrill, 1971); N. Hakman, "Political Trials in the Legal Order: A Political Scientist's Perspective" (1972), 21 *J.Pub.L.* 73.

⁶ For a preliminary attempt at a model for analysis here, with special reference to law, religion, and education, see A. R. Blackshield, "Secularism and Social Control in the West: The Material and the Ethereal", in G.S. Sharma ed., *Secularism: Its Implications for Law and Life in India* (Bombay: N.M. Tripathi, 1966) at 9, esp. at 14-18.

the massive intellectual activity which men, through countless ages, have addressed to religion and law, has in each case involved a constant struggle between highly sophisticated rationalizations and highly systematic elaborations of complex and abstract conceptual structures whose ultimate appeal is to *reason*, and unanalyzable commitments to values (sometimes dogmatic and obscurantist, but often also most moving and noble) whose ultimate appeal is to *faith*. Debates about precedent are as rich in illustrations of this struggle as are debates about divine revelation — which, indeed, they closely resemble.

Yet to focus on a *religious* model, to which we should try to assimilate law, would be to narrow absurdly the reach of the “sacred” value-systems which Becker intended to explore. And even if this were not the case, a presentation built upon the analogy between law and religion — an argument that sacred/secular theory can be applied to legal debates because law is “like” religion — would, I believe, trivialize the real value of Becker’s concepts for lawyers. I shall, therefore, make no attempt to pursue these analogies further.

B. *Law and Change*

At a deeper and more instructive level, we might seize upon the special and pervasive importance, in *legal* debates, of an underlying polarity very closely resembling that which Becker sought to elaborate. His point of departure was an attempt to explicate the contrast between the “sacred”, and the “secular”;⁷ and his central insight, which his detailed typology merely elaborates, is that “sacred” and “secular” are words which we use essentially as indicia of our attitudes to change. Men’s “sacred” values are those as to which they display, in their feelings, beliefs and behaviour, an extreme resistance to change; a society is “secular” in respect of those values for which the feelings, beliefs and behaviour of men in that society are compatible with an easy acceptance of change. Today’s highly secular society is also an extremely changeable one; in some areas we have learned to *welcome* change, and in most other areas we have at least learned to *accept* it. This, says Becker, is what “secular” *means*. By contrast, a society dominated by “sacred” values is a static, even timeless one — not in all respects, but precisely to the extent that its dominant values are “sacred”. The antinomy, in human cultures, between “sacred” and “secular” values, is a measure of changing human attitudes to the idea of change itself.

This same antinomy, never resolved, between readiness and resistance to change, is, of course, a central feature of our attitudes to law. In particular,

⁷ See Becker (1957) at 141-43. At 142 he says that “the secular is not merely the reverse of the sacred”; but his discussion in general seems to proceed as if it were. On the difficulties of his attempt to suggest an alternative meaning of “secular”, see Blackshield, *supra* note 6, at 36n. One obvious difference between “sacred” and “secular”, leading to some clumsiness in exposition, is that “sacred” denotes a quality which we attribute to an *object* of value, “secular” a kind of *attitude* adopted towards such objects. In the traditional Hindu attitude to the cow, it is the cow, not the attitude, that is “sacred”; in the Anglo-Saxon tradition, “secular” describes attitudes, not cows. I assume, however, that this is merely a grammatical point.

it shapes the direction and structure of the endless theoretical debates surrounding the nature and legitimate use of the common law judicial process — debates which I hope here to illumine. Whether we think of Judge Cardozo's profound reflections on "the spirit of change, and the spirit of conservation",⁸ or of Lord Wright's poignant question, as he surveyed the growth of the common law, as to "how this perpetual process of change can be reconciled with the principle of authority and the rule of *stare decisis*",⁹ or of the late Wolfgang Friedmann's antinomies between "tradition and progress, stability and change, certainty and flexibility",¹⁰ the tension between a vision of law as in ceaseless Heraclitean flux, and a vision of law as enduring timelessly down through the ages, is always with us.¹¹ The polarity is essentially the same as that between "sacred" and "secular" attitudes to social value-systems, as Becker understands those terms; and his conceptual strategies for clarifying and coping with the conflict ought also to be helpful to us.

Essentially, Becker's proffered solution is to take the two concepts, "sacred" and "secular", and substitute a continuous scale on which, for the sake of convenience, we can pick out a number of conceptual positions, more subtly differentiated than the original two. Becker's own versions of this augmented number of concepts vary from four¹² to twenty-two;¹³ in the version here used (which does not correspond precisely to any of his) there are five. We begin, therefore, with a model of two rather gross and unexamined conceptual postures, pitted against one another in a crude unsophisticated way, and conducive only to the unhelpful and oversimplified thinking that goes with a two-valued logic (or an adversary system of law). We substitute a subtly-shaded spectrum (or "continuum") of degrees, still open to an infinite number of gradations ranging from *extreme* resistance to change to *extreme* eagerness for it, but clustering these gradations around (in the present version) five readily distinguishable positions. These five positions are thus arranged "along a line leading from estimated maximum reluctance to change old values to estimated maximum readiness to seek new values".¹⁴

⁸ B. N. Cardozo, *The Paradoxes of Legal Science* (New York: Columbia University Press, 1928) at 7. Cardozo was here adapting the ideas of A. N. Whitehead, *Science and the Modern World* (New York: Macmillan, 1925) at 281.

⁹ Lord Wright, *Legal Essays and Addresses* (Cambridge: University Press, 1939) at xvi.

¹⁰ W. Friedmann, *Legal Theory* (5th ed. London: Stevens & Sons, 1967) at 86-87. Friedmann there conflates the narrow issue of contrasting concepts of judicial method with the wider issue, also here relevant, of the broadly ideological use of *theories* about law as devices for the support or revolutionary undermining of the political *status quo*. As to this see J. Stone, *Human Law and Human Justice* (London: Stevens & Sons, 1965) at 37, 79.

¹¹ For a fuller discussion of these tensions see J. Stone, *Legal System and Lawyers' Reasonings* (London: Stevens & Sons, 1964) at 209-12, 229-34.

¹² Proverbial, prescriptive, principial and pronormless *societies*. See Becker (1957) at 163, 182-83; and see *infra*, text accompanying notes 28-30.

¹³ See H. Becker, *Through Values to Social Interpretation* (Durham, N.C.: Duke University Press, 1950) ch.5.

¹⁴ Becker (1957) at 143.

Moreover, these focal positions are presented to us as *types*. We are *not* to expect (for example) religious attitudes to abortion to fit neatly into one or another of five watertight compartments, or exclusive pigeonholes. Rather we should use all five "types" of attitude towards the idea of change as analytical tools which help us to study attitudes to abortion. The empirical attitudes which we study may prove to involve subtle combinations, and partial overlappings, of two or more different "types". The *conceptual* array of five distinct types is nevertheless indispensable as a way of helping us to perceive what the empirical combinations and overlappings are.¹⁵

In the context of debates concerning the judicial process, there are two good reasons why a spectrum of "types" should be of greater usefulness than a polarization of opposites. First, lawyers' debates about stability and flexibility, continuity and change, are *not* a matter of choosing between one set of values and the other. What is needed is a way of giving effect (and meaning) to *both* sets of values. It is not for nothing that one of the classic common law formulae for symbolizing the timelessness of the English common law, locates its eternal verities in that most changeable of residences, "the breasts of Her Majesty's judges".¹⁶ In paradox or in mystical vision, we can of course unify the most deeply divided of opposites; but if the working common law unity of tradition and change is to be analyzed at a meaningful rather than a mystical level, we need to move from impressionism to a more sober specification of component parts. A battery of "types", with its resources for picking out different and apparently inconsistent aspects of the same empirical phenomenon, is precisely the equipment we need to help us see how common law judges have managed so successfully to have their cake and eat it too.

Second, apart from the special need to explain the apparent unity of conservation and change in law, there is in any event a need for a set of analytical tools more adapted to the complex diversity of legal phenomena than those which we currently have. The point is not just that polar opposites are inadequate to a complex discussion, but that even our polar opposites are almost wholly elusive. We have no clearly accepted terminology, and what we have is used only in amorphous and undefined ways. Our difficulty is *both* that we work with oversimple dichotomies, *and* that we have not even agreed upon meaningful labels for the dichotomies which we so hotly debate. One kind of attitude to the judicial process, for example, is often symbolized by (usually disparaging) references to "legal realism": but this kind of debating habit not only does injustice to legal realists, but muddies rather than clarifies the issues of principle we wish to debate. Another kind of attitude (as resistant to change as "legal realism" is receptive to it) is often characterized, following Pound,¹⁷ as "mechanical jurisprudence"; but this, too, has usually

¹⁵ See Becker (1957) at 163 ("The Uses and Abuses of Landmarks"). And for the definitive statement on the formation and application of "types" see E. A. Shils & H.A. Finch ed., *Max Weber on the Methodology of the Social Sciences* (New York: Free Press of Glencoe, 1949) at 90-93.

¹⁶ For a witty exchange on this theme, *inter alia* as to the reliability of Canadian breasts as repositories of such an inheritance, see *Gray v. Gee* (1923), 39 T.L.R. 429, at 430.

¹⁷ R. Pound, "Mechanical Jurisprudence" (1908), 8 *Colum.L.Rev.* 605.

generated more heat than light. Instead of working with paired polarities, we work with unpaired pejoratives. And even when a polarity emerges, its poles are so confusingly defined as to lead us only into a series of endless false trails and cross-purposes.

The ongoing debate initiated by Ronald Dworkin's article "The Model of Rules",¹⁸ for instance, pits a model of judicial decision-making in terms of "rules" against one in terms of "discretion". But both "rules" and "discretion" are conceived of in such inadequate (and so deeply self-contradictory) ways, that any hope of coming to grips with the reality of the judicial process is stultified at the outset. The broad dialectic of Dworkin's argument — by which out of the thesis of "rules" and the antithesis of "discretion" a synthesis of "principles" is born — does, indeed, parallel in certain crude structural respects the kind of analysis here to be offered. But I hope to show that, with greater care in our choice of analytical concepts and their structural (systematic) inter-relations, a far more flexible and illuminating account can be achieved.

Moreover, insofar as there *are* discernible polarities in juristic debates, these polarities chronically conflate a number of quite disparate matters. Most importantly, models and strategies of judicial decision-making as actually espoused and practised *by judges* are confused, in the literature, with such models and strategies as perceived or projected *by legal theorists*. "Conservative" attitudes to judicial precedent and social change as actually held and implemented by judges are one kind of phenomenon, essentially an empirical one; such attitudes as held by legal theorists, whether as tools for analysis of *actual* judicial behaviour or as evaluative standards for *desirable* judicial behaviour, are another thing altogether. And similarly with "liberal" or "progressive" attitudes.

In order to achieve a rough preliminary identification of the polarities I here hope to clarify, I propose by stipulative definition to use the terms "judicial dogmatism" and "judicial pragmatism" to denote contrasting attitudes and practices *of judges*, and the terms "legalism" and "realism" for contrasting attitudes *of legal theorists*. "Dogmatism" and "pragmatism" are contrasting styles *of judgment*; "legalism" and "realism" are contrasting views *about judgment*. I assume that in each pair of terms the distinguishing feature is that of resistance or receptiveness to change, just as it is in Becker's contrast of "sacred" and "secular" models.

A second contrast is between *factual* and *evaluative* uses of the positions thus labelled. To say that a judge is "dogmatic" in his close adherence to precedent and strict application of the law, regardless of considerations of justice and social utility, is one kind of observation; to say that he accepts the "dogmatic" model as a desirable one, as a symbol of the ideals to which he aspires in his judicial behaviour, is a different observation. *A fortiori*, to say that a jurist *perceives* the judicial process, in his *descriptive* writing about

¹⁸ (1967), 35 *U.Chi.L.Rev.* 14. Much of Dworkin's rhetoric there is directed to certain straw men dubbed "nominalists". I assume that these are "legal realists" under another guise.

that process, in terms of a "legalist" model, is quite different from saying that he believes, as a matter of *prescriptive* viewpoint, that the proper performance of tasks of judgment *should* reflect that model. No doubt, in the writings of both "legalists" and "realists" about judgment, their prescriptive models largely shape their *descriptive* observations. But a careful drawing of such distinctions, and a careful observation of how the descriptive and prescriptive goals of legal theory interact, would greatly enhance our understanding of most theoretical writing about judicial decision-making.

With these preliminary clarifications, the objectives of the present article can at last be stated. We begin with a crude polarity (in terms of actual judicial behaviour) between "dogmatism" and "pragmatism"; and another polarity (in terms of jurisprudential theory) between "legalism" and "realism". We shall try, by adapting Becker's typological elaboration of a sacred/secular scale, to attain a more closely empirical and more flexible understanding of the realities underlying these crude intuitive contrasts.

C. Law and Culture

Even then, this parallelism between different kinds of polarity used to symbolize contrasting attitudes to the prospect of change does not fully explain the potential value of Becker's model for lawyers. It is not that an analysis developed for the study of one set of (extra-legal) cultural responses to change can conveniently be "borrowed" as a tool for study of a *different* set of (legal) responses which also happen to be focused on the prospect of change. It is rather that Becker's field of inquiry, properly understood, embraces legal phenomena, and attitudes to those phenomena, as an important and integral part. Becker's concern is *not* with extra-legal evaluative systems to which we must somehow try to *analogize* legal phenomena; it is rather with a broad and all-inclusive range of *cultural* systems, of which law is one example.

The point is not merely the obvious one that the *law* of any community is an important part of its *culture*. It is rather that the legal aspects of a society's culture contain within themselves, in a highly developed and sophisticated form, all the working parts of "a culture"; so that law, for many purposes, can be studied almost in isolation as a distinct subculture, often substantially independent of other parts of the culture, and displaying in microcosm all the features of "culture" in general. In particular, law as we know it in any human society is an interaction of three distinct dimensions or variables.

First, "the law" consists of a specific and partially independent "social system", occupying a high-level role of formulation and maintenance of explicit behavioural norms, in relation to the whole society of which it forms a part. "The law" in this sense is a complex set of well-defined *institutions* — courts, legislatures, administrative agencies, and law-applying and law-enforcing organs of all kinds — along with the totality of the human beings who staff and serve them. In law as in other subcultures, of course, the most important functional effect of these institutions is to provide a well-defined and predictable set of interdependent social roles, and clear expectations of conduct and behaviour in those roles, for the human actors who must perform as official representatives of the institutions, or ancillary servitors of them.

In a second sense, "the law" may mean the ongoing *process* of creation and application of norms, which flows from (and indeed *is*) the working of these institutions. The focus here is on the human activity — including verbalizing, reasoning and choice-making activity — for which institutions provide both a physical setting, and a formal cultural structure. In this sort of context, for "cultures" in general, Becker speaks of the "essential" human activity as a rolled-up, undifferentiated one of "knowing-desiring-norming".¹⁹ From this viewpoint, the fundamental problem in studying any body of culture is to understand how this human commingling of perceptions and evaluations, itself an input into the culture, is influenced or even determined by other component parts of the culture.

In a third sense, "the law" may mean the specific body of *cultural materials* of substantially normative content, which are used by the institutions of "the law" as distinctive instruments of its processes. It is this component in legal culture to which Roscoe Pound gave the definitive rubric "the authoritative legal materials";²⁰ and, of course, the theoretical conflict between "legalism" and "realism" is largely concerned with how exclusively this body of received doctrine should be used as the basis for the reasoning and decision-making activities of judges. Taking judges' "knowing-desiring-norming" as a starting-point for inquiry, we are asking how far that activity is (or ought to be) controlled by the use of "authoritative legal materials".

It is, of course, fundamental to any attempt of this kind to distinguish the interacting variables in any body of culture, that each of the variables thus perceived can meaningfully be taken as a starting-point for inquiry. We might analyse the workings of law from the viewpoint of a focus either on legal institutions, or on the human activities (and especially "knowing-desiring-norming") of men in those institutions, or on the authoritative materials ("culture" in the narrow sense) which are taken as the ostensible and best-articulated basis for "knowing-desiring-norming". But, wherever we start, our objective should be to enhance understanding of the *interaction* which is taking place continually among all these variables. Ultimately, our concern is with the total workings of a total culture.

This sort of culture-wide concern, and especially a concern to locate men's devices for "knowing-desiring-norming" in their total cultural context, is (in relation to cultures in general) the subject of Becker's inquiry. Insofar as his study is successful, it ought to be *directly* applicable to *judicial* "knowing-desiring-norming", not by way of analogy, but by way of a paradigm case. "Sacred" and "secular", in his usage, are not terms for picking out one sub-set (or one range of applications) of men's cultural ideas; they are terms for studying the operation of culture in general. In focusing on "knowing-desiring-norming", he is concerned to stress, first, that sociological inquiry must always be addressed to fluid and ongoing social *processes* (which are really human *activities*), rather than to reified structural models imposed upon (and giving an illusory static or "frozen" appearance to) the actual social flux; second,

¹⁹ Becker (1957) at 140.

²⁰ See 2 R. Pound, *Jurisprudence* (St. Paul: West Publishing Co., 1959) at 106 *et seq.*

that the processes and human activities studied are always fundamentally geared to the implementation of *values*, in the broadest possible sense;²¹ and third, that the identification and pursuit of values is always dependent upon, and shaped by, an all-embracing context of culture.²²

But this all-embracing reference frame, which makes Becker's work so receptive to *legal* applications of it, is also the source of certain confusions and unnecessary complexities in his analysis. The danger of trying to talk about "culture" (or even about "values") in an all-embracing sense, is that we lose any clear conception of what we are talking about. In constructing his sacred/secular scale, Becker is careful *not* to commit himself to any assumptions about the unidimensionality or cumulativeness of scales;²³ but the loss of scientific rigour which this self-abnegation entails may also be a loss of consistency, and even of clarity. Certainly, the overall structure and drive of his analysis would have been clearer if he had kept firmly in view some directly comparable aspect or point of view, in respect of which the different points on his scale were being linked with each other. As it is, his discussion seems to pile indiscriminately one upon another several different layers of analysis.

Thus, the "sacred" end of his scale — that is, the whole range from *extreme* resistance to change, to a neutral mid-point at which change is neither resisted nor sought — is first presented through a parade of what are really different "types" of *sets of behavioural norms*: the holy; the loyalistic ("compromising clan allegiance, patriotism, identification with one or another race, class, faction, party"); the intimate ("ties with playfellows, friends, comrades, mates, partners"); the moralistic; the fitting; and the merely appropriate ("the sacred on the fringe of fadeout").²⁴ The kinds of norms embraced by these different loyalties are so diverse that it is doubtful whether they form any kind of unilinear set; and whatever unifying principle *may* be present seems not to be extendable into the "secular" reaches of the scale. At times, in this catalogue of (progressively weaker) "sacred" loyalties, Becker speaks as if he is comparing "types of evaluation"; at times his concern is rather with types of *orientation* to values.²⁵ At times the criterion for differentiation of points on the scale appears to be the kind and degree of *punishment* which one is willing to inflict on others for their infringement of

²¹ See Becker (1957) at 134: "Swiss cheese, 'pie in the sky', well-being, misery, concealed pride, a prestigious Cadillac, an enemy soldier, Satan, glory, and a ten-dollar debt are all objects of needs of some kind, and in our sense are values."

²² See Becker (1957) at 139-40, 142-43. By way of theoretical background he invokes G. H. Mead's "symbolic interactionism", as to which see G. H. Mead, *Mind, Self and Society* (Chicago: Univ. of Chicago Press, 1934; A. M. Rose ed., *Human Behaviour and Social Processes* (London: Routledge & Keegan Paul, 1962); A. Strauss ed., *The Social Psychology of George H. Mead* (Chicago: Univ. of Chicago Press, 1956).

²³ See Becker (1957) at 143n.

²⁴ *Id.* at 143-49.

²⁵ To some extent the confusion here may be merely grammatical, depending on whether in particular contexts it is more convenient to talk about valuing *attitudes*, or about the *objects* of such attitudes. See *supra* note 7. But some degree of substantive confusion, or comparison of incommensurables, appears to be present as well.

one's own felt obligations (ranging from death to "nothing more than mild and courteously concealed amusement . . . no more than an inadvertent twitch at the corners of the mouth");²⁶ at other times the focus is rather on the kinds and degrees of hardship which one is willing to undergo oneself in the implementation or defence of such obligations (ranging from martyrdom to mild inconvenience). This last criterion, identified (perhaps too readily) with his own initial criterion of degrees of resistance to change, appears to be Becker's most deliberate choice of a unifying feature for the "sacred" parts of his scale; but *this* criterion turns out not to be convincingly usable for the "secular" parts of the scale.²⁷

Accordingly, in the present adaptation of Becker's analysis, this level of classification will be wholly jettisoned — not merely because it is not readily applicable in *legal* contexts, but because it does not seem theoretically satisfying even in the culture-wide contexts for which it was designed.

At a second level, reduplicating in parallel tracks the ground already traversed (and therefore still dealing only with the "sacred" part of the scale), Becker traces the different workings-out, for all the above kinds of loyalty, of the principle that "sacred" allegiance is always manifested (and significantly reinforced) through adherence to ceremonial and ritual forms of behaviour.²⁸ But this, too, proves not to be convincingly transferrable to the "secular" parts of the scale;²⁹ and this, too, will here be dispensed with.

At a third level, again retracing the "sacred" part of the scale, he identifies two main varieties of implicit or explicit "symbolizing of sacred reluctances": the proverbial and the prescriptive. The focus here, as we shall see more fully in the next section, is quite clearly on the kinds of collocations of norms which a culture may transmit as explicit techniques for social control; and at first sight this concentration on types of predetermined normative system may seem to render this approach, too, incommensurable with that employed in the "secular" parts of the scale in which the significant unifying factor is a relative *absence* of predetermined articulate norms. Becker, however, retains the labels "proverbial" and "prescriptive" to denote the first two of four types of *society* to which, in the end, the whole of his sacred/secular scale is reduced; and our own adaption of his scale will use these same labels to denote two of the five types of decision-making on which that adaptation will focus. The essential unifying feature, which Becker's own account never precisely spells out, is that, once we focus on different ways of "knowing-desiring-norming", we are really directing our attention to different *strategies* which men and their societies may favour *for the making of value-choices*; and appeal to predetermined norms, whether "proverbial" or "prescriptive", is one kind of strategy for such choices. This normative strategy, in both its versions, is relatively resistant to change (and hence displays a "sacred" orientation in Becker's sense); strategies relatively independent of predetermined norms are also relatively receptive to change (and

²⁶ Becker (1957) at 148-49.

²⁷ See *id.* at 161-62.

²⁸ *Id.* at 149-52.

²⁹ See *id.* at 162-63.

hence "secular" in his sense). The focus on preferred or dominant strategies for value *choices* is not only the focus which *we* need for a typology of judicial decisions; it is also the missing focus which alone makes coherent overall sense of Becker's typology of "cultures".

In the "secular" reaches of Becker's scale, he again proceeds at two levels. First, focusing now much more directly upon his own basic criterion of receptiveness to change, he proceeds from bare receptiveness to frenetic eagerness for change for its own sake,³⁰ but here again *our* criterion, of favoured strategies for value choice, seems an equally appropriate one. From adherence to principles (seen essentially as receptive to change, yet in many attitudinal ways as still reflecting the normative orientations of the "sacred"), he proceeds to two kinds of purposive or teleological evaluation: the "pursuant" (i.e. pursuant to abstract principles) and the "expedient".

His account of "pursuant" evaluation tends to conflate it substantially with adherence to principles. By contrast, we shall here attempt to purge his account of principalial decision of "pursuant" overtones (leaving "principles" isolated in a rather pure and contentless form), and shall instead assign "pursuant" evaluation (along with "expediency") to a single category which (in part on substantive grounds, and in part for the sake of alliteration!) we shall here describe as "pragmatic".

Finally, Becker moves to consider types of evaluation which, though not wholly abandoning norms, appear characteristically to *favour* or tend *towards* normlessness. This tendency to normlessness Becker dubs "pronormlessness"; it completes his scale, and ours.

At a second level, Becker parallels this account of "secular" strategies for evaluation by identifying two broad "secular" types of society, designed to balance (as it were) the "proverbial" and the "prescriptive" as types of "sacred" society. For this purpose he omits the "pursuant" and "expedient" altogether, presumably assimilating the former to the "principalial", the latter to the "pronormless". Whether we focus (as we shall do here) on types of decisional strategy or (as he does) on types of society, this wholesale omission of the entire range of value-orientations here labelled "pragmatic" appears to be a serious weakness in his final scheme. It is thus on grounds of substance, as well as of symmetry, that we here substitute a set of *five* types for Becker's final *four*. Even if our concern, like his, was with types of society or culture, our set of five types would seem more appropriate to analytical needs. For as soon as the criterion for classifying cultures is seen to be that of preferred or dominant strategies for value choices, the five type-concepts now to be offered seem to represent the fullest and most rewarding application of that criterion. The present five-item scale is offered *both* as an adaptation of Becker's sacred/secular scale for lawyers, *and* as an improved model of it for sociologists.

Without more ado, I shall now describe in more detail the five positions on our revised sacred/secular scale.

³⁰ *Id.* at 155-61.

II. FIVE GO ADVENTURING AGAIN³¹

A. *The Proverbial*

In contexts of extreme resistance to change, the characteristic kind of norm invoked in support of evaluative judgments is the proverb. Such norms are "chiefly of traditional and nonrational character." They are transmitted "through communication among intimates rather than through being entrusted to specialized instructors functioning in formal organizations such as schools"; and the tradition thus imparted is accepted and adhered to "merely because it is tradition". Proverbs are "compressed bits of verbalized experience", presented to us usually in "jumbled masses" rather than in any codified system. (They may, however, be "intertwined, grown together, or merged" to acquire a kind of holistic significance which goes beyond a mere congeries into what Becker calls "accreteness".)³² The explicit meaning of any "proverb" may often be relatively trivial, but it is "full of *implicit* symbolism", mostly of great normative importance. It is at this implicit level that tendencies to "accreteness" enter: "the implicitness of at least part of the proverb, concretely considered, is accompanied by the related implicitness of its systematic linkage with other proverbs." Yet proverbs

are often contradictory in content even when full account is taken of both explicit and implicit aspects. The users of proverbs glibly repeat first one and then another, without seeming at all disturbed by what to outsiders are obvious discrepancies which would be viewed as such by insiders too if they had ever taken the trouble to codify their proverbs.³³

That legal maxims behave in ways that are characteristic of proverbs is self-evident, both in their traditionalism and in their irrationality.³⁴ What may not be quite so self-evident is that common law rules in general display the same grounding in an essentially oral tradition, the same chaotic and cheerful juxtaposition of contradictions, and the same dependence on implicit and potential depths of meaning for their growth and effectiveness.

Moreover, a "proverbial" culture is also a "pro-verbal" culture, a "folk" or "preliterate" one which tends to favour oral rather than written communication for the transmission of its learning and lore. The system of precedent was in its early centuries precisely a folklore system; and its transformation, through written reports, from oral lore into written learning, was vigorously resisted by a whole generation of judges.³⁵ Techniques of legal education, well into the twentieth century, have reflected the underlying assumptions of an ongoing oral tradition, not only in the continued practice of

³¹ With apologies to Enid Blyton.

³² The distinction between a mere congeries, and a rationally structured system, is a crucial difference between "proverbial" and "prescriptive" norms. Cf. P. A. Sorokin, *Sociological Theories of Today* (New York: Harper & Row, 1966) at 17-31.

³³ Becker (1957) at 153. See generally *id.* at 152-53, from which all the above quotations are taken.

³⁴ On the former aspect see Lord Kenyon, C.J., in *R. v. Waddington* (1800), 1 East. 1430, 102 E.R. 56; on the latter aspect see Lord Esher, M.R., *Yarmouth v. France* (1887), 19 Q.B.D. 647, at 653-54.

³⁵ See C. K. Allen, *Law in the Making* (7th ed. Oxford: Clarendon Press, 1964) at 227-28; C. G. Moran, *The Heralds of the Law* (London: Stevens & Sons, 1948); and *Slater v. May* (1704), 2 Ld. Raym. 1071, 92 E.R. 210.

personal pupillage, but generally in their adherence to mechanisms of "social learning" as ancillary to formal instruction — and indeed, until quite recently, to the exclusion of formal instruction.³⁶ The result is that the legal profession still displays many of the cultural and attitudinal characteristics that go with a "proverbial" tradition.

B. *The Prescriptive*

The content of "prescriptions", like that of "proverbs", is basically drawn from tradition; but this content is now explicitly stated, and is subjectively seen as open to further elaboration and explanation. To that extent there is *more* receptiveness to change and adaptation in "prescriptions" than in "proverbs". But such adaptations as do take place are still rather grudgingly made; Coke's willingness to engage in "renovation", but not in "innovation",³⁷ neatly symbolizes the limits of adaptability here. The available leeways for change do not go much further than a recognition that at any given time, "prescriptions" are to be "formulated as pointedly as is possible at the time in the given cultural context".

Moreover, though "prescriptions", like "proverbs", remain not really systematic but merely "accrete", they are further removed than are "proverbs" from mere jumbled congeries:

. . . they are stacked, so to speak, in piles more or less orderly as contrasted with higgledy-piggledy heaps of proverbs. Such orderliness lends itself to at least the semblance of deductive systematization, although much more often than not it is merely semblance. The system amounts only to a crude catalog sequence, determined by historical happenings, convenience of memorization, or peculiarities of the method, if any, of making some sort of record . . . in many cases the stack is solidified by troweling deductive mortar between the joints, and a great deal of ingenuity may be lavished on this task.

This "troweling" of deductive "mortar" has an impact not merely on the formal appearance presented by the materials on which the decision-maker draws, but also on the way in which he works in using these materials. Although the prescriptive "system" remains *in fact* merely "accrete" — its deductive "solidification" having an "oftentimes 'afterthought' nature" — these "afterthoughts" permit us to classify fully developed prescriptive "systems" as "formally rational".

That is to say, "good reasons" can usually be given by their adherents for the existence and perpetuation of every one of the parts and the totality. As we know, the offering of "good reasons" usually amounts to nothing more than . . . rationalization or *ex post facto* justification, but the justification may be very consistently carried out. Indeed, it may be a task specifically assigned to highly trained scribes, priests, "doomsmen", and the like.³⁸

Clearly, insofar as judicial decision-making at common law is a matter of applying a set of authoritative legal rules, these legal rules form precisely a system of "prescriptions" in Becker's sense.

³⁶ For the history here see W. S. Holdsworth, *A History of English Law* (London: Methuen, 1938) at 481-499; C.H.S. Fifoot, *Judge and Jurist in the Reign of Victoria* (London: Stevens & Sons, 1959) at 21-28. As to the twentieth-century position in England see B. Abel-Smith & R. Stevens, *Lawyers and the Courts* (London: Heinemann, 1967) ch. 7. And see *infra*, note 65.

³⁷ *Calvin's Case* (1608), 7 Co. Rep. 1a, at 27a; 77 E.R. 377, at 409.

³⁸ Becker (1957) at 154, from which all the above quotations are taken.

C. *The Principial*

Although Becker's sacred/secular scale is obviously to be interpreted as a nonmetric one, he sometimes finds it convenient (while avoiding "unduly precise connotations") to depict it "algebraically" as ranging in effect "from maximum plus to maximum minus, with a zero or transitional point somewhere about the middle."³⁹ In a nonmetric scale no "true zero point" or "center of indifference" between reluctance and receptiveness to change can actually be located;⁴⁰ but "from the analytic angle such a point must be postulated".⁴¹ "Principled decision-making" lies not quite at this postulated point, but at the stage when "transition through the zero point occurs", and "the secular portion of the scale begins". Here readiness to change and resistance to it are "almost in balance . . . but not quite". The "nature, speed, or range" of change accepted as tolerable are still subject to "certain restrictions stemming from the sacred"; and though "proverbs" and "prescriptions" are now markedly diminished in compulsion, "a good deal of their remaining efficacy may be transferred to somewhat more abstract formulations functioning as . . . principles". For all this, the crucial point is that within the limits set by these principles, with their lingering aura of sacredness, "there is acquiescence in change, active assent to it, or even search for it."⁴²

This relative acquiescence in change is a product of the high degree of *abstraction* entailed in the formulation and application of principles. Proverbs and prescriptions are confined to "concrete" applications, "tightly bound to their immediate manifestations in conduct; extensive variation in the way they are applied therefore destroys their effectiveness". The abstraction process which leads to the emergence of principles is essentially a way of "salvaging" the content of proverbs and prescriptions, by cutting them loose from "specific actions enjoined or prohibited", and giving them "general bearing". The resulting secular principles

are considerably more flexible, admitting of many changes in application without rendering them worthless . . . Such abstract principles are still viewed as sacred, for they are regarded as basically unalterable, but the scope of the circumstances

³⁹ *Id.* at 143.

⁴⁰ This is so even in the case of unilinear jurimetric scales, since their extreme points are *not* "maximum plus" and "maximum minus", but only the *most* extreme positions occurring in a particular court at a particular time; and since all measurements in such a scale are relative to the particular group of judges being observed, there is no way of knowing how closely (if at all) the observed extremes approximate "maximum plus" and "maximum minus". See A.R. Blackshield, "Quantitative Analysis: The High Court of Australia, 1964-1969" (1972), 3 *Lawasia* 1, at 55-56, n. 198. It may nonetheless be worth noting here that in other researches (as yet unpublished) of the kind there reported, I have found a certain amount of evidence that as well as the X and Y Scales there reported, which respectively measure political and economic conservatism and "institutional authoritarianism" in the High Court of Australia, that Court's decisions have sometimes appeared to support the construction of a Z Scale, which would measure degrees of willingness to depart from "strict legalism". In such a scale *some* Australian judges (e.g., Sir Owen Dixon) have at times appeared to occupy, *in relation to their colleagues*, a "zero point" or "centre of indifference". And see *infra*, note 62.

⁴¹ Becker (1957) at 155.

⁴² *Ibid.*

to which they have become applicable is so great that striking changes may come about under their auspices — changes that their formulators rarely if ever concretely envisage, but that may be foreseen as the vague 'shape of things to come'. Presumably inviolate and inviolable, abstract principles nevertheless lend themselves to changes that as time goes on may be very far-reaching indeed.⁴³

The changes thus ushered in under the sanctioning shelter of "principles" may, says Becker, be rationalized as changing "means" to enduring "ends"; or they may be justified by deductive argument similar to that employed in applications of a prescriptive system. In either case, whether because of the entanglement of "means" and "ends" in conceptual renderings of human affairs,⁴⁴ or because of the tendency to "justificatory argument rather than genuine deduction", the truth is that such interpretive judgments, though purportedly merely "pursuant" to the implementation of "principles", amount to substantive changes of the operative value-system. These changes are reflexive in impact: they "progressively modify the principles to which they are pursuant".

The "vastly wider scope of change" under principled rationality is made possible (as we have seen) by the high level of abstraction of the "principles" employed. But the principled decision-maker must pay a price for the freedom which this abstraction offers. The converse consequence of abstraction is that the "interpretations" which the decision-maker must give to connect his principle "with the concrete enactments it ostensibly sanctions must be highly sophisticated and hence beyond the grasp of most laymen". It may then be difficult to convince these laymen that any "principle" whatsoever is still in fact being observed.⁴⁵

In other words, to locate the principled decision-maker "almost" at the mid-point between "sacred" norm-application and "secular" creativity is to assign him to a delicately equilibrating ground which, insofar as it can be held at all by actual men or their institutions, can only be perilously held. Progressive "abstraction" of precepts, yielding progressively higher "principles", cannot be continued indefinitely, but at a certain point may render principles so rarefied in content as to become almost vacuous; and external observers of the "principled" decision-making process may think that this vanishing-point of "principles" has been reached even before it is subjectively

⁴³ *Id.* at 156.

⁴⁴ Cf. Lon Fuller, "American Legal Philosophy at Mid-Century" (1954), 6 *J. Legal Ed.* 457, at 480; Lon Fuller, "Human Purpose and Natural Law" (1958), 3 *Natural L.F.* 68.

⁴⁵ Becker (1957) at 156-57; and see Howard Becker, *Man in Reciprocity* (New York: F.A. Praeger, 1956) at 184ff. ("Abstraction is Necessary for Principle, but Harmful to Principle"). There is thus a rich and deeply illuminating paradox in his suggestion (see Becker (1957) at 156) that the decisional strategies of the U.S. Supreme Court are an example of judgment through "principles". For Becker, in 1957, was making this suggestion just as respected legal scholars were beginning to unleash a storm of criticism against that Court precisely for its supposed failure to produce any meaningful "principles" at all. See, e.g., H. M. Hart, "Comment", in M. G. Paulsen ed., *Legal Institutions Today and Tomorrow* (New York: Columbia University Press, 1959) at 40; H. Wechsler, "Towards Neutral Principles of Constitutional Law" (1959), 73 *Harv. L. Rev.* 1. And see *infra*, note 75.

reached in the decision-maker's own approach to his task.⁴⁶ At this vanishing-point of "principles", the balance which they represent between traditional continuity and openness to change will be lost. Either, as the "principle" melts away, we shall be left with merely a congeries of the concrete enactments drawn from it, and thus relegated to "prescriptive" (or even to "proverbial") valuations; or the last tenuous link with "sacred" tradition will be dissolved, releasing decision-making processes into unrestricted freedom to choose an expedient "result" in each case.

D. *The Pragmatic*

Freedom to choose expedient "results", despite ubiquitous innuendoes in jurisprudential debate, is not necessarily inconsistent with adherence to "principles". Nor is it necessarily any less admirable than such adherence. If the most carefully "principled" procedures may sometimes be "compatible with very great iniquity",⁴⁷ the most brusquely "expedient" pursuit of convenient pragmatic solutions may equally be compatible with benevolence of intention, and beneficence of result. "Expediency" may even without undue linguistic strain be *limited*, by stipulative definition, to pursuit of the "trans-empirical" and "absolutely valid" ideals of the good, the true, and the beautiful.⁴⁸ And even if the ideals or purposes pursued are "fantastic" or "non-sensical",⁴⁹ "expedient" decision-making remains rational in a double sense: first, that it must be directed to the intelligent pursuit of *some* ideal or purpose, and second, that it is restricted in its choice of means to the choice of what is feasible, and likely to realize the desired ideal" . . . only that which seems likely to work is put into operation"; expedient choices are restricted "by rational judgments of instrumental efficiency".⁵⁰ If "prescriptive" decision-making is close to an ideal type of Max Weber's "intellectual" or "conceptual" rationality, "pragmatic" decisions are close to an ideal type of his "efficient" or "economic" rationality.⁵¹

⁴⁶ It is at this stage of the judicial process that charges of delusion and self-delusion begin to fly. See J. Frank, *Law and the Modern Mind* (New York: Brentano's, 1930) at 222-31; A. S. Miller & A. W. Schefflin, "The Myth of Neutrality in Constitutional Adjudication" (1960), 27 *U. Chi. L. Rev.* 661; J. Stone, *Social Dimensions of Law and Justice* (London: Stevens & Sons, 1966), at 676-87. But if an observer thinks that a judge is using a principle so tenuous, and so remotely relevant, as to yield no "principled decision" at all, and if the judge subjectively and sincerely believes that he is working with a "real" principle from which his conclusions are genuinely drawn, which view is to be taken as the truth of the matter? The real problem arises when some observers accept at face value the illusion of a principled decision, while other (more acute) observers, and the judge himself, know that this is merely illusion.

⁴⁷ See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 202.

⁴⁸ See Gustav Radbruch, *Rechtsphilosophie* (6th ed. Stuttgart: K. F. Koehler Verlag, 1963) at 147; and English translation in K. Wilk ed., *The Legal Philosophies of Lask, Radbruch, and Dabin* (Cambridge, Mass.: Harvard University Press, 1950) at 91.

⁴⁹ Becker (1957) at 159.

⁵⁰ *Id.* at 158.

⁵¹ See Max Weber, *Wirtschaft and Gesellschaft* (2nd ed. Tübingen: J. C. B. Mohr, 1925) at 395-97, 412, 456 ff., 468 ff., 492-93, 661 ff.; and English translation in Max Rheinstein ed., *Weber on Law in Economy and Society* (Cambridge, Mass.: Harvard University Press, 1954) at 61-64, 96-97, 198 ff., 224 ff., 276-78, 350 ff. And see A. R. Blackshield, "A Pelican in the Wilderness" (1966), 19 *J. Legal Ed.* 127, at 155 *et. seq.*

The contrast of "pragmatic" with "principial" decisions is, therefore, simply that the latter are "rationally limited" not only in the means employed, but also "in the ends toward which they may be directed; consistency with presumably unalterable principles is demanded."⁵² By contrast, "expedient rationality" is that which has been freed of restrictions imposed by this last kind of demand; expediency⁵³ "means only acting in such ways as to free, release, or extricate — to remove hampering restrictions". Expedient rationality is a "result-oriented" or (in Becker's term) a "consequent" rationality; but at the level of means (whether or not at the level of ends) it is still a rationality.

Yet, in a sense, the habits of speech which flatly oppose "expediency" to "principle" are after all justified. It is empirically true that often in human affairs, decision-makers choose "expediency" either because of impatience with the fetters of "principle", or because of traumatic emergencies which make adherence to principles no longer a viable option.⁵⁴ The kinds of decision-makers who manifest impatience with principles are frequently likely to be men not committed to benevolent ideals; the kinds of crisis-situations giving rise to trauma are even more frequently likely to be unreceptive to the flourishing of such "abstract" commitments.⁵⁵ To that extent only, it is true to say that unprincipled procedures are likely to have an empirical "affinity" for evil purposes.⁵⁶

E. *The Pronormless*

More unambiguously open to rational condemnation are choices "so remote from even formal rationality" that it is no longer possible to distinguish "means" from "ends". Both means and ends are now "so heavily charged with emotion as to be "strikingly" irrational — "counter-rational, rather than merely nonrational". Such choices, says Becker, are oriented to "at least two types" of means (or ends?) of personal gratification: "the comfortable and the thrilling".⁵⁷ In either case, the result is almost — but not quite — "normlessness".

. . . persons flinging themselves into the nonrational pursuit of the new as new overstep most if not all proverbial, prescriptive, and principial limits; indeed, even the rational requirements of consequently secular conduct exercise little or no control . . . [A] high proportion of the previously functioning norms, whether merely "external" or "internalized" . . . are evaded, disregarded, altered, or flouted . . . This relative normlessness reaches beyond the form and content of the norms themselves in that the connections . . . linking the norms into some ascertainable kind of system, weaken rapidly, fluctuate, or almost vanish

⁵² Becker (1957) at 158.

⁵³ Etymologically linked with the Latin *expedire*, "to free the feet".

⁵⁴ Becker (1957) at 157.

⁵⁵ On totalitarian and other disruptive potentialities here, see *id.* at 158; and the fuller discussion in Becker, *op.cit.supra* note 13, at 281-305.

⁵⁶ See on Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) at 153-55, 157-59; Lon Fuller, "A Reply to Professors Cohen and Dworkin" (1965), 10 *Vill.L.Rev.* 655, esp. at 664. But in any wider sense than the above, claims for this sort of "affinity" remain extremely hazardous. See H. L. A. Hart, Book Review (1965), 78 *Harv.L.Rev.* 1281; A. R. Blackshield, Book Review (1965), 20 *U.Va.Reading Guide* 11. And see *supra*, note 47.

⁵⁷ Becker (1957) at 159.

. . . [T]he accrete character of proverbial and prescriptive value-systems, the at least ostensibly deductive . . . character of principal value-systems, and even the rationally means-restricted character of consequent value-systems are so fundamentally changed by the hither-and-yon search for transitory and disconnected ends . . . as hardly to warrant use of the term "system".⁵⁸

Yet — at any rate so far as we are concerned with social decisions, or with any decisions having more than a purely personal significance for the pleasure-loving individual — *total* normlessness is simply inconceivable. A society, or the makers of its decisions and ideologies, may "*favor* a normless state of affairs"; but in fact "needs and their correlative values are never utterly discrete, never wholly 'private', never completely at random, never without functioning system." The most we can say is that decision-making may be "pronormless", meaning that it is shaped by an *aspiration*⁵⁹ to total normlessness.⁶⁰

III. THE "SACRED" AND THE "SECULAR" IN JUDGMENT AND JURISPRUDENCE

To ask which of the preceding five types of decisional apparatus offers the "correct" pigeonhole into which legal decisions "fit" would be, of course, to ask a misconceived and meaningless question.⁶¹ Actual subcultural "blocks" of human evaluative experience — legal, moral, managerial and other — will each have their own version of the sacred-secular "scale", any empirical instance being *potentially* located at any point upon it. A body of evaluative experience such as that of judicial decision-making, in which innumerable instances succeed one another in institutionalized continuity, will seem in long-term historical perspective to wander back and forth along the scale; and while this wandering may at some broad levels of analysis be amenable to interpretation and presentation in terms of pendulum swing,⁶² at other (more closely historical) levels it may seem simply erratic.

⁵⁸ *Id.* at 160, from which the following quotations are also taken.

⁵⁹ See Blackshield, *supra* note 6, at 18, 21-22.

⁶⁰ *Cf.* D. Lloyd, *The Idea of Law* (Baltimore: Penguin Books, 1964) at 14-24; Stone, *op.cit.* *supra* note 46, at 473-78.

⁶¹ See *supra*, note 15.

⁶² See Paul Weiler, *In the Last Resort* (Toronto: Carswell/Methuen, 1974), e.g. at 227, arguing that in the 1950s the Supreme Court of Canada, while working through the medium of highly prescriptive judgments, was in fact consistently "groping towards, and . . . gradually achieving" a substantive principial output, but that in the 1960s the Court "regressed" to pure prescriptivism. (He sees signs of "another fundamental change" for the 1970s.) Exactly the same recession from the "principial" style of the fifties to a disappointing "prescriptivism" in the 1960s has been true, to a very striking degree, for the High Court of Australia. See Blackshield, *supra* note 40, at 12-13. Moreover, in both these national courts, the sixties' "prescriptivism" has masked an even more disappointing reliance on "proverbialism", along with a (sometimes rather uneasy) attempt at pragmatism. More intriguingly still, the 1950s, which were thus in both Canada and Australia a high point for "principled" judgment, were in Britain (especially in the House of Lords) a decade of the most rigid "prescriptivism" for many years; and the 1960s, which in the Dominions have seen a falling away from "principles", have in Britain seen their triumphant return. No doubt these pendulum swings are due in part to the influence merely of dominant individual judges: Rand in Canada, (and Laskin *de praesenti et futuro*), Dixon in Australia, Reid (and perhaps more recently Diplock) in the House of Lords. But significant factors of "period style", reflecting wider cultural movements, seem also to be involved.

Moreover, a single body of decisions, proceeding from a single institution or group in a single cultural and temporal context, may seem to occupy simultaneously two inconsistent places on Becker's continuum. In particular, if we take his "principled" mid-point as the ideal, it is possible that a decision-making individual or group may seem to fall short of this ideal in both directions at once.⁶³

Nevertheless, it seems possible to venture some assertions about the places on the continuum which common-law judicial processes (and scholarly views concerning these) have occupied from time to time.

At least in terms of judges' aspirations and self-perceptions, the "normal" location of common law judgment appears to vacillate between the prescriptive, and the "principled". But achievement and aspiration do not always coincide. In the following sketch of how our typology might be applied to an overall view of empirical judicial behaviour, we must be advertent *both* to ways in which judges implement their prescriptive and principal aspirations, *and* to ways in which they veer off in proverbial or pragmatic directions, or in both directions at once.

For example, where adherence to legal tradition (or to some broader national or cultural tradition) is particularly strong as a value, the prescriptive procedures which are normal for judges may tend to gravitate towards the merely proverbial. Alternatively, this may happen where (as in pioneer or "frontier" societies) a sense of cultural isolation and a sharing of common hardships binds judges, lawyers and laymen together in a strong sense of community.⁶⁴ (This is only to say that "proverbial" patterns of judgment may flourish either in very old or in very new societies.) In either context, the tendency to proverbialism will be reinforced if these cultural values are coupled with adherence to the common lawyer's faith in techniques of empirical problem-solving that do not transcend the concrete context of each individual case. We have seen that common law techniques of legal education (or professional socialization) may also encourage proverbialism,⁶⁵ and so

⁶³ See Becker (1957) at 158, observing that totalitarian systems "unite, in seemingly incongruous but none the less effective ways, both rigid prescription and far-reaching expediency".

⁶⁴ See *id.* at 164-72, emphasizing the crucial role in the shaping or dissolving of "sacred" allegiance (and hence of "proverbial" judgment) which is played by "vicinal, social, and mental" isolation. Perhaps the Canadian achievement (on the whole an enviable one) in retaining, in the midst of an advanced post-industrial culture, many of the cultural ideals and attitudes of a frontier society, may help to explain the relatively high degree of "proverbialism" which appears to be a distinctive feature of Canadian judicial performance.

⁶⁵ See *supra*, note 36. This, too, for all but the newest generation of Canadian judges, might be a reason for a very high degree of proverbialism. See H. Arthurs, "The Canadian Legal Profession in Transition", in J. Ziegel ed., *Law and Social Change* (Toronto: Osgoode Hall Law School/York University, 1973) at 1, esp. at 3-9. To paraphrase Dean Arthurs' thesis in the present terminology, he is arguing that (save for a handful of men) Canadian legal education as late as 25 years ago was still *wholly* proverbial; and that prescriptive, principal and pragmatic patterns and ideals have all burst upon Canadian law schools together within the past generation. This would not explain the strong current of pragmatism in many Canadian judgments, nor the qualified triumph of "principles" in the Supreme Court of Canada for a time in the 1950s. (See *supra*, note 62.) But it would certainly explain why so much proverbialism has mingled with those other currents.

also (at least insofar as we take them seriously) would recurring expressions of sceptical distrust of legal theory, and especially of "logic".⁶⁶

Insofar as any or all of these factors operate to determine the values and drives of the legal culture, and hence the attitudes of lawyers and judges as they are shaped by that culture, such attitudes must inevitably fall short even of the minimal "semblance of deductive systematization" which is necessary to the maintenance of prescriptive rationality. Instead of deduction, judgment will turn on intuition, whose grounds are absorbed and expressible only through folklore.⁶⁷ Instead of systematic prescriptive structures (or rather, alongside of and disconcertingly commingled with them), the authoritative legal materials will incorporate "higgledy-piggledy" heaps of hybrid concepts⁶⁸ which are often stubbornly resistant to rational systematization, and depend for their workability on traditional lawyers' intuitions.

Yet common law judgment can never be *wholly* confined to proverbial patterns. In every case which he decides, the common law judge is under a compelling institutional duty owed to litigants and counsel, to other judges and to the legal tradition itself, to explain his reasons for judgment clearly; to formulate his norms "as pointedly as possible . . . in the given cultural context".⁶⁹ This duty presses on all judges; but most exigently on those who sit on the appellate bench. Its consequence is that if their decisions can never entirely escape the "proverbial" roots of the common law, they can never wholly sink back into "proverbialism", either. The professional role assumed by the judge drives him almost inevitably to find his core concept of judicial duty in prescriptive rationality, and to act accordingly. And if, on the one side, this rationality wavers towards the merely proverbial, on the other side it is constantly impelled towards the principal. In part this is because the pressure of exigent human problems (which, even if they cannot be solved, must judicially be "managed" *somehow*) is constantly impelling the judge to strain his available prescriptive materials to — and beyond — the limits of their adaptability. In part it is because the prescriptive materials themselves — through inherent possibilities and ambiguities; through contradictions which cannot be resolved by applying the "deductive mortar" of a prescriptive system, and must therefore be transcended by appeal to a higher plane of abstraction; and above all through the pervasive drive for "reasoned elaboration"

⁶⁶ See Stone, *op.cit. supra* note 11, at 230.

⁶⁷ One illuminating application of the present typology might be to debates concerning the almost uncontrolled discretions which arise from such practices as plea bargaining, selective prosecution, and the like. Concern about such practices is generally directed to the fear that, through them, the "prescriptive" ideal of equal justice through law may teeter over into (at best) the pragmatic, and (at worst) the pronormless. But perhaps our concern should rather be that such practices cause law enforcement to teeter *in the opposite direction*: away from principle and pragmatism, into "intuitive" and hence unexaminable judgments, based on nothing more than a folklore tradition which may well import values quite other than those we would rationally wish to pursue. (I am here indebted to a suggestion made by my student Ms. Carmen Williams.) Certainly, the plea-bargaining prosecutor is more like the priest of a "sacred" system than the playboy of a "secular" one.

⁶⁸ Trust? Quasi-contract? Assumpsit?

⁶⁹ Becker (1957) at 154.

tion" which prescriptive norms reflect, but cannot fulfil — both invite and encourage "principalization" of their ideas.⁷⁰

Normally, then, both through external challenges and through inherent drives for "principle", common law judgment has been prescriptive, tending to the principal. But it follows from this that for some courts, at some periods of their history, external challenges may be so constant and so large in implication, and inherent drives in the material to be used in justification may be so wide and pervasive, that the movement into "principled" decisions becomes virtually complete. In such a transition, the quality of the tasks that the court is typically called upon to perform may be decisive;⁷¹ and so may the relative *quantities* of different kinds of qualitative tasks which arise for disposition. Courts of constitutional review, accustomed to facing challenges of sweeping social and political significance, and required to deal with these on the basis of prescriptive materials whose prescriptions are framed in fundamental — if not monumental — terms, are here especially challenged to something more than mere prescription. Familiar observations on the special techniques required in cases where "it is a constitution that we are interpreting"⁷² take on a new significance in the light of Becker's spectrum; and so do observations on the contrast between the Supreme Court of the United States (whose work now lies almost wholly in the constitutional field), and other supreme tribunals like those of Canada and Australia (which combine such tasks with those of "ordinary" appellate review).⁷³ In "ordinary" appellate tasks, even a high appellate court is still pulled by the nature of the material with which it works (and of the problems upon which it works) towards the precise deductive analysis of prescriptive decision-making, and even towards the piecemeal intuitions of the proverbial. In tasks of judicial review, the pull is in the other direction.

Accordingly, a court which is habitually required to work in both these fields may be expected, even in its most prescriptively-oriented work, to show more awareness of and sensitivity to "principles" than would represent the norm for common law courts not thus doubly burdened; while even in

⁷⁰ See Stone, *op.cit. supra* note 11, ch.7 *passim*.

⁷¹ The nascent experience of the Supreme Court of Canada with the Bill of Rights is an obvious example; and initial judicial reluctances to respond to the challenge are only to be expected. See Weiler, *op.cit. supra* note 62, at 195 ff., 227. And see A. R. Blackshield, "Fundamental Rights' and the Institutional Viability of the Indian Supreme Court" (1966), 8 *J. Indian L. Inst.* 139, at 164, 169, 190-217, on the similar experience with "fundamental rights" litigation in the Supreme Court of India — as to which see now the remarkable judgment of Matthew, J., in *Kesavananda v. State of Kerala*, A.I.R. 1973 S.C. 1461.

⁷² See Marshall, C.J., in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, at 407 (1819).

⁷³ See e.g., in the Australian literature Sir Owen Dixon, Address at Annual Dinner of Am. Bar Ass'n. (1942), 16 *Austl. L.J.* 192 at 194-95 (also in Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (Sydney: Law Book Co. of Australasia, 1965) at 100, esp. at 104); G. Sawyer, "The Supreme Court and the High Court of Australia" (1957), 6 *J. Pub. L.* 482, at 488; S. H. Kadish, "Judicial Review in the High Court and the United States Supreme Court" (1959), 2 *Melbourne U.L. Rev.* 4 (Pt. I) 127 (Pt. II), at 153; R. Else-Mitchell, *Essays on the Australian Constitution* (2d ed. Sydney: Law Book Co. of Australasia, 1961) at xxx.

the largest issues of judicial review, attitudes and methodologies grounded in its prescriptive tasks will hold it short of full commitment to Becker's model of "principles". By contrast, a court not regularly subjected to the restraints of work in the prescriptive domain may be expected to shift more readily, and more completely, to "principled" commitment relatively unchecked by such restraints. For the Supreme Court of the United States, therefore, "principled decision-making" in Becker's sense would represent (almost) the norm.

In short, some courts may lie very close to exact correspondence with the ideal type of prescriptive rationality; others may lie equally close to "principled" rationality. Those which are most prescriptive may sometimes (as in Canada) tend to become merely proverbial; may those which are most "principled" tend sometimes to be merely expedient? It is clear that over the past two decades many highly respected critics of the United States Supreme Court have seen this at least as a possibility, and that a responsible critic could tenably find grounds to believe (or at least to fear) that the Supreme Court in fact underwent such a shift during the 1950s. For example, Herbert Wechsler's notable plea in 1959 for return to "neutral principles" in American constitutional legislation⁷⁴ — despite the exasperating imprecisions in his presentation of it⁷⁵ — can really be assigned to a quite precise location on our continuum: what he was trying to say was simply that the Supreme Court *should* go beyond prescriptive to "principled" rationality, but that it *should not* go further into expedient rationality. Given what has here been called the delicate equilibration of the "principled" model, this location in fact suffices to make overall sense of Wechsler's position. For the apparent inconsistencies of that position, the opposite directions of its potential implications, and even Martin Shapiro's charge that Wechsler was simply "trying to have his cake and eat it too",⁷⁶ are thus finally resolved — or at least explained.

If we ask, however, whether the Supreme Court has in fact made the kind of shift into pragmatism here contemplated — or, indeed, whether any court of law ever makes such a shift — the answer is that this is rather doubtful. No doubt one of the forces which the equilibration of "principles" holds in tension is a constant pull towards the merely pragmatic; no doubt, too, any court committed to working with "principles" may sometimes succumb to this shift, handing down a decision in which (consciously or unconsciously) it has allowed pragmatic inclinations to prevail. But precisely because such a court is committed to "principles", such a case is unlikely to signal a *shift* from this commitment. What has happened is merely that this commitment has faltered or failed in a given case, Case₁. In the next case, Case₂, the commitment to principle is taken up as before, with the same

⁷⁴ *Supra* note 45.

⁷⁵ See M. Shapiro, "The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles" (1963), 31 *Geo. Wash. L. Rev.* 587; Miller & Scheffin, *supra* note 46; M. P. Golding, "Principled Decision-Making and the Supreme Court" (1963), 63 *Colum. L. Rev.* 35; Stone, *op. cit. supra* note 11, at 316-21.

⁷⁶ Shapiro, *op. cit., supra*, note 75, at 592n.

hazards, the same tension — or suspension — between prescription and pragmatism, but also with the same judicial search for “genuine principle”. Again there is the possibility of merely expedient disposition; but this possibility is in no way augmented or enhanced by the fact that the same possibility happened to be realized in Case₁. If anything — at least where Case₁ was decided in a *knowingly* pragmatic way — the effect of experience with Case₁ may reinforce the determination that Case₂ (and Case₃) are to be decided by strict implementation of principle.

In terms of Becker’s scale, therefore, prescription and “principle” mark opposite ends of the *normality* — and also the full *propriety* — of the judicial process as it is actually practised. In particular cases, or even in particular countries at a particular time, prescription may degenerate *de facto* into a mere adherence to proverbial tradition; or “principle” into pragmatism. Divergences from “normality” may even occur in both these directions at once; many Canadian judges, for instance, appear to a foreign observer to display, in their judicial style, an unusual combination of the proverbial and the pragmatic.⁷⁷ The result, in both proverbial and pragmatic manifestations, is an impressive record of achievement in intuitively “sound” disposition of concrete factual problems, but (for many judges) a tendency to flounder when abstract conceptual or analytical problems demand the exercise of prescriptive or principial skills. Yet even such national deviations from common law “normalcy” seem not to reflect a systematically adopted departure from the prescriptive and principial *aspirations of judges*. To say that the proverbial, prescriptive, principial, and pragmatic models must all be taken into account as we survey historical and national variations in the style of judicial decisions, is only to say that the merely proverbial and the merely pragmatic represent the points of cut-off or fade-out for such variations.

This would mean that in a scale of divergent judicial approaches as empirically found, Becker’s pronormless non-rationality would be left wholly out of account. No doubt, just as responsible critics of the United States Supreme Court in the fifties and sixties were able to maintain that the Court had fallen into mere pragmatism, its irresponsible critics were able to maintain (and did!) that the Court had rushed into “pragmatic” approaches in such a headlong manner as to be propelled into normlessness, or at least pronormlessness. Clearly, however, such charges need not be taken seriously. “Pronormless” decisions, in Becker’s account, are merely “whim decrees”;⁷⁸ the pronormless decision-maker is one who accompanies his choices with the flatly defiant challenge: “I like it because I like it, and what’s to stop me?”⁷⁹ It seems highly unlikely that any court — even among those most wholly subservient to totalitarian rule — has ever carried expediency to these extreme lengths, treating judgments *merely* as “whim decrees” in the light of what is “comfortable” or “thrilling”. Certainly in the non-totalitarian systems with

⁷⁷ See *supra* notes 62, 64-65.

⁷⁸ Becker (1957) at 160.

⁷⁹ *Id.* at 159.

which we are concerned, such judicial abandonment of any form of rationality seems wholly inconceivable — at least in appellate courts!⁸⁰

When, however, we turn from discussion of actual judicial attitudes, to discussion of jurists' and legal philosophers' appraisals and aspirations with regard to modes of judgment, our whole scale must undergo a perceptible shift. At the extreme traditionalist end of the scale, legal theorists prepared to assert that judicial decision-making is a merely proverbial process are few and far between. Even Bacon's famous reduction of the judge's materials to a mere proverbial collocation of "distinct and dis-joyned Aphorismes" (and his corresponding eschewal of a prescriptive model "which would have made every particular rule through coherence and relation unto other rules seeme more cunning and deep") was coupled with (and justified by) an expressed desire to leave future judgments "more free to turn and tosse".⁸¹ And even von Savigny's arch-traditionalist theory of the *Volksgeist* was coupled with a recognition of the sophisticated "technical element" of juristic articulation.⁸² The law of the *Volksgeist* itself might be (and clearly was) merely proverbial; but lawyers and judges were to bring to the proverbial materials a "systematic" spirit through which alone it was possible "to view every notion and every rule in lively connection and co-operation with the whole".⁸³ His stand against codification might conceivably be taken to imply that law (as he knew it) should not proceed beyond the prescriptive *to the principial*; and, of course, his concept of "people's law" was a proverbial one. But that lawyers' and judges' law must be prescriptive and *not* proverbial was a crucial part of his doctrine.

Only with Savigny's American disciple James Coolidge Carter do we find explicit affirmation of proverbial tradition as constituting the very stuff of judicial decision-making. Even in Carter's account of judgment, the proverbial substratum is overlaid with elements of prescriptive (and even principial)

⁸⁰ The cynicism of a Jeremy Bentham might lead us to say that common law judges can and do reach decisions *merely* on the basis of personal "whim". The eleven volumes of J. Bowring ed., *Works of Jeremy Bentham* (Edinburgh: W. Tait, 1838-1843) are replete with instances of Bentham's extreme views in this respect: see, e.g., in vol. 5 (at 53) J. Bentham, *Letters on the Proposed Reform in the Administration of Civil Justice in Scotland* (the "Scotch Reform" letters, 1808) at 59-60; and also (at 231) J. Bentham, *Truth against Ashhurst* (1792). In vol. 2 (at 1) see J. Bentham, *Principles of Judicial Procedure* (first published posthumously, 1837) at 7-8, 19-20; and in vol. 11 see J. Bentham, *Letter to the Duke of Wellington* (1816) at 9. Bentham, of course, was irrational in his hostilities on this matter; but every jurisdiction has anecdotes ascribing to one or two judges a posture not far short of "whim". What would save appellate courts, even then, from this sort of charge is not necessarily their greater integrity, but simply their collegiate composition. One *can* conceive of one man following pronormless "whim" in his decisions; but the idea of nine men, or even five, all following the *same* whim is itself rather whimsical.

⁸¹ Sir Francis Bacon, *Maxims of the Common Laws of England* (written 1597; first published posthumously, London: Assignes of J. More, 1630) at 10; also published in *Lord Bacon's Law Tracts* (2d ed. London: Dan. Browne, 1741) at 31.

⁸² F. K. von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg: J.C.B. Mohr, 1814), as translated by A. Hayward in F. K. von Savigny, *On the Vocation of Our Age for Legislation and Jurisprudence* (London: Littlewood & Co., 1831) at 7-9 and *passim*.

⁸³ *Id.* at 64-65.

imputation, so as to shift it at any rate *close to* the prescriptive; yet we should probably concede that notwithstanding these partial overlays, his picture of the judicial decision remained a proverbial one, with precedents old and new representing merely the "declaration", "authentication", or "enforcement" of custom.⁸⁴ Despite all the concessions to orthodoxy to which he was impelled,⁸⁵ it seems clear from the overall mood and drive of his argument⁸⁶ that he did intend literally to take his stand upon "proverbialism". To that extent his theory would stand as a solitary (if unconvincing and self-deceptive) exception to the generalization now to be hazarded.

This is that one can scarcely conceive of any legal theorist presenting the task of judicial decision as merely proverbial, since the very enterprise of

⁸⁴ J. C. Carter, *Law: Its Origin, Growth and Function* (New York: G.P. Putnam's Sons, 1907) at 65, 313.

⁸⁵ He did concede (*id.* at 65) that judicial pronouncements might wean "enlightened" society away from *merely* proverbial attitudes, causing custom to be "settled" and "regulated", and conflicting practices to be "discredited and pass away". But he insisted that this could come about only if judicial decisions were "correct . . . that is, if the true custom is chosen" (meaning "the one most consistent with the largest usage"). He conceded, too (at 67-68), that in "full enlightenment" judicial institutions proliferate into elaborate hierarchies with complex jurisdictional rules, staffed by (and approached through) men of "special professional education"; and he gave full weight to the "many thousands of volumes" of reports and treatises, and the intricate classificatory systems of cognition, employed by such men "to aid them in their duties". But he still insisted (at 69) that the purpose of these thousands of volumes was *merely* to furnish a record of authenticated custom. He conceded, finally (at 70-74, esp. 73), that there may be cases where even this "prodigious" record of custom fails, since "the question has never before arisen"; that the appellate court in such cases typically remarks "that the case . . . must be decided upon *principle* — a vague expression, but correct enough"; and that "some would say" that in such cases "the judges had *made* the law out of their own heads, upon a simple consideration of whether the (defendant's conduct) was right or wrong". But for his own part he argued that even here common "custom" was really decisive. For "whose notion of right and wrong was it? It did not come from on High. It was not sought for in the Scriptures, or in any book of ethics. The judges in considering whether the act was right or wrong applied to it the method universally adopted by all men; they judged it by its consequences If we went no further it would be manifest that custom decided the case, for to determine whether it was right or wrong by the *customary modes* of determining right and wrong is to determine it according to custom. The court, indeed, declared that its decision was made upon *principle*; but what is meant by this? What is the import of this word 'principle'? It has various meanings, but as here employed it denotes a proposition very widely true, and the truth of which is universally admitted." From these last two words, he then spun an assertion that any "principle of law" could be such "only because it accorded with the universal custom of men"; and that the procedure of logical deduction from such a principle, though "sometimes supposed to be peculiar to the law", is itself an adherence to custom, since it conforms to "the mode, and the only mode, in which the human mind acts when it engages in reasoning". To concede the presence of prescriptive, principial, and even pragmatic methods of decision, but then to maintain a stubborn insistence that all of these are really dependent exclusively on "custom", is certainly a strange way of arguing that all judgments are merely "proverbial" — especially when the argument can only be made by crude play on the words "custom" and "customary", taken in senses different from each other as well as from the "proverbial" sense. But, whatever we think of Carter's execution, his intention seems unmistakable.

⁸⁶ Cf. *id.* at 310 ff., esp. at 312; and see J.C. Carter, "The Ideal and the Actual in the Law" (1890), 24 *Am.L.Rev.* 752.

constructing a legal *theory* involves a commitment to rationality which suffices to carry even the most conservative mind at least to the stage of adopting a prescriptive model of judgment. We may, indeed, go so far as to say that the *normal* model of theorizing about the judicial process — even for “legalists” — would be in terms of the maximum possible degree of rational procedure: that is, in terms of “principles” rather than of mere prescriptions. It is not for nothing that Sir William Blackstone’s model of law — in which “everywhere . . . ‘principles’ were waiting to be found”⁸⁷ — has become a kind of archetypical symbol of Anglo-American “legalism”. Insofar as the “legalist” does recoil from the openness of “principles”, he is likely to turn not to blind insistence on proverbial tradition, but to acceptance at face value of the prescriptive model’s semblance of precise and unambiguous clarity of statement in its individual norms, and of orderly patterns of deductive reasoning and systematic cohesion linking the norms into rational unity. The extreme “legalist”, in other words, is likely to stress precisely those features of the prescriptive model which most sharply and emphatically distinguish it from the proverbial.

For the “realist”, on the other hand, even the openness of “principles” is likely to seem too restrictive of the creative resources which he seeks to ascribe to the judicial process. The picture he draws will usually lie close to our present ideal type of “pragmatism”, with no restraints save “instrumental efficiency”: the choice of means that are feasible, and likely to realize effectively the judge’s chosen goals. It accords with this that the writings most distinctively characteristic of American legal realism were in general agreement that judicial goals should be set and pursued by “scientific” procedures — involving especially behavioural aspects of sociology and psychology, along with quantitative and statistical fact-gathering of all kinds.⁸⁸ For “science” in all its forms is the embodiment of expedient rationality: “only those evaluations yielding prediction and control, regardless of other ends, are scientifically relevant”.⁸⁹

The extreme legal realist, indeed (Scandinavian or American), may occasionally display a certain tendency to rush in where even the most “pragmatist” of judges refuse to tread: into ebullient proclamations of “pronormlessness”. Such proclamations — leading to what R. W. Dox called “dice box jurisprudence”⁹⁰ — were perhaps clearest in the almost Augustinian confessions of Judge Hutcheson,⁹¹ and Jerome Frank, in his more exuberant

⁸⁷ See D. Boorstin, *The Mysterious Science of the Law* (Cambridge, Mass.: Harvard Press 1941) at 20.

⁸⁸ See F. V. Cahill, *Judicial Legislation* (New York: Ronald Press, 1952) at 113-21; G. Tarello, *Il Realismo Giuridico Americano* (Milan: Giuffrè, 1962) at 41-43; 63-67; G. Reuschlein, *Jurisprudence: Its American Prophets* (Indianapolis: Bobbs-Merrill, 1951) at 275-87 (and cf. generally *id.* at 307-27). Sadly this most valuable (though least novel) of American realist concerns has been the one most often pilloried. See, e.g., A.L. Goodhart, “Some American Interpretations of Law”, in W.I. Jennings ed., *Modern Theories of Law* (London: Oxford University Press, 1933) at 1, esp. at 15-17; and the Harvard faculty frolic revived in Tarello, *op.cit. supra*, at 204n.

⁸⁹ Becker (1957) at 159.

⁹⁰ R. W. Dox, “Dice Box Jurisprudence” (1932), 5 *Lincoln L. Rev.* 1.

⁹¹ J.C. Hutcheson, “The Judgment Intuitive: The Function of the ‘Hunch’ in

moments, was only one step behind. Frank's position (like Carter's at the opposite, "proverbial" extreme) is, however, a complex one, difficult to locate precisely at any point on Becker's scale.

His flirtations with "pronormlessness" sprang mainly from discontentment with the views of men like Gray and Cardozo,⁹² Pound and Ihering, Demogue and Wurzel.⁹³ All of these had acknowledged the illusoriness of rule-bound thinking; none of them had gone far enough in abandonment of the acknowledged illusion to satisfy Frank's demands. Accordingly the main theme of his *Law and the Modern Mind* became a call for "complete liberation";⁹⁴ for recognition that "all legal rules, principles, precepts, concepts, standards — all generalized statements of law — are fictions";⁹⁵ for "a more adult attitude towards chance and change";⁹⁶ and above all for emulation of Holmes, the one "completely adult jurist".⁹⁷

Along with these reiterated calls, however, were many caveats, making it clear that Frank's advocacy of "complete liberation" was not after all intended as advocacy of "normlessness". "Rules and principles" were still to be allowed some function, provided that this was not "mechanical" nor all-embracing.⁹⁸ Abandonment of "an infantile hope of absolute legal certainty" was to be sought not merely because "liberation" was psychologically "healthy", releasing the "inherent spontaneity" and "wakeful vitality" from which "true growth" can proceed; but because such abandonment would "augment markedly the amount of actual legal certainty". The "complete liberation" that Frank envisaged was in the end to yield "not . . . a policy of incessant, hectic change, but a policy of healthy and vital growth", "a balanced, not an anarchic, attitude towards law"; neither "too much change" nor "too much rigidity".⁹⁹

All this suggests that Frank himself was wavering between two theories of the judicial process. In his "balanced" moments, he was merely restating

Judicial Decisions" (1929), 14 *Cornell L.Q.* 274; J.C. Hutcheson, "Lawyer's Law, and the Little, Small Dice" (1932), 7 *Tul.L.Rev.* 1.

⁹² Frank, *op.cit. supra* note 46, at 32-41, 236-39.

⁹³ *Id.* at 207-31.

⁹⁴ *Id.* at 82.

⁹⁵ *Id.* at 167. In the original the entire phrase quoted above is italicized. But it is preceded by the phrase "in a sense", also italicized.

⁹⁶ *Id.* at 248.

⁹⁷ *Id.* at 253ff.

⁹⁸ *Id.* at 131-32, 278. Both passages include an assertion that: "To deny that a cow consists of grass is not to deny the reality of grass or that the cow eats it. So while rules are not the only factor in the making of law, i.e. decisions, that is not to say there are no rules". But just as the apparent assertion of pronormlessness quoted *supra*, note 95, is drawn back from such extremism by the words "in a sense", so this "cowed" abjuration of pronormlessness is drawn back towards what it abjures by the words "law, i.e. decisions."

⁹⁹ On legal certainty see *id.* at 159; on "true" and "healthy" growth see *id.* at 250-51 (and *cf. id.* at 245). See also *id.* at 140 n., where Frank takes it upon himself to deliver a similar unsolicited caveat against reading Hutcheson's 1929 article (*supra*, note 91) "with complete literalness". Hutcheson, he thinks, "would surely admit" that "rules, principles and the like" are more important than Hutcheson concedes.

our own initial antinomy between "legalism" and "realism", between conservation and change.¹⁰⁰ At these moments he would finally be at one with his only partly "liberated" forerunners, men like Pound and Cardozo. Yet mere antinomic statements customarily yield mental comfort, rather than mental clarity;¹⁰¹ and Frank's drive is above all a search for a clearly-stated position, if need be (and perhaps even preferably!) a mentally uncomfortable one. In the moments when he most fervently states his own deep-rooted beliefs, he is at one with Hutcheson rather than with Pound;¹⁰² and in these moments, like Hutcheson, he is drawn to language of which the implicit yearnings, and sometimes the explicit connotations, tend to be those of "pronormlessness".

This term, it will be recalled, does not mean that total absence of norms is asserted as empirically found. It means only that such total normlessness is asserted as desirable. And not only for Frank or Hutcheson, but for legal theorists in general,¹⁰³ this concern with what is *desirable* may be the final key to an overall understanding of the odd divergence between our scaling of the judicial process as it actually is, and our scaling of the theories purporting to tell us how it is.

For, as we have here already suggested,¹⁰⁴ *theories* of the judicial process are often at least as concerned to proffer value-standards of how decisions ought ideally to be reached, as they are to proffer descriptions of how their authors think that such decisions are actually reached. Statements thus proffered may well be given to flights of exaggeration, of a kind not uncommon in the expression of moral aspirations for unattainable ideals. It may even be essential to the effectiveness of an ideal that it should be unattainable.¹⁰⁵ Such exaggerations may therefore be sometimes the result of a deliberate inflation of desires, thought needful to obtain even modest results: the assumption is not that judges given an inch of freedom are likely to take

¹⁰⁰ See, *supra*, text following note 18; and see Frank, *op. cit. supra*, note 46, at 252n., adopting as a final statement of the properly "adult" attitude the identical passage from Whitehead in which Cardozo (*supra*, note 8) had found the philosophical ground for *his* version of the antinomy.

¹⁰¹ See Stone, *op. cit., supra*, note 11, at 232, observing that most antinomic approaches "have tended finally to end by softening with appropriate indeterminacies the divergent drives."

¹⁰² Cf. Symposium, "Modern Trends in Jurisprudence" (1934) 7 *Am.L.S.Rev.* 1057, for a striking union of Frank and Hutcheson in common cause against Pound.

¹⁰³ The fact that Hutcheson's theories were offered from the bench, and that Frank's were later carried to it, is an additional complication for our present attempt to "scale" judges' manifestations of attitudes towards the judicial process, and theorists' attitudes to it, as different phenomena. To insist that what judges do is one thing, and what theorists say about judges is another, is only a beginning of clarity; and the present analysis may thus seem to confuse as well as illumine. For full clarity, we should have to distinguish further between what judges *do*, and what they themselves *say* they do; while the problematics of analysing positions like those of Frank and Carter suggest that even we turn to theorists, we may need to distinguish between what they are actually saying, and what they themselves *say* they are saying!

¹⁰⁴ See, *supra*, text following footnote 18.

¹⁰⁵ Cf. A.D. Lindsay, *The Two Moralities* (London: Eyre & Spottiswoode, 1940); Fuller, *op.cit. supra*, note 56, at 51-15.

an ell, but that only when urged to take an ell are they likely to take even an inch.

Whatever the causes, the result can be stated in a simple and symmetrical manner. The normal range of shifts in actual adjudicative approaches may be said to be between the prescriptive and the principial. Its prescriptive phases may sometimes become extended or exaggerated into the merely proverbial; its principial phases may sometimes crumble into the merely pragmatic. By contrast the normal range of shifts in jurisprudential theories about these phenomena is between the principial and the pragmatic. Theorizing in its principial phase may sometimes be exaggerated into the prescriptive; theorizing in its pragmatic phase may sometimes be exaggerated into the pronormless. In the actual practice of judgment pronormlessness, save in the rarest and most eccentric of instances, is an empty category, for which no empirical examples are likely to be found; in the range of *theories* about judgment, proverbialism (again with the rarest aberrational exceptions) is likewise an empty category.

In short, there are really not one but *two* partly overlapping scales of "ideal types" for the judicial process. Only when the two scales are (as it were) laid one upon another does the full five-item scale emerge; and only then do "principles" become the central pivot on which the entire analysis turns.

It is not for nothing that this notion has emerged as the central focus for debates about common law judgment. The debate at the end of the fifties surrounding Herbert Wechsler's criticism of the United States Supreme Court,¹⁰⁶ and the debate at the end of the sixties surrounding Ronald Dworkin's criticism of Herbert Hart's "model of rules",¹⁰⁷ both centred on an attempt to give content to a notion of "principles" as an ideal basis for judicial decision, which would hold in a perfect state of balance the conflicting needs of prescriptivism and of pragmatism, of continuity and change. But our present analysis suggests that the search for "principles", if these are conceived of as an identifiable kind of predetermined norms, is a misdirected search. "Principial" judgment, as it emerges from the preceding discussion, is not characterized by dependence on a distinctive normative content; it is characterized rather by what it *does* with the normative content to be derived from a body of "prescriptions", and yet also with the values (and "consequent" implementative strategies) derived from "pragmatic" judgments. In short, "principial" judgment is characterized not by the materials it works with, but rather by *how it works*. As M. P. Golding¹⁰⁸ perceptively noted over a decade ago, our search for a perfectly balanced model of the judicial process should be directed not to principles, but to *principled decision-making*.

¹⁰⁶ See *supra*, notes 45, 75.

¹⁰⁷ See *supra*, note 18.

¹⁰⁸ *Supra*, note 75.

